September 14, 2018

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Secretary
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Comments on the Proposed Instrument *Derivatives: Business Conduct*
issued by the Canadian Securities Administrators

Dear Madams:

We, the Japanese Bankers Association, would like to express our gratitude for this opportunity to comment on the Proposed National Instrument 93-101 *Derivatives: Business Conduct* and the Proposed Companion Policy 93-101 *Derivatives: Business Conduct* (collectively, "Proposed Instrument") issued on June 14, 2018 by the Canadian Securities Administrators ("CSA"). We respectfully expect that the following comments will contribute to your further discussion.

We would highly appreciate it if you read this comment letter and our comment letter concurrently submitted to the CSA in respect of Proposed National Instrument 93-102 and its companion policy issued in April together, given many issues are related to each other.

[General Comments]

1. Exemption based on equivalence assessment

From the perspectives of international comity and avoidance of excessive regulatory burdens, the CSA should flexibly grant an exemption to non-Canadian financial institutions that are complying with their national OTC derivatives regulations, such as Japanese banks, based on equivalence assessment without imposing on any conditions to

qualify for the exemption. It would be appropriate to be regulated by home authorities, particularly with respect to compliance requirements on "derivatives business unit" for foreign derivatives dealers prescribed in Part 5 (Section 29-35).

(Rationale)

Japan has already implemented the OTC derivatives regulations following the G20 agreement by incorporating them into the Financial Instruments and Exchange Act (the "Act") whose equivalence to U.S. regulations has been recognized by the CFTC. Imposing Canadian registration requirements on Japanese financial institutions that are already subject to such a strict national regulation would force them to address inefficient duplicated regulations, which lead to excessive regulatory burdens. Therefore, the CSA should carry out a comprehensive equivalence assessment on other jurisdiction's legislation and exclude foreign financial institutions in such a jurisdiction from the scope of application of the Proposed Instrument if they are deemed as complying with strict national OTC derivatives regulations that are recognized as equivalent to the requirements in the Proposed Instrument.

When the OTC derivatives regulations under the Dodd-Frank Act took effect in the U.S., some financial institutions terminated their transactions with U.S. firms. Similarly, if financial institutions that are subject to national OTC derivatives regulations are required to comply with the requirements in the Proposed Instrument, some financial institutions may cease from transacting with Canadian firms in order to avoid regulatory burdens, causing adverse consequences on the liquidity of Canadian derivatives markets.

Even if the exemption based on equivalence assessment is not granted, it would be appropriate to be regulated by home authorities, with respect to requirements on "derivatives business unit" for foreign derivatives dealers prescribed in Part 5, including establishment of policies and procedures, establishment of compliance system and recordkeeping, in order to eliminate duplicated regulation.

The following comments are provided in case that the Japanese financial institutions are not granted an exemption from the requirements in the Proposed Instrument.

2. Clarification of the scope of application

We request the CSA to clarify the definition of "in Canada" used in the Proposed Instrument and consider how the requirements in the Proposed Instrument will apply to cross-border transactions. Specifically, the scope of application of the Proposed Instrument should be limited to transactions entered into within Canada by a dealer registered as a derivatives dealer with Canadian authorities. Furthermore, if transactions

executed by a registered non-Canadian dealer are included in the scope of application, such transactions should be limited to trading with a non-eligible derivatives party ("non-EDP") in Canada.

(Rationale)

Given that the term "in Canada" is used in the preamble, etc. of the Proposed Instrument (p. 4804 "Substance and Purpose of the Proposed Instrument"), it is our understanding that the Proposed Instrument applies to derivatives transactions conducted in Canada. However, it is not necessarily clear in what cases cross-border transactions will be subject to the requirements in the Proposed Instrument specifically. In this view, the CSA should provide clarification to the definition that transactions "in Canada" subject to the requirements in the Proposed Instrument are limited to transactions conducted within Canada such as "transactions executed and booked within Canada," or "transactions with a Canadian counterparty located within Canada". If it is not clarified, the Proposed Instrument could be interpreted in a way that it will apply to all derivatives dealers and even to all of those transactions entered into between non-Canadian derivatives dealers. This will cause excessive regulatory burdens on financial institutions established in foreign jurisdictions. If it is determined to include transactions executed by a registered non-Canadian derivatives dealer into the scope of application, transactions subject to the requirement should be limited to those trading with non-EDP within Canada, similar to the approach taken under the corresponding EU regulations where the scope of application is limited to only those transactions that are deemed to genuinely require customer protection are identified.

[Specific Comments]

1. Condition that all or substantially all of the assets are situated outside Canada (Section 21, 38)

The CSA should clearly define the condition that "all or substantially all of the assets of the derivatives firm may be situated outside the local jurisdiction" and also limit the scope of derivatives parties to which a written disclosure should be delivered to those parties located within Canada.

(Rationale)

The words "all or substantially all of the assets" should be clarified as its meaning is not necessarily clear. CSA should confirm that at least those firms located outside Canada and having a Canadian branch meets this condition. Furthermore, if the requirements in the Proposed Instrument are applied to all derivatives dealers, all transactions between non-Canadian derivatives dealers will also be subject to the requirements, imposing excessive regulatory burdens on financial institutions in foreign jurisdictions. Therefore, in order to

ensure that this disclosure requirement will not apply to all of the foreign derivatives dealers' counterparties, the scope of its application should be limited to their counterparties located within Canada.

2. Scope of the exemption for foreign derivatives dealers (Section 38)

Foreign derivatives dealers in jurisdictions whose corresponding requirements are deemed to be equivalent to the requirements in the Proposed Instrument should not be required to satisfy the conditions to qualify for the exemption from specific requirements in the Proposed Instrument, but instead should be allowed to be exempted without conditions. If this request is not accepted, the CSA should clarify the scope of this exemption.

(Rationale)

Our view on the exemption for foreign derivatives dealers is as noted in section 1. of the General Comments. If, however, our request is not accepted, the CSA should clarify the scope of the exemption. While our understanding is that the Proposed Instrument is applicable to "derivatives transactions executed and booked within Canada," Section 38 gives rise to uncertainty as to whether the exemption thereunder is applicable to those transactions within Canada, concurrently being subject to their national regulations. More specifically, we are uncertain whether, if Japan is listed as an exempted jurisdiction in Appendix A, the exemption under Section 38 will apply to derivatives transactions that are entered into by Japanese banks and become subject to both Japanese and Canadian regulations, and Japanese banks will only need to comply with the Japanese regulation and be exempted from the requirements in the Proposed Instrument pursuant to Section 38.

Furthermore, if a third country other than Canada and Japan is designated as an exempted jurisdiction in Appendix A and Japanese banks become subject to both the regulations of that jurisdiction and Canada, it is also uncertain whether Japanese banks will be exempted from the requirements in the Proposed Instrument so long as they comply with the regulation of that third country. (For example, where EU is designated as an exempted jurisdiction in Appendix A and Japanese banks comply with EMIR or MiFID II for their EU-related transactions, it is not clear whether Japanese banks will be exempted in accordance with Section 38.)

3. Definition of "eligible derivatives party ('EDP')" (Section 1)

We understand that all derivatives parties referred to in Section 1 are defined as an EDP under the condition that they are "organized under the laws of Canada or a jurisdiction of Canada or that has their head office or principal place of business in Canada." Is our understanding correct?

(Rationale)

This point needs to be clarified because the current description in Section 1 – Definition of eligible derivatives party does not specify this, which could lead to an interpretation that all transactions between non-Canadian parties are subject to the requirements in the Proposed Instrument.

4. Exemption for transactions on trading facilities, etc.

We believe it appropriate to exempt transactions that are executed on a trading facility or are centrally cleared. In addition to these transactions, FX forwards and FX swaps should also be exempted.

(Rationale)

We understand that transactions executed on a trading facility as well as transactions centrally cleared are appropriately supervised by Canadian authorities.

FX forwards and FX swaps are traded in those markets with relatively high liquidity and transparency. Also, there is a mechanism in place to mitigate their settlement risk. In light of these situations, the U.S. Commodity Exchange Act exempts these products from the scope of application.