Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

September 17, 2018

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Attention:

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Re: Canadian Securities Administrators Notice and Request for Comment – Proposed National Instrument 93-102 – *Derivatives: Registration* and Proposed Companion Policy 93-102 – *Derivatives: Registration*

OVERVIEW

The Portfolio Management Association of Canada (**PMAC**), through its Industry, Regulation & Tax Committee, is pleased to have the opportunity to provide comments on Proposed National Instrument 93-102 – *Derivatives: Registration* and Proposed Companion Policy 93-102 – **Derivatives: Registration** (**NI 93-102**, and collectively, the **Consultation**) published by the Canadian Securities Administrators (**CSA**).

All other capitalized terms used in this letter but not defined in this submission have the same meaning given to them in the Consultation.

In light of the many overlapping issues in the two instruments, this submission should be read in conjunction with our contemporaneous submission on Proposed National Instrument 93-101 – *Derivatives: Business Conduct* and Proposed Companion Policy 93-102 – *Derivatives: Business Conduct* (**NI 93-101** or the **Business Conduct Consultation**).

PMAC represents investment management firms registered to do business in Canada as portfolio managers. PMAC's over 250 members encompass both large and small firms managing total assets in excess of $1.8 trillion for institutional and private client portfolios.

PMAC advocates for the highest standard of unbiased portfolio management in the interest of the investors served by our members. PMAC consistently supports measures that elevate standards in the industry, enhance transparency, improve investor protection and benefit the Canadian capital markets as a whole.

GENERAL COMMENTS

Consistent with our submission with respect to the 2017 Business Conduct Consultation, PMAC supports the CSA's aim to establish a robust investor protection regime that meets the International Organization of Securities Commissions (**IOSCO**) standards with respect to over-the-counter (**OTC**) derivatives. We applaud the work of the CSA to develop and adopt a harmonized derivatives registration and business conduct regime across Canada. We believe that the establishment of a national regime is a positive step for industry, the Canadian economy, and investors.

PMAC supports the CSA's efforts to ensure that all derivatives firms remain subject to certain minimum standards in relation to their business conduct towards both investors and counterparties. PMAC is also supportive of requiring registration of certain firms in this respect. However, we believe that the registration category of portfolio manager, coupled with general derivatives-specific proficiency and risk management requirements, is sufficient to meet or exceed such standards, as set out in greater detail below.

PMAC continues to believe that the Consultation and the Business Conduct Consultation are primarily focused on addressing policy issues arising from dealing activities and do not identify specific investor or market protection issues with respect to the activities of advisers, particularly portfolio managers, vis-à-vis derivatives.

In particular, we look to the CSA's anticipated benefits of NI 93-101 and note that chief among them is a reduced likelihood of loss through inappropriate transactions, inappropriate sale of derivatives and market misconduct. We also respectfully disagree with the CSA's assessment in the Consultation that the costs of portfolio managers complying with NI 93-102 are proportionate to the benefits to the Canadian market of implementing the Consultation, as currently drafted.

We are not aware of any significant enforcement action involving a portfolio manager advising in derivatives or derivatives strategies. We strongly believe that the imposition of additional, prescriptive and onerous requirements on portfolio managers is not an effective or efficient solution to the CSA's stated concerns. For registered advisers, we continue to believe that the CSA's laudable policy objectives of creating a uniform approach and protecting participants in the OTC derivatives markets from unfair, improper and fraudulent practices can be best achieved by leveraging National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) and by providing an exemption from the derivatives registration requirement for portfolio managers, all as more fully set out below.

Our submission covers the following: 1) a summary of PMAC's key recommendations; 2) Consultation feedback; 3) responses to specific Consultation questions; and 4) other comments. The questions are identified by the numbers assigned to them in the Consultation and, as such, their numbering is not consecutive.

SUMMARY OF PMAC'S KEY RECOMMENDATIONS

The following is a high-level summary of PMAC's key recommendations, each of which is discussed in greater detail in the body of this submission.

1. **Portfolio managers should be exempt from registration under NI 93-102**. Portfolio managers and their registered advisers should be entirely exempt from registration as derivatives advisers under NI 93-102 and from the requirements of NI 93-101, subject to being able to evidence general proficiency and implementing certain risk-management practices relating to derivatives, as more fully set out below. The rigorous proficiency standards, fiduciary duty of care owed by advisers to their investors, minimum insurance and capital requirements, and the robust, principles-based regime advisers must adhere to under NI 31-103 – coupled with a lack of any policy rationale justifying the need for a separate registration regime for advisers for this purpose - warrants a complete exemption from registration. PMAC has concerns that a Canadian derivatives regime that goes beyond IOSCO's standards and that captures advisers in a way that the U.S. Commodity Futures Trading Commission (**CFTC**) does not, may have a negative impact on the Canadian derivatives market, as well as on Canadian investors. PMAC respectfully disagrees with the CSA's cost benefit analysis with respect to implementing the derivatives regime for advisers. We note that NI 93-102 and NI 93-101 would require material additional compliance resources and costs and the repapering of existing derivatives agreements, client documentation and policies and procedures, all without demonstrated investor or market harm being addressed.

The following recommendations are being made **in the alternative**, were the CSA not to accept PMAC's strong recommendation for a wholesale exemption from registration under NI 93-102 for portfolio managers.

2. **A series of exemptions and clarification are required for portfolio managers.** A series of exemptions with respect to portfolio managers' advising activity is required, as is clarification with respect to when advising in derivatives is considered to be "incidental" and therefore, does not trip the business trigger and necessitate registration. We believe these exemptions and guidance are necessary for the continued efficient functioning of the markets and for ensuring that investors continue to have their interests protected by firms through the use of hedging and/or other derivatives strategies, where such strategies are not core to the firm's overall investment strategy or the primary investment activity employed for the derivatives party.

3. **Exemptions are required for international advisers and sub-advisers.** We are also requesting that exemptions from the derivatives registration requirement for international advisers and sub-advisers, similar to exemptions set out in NI 31-103, be included in NI 93-102 and NI 93-101 to ensure competitiveness and to maintain investor choice and market liquidity. PMAC is concerned that there could be unintended adverse consequences to investors and the Canadian market if existing business relationships with foreign advisers were to be interrupted as a result of the implementation of NI 93-102 and NI 93-101.

4. **Individual registration exemptions are required for portfolio managers.** PMAC has set out a series of exemptions from the individual registration requirements for derivatives advisers. 1) There should be an express exemption from the registration requirement for an advising representative with discretionary authority over the account of an EDP. Managed accounts should not be singled out from the currently contemplated exemption. This is also supported by the CSA's acknowledgment of comments received during the 2017 Business Conduct Consultation that managed account clients benefit from the highest duty of care owed by advisers and do not require or want the protections that private clients do. 2) We

also request an exemption for an advising representative advising an affiliated entity that is an investment fund. Both a registered adviser and an investment fund advised by a registered adviser are considered EDPs and, since the adviser in this scenario would be intimately involved in the affiliated fund, registration for such an individual should not be required solely on the basis of that individual providing advice to the affiliated fund. 3) An exemption from derivatives dealer registration requirements is also required for derivatives advisers and their (registered or exempt) advising representatives where the dealing activities of the derivatives adviser are in connection with providing advice to a client. This exemption would mirror Section 8.5.1 of NI 31-103, with the important exception that such trades would not need to be made through a registered or exempt dealer under NI 93-102.

5. **Eligible Derivatives Parties.** We request that the CSA amend the definition of EDP to include any "permitted client" (as such term is defined in NI 31-103) that is not an individual. We further request that the CSA reconsider the requirement for firms to obtain a written representation from non-individual EDPs' as to their "knowledge and experience" to evaluate information about derivatives. As currently drafted, the definition of EDP does not incorporate sufficient harmony with existing securities law concepts, nor does it acknowledge the unnecessary burden that this new, additional definition will impose on firms and the sophisticated clients that it is intended to capture.

6. **Registration categories and proficiency requirements should align with NI 31-103.** There should be consistency between NI 93-102 and NI 31-103 with respect to the categories of adviser registration and proficiency for individual registration categories. PMAC believes that the inclusion of a registration category of derivatives associate advising representative, with appropriate proficiency and relevant investment management experience (**RIME**), is needed to preserve existing client service and business models in the portfolio management space. PMAC has set out more detailed recommendations with respect to possible ways to evidence this proficiency and RIME below.

7. **Requirements, roles and responsibilities of derivatives UDPs, CCOs and CROs.** PMAC has concerns with respect to the duplicative, overlapping and potentially conflicting roles and reporting obligations proposed for derivatives UDPs, CCOs and CROs. Stemming from PMAC's successful request in 2010 with respect to a similar proposal under the *Quebec Derivatives Act* (**Quebec Act**), PMAC requests that firms be permitted to appoint an officer responsible for derivatives advising (including the senior derivatives manager) that satisfies the RIME and proficiency for derivatives CCOs proposed in NI 93-102, in the event that the firm's current CCO does not have that RIME and proficiency, as is permitted under the Quebec Act. Failure to permit flexibility in this fashion, as well as requiring CCOs to obtain asset-class specific expertise instead of focusing on their oversight function, will do a disservice to firms without any proportionate increase in investor protection. Such a requirement (alongside overall increased compliance costs under the derivatives proposals in general) could also have potentially deleterious effects on the competitiveness of smaller and mid-sized firms, and this will ultimately negatively impact investor choice.

8. **Coordination with other regulatory initiatives and transition matters.** The CSA should assess the impact of the proposed amendments to NI 31-103 (the **Client Focused Reforms**) on the CSA's investor protection and market efficiency concerns, prior to implementing the derivatives registration regime. Firms have approximated that a three

year transition period may suffice for the implementation of many of the amendments necessitated by the derivatives regime.

9. **Missing Critical Information**. Certain missing information in the Consultation, including, for example, capital requirements, the list of jurisdictions for substituted compliance, transitional provisions, and the quantum of registration fees is critical to a proper assessment of the Consultation and NI 93-102 should be republished in full for additional feedback so that stakeholders can have the benefit of reviewing all relevant information.

CONSULTATION FEEDBACK

International standards and the robust Canadian regulation of advisers

The substance and purpose of NI 93-102, as explained by the CSA in the Consultation, is to develop an instrument to protect investors, reduce risk, and improve transparency and accountability in the OTC derivatives market. The Consultation is also a response to IOSCO's concerns about the contribution to the financial crisis of 2008 by some firms dealing in derivatives as a result of not effectively managing their own derivatives-related risks. Importantly, the Consultation references IOSCO's comments that:

> Historically, market participants in the OTC derivatives markets have, in many cases not been subject to the same level of regulation as participants in the traditional securities market. This lack of sufficient regulation allowed certain participants to operate in a manner that created risks to the global economy that manifested during the financial crisis of 2008. [emphasis added].

PMAC believes that portfolio managers are already robustly regulated and overseen by members of the CSA under NI 31-103 and that the creation of another parallel - but not identical - regulatory regime to oversee this category of registrants is not warranted to address IOSCO's OTC derivatives market concerns.

We believe the CSA has approached the Consultation from the point of view that advisers must be regulated in the same way as dealers in order to satisfy Canada's IOSCO obligations with respect to OTC derivatives. PMAC feels that this approach does not adequately account for unique circumstances regarding the regulation of portfolio management firms. These factors include the rigorous proficiency requirements required of advisers, the fiduciary duty of care owed by advisers to their investors[1], minimum insurance and capital requirements, and the robust, principles-based regime that advisers must adhere to under NI 31-103. We believe these factors warrant the exclusion of portfolio managers from certain of the proposals in the Consultation.

Advisers are investment management professionals whose education and vigorous vetting in order to become registered as such warrants a proportional and practical regulatory framework and appropriate exemptions from registration with respect to OTC derivatives. Please refer to Appendix **A** of this submission for a review of the differences in proficiency currently set out in NI 31-103 for different registration categories. PMAC continues to stress the importance of regulating advisers in a way that acknowledges their registration category and duty of care, as opposed to imposing a one-size-fits-all framework across all registrants.

[1] This duty is currently imposed by common law across Canada and, pursuant to CSA 33-404, a statutory fiduciary duty is proposed to be introduced across Canada for jurisdictions that do not currently have such a duty in their securities acts.

The regulation of derivatives advisers warrants a lighter touch and a more principles-based approach to compliance than is being currently proposed. We encourage the CSA to enable advisers to continue to serve the best interests of their investors without undue regulatory burden that does not result in any necessary accompanying investor or market protection benefit.

Concerns regarding applicability of NI 93-101 and NI 93-102 to portfolio managers

PMAC does not believe that the Consultation and the Business Conduct Consultation, as they would apply to advisers, adequately account for the fiduciary obligations owed by advisers to their clients, nor do they account for the professionalism of the portfolio manager registration category, generally. Moreover, many of the specific requirements outlined in both Consultations are already addressed by well-established and effective registration, proficiency and market conduct requirements that advisers are subject to under NI 31-103.

We respectfully disagree with the CSA's response to the 2017 Business Conduct Consultation that the proposed regulatory regime for derivatives advisers does not unnecessarily duplicate certain requirements under NI 31-103 for portfolio managers.

PMAC has concerns that a Canadian derivatives regime that goes beyond the IOSCO recommendations and that captures advisers in a way that the CFTC does not, may have a negative impact on the Canadian derivatives market, as well as on Canadian investors. It is PMAC's view that onerous, duplicative requirements on portfolio managers threaten to negatively impact the competitiveness of smaller and mid-sized firms domestically, as well as the competitiveness of Canadian firms internationally. For this reason, despite the amendments to NI 93-101 and the publication of the Consultation, PMAC continues to believe that a compelling policy rationale for requiring separate market conduct and registration rules for advisers with respect to OTC derivatives has not been adequately articulated.

The CSA cite the importance of implementing NI 93-102 to enable the review, approval/denial or suspension of registration of a firm or individual in appropriate circumstances. PMAC believes that NI 31-103 already provides the CSA with this ability in respect of portfolio management firms and their registered individuals and that minor amendments to NI 31-103 to account for key derivatives-related concepts, such as general proficiency and certain risk-managements systems, would instead satisfy the CSA and IOSCO's policy objectives while maintaining an appropriate balance between oversight and regulatory burden.

Outlining the anticipated costs and benefits of NI 93-102, the CSA again cite the importance of the registration requirement in allowing the CSA to assess the suitability of these firms before they are allowed to carry on the business of dealing or advising in derivatives and in preventing persons from dealing or advising on derivatives where they do not have the education, training and experience to carry out their responsibilities or where their past behavior makes their registration contrary to the public interest.

PMAC supports the notion that advisers should have the proper proficiency for all activities in which they engage. Investors deserve this. As such, we believe it is appropriate to require registered firms that are advising in derivatives to evidence and maintain records of their registrants' appropriate proficiency in this respect. However, we do not believe that advisers should be subject to the full complement of prescriptive proficiency requirements under NI 93-102.

We instead request an express acknowledgment that firms and individuals registered under NI 31-103 that advise on derivatives and derivatives strategies and comply with Section 18(1), Section 29 - Chief Derivatives Risk Officer Requirement (subject to our comments on this section later in this submission) and, Section 39 (subject to our comments on this section later in this submission) of NI 93-102, will not be required to be registered under NI 93-102. PMAC believes that these

minimum requirements for advisers should be set out in a separate section under NI 31-103 for clarity and simplicity.

In the alternative, should such an express exemption not be provided by the CSA, we request that portfolio managers that are only dealing with EDPs, as defined under NI 93-102, that are not individuals, should be fully exempt from the registration requirement under NI 93-102.

PMAC further notes that National Instrument 81-102 – *Investment Funds* (NI 81-102) permits prospectus-qualified mutual funds that are advised by a portfolio manager subject to NI 31-103, to transact in "specified derivatives" for retail investors, subject to certain conditions. The example in NI 81-102 demonstrates that the CSA has already deemed the use of derivatives by portfolio managers to be acceptable for retail investors, subject to the restrictions set out in NI 81-102. We believe this should be continued to be permitted for retail investors generally, subject to the NI 81-102 restrictions, based on the duty of care and proficiency of this particular registration category.

Imposing onerous, overlapping and unclear registration and compliance requirements may dis-incent certain registrants from using derivatives in their investment strategies, despite having the required expertise and documented investment rationale.

Coordination with other regulatory initiatives and transition matters

PMAC supports the ongoing efforts of the CSA to identify opportunities to improve the investor-adviser relationship. We believe that the integrity of the client-registrant relationship is of crucial importance for confidence in the markets, a healthy economy, and access to investment advice for all Canadians. PMAC is a strong believer in the importance and effectiveness of existing registration requirements and ongoing obligations. PMAC is also mindful of the extensive work being undertaken by the CSA to further bolster the registration regime as a result of the Client Focused Reforms. Portfolio management firms embrace change that will improve protection, efficiency, and outcomes for investors, but are wary of changes that will unduly increase regulatory and compliance burden when more straightforward alternatives could accomplish the same policy objective.

We believe that the regulatory framework under NI 31-103 as it applies to portfolio managers is very well considered and sufficiently principles-based so as to allow firms to responsibly discharge their duty of care toward clients while adopting innovative and effective business models and philosophies. Firms registered as portfolio managers under NI 31-103 have developed and continuously oversee finely-honed compliance regimes and adhere to the highest standard of conduct in the industry.

With respect to implementation, we ask that the CSA consult further on the implementation of a harmonized and practical implementation schedule that will encompass the Client Focused Reforms, NI 93-102, and NI 93-101 in order to minimize disruption and compliance burden. We believe that there is currently a great deal of upheaval and uncertainty for registrants and urge the CSA to minimize this by coordinating a smooth transition for these significant changes without creating "death by a thousand cuts" in terms of new and/or enhanced obligations.

Members have also suggested that the CSA should assess the impacts of the Client Focused Reforms, once they have been implemented, on the Canadian market and on the CSA's investor protection and market efficiency concerns, prior to implementing the derivatives regime. If the CSA were to determine not to exempt portfolio managers in the manner requested by PMAC, firms have approximated that a transition time of 3 years may be sufficient to implement the required changes.

PMAC is also requesting confirmation and further information from the CSA as to whether the Client Focused Reforms will be incorporated, as applicable, into NI 93-101 and NI 93-102. We believe

that it is important for stakeholders to have a complete understanding of whether the potentially material proposed changes will be incorporated into the derivatives regime so as to allow further comment and/or to eliminate uncertainty. If the intention of the CSA is to amend NI 93-101 and, to a lesser extent, NI 93-102 with elements of the Client Focused Reforms, the contents of our submission herein and on the Business Conduct Consultation would be greatly impacted and, as such, we would anticipate another round of public comments on both instruments in this context.

Finally, we note that NI 93-102 does not propose to grandfather derivatives entered into before the effective date of the proposed rules. The instruments should expressly state that all pre-effective date transactions (regardless of their remaining term) will be grandfathered to create certainty and to avoid the undoing of transactions already entered into.

Application of NI 93-102 to foreign firms

In setting out the anticipated costs and benefits of NI 93-102, the CSA note:

> There is a possibility that foreign derivatives firms may be dissuaded from entering or remaining in the Canadian market due to the costs of complying with [NI 93-102], which would reduce Canadian derivatives parties' options from derivatives services. However, [NI 93-102] contemplates a number of exemptions, including exemptions for smaller derivatives dealers that only deal with eligible derivatives parties and for derivatives firms located in foreign jurisdictions, which are subject to and in compliance with equivalent requirements for foreign firms. These exemptions could significantly reduce compliance costs associated with [NI 93-102] for derivatives firms located in and complying with the laws of approved foreign jurisdictions.

Members are concerned about the impact on end investors should the complexity, filing burden and/or cost of the Canadian derivatives regime deter international participation in our markets.

Canadian rules, with respect to derivatives, should account for our reliance on foreign markets for liquidity and access to foreign advisers in order to achieve a balance of interests. PMAC has concerns regarding the proposed requirement that foreign derivatives firms that are exempt from registration under equivalent foreign or domestic regulations would nonetheless be required to be registered in Canada under NI 93-102, or, at a minimum, apply for discretionary relief, and would also be required to comply with the requirements in NI 93-101 by virtue of tripping over the business trigger. We continue to strongly urge the CSA to extend certain aspects of the international adviser exemption in Section 8.26 of NI 31-103 as well as the international sub-adviser exemption set out in subsection 8.26.1 of NI 31-103 in both NI 93-101 and NI 93-102 so that existing business relationships and access to investments for firms' clients will not be disrupted.

We understand that the CSA wishes to limit the exemption from the registration requirement to firms that are "registered, licensed or otherwise authorized under the securities, commodity futures or derivatives legislation of a foreign jurisdiction specified in Appendix G" of NI 93-102 (**Appendix G**). PMAC believes that, if the CSA is prepared to rely on the substituted compliance of those foreign jurisdictions for firms that must be regulated, it also follows that the exemptions from derivatives regulation that those jurisdictions have approved should similarly be valid exemptions for the purposes of NI 93-101 and NI 93-102. Further, PMAC is not aware of other jurisdictions that have registration regimes applicable to derivatives advisers in respect of OTC derivatives transactions, so substituted compliance as currently contemplated will not be meaningful. For this reason, we recommend that an exemption also be available where a foreign derivatives adviser is not required to be registered in its home jurisdiction to advise in respect of derivatives, if that foreign derivatives adviser is registered, or exempt from registration, under its home jurisdiction's securities legislation.

We believe that the CSA can concurrently take a meaningful and principles-based approach to addressing the issue of substituted compliance while, at the same time, avoiding implementing measures that would unnecessarily disrupt cross-border trade flows. Certain members have suggested that one way of achieving a more principles-based assessment of substituted compliance would be to permit IOSCO member jurisdictions that have implemented IOSCO's recommendations in this respect to automatically be included in the CSA's substituted compliance regime.

If the CSA's derivatives regime is implemented without a workable exemption from registration for international advisers, members have voiced concerns that Canadian firms may be unable to attract and hire top international talent for their investors since international advisers may be deterred from participating in the Canadian market without an exemption. We also note that the Canadian registered firm would continue to be – as is currently the case under subsection 8.26.1(1)(b) of NI 31-103 – responsible for any loss that arises out of the failure of the international sub-adviser and that the sub-adviser would be subject to the Canadian registered firm's initial and on-going due diligence, if an exemption similar to section 8.26.1 of NI 31-103 is included in NI 93-102.

While PMAC would strongly recommends that the CSA not adopt the proposed substituted compliance concept in the derivatives regime, we understand that Appendix G will be completed and published for comment under separate cover once the CSA has completed an equivalency analysis. We believe that, in order to respond to evolving regulatory regimes, the CSA should develop a way that would permit the efficient evaluation and addition of new jurisdictions to the list of acceptable substituted compliance jurisdictions under Appendix G, as opposed to risking a static list that could become outdated.

For globally integrated firms, members have raised the following unintended consequences of the Consultation and Registration Consultation, as it applies to such firms. In the scenario where there is a Canadian registered adviser (PM Co) advising Canadian clients and the negotiation and execution of derivatives-related agreements are the responsibility of a U.S. based-affiliate (US Co.), such execution-related services may be provided pursuant to an execution services agreement. PM Co. would be caught as a "derivatives adviser", and US Co. would be caught as a "derivatives dealer", due to its activities as an intermediary and facilitator. From the perspective of the integrated firm, the services are simply being assigned to different affiliates and, as such, we believe it should be sufficient for only PM Co. to be registered as a derivatives adviser under NI 93-101 (where US Co.'s derivatives activity is incidental to PM Co.'s advising activity). Where services to a client are shared by affiliates, the requirement for both affiliates to be registered under the Canadian regime and/or be subject to NI 93-101 should not apply to the affiliate whose involvement can be viewed as incidental. This request is being made in addition to the request for an exemption for portfolio managers advising in relation to derivatives or strategies involving derivatives that is reasonably considered to be incidental, as that term is proposed to be defined in our response to Consultation Question 4, set out below.

Members have also raised concerns about the increased costs to Canadian dealers that provide their services to Canadian portfolio managers. Such Canadian dealers may not only experience increased costs directly as a result of proposed NI 93-101 and NI 93-102, but may also experience increased costs indirectly as a result of having fewer international dealers to deal with, should there be significant foreign dealer exits from Canada. Such costs at the dealer level could have the unintended negative consequence of wider spreads and a drag on investment returns for Canadians.

Missing Critical Information

There is critical information still missing from NI 93-102 and we look forward to the opportunity to review and comment, for example, on capital requirements, the list of jurisdictions for substituted

compliance under Appendix G, transitional provisions, and the quantum of registration fees for firms and individual registrants, when published.

We also urge the CSA to devise fee schedules that do not duplicate costs for firms and individuals who are already registered in one or more categories. For example, there should be no additional fees for a registered securities firm to add to an existing UDP's registration the category of derivatives UDP. Additionally, for firms that are already a registrant in a Canadian jurisdiction, will there be a discounted fee for registering under the derivatives adviser registration category, in recognition of the fact that such firm is already overseen and regulated by the CSA under other registration categories? Members note that there are no ongoing filing fees required for firms registered under the securities act under the Quebec Act in this respect.

We also ask the CSA to ensure that the transitional provisions that remain to be proposed will take into account the almost unprecedented degree of regulatory change facing the asset management industry. It is of utmost importance to the health of the Canadian capital markets and to all stakeholders that these transitional provisions ensure an appropriate balance between an effective transition to the new derivatives regime against the potentially material and disruptive impacts that regulatory change will have on firms and, by extension, their investors.

Furthermore, members are unclear as to whether the CSA's proposed derivatives regime is intended to replace the Quebec Act with respect to OTC derivatives. If that is the case, members are concerned about the regulatory burden, overlap, inconsistencies, and confusion that may be caused for registrants who are subject to the CSA's derivatives regime for OTC derivatives, NI 31-103 for other securities, and the Quebec Act with respect to exchange-traded derivatives. We note that the CSA has the opportunity to draft a regime from scratch. We believe that, especially when starting from a blank slate, every possible measure should be undertaken to create harmony and to leverage applicable concepts and definitions from existing instruments, frameworks, and requirements for the benefit of all stakeholders. To do so will not only benefit firms and their investors, but can increase the competitiveness of the Canadian market and promote increased compliance.

RESPONSES TO SPECIFIC CONSULTATION QUESTIONS

The following are PMAC's responses to certain of the specific questions set out in the Consultation:

> 2. **Definition of "affiliated entity".** *The Instrument defines "affiliated entity" on the basis of "control", and sets out certain tests for "control". In the context of other rules relating to OTC derivatives, we are also considering a definition of "affiliated entity" that is based on accounting concepts of "consolidation" (a proposed version of the definition is included in Annex II). Please provide any comments you may have on (i) the definition in the Instrument, (ii) a definition in Annex II, and (iii) the appropriate balance between harmonization across related rules and using different definitions to more precisely target specific entities under different rules.*

PMAC urges the CSA to harmonize the definitions of "affiliated entity" so that there is harmonization across securities law instruments. We do not believe that proposed changes to the definition of "affiliated entity" warrant creating different definitions of the same concept under different securities rules.

> 3. **Definition of "eligible derivatives party".** *Paragraphs (m), (n), and (o) provide that certain persons and companies are eligible derivatives parties if they meet certain criteria, including meeting certain financial thresholds. Are these criteria appropriate? Please explain your response.*

While PMAC had hoped the CSA would leverage the existing "permitted client" definition instead of introducing a new category of sophisticated investor, given the CSA's decision to continue with the definition of EDP, we encourage as much consistency as possible between NI 31-103, NI 93-101, and NI 93-102 based on the philosophy of these being parallel regulatory regimes and in order to avoid confusion and complexity. As such, we request that the CSA amend the definition of EDP to include any non-individual person that is a "permitted client", as such term is defined in NI 31-103.

While PMAC believes the criteria in subsection (n) of the EDP definition are an appropriate way for the CSA to harmonize EDP with the "accredited counterparty" category under the *Derivatives Act* (Quebec), members have noted concerns, however, that such criteria remains insufficiently harmonized with the "eligible contract participant" category under the U.S. Commodity Exchange Act. We believe it is crucial to ensure as much harmonization as possible.

We note that, as proposed, NI 93-102 will require many firms to potentially grapple with four different sophisticated investor definitions: "accredited investor", "permitted client", "qualified party" and EDP. This is not only overly cumbersome for firms, but it is likely to be frustrating for investors who will be required to complete all the resultant paperwork. We continue to believe that this additional complexity is unwarranted.

PMAC further asks the CSA to reconsider the requirement for firms to obtain a written representation of an institutional EDP's "knowledge and experience" to evaluate information about derivatives. For institutional EDPs, the requirement to obtain such a representation only creates regulatory burden without corresponding risk reduction or investor protection benefits. Institutional EDPs do not require these additional protections and have the resources and the expectation that they will contractually negotiate their own commercial arrangements with derivatives advisers.

> 4. **Application of the derivatives adviser registration requirement to registered advisers/portfolio managers under securities legislation.** *Under the Proposed Instrument, a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others in derivatives will be required to register as a derivatives adviser unless an exemption from registration is available. We understand that a registered adviser under securities or commodity futures legislation may provide advice in relation to derivatives or strategies involving derivatives or may manage an account for a client and make trading decisions for the client in relation to derivatives or strategies involving derivatives. If the performance of these activities in relation to derivatives is limited in nature so that it could reasonably be considered incidental to the performance of their activities as registered advisers for securities, we may consider the registered adviser/portfolio manager to not be "in the business of advising others in relation to derivatives". a) Do you agree with this approach? If not, why not? Alternatively, should we consider including an express exemption from the derivatives adviser registration requirement for a registered adviser under securities or commodity futures legislation? If yes, what if any conditions should apply for this exemption? b) When should the provision of advice by a registered adviser/portfolio manager in relation to derivatives be considered incidental to the performance of their activities as a registered adviser/portfolio manager? What factors should we consider in distinguishing between registered advisers who need to register as derivatives advisers from those that do not?*

<u>Express exemption for advisers is warranted</u>

PMAC commends the CSA for consulting on whether and in what circumstances registered advisers should be considered derivatives advisers that are required to register under NI 93-102. By posing this question, we believe the CSA is revealing an important understanding and acknowledgment of the professionalism of advisers and the ways in which they use derivatives.

PMAC strongly encourages the CSA to include an express exemption from the derivatives registration requirement for portfolio managers by virtue of being subject to robust and comprehensive regulation under NI 31-103 and subject to a fiduciary duty when dealing with their clients. Portfolio managers do not have separate standards of conduct or compliance for different asset classes – they are bound by the highest standard of care and registrant regulation across their entire business. For this reason, we request an express acknowledgment that firms and individuals advising on derivatives and derivatives strategies that comply with Section 18(1), Section 29 (subject to our comments on this section later in this submission), and, Section 39 (subject to our comments on this section later in this submission), of NI 93-102 will not be required to register under such NI 93-102. PMAC believes that these minimum requirements for advisers should be set out in a separate section under NI 31-103 for clarity and simplicity.

The additional regulatory burden on advisers proposed under NI 93-102 would add complexity without corresponding investor benefit in this instance, especially since the CSA has not articulated any specific risks posed to investors or the markets by advisers.

Advice that is "incidental"

PMAC requests a clear acknowledgment in NI 93-102 and/or in its Companion Policy for a registered adviser where advising in relation to derivatives or strategies involving derivatives is reasonably considered to be incidental to the performance of their activities as portfolio managers. Clarity in respect of when a portfolio manager meets the "incidental" test and has not tripped the business trigger and thus, is not required to register under NI 93-102 would provide certainty for stakeholders.

PMAC members expressed strong views that the exemption from the registration requirements applicable to advisers in Section 31[2] of the *Commodity Futures Act* (Ontario) (**CFA**) is insufficiently clear as to which activities are exempt from registration. Without additional guidance to assist advisers in being able to properly assess whether the activities that they may engage in are "incidental" for the purposes of NI 93-102, members are concerned that some firms will incur additional and unnecessary compliance costs for fears of being in contravention of the requirement, while others may be discouraged from engaging in advising on derivatives in a manner that is indeed incidental, for fear of tripping the registration trigger.

In determining when the provision of advice by a registered adviser in relation to derivatives or derivatives strategies is "incidental", PMAC believes any of the following indicia are appropriate indicators:

1. Where the derivatives-related advice, would not be reasonably considered by the adviser, in the exercise of its professional judgement, to be core to the overall investment activity or the primary investment activity that is employed for the derivatives party. This may be evidenced by the description of the derivatives-related investment activity that is employed for the derivatives party, orally or as set out in the investment management agreement or offering documents that are provided or otherwise made available to the derivatives party; or

[2] Registration as an advisor is not required to be obtained by […] (d) a person or company registered as an adviser under the Securities Act, or any partner, officer or employee thereof; […] where the performance of the service as an adviser is solely incidental to their principal business or occupation.

2. If the derivatives advisory activity is solely for hedging purposes, and the adviser does not determine which direction to hedge and the direction of hedging is determined by the client's existing position and desired exposure by the adviser; or

3. The derivatives activity is intended to bring the asset mix back to investment policy statement weights and is not intended for speculative or tactical purposes.

We ask that the CSA provide specific examples to provide clarity in the Companion Policy to NI 93-102 regarding when advising in relation to derivatives or strategies involving derivatives is reasonably considered to be "incidental" to the performance of activities as portfolio managers.

One practical example of "incidental" activity is that many portfolio management firms use foreign exchange forwards and swaps for hedging purposes to protect the interests of their investors, and as a supplement to their core or primary investment strategy. These practices are well established and a wide-spread way to reduce risk and, when done by portfolio managers, ought not to be considered advising in derivatives triggering the registration or business conduct requirements of NI 93-102 or NI 93-101. It is important to note that common law fiduciary obligations and the registration regime found in NI 31-103, including the associated proficiency requirements would continue to apply.

We point to compelling international reasons in support of this particular example, including the U.S Treasury Department's exclusion of foreign exchange forwards and swaps from the U.S. Commodity Futures Trading Commission's oversight with respect to registration, mandatory clearing and trade execution and margin in 2012, as part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Requests in the alternative for adviser registration exemptions

Should the CSA ultimately determine not to pursue an express exemption from the requirement for advisers to register under NI 93-102, we present the following alternative requests for exemptions for advisers. Section 16(4) would require registration under NI 93-102 in the scenario where an individual is advising an affiliated entity that is an investment fund. This would require an adviser to register when she/he is the trustee or manager of a proprietary pooled fund sold under prospectus exemptions to accredited investors. Both a registered adviser and an investment fund advised by a registered adviser (see subparagraphs (b) and (l) of the definition of EDP) are considered EDPs. Since the adviser in this case would be intimately involved in the affiliated fund, registration for such individuals should not be required solely on the basis of that individual providing advice to the affiliated fund. The requirement to register would be inconsistent with the definition of "accredited investor" under National Instrument 45-106 – *Prospectus Exemptions* (**NI 45-106**), including an investment that is advised by a person registered as an adviser. We urge the CSA to consider exempting individuals from registration in this case if the fund distributes only to accredited investors, as defined in NI 45-106. We also note that section 2.10 of NI 45-106 provides a "minimum investment amount" exemption and query the policy basis upon which a similar exemption was excluded in NI 93-102. PMAC believes that it is critical for the CSA to ensure that pooled investment vehicles (**pooled funds**) are treated fairly and granted appropriate exemptions. This is because pooled funds offer Canadians, particularly the middle class, access to various asset classes on a cost-effective basis given the ability to find economies of scale by pooling investments and sharing costs. Canadian individual investors and pension plans invest in these pooled funds as retirement savings vehicles. According to a Strategic Insight report from 2017, Canadians have $65 billion invested in pooled funds and the majority of these investments are funds being in employer sponsored defined contribution pension plans. Many portfolio managers offer pooled funds and, while they are sold to investors eligible to purchase under prospectus exemptions, it is important to note that these particular investors are not necessarily high net worth individuals, instead, they can be managed accounts of a portfolio manager and/or various retirement and other savings vehicles that are eligible to invest in these pooled funds. We

believe that ensuring that undue regulatory burden is not created around these funds is of great importance. On a related matter, we believe that the CSA should not impose transaction confirmation and written agreements requirements on an adviser in any scenario, but particularly, when an adviser is advising a proprietary fund for which it is the trustee/manager, otherwise the adviser would be reporting to itself.

PMAC requests the introduction of an exemption from the derivatives dealer registration requirement for derivatives advisers and for their advising and associate advising representatives (whether or not they are registered under NI 93-102 or exempt from registration therefrom) where the dealing activities of such derivatives advisers are in connection with providing advice to a client. This would parallel the exemption in Section 8.5.1 of NI 31-103. Under NI 93-102, however, we believe that this exemption should not be tied to the condition that the trade be made through a registered or exempt dealer – as these types of derivatives transactions would not be typically transacted through such a dealer.

It is PMAC's view that the exemptions noted in our submission would serve to impose a proportional regulatory burden on registrants while protecting investors and the integrity of the Canadian capital markets, all while allowing the CSA to meet IOSCO standards in a way that is tailored to reflect the Canadian market and securities regulatory framework.

We reiterate our strong view that an express exemption for advisers registered under NI 31-103 that comply with the above-noted minimum criteria under NI 93-102 with respect to proficiency and risk-management, together with the identification of indicia and examples of what may be considered to be "incidental", is a preferred approach and, we believe it to be an appropriate and proportionate way to maintain investor protection, efficient markets and proportionate regulatory burden.

> 6. **Exemption from the individual registration requirements for derivatives advising representatives.** *Subsections 16(3) and subsection 16(4) provide an exemption from the requirement to register an individual as a derivatives dealing representative or as a derivatives advising representative in certain circumstances. Are the exemptions appropriate? In subparagraph 16(4)(b)(iii), individuals that act as an adviser to a managed account are not eligible for the exemption from the requirement to register as a derivatives advising representative. Is this carve out appropriate where an individual has discretionary authority over the account of an eligible derivatives party?*

We also propose the inclusion of the following exemption for incorporation into NI 93-102 to create a balanced and workable OTC derivatives regime for advisers. PMAC firmly believes that there should be an express exemption from the registration requirement for advising representatives in the case where the advising representative is a registered portfolio manager and has discretionary authority over the account of an EDP. We do not believe that managed accounts should be singled out in this fashion, particularly since an individual would not be required to register as a result of managing an arm's-length investment fund. In the Consultation, the CSA states with respect to EDPs:

> those derivatives parties […] do not require the full set of protections afford to "retail" customers or investors, either because they <u>may reasonably be considered sophisticated</u> or because they have <u>sufficient financial resources to purchase professional advice</u> or otherwise protect themselves through contractual negotiation with the derivatives firm. [emphasis added].

We believe that this statement, along with the CSA's acknowledgment of comments received during the 2017 Business Conduct Consultation that managed account clients benefit from the highest duty of care owed by advisers and do not require or want the protections that private

clients do, is a critical acknowledgement. We encourage the CSA to extend that rationale to allow for a registration exemption for advisers that are dealing with managed accounts of EDPs.

> 7. **Specific proficiency requirements for individual registrants.** *Subsections 18(2) through (6) of [NI 93-102] establish specific proficiency requirements for each individual registration category. Are these specific requirements appropriate? If not, what specific exams, designations or experience are appropriate?*

PMAC believes that registered advisers should only be required to comply with the principles-based proficiency requirements set out in Section 18(1) of NI 93-102.

Should the CSA determine that a principles-based approach to proficiency requirements is insufficient for advisers, we present the following comments in the alternative.

We note that the CSA has determined to focus more on experience requirements than on educational requirements, unlike in NI 31-103, presumably as a result of there currently being fewer OTC derivatives-specific designations or courses available. PMAC believes that, due to fewer courses being available with respect to derivatives that there should also be additional opportunities for registrants to evidence their proficiency through alternate ways. For example, PMAC believes that a bright-line RIME test of 5 years should be an alternative way for an individual to demonstrate proficiency for registration under NI 93-102.

PMAC is supportive of the discretion built into the Companion Policy to NI 93-102 for the CSA to make a case-by-case determination as to whether the experience an individual gained to earn the CFA Charter qualifies as relevant experience for the purposes of being registered as a derivatives advising representative. We also support the commentary that the 48 months of RIME do not need to be consecutive.

PMAC urges the CSA to create another category of registration under NI 93-102 for derivatives associate advising representatives to mimic the supervisory structure and career path permitted for associate advising representatives under NI 31-101. Enabling firms to hire and train associate advising representative talent is crucial to preserving flexibility and for enabling the continuation of existing business relationships and client service models for portfolio management firms.

With respect to relevant proficiency and RIME for derivatives associate advising representatives, we have set out a chart showing the comparison between the proposed RIME and proficiency for derivatives advising representatives and derivatives associate advising representatives for clarity.

PMAC believes that the proficiency requirements should be as follows:

Derivatives Advising Representatives	**Derivatives Associate Advising Representative**
One or more of the following must apply: (a) The individual has earned a CFA Charter and has gained 12 months of relevant investment management experience, including experience related to derivatives in the 36-month period before applying for registration; (b) All of the following apply: a. The individual has received the Canadian Investment Manager Designation; b. The individual has passed the	One or more of the following must apply: (a) The individual has earned a Level 1 of the CFA Charter and has gained 24 months of relevant investment management experience, including experience related to derivatives (b) All of the following apply: a. The individual has received the Canadian Investment Manager Designation; b. The individual has passed the Derivatives Fundamentals Course Exam or the Derivatives Fundamentals and Options Licensing Course; c. The individual has gained 24 months of

Derivatives Fundamentals Course Exam or the Derivatives Fundamentals and Options Licensing Course[3] c. The individual has gained 48 months of relevant investment management experience, including experience relating to derivatives, at least 12 months of which was gain in the 36-month period before applying for registration.	relevant investment management experience, including experience relating to derivatives.

With respect to Section 18(3)(a) of NI 93-102, members noted that the Financial Markets Risk Management Course should be added as an additional way to evidence CRO proficiency.

For the purpose of all individuals that would be required to register as derivatives advisers, we request that the CSA establish a transition period for individuals currently advising in respect of OTC derivatives and/or for those registered as a commodity trading manager, of at least 5 years after which such individuals will be required to evidence the educational and/or experiential proficiencies that are ultimately deemed to be appropriate under NI 93-102.

> 9. **Requirements, roles and responsibilities of UDPs, CCOs and CROs.** *Sections 27-29 of [NI 93-102] establish requirements, roles, and responsibilities of individuals registered as the ultimate designated person (**UDP**), the chief compliance officer (**CCO**) and the chief risk officer (**CRO**) for each registered firm. Considering the obligations imposed on senior derivatives managers in the Business Conduct Instrument, are the requirements, roles and responsibilities in Sections 27-29 of [NI 93-102] appropriate?*

With respect to the proposed role of derivatives CCO, PMAC strongly believes that firms should have the option of appointing an officer responsible for derivatives advising (including the senior derivatives manager) that satisfies the RIME and proficiency for derivatives CCOs proposed in NI 93-102, in the event that the current CCO does not have that RIME and proficiency.

PMAC successfully made this same request to the autorité des marchés financiers (**AMF**) in March of 2010 with respect to the AMF's consultation on *loi sur les instruments dérivés* and we believe that this allowance has resulted in improved flexibility for firms, allowing them to meet the regulatory requirements in a way that maintains investor and market protection without undue burden. PMAC is reiterating our opposition to any requirements that would have the effect of requiring CCOs to have technical product knowledge or product experience requirements so that CCOs can focus on monitoring and internal control functions.

PMAC has concerns about the feasibility of firms being able to hire CCOs with the proposed requisite derivatives proficiency and RIME, as well as more general concerns regarding the requirement for CCOs to become highly expert in one asset class. While we believe that CCOs must be aware of new product development, this can be achieved by liaising with their firm's Chief Investment Officer or with the officer responsible for derivatives trading, as PMAC proposes.

The proposal to allow for the designation of an officer responsible for derivatives trading will not detract from the policy object of ensuring that derivatives advising representatives are subject to a

[3] Screenshots of the course details for the Derivatives Fundamentals and Options Licensing Course, which are used in the IIROC Rules, are found in Appendix B to this letter for reference.

robust internal monitoring and reporting process with respect to their derivatives activities – a regime that is already well established for firms registered as portfolio managers under NI 31-103.

It is PMAC's view that the roles and responsibilities set out in Sections 27-29 of NI 93-102 are somewhat duplicative and that the CCO and CRO are proposed to have concurrent and/or overlapping responsibilities. We believe that, to reduce complexity – as well as the potentially material costs of hiring another registered individual - without negatively impacting investor protection, the CCO and CRO role ought to be able to be fulfilled by the same individual.

We believe that the requirement for the derivatives UDP to report to the board of directors of a firm in the circumstances set out in Subsection 27(3)(c) of NI 93-102 is inconsistent with NI 31-103 where there is no equivalent requirement. Moreover, we do not believe that a sufficiently robust explanation has been provided as to why the reporting structures should deviate from a derivatives perspective. We also view this requirement as duplicative of the requirement for the senior derivatives manager (or, if delegated, the CCO) to report to the board in the circumstances set out in Subsection 31(2) of NI 93-101 and as elaborated on in the Companion Policy to NI 93-101. We believe that deleting the requirement in Subsection 27(3)(c) of NI 93-102 would clarify the reporting obligations without creating a duplicative burden that does not bolster the compliance function.

In requiring derivatives firms to appoint a derivatives UDP, CCO and CRO, the CSA is looking to identify key persons that will be the points of contact for compliance and risk management issues and to hold these individuals responsible for the firm's failure to meet their regulatory obligations. We support the appointment of accountable individuals for this purpose, however, similar to our concerns with respect to the appointment of a derivatives CCO, we believe that the requirement to appoint a CRO may pose a serious compliance burden on certain firms without a corresponding investor or market protection benefit.

Members have noted that several firms, but especially smaller and mid-sized firms are unlikely to have a qualified person in-house or be in a position to hire a CRO without significant impact to the firm. We believe that flexibility to allow firms to fulfill the duties of the CRO set out in Section 29 of NI 93-102 by allowing the derivatives CCO and the CRO to be the same person, is warranted. That having been said, it is difficult to imagine that the RIME required of a CRO will be RIME that a CCO currently possess and, as such, we believe that additional flexibility and/or grandfathering and/or a transition period of not less than 5 years can assist firms in meeting these requirements.

The CSA should balance the need to assess and manage risks related to a derivatives firm in a formalized way, alongside a realistic assessment of advisers' risk management track record. This analysis should also include a holistic view from the CSA of the likely material impact that proposed voluminous regulatory changes, including but not limited to various "nuisance costs" like increased corporate[4] and regulatory filings, are likely to have an impact on the ability of smaller firms to compete with more highly resourced firms. We believe that achieving an appropriate balance between prudent risk management and ensuring that regulatory change does not have the unintended result of forcing greater consolidation in the industry and less investor choice is a difficult but essential task for regulators. We believe that allowing greater flexibility and streamlining certain reporting requirements for portfolio management firms that will be required to register under NI 93-102 will result in reduced regulatory burden without compromising market and investor protection.

[4] Beyond securities law filing costs, we note that there are numerous other corporate filings that would be triggered, such as provincial annual return filings, including updating the lists of corporate officers filed in corporate registries and notices of change of directors. While not in and of themselves material, we urge the CSA to consider the totality of compliance costs and burdens currently being contemplated as a result of the Client Focused Reforms and the proposed derivatives regime to determine where regulatory burden can be properly balanced with achieving the CSA's policy objectives in the context of advisers, specifically.

For larger firms, we note that the requirement that the CRO be an officer or partner of the firm could pose challenges. If a firm has an eligible CRO in a foreign jurisdiction, from a foreign control perspective under the *Income Tax Act* (Canada), that person may not be permitted to be an officer of the firm. Permitting flexibility on this front in order to ensure that the most qualified person is able to act as CRO would be helpful.

With respect to the RIME the CSA is proposing for a CRO, PMAC believes that the CRO should be able to evidence as RIME with 5 years of experience at a securities firm engaging in substantially similar types of derivatives transactions that the registered firm for which she or he will act as CRO will undertake. This RIME would be relevant and sufficient to meet the CSA's policy concerns, while ensuring that a smaller firm is not required to pay a large salary to a CRO without clear justification.

PMAC is concerned that the proposed requirement for the CRO to report non-compliance to the UDP and to the board is bypassing established and efficiently functioning compliance structures. We believe that reporting through the CCO and then up to the board will improve the compliance process. We are also concerned that a regulatory requirement that the CRO report to the UDP instead of to the CCO, and that the UDP report to the regulator instead of to the CCO, will make it very challenging for the CCO to be aware of and fulfill his or her responsibility over the compliance activities of the firm.

> 10. **Minimum requirements for risk management policies and procedures.** *Section 39 sets out the minimum requirements for risk management policies and procedures. Are any of the requirements inappropriate? Are the requirements for independent review of risk management systems appropriate?*

Members noted that the requirement for an independent review of risk management systems may be unduly onerous for firms, particularly for smaller firms, and query whether the burden is commensurate with the anticipated benefit.

We do not believe that a compelling explanation has been provided as to why risk management requirements diverge so greatly under NI 93-102 from what is required under NI 31-103. For example, the proposed requirement in Subsection 39(2) of NI 93-102 that risk management policies and procedures be approved by the board goes beyond the normal requirements for policies and procedures and does not account for the expertise and responsibility of risk-management and compliance in crafting and overseeing such policies.

OTHER COMMENTS

With respect to Section 36(2) of NI 93-102, we query why the requirement to file quarterly financials goes beyond those required under NI 31-103.

We understand that Sections 40-42 of NI 93-102 are intended to promote legal certainty, reduce risk and improve efficiency and are based on IOSCO standards for risk mitigation. We are of the view that the requirements under these sections should not apply to derivatives advisers, and that it should be sufficient for these requirements to apply to derivatives dealers that are counterparties to the transaction.

We have the following specific comments in the event that the CSA does not agree with PMAC's position on these sections:

Section 41 of NI 93-102 provides that:

A registered derivatives firm must, in relation to each transaction with a derivatives party, enter into a written agreement with the derivatives party that establishes a process for determining the value of the derivative.

Members request clarity on how Section 42 of NI 93-102 applies to a derivatives firm that is an adviser that acts for or on behalf of a derivatives party. The use of the words "or for" in Section 40, but not in Sections 41 or 42, suggests that a derivatives firm that is an adviser does not have the responsibilities (that more clearly would apply to a derivatives dealer) that are set out in Sections 41 and 42. Moreover, as set out above, Sections 41 and 42 appear to dovetail with Section 33 of NI 93-101, and the Companion Policy to NI 93-101 suggests that the relevant agreement is between two counterparties to a transaction. We would like to see these sections revised to be clear in respect of the responsibilities, if any, that are intended to apply to a derivatives adviser when acting for or on behalf of its client. Ideally, the Companion Policy will also further clarify what is intended in respect of a derivatives adviser's responsibilities.

We also believe that the concept of "as soon as possible" in Section 42(1)(b) of NI 93-102 should be changed to "within a reasonable period of time", to be consistent with Sections 42(2) and 42(3) of NI 93-102 and to be more realistic, taking into account actual market practice. We also suggest the insertion of the word "material" before the word "dispute" in Sections 42(3) and 42(4) in order to ensure a proportional obligation in this respect.

CONCLUDING COMMENTS

We would like to thank the CSA for the work, thought and outreach that has gone into developing and publishing this Consultation as well as the Business Conduct Consultation. We support the CSA's efforts in this respect and, subject to our comments herein, believe that Canadian investors and businesses are well-served by seeking to meet IOSCO's international standards for OTC derivatives.

For registered advisers, we continue to believe that additional flexibility and appropriate exemptions are warranted in order to achieve the right balance between regulatory efficiency, investor and market protection. We look forward to the opportunity to comment on future iterations of NI 93-102 and are heartened by many of the very positive changes we saw the CSA incorporate in NI 93-101 as a result of comments received during the 2017 Business Conduct Consultation. We would be happy to speak with you further about any of the remarks in this submission and/or with respect to our submission on NI 93-101.

Sincerely,

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

Katie Walmsley
President

Portfolio Management Association of Canada

Margaret Gunawan
Managing Director – Head of Canada Legal & Compliance
BlackRock Asset Management Canada Limited

Appendix A
Proficiency Requirements for Advisers and other Registrants

Registration Requirements			
Position	**Portfolio Manager**	**Mutual Fund Dealer**	**Exempt Market Dealer**
Dealing Representative	**N/A**	A dealing representative of a mutual fund dealer must not act as a dealer in respect of the securities listed in paragraph 7.1(2)(b) unless any of the following apply: **(a)** the individual has passed the Canadian Investment Funds Course Exam, the Canadian Securities Course Exam or the Investment Funds in Canada Course Exam; **(b)** the individual has met the requirements of section 3.11 [portfolio manager – advising representative]; **(c)** the individual has earned a CFA Charter and has gained 12 months of relevant securities industry experience in the 36-month period before applying for registration; **(d)** the individual is exempt from section 3.11 [portfolio manager – advising representative] because of subsection 16.10(1) [proficiency for dealing and advising representatives].	A dealing representative of an exempt market dealer must not perform an activity listed in paragraph 7.1(2)(d) unless any of the following apply: **(a)** the individual has passed the Canadian Securities Course Exam; **(b)** the individual has passed the Exempt Market Products Exam; **(c)** the individual has earned a CFA Charter and has gained 12 months of relevant securities industry experience in the 36-month period before applying for registration; **(d)** the individual satisfies the conditions set out in section 3.11 [portfolio manager – advising representative]; **(e)** the individual is exempt from section 3.11 [portfolio manager – advising representative] because of subsection 16.10(1) [proficiency for dealing and advising representatives].
Chief Compliance Officer	A portfolio manager must not designate an individual as its chief compliance officer under subsection 11.3(1) [designating a chief compliance officer] unless any of the following apply: **(a)** the individual has:	A mutual fund dealer must not designate an individual as its chief compliance officer under subsection 11.3(1) [designating a chief compliance officer] unless any of the following apply:	An exempt market dealer must not designate an individual as its chief compliance officer under subsection 11.3(1) [designating a chief compliance officer] unless any of the following apply:

	(i) earned a CFA Charter or a professional designation as a lawyer, Chartered Accountant, Certified General Accountant or Certified Management Accountant in a jurisdiction of Canada, a notary in Québec, or the equivalent in a foreign jurisdiction, *(ii)* passed the PDO Exam or the Chief Compliance Officers Qualifying Exam and, unless the individual has earned the CFA Charter, the Canadian Securities Course Exam, and *(iii)* either: ***A)*** gained 36 months of relevant securities experience while working at an investment dealer, a registered adviser or an investment fund manager, or ***B)*** provided professional services in the securities industry for 36 months and also worked at a registered dealer, a registered adviser or an investment fund manager for 12 months; **(b)** the individual has passed the Canadian Securities Course Exam and either the PDO Exam or the Chief Compliance Officers Qualifying Exam and any of the following apply: *(i)* the individual has worked at an investment dealer or a registered adviser for 5 years, including for 36 months in a compliance capacity; *(ii)* the individual has worked for 5 years at a Canadian financial institution in a compliance capacity relating to portfolio management and also worked at a registered dealer or a registered adviser for 12 months; **(c)** the individual has passed either the PDO Exam or the Chief Compliance Officers Qualifying Exam and has met the requirements of section 3.11 [portfolio manager – advising representative].	**(a)** the individual has: *(i)* passed the Canadian Investment Funds Course Exam, the Canadian Securities Course Exam or the Investment Funds in Canada Course Exam; *(ii)* passed the PDO Exam, the Mutual Fund Dealers Compliance Exam or the Chief Compliance Officers Qualifying Exam; and *(iii)* gained 12 months of relevant securities industry experience in the 36-month period before applying for registration; **(b)** the individual has met the requirements of section 3.13 [portfolio manager – chief compliance officer]; **(c)** section 3.13 [portfolio manager – chief compliance officer] does not apply in respect of the individual because of subsection 16.9(2) [registration of chief compliance officers].	**(a)** the individual has: *(i)* passed the Exempt Market Products Exam or the Canadian Securities Course Exam; *(ii)* passed the PDO Exam or the Chief Compliance Officers Qualifying Exam; and *(iii)* gained 12 months of relevant securities industry experience in the 36-month period before applying for registration; **(b)** the individual has met the requirements of section 3.13 [portfolio manager – chief compliance officer]; **(c)** section 3.13 [portfolio manager – chief compliance officer] does not apply in respect of the individual because of subsection 16.9(2) [registration of chief compliance officers].

Advising Representative	An advising representative of a portfolio manager must not act as an adviser on behalf of the portfolio manager unless any of the following apply: **(a)** the individual has earned a CFA Charter and has gained 12 months of relevant investment management experience in the 36-month period before applying for registration; **(b)** the individual has received the Canadian Investment Manager designation and has gained 48 months of relevant investment management experience, 12 months of which was gained in the 36-month period before applying for registration.	**N/A**	**N/A**
Associate Advising Representative	An associate advising representative of a portfolio manager must not act as an adviser on behalf of the portfolio manager unless any of the following apply: **(a)** the individual has completed Level 1 of the Chartered Financial Analyst program and has gained 24 months of relevant investment management experience; **(b)** the individual has received the Canadian Investment Manager designation and has gained 24 months of relevant investment management experience.	**N/A**	**N/A**

Appendix B
Screenshots of DFC and DFOL Course Components

DERIVATIVES FUNDAMENTALS COURSE (DFC®)

COURSE INFORMATION

ENROL NOW

DEMYSTIFY DERIVATIVES - UNDERSTAND ONE OF THE MOST POWERFUL INVESTMENTS IN THE INDUSTRY

The Derivatives Fundamentals Course (DFC®) introduces you to the complex world of forwards, futures, swaps and options. Learn about the derivatives market from both a risk management and a trading perspective and jumpstart your career in this exciting market.

BENEFITS

- **The First Step to Earning Your Futures and/or Options License:** The DFC® plus the Options Licensing Course and/or the Futures Licensing Course satisfies a major proficiency requirement to become licensed to sell exchange-traded options and futures. You may also take the Derivatives Fundamentals and Options Licensing (DFOL) course as a substitute for completing the DFC and OLC to gain your options license.
- **Become a Derivatives Market Specialist:** Be recognized for your broad knowledge of derivatives products and strategies with the Certificate in Derivatives Market Strategies.
- **Qualify to Sell Managed Future Funds (Commodity Pools):** The DFC® fulfills the provincial securities commissions proficiency requirements for mutual funds representatives interested in selling Managed Future Funds.
- **Be registered as a Commodity Trading Advisor or Commodity Counsel or a Commodity Trading Manager:** Contract for Differences can be sold to investors in Ontario and Quebec. To do so you must be employed by an IIROC member firm and successfully complete the FLC and DFC courses as well as hold a license as a Registered Representative.
- This course is included in the CSI programs recognized for advance standing by Dalhousie University within their MBA (Financial Services) degree.

WHO SHOULD ENROL

Enrol in the DFC® if you're:

- Interested in obtaining a license to sell derivatives
- Looking for CE credits
- Seeking general derivatives knowledge
- Are working towards your Certificate in Derivatives Market Strategies
- Are working towards your Certificate in Equity Trading and Sales
- Are working towards your Certificate in Fixed Income Trading and Sales

COURSE LEADS TO THE FOLLOWING CREDENTIALS:

DERIVATIVES FUNDAMENTALS AND OPTIONS LICENSING COURSE (DFOL)

COURSE INFORMATION

ENROL NOW

BECOME LICENSED TO DEAL IN OPTIONS WITH ONE COURSE

The Derivatives Fundamentals and Options Licensing (DFOL) course is a one-step solution towards meeting both the regulatory and educational requirements to advise clients in options, and the base requirement for CSI's Certificate in Derivatives Market Strategies. The Derivatives Fundamentals and Options Licensing Course is an introduction to the complex world of forwards, futures, swaps, options and their applications. This course gives students more advanced and specific information on the rules, regulations and practices associated with dealing in exchange traded options.

After completing the course students will understand the similarities and differences between the various types of derivative products and the advantages and disadvantages of using options versus forwards and exchange-traded versus over-the-counter derivatives in different situations. By having a broad perspective on all types of derivatives with a specialty in options, advisors will be able to provide their clients with informed and holistic advice, recommendations and execution.

WHO SHOULD ENROL

- A retail or institutional advisor seeking approval to deal in options with clients
- An investment representative seeking approval to deal in options with clients
- A supervisor seeking approval to supervise options trading activity
- Are working towards your Certificate in Equity Trading and Sales
- Are working towards your Certificate in Fixed Income Trading and Sales

COURSE LEADS TO THE FOLLOWING CREDENTIALS: