



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

MESSAGE FROM THE PRESIDENT AND CEO

The attached «**Guidance Notice**» is the first of its kind to be issued pursuant to a pilot project initiated by the Investment Industry Association of Canada (IIAC) to help those of our members who are dealers or advisers in derivatives and, as well, their chief compliance officers (CCOs), to deal with certain regulatory compliance issues.

In the wake of the registration reform and in light of feedback received from many of our members, we believe that such a service will provide much needed help to our CCOs when no formal by-laws, rules, guidelines, policies, rulings, official interpretations or staff notices (legislation) have been issued on a given topic by the Canadian Securities Administrators, the Investment Industry Regulatory Organization of Canada or other authorities.

IIAC Guidance Notices will be issued in selected instances to help our members to successfully respond to unusually complex implementation or compliance issues, allowing them at the same time to improve their capacity to more efficiently manage their legal and regulatory risk position.

The IIAC's objective is to facilitate the development of a high quality compliance practice and robust client protection standards among our members, while promoting fair and equitable competition within the Canadian securities industry.

WHILE A GUIDANCE NOTICE MAY OCCASIONALLY BE THE OBJECT OF PRIOR CONSULTATIONS WITH REGULATORS, IT IS EXCLUSIVELY CIRCULATED AS AN INFORMATION TOOL SPECIALLY DESIGNED FOR THE USE OF THE MEMBERS, AUTHORIZED PERSONNEL AND EMPLOYEES OF IIAC. IT IS NOT, AND SHOULD NOT BE VIEWED AS, A LEGAL OPINION AND SHOULD ONLY BE RELIED UPON AS A MERE REFERENCE.

Members, as needed, should continue to consult their own legal or other advisors in due course as they may see fit to review the matters discussed in an IIAC Guidance Notice before they: (i) make the determinations deemed appropriate to ensure their regulatory compliance in light of their own conditions and circumstances; and (ii) establish, maintain or apply policies and procedures forming part of their system of controls and supervision.

Ian C. W. Russell, FCSI



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

In collaboration with:

lavery *

GUIDANCE NOTICE No. 01-10

Subject : Quebec Derivatives Act –
Exemption regarding activities and transactions in
OTC derivatives with Accredited Counterparties

Date: February 2010

The Quebec *Derivatives Act* (QDA or Act) came into effect on February 1, 2009. On September 28, 2009, the QDA and the *Derivatives Regulation* (DR) were amended as a consequence of the securities registration reform, which came into force on that same date in Canada.

The QDA is a principles-based legislation which gives IIAC member firms dealing or advising in the derivatives or securities fields (**Members**), and to each individual (representatives, employees, agents) acting on their behalf, a fairly broad discretion in the determination of the best ways to respect these principles and therefore, a capacity to design and apply internal controls and supervisory procedures that they, as regulated entities, deem appropriate to ensure their compliance with QDA requirements.

The objective of this Guidance Notice is to facilitate a prudent exercise of such discretion with respect to over-the-counter (OTC) derivatives activities or transactions involving a Member firm and another (other) "*accredited counterparty(ies)*", as such expression is defined in the QDA.

More specifically, it aims:

to provide the firms and their chief compliance officers with suggestions on practical ways of controlling and supervising the access to the exemption granted by s. 7 QDA with respect to OTC derivatives; and, more generally,

to support the development of standards that may be used as benchmarks to evaluate the quality of the various compliance procedures that Members have put in place in this regard.

* Jean Martel and Michel Servant,
Partners at Lavery's Montreal office

General Concepts

Under s. 3 QDA, a *derivative* is an option, a swap, a futures contract or any other contract or instrument whose market price, value, or delivery or payment obligations are derived from, referenced to or based on an underlying interest (or any other contract or instrument designated by regulation or considered equivalent to a derivative on the basis of criteria determined by regulation).¹

The derivative is deemed to be *standardized* when it is traded on a published market, has characteristics determined by this market, and is cleared and settled by a recognized clearing house. The *OTC* derivative concept encompasses any derivative that is not standardized.

Accredited Counterparty Exemption

S. 7 QDA provides, as a general rule, that most of the regulatory framework that has been put in place by that Act including, most importantly, the dealer and adviser registration requirements (ss. 54 and following QDA) and the obligation of a person to be qualified by the AMF to create or market a derivative so that it may be offered to the public (s. 82 QDA),² does not apply to OTC derivatives activities or transactions involving only "*accredited counterparties*". We will refer to this rule as the «Exemption».

The "*accredited counterparty*" definition of the QDA includes several classes of entities or persons whose resources, situation or knowledge are such that in most cases, the full protection of the various provisions of the Act has been found unnecessary with respect to their dealings in OTC derivatives. The AMF *Policy Statement respecting Accredited Counterparties* attached as Appendix A (Policy Statement) elaborates on certain aspects of this definition and provides directions to help determine whether a given counterparty is entitled to benefit from s. 7 QDA.

For the purpose of the Exemption, an IIAC Member which is a duly registered dealer or adviser under the *Securities Act* (Quebec) (SA) qualifies as an *accredited counterparty* within the meaning of par. 4 of this expression's definition (s. 3 QDA). Though the QDA prescribes separate registration requirements for dealers and advisers in derivatives as opposed to securities, s. 57 provides that securities dealers and advisers who:

are duly registered in accordance with the SA; and

meet the conditions imposed by and pay the related fees required under the QDA for registration to carry on business in derivatives;

are deemed to be registered under the QDA, for as long as they remain registered under the SA.

Compliance Paper Trail

Pursuant to s. 65 of the QDA, Members and their representatives must exercise all the care that may be expected of a knowledgeable professional in the same circumstances, to obtain or confirm such information about a client as will enable them to determine whether the trade they are being asked to carry out is in keeping with the rules governing their business.

Consequently, to mitigate the regulatory risk relating to the application of the Exemption, the Member should, before engaging in an activity pertaining to, or entering into, an OTC derivative contract with a counterparty (which may or may not be a client holding an account with the Member), conduct appropriate due diligence and obtain from the counterparty factual statements which, as at the time

¹ No such designation or determination by regulation had been made at the date of issue of this Guidance Notice.

² A person, however, who is not a recognized regulated entity (s. 82 QDA)

the relevant activity is pursued or the OTC derivative contract entered into, will reciprocally establish that both the Member itself and the counterparty are entitled to the benefit of the Exemption.

Moreover, the Member should create a compliance paper trail to always be able to demonstrate to any competent regulator (i.e. one of the Canadian Securities Administrators, a self-regulatory organization or other authority (**Regulator**)) that: (a) such diligence has been conducted on his behalf by the responsible registered person; and (b) the required statement of facts has been obtained as at the required time i.e., as the case may be, when each continuingly pursued sequence of regulated activity involving OTC derivatives is engaged in, or every time a transaction on an OTC derivative is entered into (**Required Time**).

These statements of facts could be in the form of representations to the effect that the relevant counterparty is included in one or more of the categories of accredited counterparties listed in Appendix B hereto.

Any IIAC Member that wishes to rely on the Exemption to enter into an OTC derivative transaction (as opposed to activity) while being spared from compliance with any of the requirements mentioned in s. 7 QDA is legally bound to make such determination at each Required Time. But once the transaction has been executed by a counterparty (say, the IIAC Member) who has taken appropriate means to verify, at that Time, that such transaction was duly eligible to benefit from the Exemption, such counterparty has thereafter no obligation to ensure that the other counterparty continues to itself qualify as an accredited counterparty during the term of the instrument for the transaction to stay eligible for such benefit.

Evidencing a counterparty's accredited status

To be able to evidence to the Regulator, upon request, that reasonable means have been deployed to verify the accredited status of their counterparties under the QDA and therefore, to verify the applicability of the Exemption to an activity or transaction on OTC derivatives, Members may resort to one (or a combination or variation) of three means of obtaining and documenting the representations to be obtained from their counterparty.³ These are:

the account opening material (notably the account or customer agreement (**OTC Account Agreement**), among other documents that may be required at such time as the case may be);

specific letters or certificates; or

an Accredited Counterparty Agreement.

OTC ACCOUNT AGREEMENT

The relevant factual statements may be initially obtained as part of the KYC diligence procedures that the firm has to conduct before it opens an account in the name of someone intending to become a party to or to trade in OTC derivatives.

These statements may, for instance, be included in an annex in the form of Appendix B, to be attached to the OTC Account Agreement pertaining to the client and to be kept in original executed form in such client's file. The annex should also include representations made on behalf of the Member, to establish its own accredited quality as a counterparty taking part in the activity or transaction (see above, *Compliance Paper Trail*).

³ If the Member's counterparty is a patrimony endowed with a certain degree of autonomy, such as a pension fund, trust or *bona fide* association, it is recommended that the Member obtain a copy of a resolution or other formal confirmation of authorization by the administrators of such patrimony to execute and deliver the relevant documentation, as the responsibility for compliance with the QDA rests with them only (s. 5 QDA).

If the Member proceeds in this manner, the veracity and sufficiency of the information provided in the annex relating to the client's statement of facts should be reviewed periodically and updated as needed to ensure, among other factors that would otherwise need to be verified, that the client continues to be eligible to the Exemption at each Required Time because of his accredited counterparty quality.

LETTER OF REPRESENTATIONS

To be allowed to claim the benefit of the Exemption, the accredited status of a counterparty (whether such counterparty is the Member itself or the client) has to be verified. The Member firm might prefer — because of the particular nature of the activity or the terms of a transaction, or in light of specific circumstances, as the case may be — to use *ad hoc* letters of representations modeled on Appendix B to be exchanged as of the Required Time, so that each counterparty is provided on a timely basis with reasonable assurance that the other counterparty is effectively accredited.

ACCREDITED COUNTERPARTY AGREEMENT

Alternatively, Members could integrate into a formal agreement the representations to be used and exchanged between counterparties to confirm their accredited status. Such an agreement could either be entered into as part of the account opening procedures or as a separate instrument coming into effect as at or prior to the relevant Required Time.

Such an agreement could cover the various types of OTC derivative instruments or activities that the parties want to engage in or execute, and include reciprocal representations by each counterparty as to its accredited status deemed to be repeated and be effective at each Required Time as the case may be, as more fully discussed below.

An example of the form of such a proposed agreement is set out as [Appendix C](#) to this Guidance Notice.

Change of circumstances; Deemed repetition of representations

Whether an annex to the account opening material, an exchange of letters or certificates with the client or a formal agreement is used to ensure that the conditions of availability of the Exemption are met, the Member could nonetheless consider to add the following⁴ in the documentation used (annex, letter, certificate, agreement, etc.):

a clause specifying that if there is a change in the circumstances supporting a representation made by a counterparty that it is accredited within the meaning of the QDA — in the case of a Member for instance, such a representation would classically be that it is a dealer or adviser registered under the QDA, a dealer or adviser registered under the *Securities Act* (Quebec) or a person authorized to act as such or to exercise similar functions under equivalent legislation applicable outside Québec⁵ — the relevant counterparty will disclose forthwith to the other that such change has occurred and confirm that it is still included in the class(es) of *accredited counterparties* that it represented it was included in;

a stipulation that the representations made to establish accredited counterparty status will be, and shall be deemed to be, repeated at each time an OTC derivatives activity or transaction is pursued by the counterparty involved in such activity or transaction;

an agreement to keep in a place accessible to the Regulator and in an intelligible format all documents (including tapes of phone conversations) necessary to establish, as needed, that both counterparties have rightfully availed themselves of the Exemption.

⁴ These could be inserted, as deemed useful or desirable, in the material proposed in Appendices B and C.

⁵ See *infra*, *Members' Accredited Counterparty Status* and Class 4 of Appendix B.

Members are also reminded that the *Policy Statement* indicates that the Exemption is not available if a Member has reasonable grounds to believe that the factual statements made by his counterparty in his representations are false.⁶

A fair construction of the *Policy Statement* on this point would suggest that if accredited counterparty 1 (the Member) has used reasonable means to verify and evaluate the accredited status of counterparty 2, counterparty 1 would benefit from the Exemption notwithstanding the fact that counterparty 2 is not really accredited and has made untrue or inaccurate representations or statements of fact to the contrary. Should that be the case, only counterparty 2 could theoretically be held accountable of its failure to comply by the AMF. However, Members should note that this situation would have no impact on the legal validity/enforceability of the OTC instrument entered into by accredited counterparties 1 and 2, as specified in s. 9 QDA.

Enhanced Representation/Procedures

The AMF Policy Statement mentions that the person relying on par. 7° of the *accredited counterparty* definition (s. 3 QDA)⁷ must establish in a conclusive and verifiable manner that the statutory conditions have been met, e.g. requisite knowledge and experience and minimum asset tests.

We would recommend that Members enhance their Know Your Client (KYC) procedures when carrying on activities or entering into transactions on OTC derivatives with a person who claims to have a Class 7 accredited counterparty status, to ensure that the requisite conditions for the S. 7 Exemption to be available on that account are met by the client and are verifiable by the Member. In addition, more detailed representations may be needed from the client/counterparty to ensure that such conditions are met.

Accredited Investor Transitional Exemption

In addition to the s. 7 QDA Exemption, an AMF staff notice issued on October 2, 2009 (11/09 Staff Notice)⁸ has confirmed that General Order N°2009-PDG-0007 (02/09 Order) of the AMF, adopted under ss. 86 and 99 of the QDA to grant exemptive relief to persons that would have otherwise been required to register as dealers, advisers or representatives under the QDA (ss. 54 and 56), or to qualify with the AMF to be allowed to create or market a derivative (s. 82 QDA), is still available in accordance with its terms until March 27, 2010, at which time Part 3 of *Regulation 45-106 respecting prospectus and registration exemptions* will cease to apply (s. 8.5 of R. 45-106).

The 02/09 Order exempts from QDA registration and qualification requirements those persons carrying on activities relating to certain derivatives formerly identified in the SA before the coming into force of the QDA and mentioned in the Order, i.e.:

options or negotiable futures contracts pertaining to securities and Treasury bond futures contracts;⁹

options on commodity futures contracts or financial instrument futures contracts;¹⁰ and

⁶ In this connection, a prudent construction of the *Policy Statement* would also imply that the same result would be achieved if the Member should have had reasonable grounds to reach this conclusion if he had not been negligent in conducting the due verification and evaluation of its counterparty's accredited status.

⁷ See Appendix B, par. 7.

⁸ *Avis concernant la Décision générale relative à la dispense d'application des articles 54, 56 et du premier alinéa de l'article 82 de la Loi sur les instruments dérivés (Décision N°2009-PDG-0007)*, AMF Bulletin, October 2, 2009.

⁹ As described in s. 1(4°) SA, before being abrogated by s. 196(2°) QDA.

¹⁰ As described in s. 1(5°) SA, before being abrogated by s. 196(2°) QDA.

futures contracts on commodities, financial products, currencies and indices on exchange-traded securities (s. 1.1).¹¹

The relief is granted on the condition that the activities are pursued with «*accredited investors*» exclusively, as defined in *Regulation 45-106 respecting prospectus and registration exemptions* (R. 45-106).¹²

As indicated in the 11/09 Staff Notice, this discretionary exemption has been granted under the QDA in connection with derivatives instruments that are governed by that Act. Since the conditions of exemption prescribed by the AMF 02/09 Order refer to *accredited investors* and that this concept has been maintained in R. 45-106 as of September 28, 2009,¹³ staff has held that such exemption would still be available until the exemptions contained in Part 3 of R. 45-106 (and more particularly in this case, in s. 3.3) would cease to apply in March 2010, as per ■.

A valid argument could therefore be made that the activities pursued in connection with the types of derivatives contemplated by AMF 02/09 Order, whether standardized or OTC (since the Order makes no distinction), could still be available for some time to the persons pursuing these activities, on conditions set forth in the Order that might be less demanding from the compliance standpoint (two counterparties accredited, notably) than the Accredited Counterparties Exemption. However, with respect to IIAC Members who are either already registered under the QDA or registered under the SA and meeting the s. 57 QDA criteria (see above, *Accredited Counterparty Exemption*), this transitional exemption could offer limited additional benefits when compared with the S. 7 QDA Exemption, except to the extent that discrepancies between the lists of accredited investors and accredited counterparties turn out, in certain circumstances, to offer more flexibility to the Member.¹⁴

We attach in Appendix D a list of all classes of accredited investors as defined in R. 45-106. Members will note that there are substantial similarities, but also some differences, between such list and the one that is to be found in Appendix B, relating to accredited counterparties.

Should Members choose to avail themselves of the exemption granted by the 02/09 Order, they should remember that it is a discretionary exemption granted by the AMF under the QDA and therefore, that the burden of evidencing that all prerequisite conditions for the Member to be eligible to the benefit of the 02/09 Order exemption have been met. To ensure that they may execute this obligation upon request of the Regulator, Members would be well advised to take into account, *mutatis mutandis*, the suggestions made in this Notice with respect to complying with the accredited counterparty Exemption, to the extent applicable.

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¹¹ As described in s. 1.1 of the *Securities Regulation*, before being abrogated by s. 227 QDA.

¹² *Regulation 45-106 respecting prospectus and registration exemptions* which, at the time 02/09 Order was issued as of February 1, 2009, had been approved by Ministerial Order 2005-20, dated August 12, 2005.

¹³ As approved by Ministerial Order 2009-05, dated September 9, 2009.

¹⁴ For instance, because of lower asset tests to be met for the time being by individual clients that are accredited investors, but who could not be recognized as Class 7 accredited counterparties.

APPENDIX A

POLICY STATEMENT RESPECTING ACCREDITED COUNTERPARTIES DERIVATIVES ACT

Purpose

Section 3 of the *Derivatives Act* (the "Act") sets out the definition of "accredited counterparty." Derivatives transactions of an accredited counterparty are exempted from many provisions of the Act. This Policy Statement is intended to specify, for greater certainty, certain components of this definition.

Financial institutions

Paragraph 3 of the definition of accredited counterparty includes Canadian and foreign financial institutions, as well as supranational financial institutions.

Under paragraphs 1 and 2, the definition also includes any government and public board.

Accreditation of certain counterparties

The criteria of the definition of an accredited counterparty should be applied at the time a derivative is entered into. A counterparty is not required to ensure that the other counterparty continues to be accredited during the life of the derivative.

An accredited counterparty that engages in a derivatives transaction is responsible for determining whether the other party is also accredited and whether the transaction thus benefits from the exemption set out in section 7 of the Act. To do so, the counterparty may rely on the factual statements made by the other party, provided that it does not have reasonable grounds to believe that such statements are false. However, the counterparty is nonetheless responsible for determining whether, on the basis of the facts, the exemption is applicable. Usually, the person conducting such a transaction should conserve all documents necessary to establish that it has rightly availed itself of the exemption.

Under paragraph 7 of the definition of accredited counterparty, a person will be considered an accredited counterparty if that person has the requisite knowledge and experience, and has the minimum assets provided for in section 1 of the Derivatives Regulation. Such person must establish in a conclusive and verifiable manner that the requisite conditions have been met. The establishment of compliance with these conditions may vary significantly based on a person's particular circumstances. The counterparties concerned should be satisfied that they are able to evaluate the information obtained.

APPENDIX B

FORM OF STATEMENT OF FACTS / REPRESENTATIONS

The Client hereby represents, warrants and certifies to the Member (and acknowledges that the Member is relying on such representations, warranties and certifications) that it is an "*accredited counterparty*" within the meaning of the QDA on the basis that the Client comes under one or more of the following classes of "*accredited counterparty(ies)*", as indicated below in respect of such class(es):

(PLEASE CHECK THE BOX OF THE APPLICABLE CLASS(ES) OF ACCREDITED COUNTERPARTY)

1. A government, government department or public body or a wholly owned enterprise or entity of a government;
2. a municipality, public board or commission or other similar municipal administration, a metropolitan community, a school board, the *Comité de gestion de la taxe scolaire de l'Île de Montréal* or an intermunicipal management board in Québec;
3. a financial institution, including the Business Development Bank of Canada established under the *Business Development Bank of Canada Act* (Statutes of Canada, 1995, chapter 28), or a subsidiary of such a financial institution to the extent that the financial institution holds all the subsidiary's voting shares, other than the voting shares held by directors of the subsidiary or its employees;
4. a dealer or adviser registered under the *Derivatives Act* (Quebec), a dealer or adviser registered under the *Securities Act* (Quebec) or a person authorized to act as such or to exercise similar functions under equivalent legislation applicable outside Québec where its head office;
5. a registered representative of a person described in paragraph 4 or a representative who has ceased to be so registered within the last three years;
6. a pension fund regulated by the Office of the Superintendent of Financial Institutions established by the Office of the Superintendent of Financial Institutions Act (Revised Statutes of Canada, 1985, chapter 18, 3rd Supplement), the *Régie des rentes du Québec* or a pension commission or similar regulatory authority in Canada whose investment policy provides for or authorizes the use of derivatives, or an entity that is analogous in form and function established under legislation applicable outside Québec;
7. a person¹⁵ who establishes in a conclusive and verifiable manner (a) that the person has the requisite knowledge and experience to evaluate the information provided to the person about derivatives, the appropriateness to the person's needs of proposed derivatives strategies, and the characteristics of the derivatives to be traded on the person's behalf; (b) that the person has assets equal to or in excess of the minimum assets specified by regulation; and (c) that the person has at the person's disposal net assets in the amount specified by regulation and sufficient to fulfill the person's delivery or payment obligations under the terms of derivatives to which the person is party, in light of the positions held in the person's account and the orders the person is seeking to have executed;

¹⁵ Under the Act, "person" means a natural person or a legal person, and also includes a partnership, a trust, a fund, an association, a syndicate, a body, an entity or any other group of persons that is not constituted as a legal person and any person acting as trustee, liquidator, executor or legal representative. (s. 3 QDA)

8. an investment fund whose investment policy includes or authorizes the use of derivatives, that distributes or has distributed its securities under a prospectus for which the *Autorité des marchés financiers* (the «AMF») or another authority empowered to issue receipts under the securities legislation of another province or a territory of Canada has issued a receipt, or that distributes or has distributed its securities exclusively to (a) a person who is or was an accredited investor within the meaning of the *Securities Act* (Quebec) at the time of the distribution; (b) a person who acquires or has acquired securities of the fund in order to make a minimum amount investment or an additional investment under the conditions prescribed by the *Securities Act* (Quebec); or (c) a person described in subparagraph a or b who acquires or has acquired securities of the fund in order to reinvest in the fund, in the circumstances set out in the *Securities Act* (Quebec);
9. an investment fund that is advised by an adviser described in paragraph 4;
10. a charity registered under the *Income Tax Act* (Revised Statutes of Canada, 1985, chapter 1, 5th Supplement) or the *Taxation Act* (R.S.Q., chapter I-3) that, in regard to the trade in question, has used the services of an adviser registered under the *Derivatives Act* (Quebec) or of a person authorized to act as such or to exercise similar functions under the equivalent legislation of another province or a territory of Canada;
11. a person all of whose interest holders, except the holders of voting securities required by law to be held by directors, are accredited investors within the meaning of the *Securities Act* (Quebec);¹⁶
12. a hedger,¹⁷ that is, a person who, because of the person's activities, (a) is exposed to one or more risks attendant upon those activities, including supply, credit, exchange and environmental risks and the risk related to fluctuations in the price of an underlying interest; and (b) seeks to hedge that risk by engaging in a derivatives transaction, or a series of derivatives transactions, where the underlying interest is the underlying interest directly associated with that risk or a related underlying interest; or
13. a person specified by regulation or designated by the AMF as an accredited counterparty under section 87 of the *Derivatives Act* (Quebec).

Client signature and date

¹⁶ [or within the meaning of the definition provided in section 1.1. of *Regulation 45-106 respecting Registration and Prospectus Exemptions*]

¹⁷ S. 3 ODA defines "hedging" as the entering into of a derivatives transaction or a series of derivatives transactions, and the maintaining of the position or positions resulting from the transaction or series of transactions if

(1) the intended effect of the transaction or series of transactions is

(a) to offset or reduce the risk related to fluctuations in the value of an underlying interest or a position, or of a group of underlying interests or positions; or

(b) to substitute a risk to one currency for a risk to another currency, provided the aggregate amount of currency risk to which the hedger is exposed is not increased by the substitution;

(2) the transaction or series of transactions results in a high degree of negative correlation between changes in the value of the underlying interest or position or group of underlying interests or positions being hedged and changes in the value of the derivatives with which the value of the underlying interests or positions is hedged; and

(3) there are reasonable grounds to believe that the transaction or series of transactions no more than offsets the effect of price changes in the underlying interest or position, or group of underlying interests or positions, being hedged;

The Member hereby represents, warrants and certifies to the Client (and acknowledges that the Client is relying on such representations, warranties and certifications) that as a dealer or adviser registered under the *Derivatives Act* (Quebec), a dealer or adviser registered under the *Securities Act* (Quebec) or a person authorized to act as such or to exercise similar functions under equivalent legislation applicable outside Quebec, the Member is a Class 4 accredited counterparty under the *Derivatives Act* (Quebec), as mentioned above.

Member signature and date

APPENDIX C

FORM OF ACCREDITED COUNTERPARTY REPRESENTATION LETTER

ACCREDITED COUNTERPARTY AGREEMENT (the "Agreement")

This Agreement entered into as of this ___ day of _____, 20__.

By and between:

("Member")

And:

("Client")

WHEREAS Member and Client have entered into or intend to enter into one or more derivatives (as defined in the *Derivatives Act* (Quebec) (the "QDA") from time to time;

WHEREAS, pursuant to Section 7 of the QDA, *over-the-counter derivatives* activities or transactions involving *accredited counterparties* (as such terms are defined under the QDA) only are exempted from various provisions of the QDA;

WHEREAS each of Member and Client intends to engage in or enter into such "over-the-counter derivatives" activities or transactions as an "accredited counterparty" within the meaning of the QDA and under the regulations made thereunder, as interpreted by the *Autorité des marchés financiers* (the "Derivatives Legislation");

NOW, THEREFORE, in consideration of the above recitals and the mutual agreements contained herein and for other good and valuable consideration, the parties hereby agree as follows:

1. Qualification as an "Accredited Counterparty".

1.1 Client Representations.

Client agrees that the following representation shall be deemed to be repeated on each date on which a derivative (as defined in the QDA) is entered into.

Client hereby represents, warrants and certifies to the Member (and acknowledges that the Member is relying thereon) that it is an "accredited counterparty" within the meaning of the Derivative Legislation on the basis that Client fits within one of the categories of an "accredited counterparty" reproduced below beside which Client has indicated Client belongs to such category:

(PLEASE CHECK THE BOX OF THE APPLICABLE CATEGORY OF ACCREDITED COUNTERPARTY)

1. A government, government department or public body or a wholly owned enterprise or entity of a government;
2. a municipality, public board or commission or other similar municipal administration, a metropolitan community, a school board, the *Comité de gestion de la taxe scolaire de l'Île de Montréal* or an intermunicipal management board in Québec;
3. a financial institution, including the Business Development Bank of Canada established under the *Business Development Bank of Canada Act* (Statutes of Canada, 1995, chapter 28), or a subsidiary of such a financial institution to the extent that the financial institution holds all the subsidiary's voting shares, other than the voting shares held by directors of the subsidiary or its employees;
4. a dealer or adviser registered under the *Derivatives Act* (Quebec), a dealer or adviser registered under the *Securities Act* (Quebec) or a person authorized to act as such or to exercise similar functions under equivalent legislation applicable outside Québec;
5. a registered representative of a person described in paragraph 4 or a representative who has ceased to be so registered within the last three years;
6. a pension fund regulated by the Office of the Superintendent of Financial Institutions established by the Office of the Superintendent of Financial Institutions Act (Revised Statutes of Canada, 1985, chapter 18, 3rd Supplement), the *Régie des rentes du Québec* or a pension commission or similar regulatory authority in Canada whose investment policy provides for or authorizes the use of derivatives, or an entity that is analogous in form and function established under legislation applicable outside Québec;
7. a person who establishes in a conclusive and verifiable manner (a) that the person has the requisite knowledge and experience to evaluate the information provided to the person about derivatives, the appropriateness to the person's needs of proposed derivatives strategies, and the characteristics of the derivatives to be traded on the person's behalf; (b) that the person has assets equal to or in excess of the minimum assets specified by regulation; and (c) that the person has at the person's disposal net assets in the amount specified by regulation and sufficient to fulfill the person's delivery or payment obligations under the terms of derivatives to which the person is party, in light of the positions held in the person's account and the orders the person is seeking to have executed;¹⁸
8. an investment fund whose investment policy includes or authorizes the use of derivatives, that distributes or has distributed its securities under a prospectus for which the *Autorité des marchés financiers* (the "AMF") or another authority empowered to issue receipts under the securities legislation of another province or a territory of Canada has issued a receipt, or that distributes or has distributed its securities exclusively to (a) a person who is or was an accredited investor within the meaning of the *Securities Act* (Quebec) at the time of the distribution; (b) a person who acquires or has acquired securities of the fund in order to make a minimum amount investment or an additional investment under the conditions prescribed by the *Securities Act* (Quebec); or (c) a person described in subparagraph a or b who acquires or has acquired securities of the fund in order to reinvest in the fund, in the circumstances set out in the *Securities Act* (Quebec);
9. an investment fund that is advised by an adviser described in paragraph 4;
10. a charity registered under the *Income Tax Act* (Revised Statutes of Canada, 1985, chapter 1, 5th Supplement) or the *Taxation Act* (R.S.Q., chapter I-3) that, in regard to the trade

¹⁸ Members are reminded that the establishment of the availability of this exemption needs to be made in a conclusive and verifiable manner: see above, *Enhanced representations / Procedures*.

in question, has used the services of an adviser registered under the *Derivatives Act* (Quebec) or of a person authorized to act as such or to exercise similar functions under the equivalent legislation of another province or a territory of Canada;

11. a person all of whose interest holders, except the holders of voting securities required by law to be held by directors, are accredited investors within the meaning of the *Securities Act* (Quebec);
12. a hedger, that is, a person who, because of the person's activities, (a) is exposed to one or more risks attendant upon those activities, including supply, credit, exchange and environmental risks and the risk related to fluctuations in the price of an underlying interest; and (b) seeks to hedge that risk by engaging in a derivatives transaction, or a series of derivatives transactions, where the underlying interest is the underlying interest directly associated with that risk or a related underlying interest; or
13. a person specified by regulation or designated by the AMF as an accredited counterparty under section 87 of the *Derivatives Act* (Quebec).

1.2 Multi-Branch Client Representation.

Client hereby acknowledges that it has a branch or affiliate that is located in the Province of Quebec, and hereby covenants and agrees to cause such branch or affiliate not to enter into any derivative unless it has delivered a representation to Member as to its status as an "accredited counterparty" within the meaning of the QDA and additional undertakings as required by Member.

1.3 Member's Representation.

Member agrees that the following representation shall be deemed to be repeated on each date on which a derivative (as defined in the QDA) is entered into.

Member is a dealer or adviser registered under the QDA, a dealer or adviser registered under the *Securities Act* (Quebec) or a dealer authorized to act as such or to exercise similar functions under equivalent legislation outside Canada.

2. Defined Terms.

For purposes of the representations provided above, the following terms have the following meanings as set forth in the *Derivatives Act* (Quebec):

"**derivative**" means an option, a swap, a futures contract or any other contract or instrument whose market price, value, or delivery or payment obligations are derived from, referenced to or based on an underlying interest, or any other contract or instrument designated by regulation or considered equivalent to a derivative on the basis of criteria determined by regulation;

"**hedging**" means the entering into of a derivatives transaction or a series of derivatives transactions, and the maintaining of the position or positions resulting from the transaction or series of transactions if

- (1) the intended effect of the transaction or series of transactions is (a) to offset or reduce the risk related to fluctuations in the value of an underlying interest or a position, or of a group of underlying interests or positions; or (b) to substitute a risk to one currency for a risk to another currency, provided the aggregate amount of currency risk to which the hedger is exposed is not increased by the substitution; and
- (2) the transaction or series of transactions results in a high degree of negative correlation between changes in the value of the underlying interest or position or group of underlying interests or positions being hedged and changes in the value of the derivatives with which the value of the underlying interests or positions is hedged; and

(3) there are reasonable grounds to believe that the transaction or series of transactions no more than offsets the effect of price changes in the underlying interest or position, or group of underlying interests or positions, being hedged;

“person” means a natural person or a legal person, and also includes a partnership, a trust, a fund, an association, a syndicate, a body, an entity or any other group of persons that is not constituted as a legal person and any person acting as trustee, liquidator, executor or legal representative.

3. **Notice of Change of Accredited Counterparty Status.**

In the event that either party to this Agreement ceases, or reasonably believes that it may cease, to be in a position to make the representations it has made in Section 1 of this Agreement, it shall so advise the other party as soon as possible and in any event before any further derivative (as defined in the QDA) is entered into between the parties.

4. **Non-Reliance.** Each party to this Agreement will be deemed to represent to the other party on the date on which it enters into a derivative (as defined in the QDA) that it (i) is acting for its own account, (ii) has made its own determination that the derivative (as defined in the QDA) is appropriate based on its own judgment and upon advice from any advisers it has consulted, (iii) has made its own independent decision to enter into that derivative (as defined in the QDA) [and (iv) is not relying on any communication (written or oral) of the other party as investment advice, a recommendation to enter into that derivative, or an assurance or guarantee as to the expected results of that derivative. Information and explanations related to the terms and conditions of a derivative (as defined in the QDA) shall not be considered investment advice or a recommendation to enter into such derivative].

5. **Execution in Counterparts.** This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same agreement.

6. **Language.** Each of the parties hereto hereby acknowledges that it has consented to and requested that this Agreement and all documents relating thereto be drawn up in the English language only. *Les parties aux présentes reconnaissent avoir accepté et demandé que la présente convention et tous les documents s’y rapportant soient rédigés en langue anglaise seulement.*

7. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the Province of ■ and the laws of Canada applicable therein.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first written above.

[MEMBER]

[CLIENT]

By: _____
Name:

By: _____
Name:

Title:

Title:

APPENDIX D

LIST OF ACCREDITED INVESTORS AS DEFINED IN R. 45-106

UNTIL MARCH 27, 2010

“accredited investor” means

- (a) a Canadian financial institution, or a Schedule III bank;
- (b) the Business Development Bank of Canada incorporated under the Business Development Bank of Canada Act (S.C. 1995, c. 28);
- (c) a subsidiary of any person referred to in paragraphs *a* or *b*, if the person owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of that subsidiary;
- (d) a person registered under the securities legislation of a jurisdiction of Canada as an adviser or dealer, other than a person registered solely as a limited market dealer under one or both of the Securities Act (R.S.O. 1990, c. S. 5) of Ontario or the Securities Act (R.S.N.L. 1990, c. S-13) of Newfoundland and Labrador;
- (e) an individual registered or formerly registered under the securities legislation of a jurisdiction of Canada as a representative of a person referred to in paragraph *d*;
- (f) the Government of Canada or a jurisdiction of Canada, or any crown corporation, agency or wholly owned entity of the Government of Canada or a jurisdiction of Canada;
- (g) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;
- (h) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;
- (i) a pension fund that is regulated by the Office of the Superintendent of Financial Institutions (Canada), a pension commission or similar regulatory authority of a jurisdiction of Canada;
- (j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds \$1 000 000;
- (k) an individual whose net income before taxes exceeded \$200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded \$300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year;
- (l) an individual who, either alone or with a spouse, has net assets of at least \$5 000 000;
- (m) a person, other than an individual or investment fund, that has net assets of at least \$5 000 000 as shown on its most recently prepared financial statements;
- (n) an investment fund that distributes or has distributed its securities only to
 - (i) a person that is or was an accredited investor at the time of the distribution;
 - (ii) a person that acquires or acquired securities in the circumstances referred to in sections 2.10 [Minimum amount investment], or 2.19 [Additional investment in investment funds], or

(iii) a person described in paragraph (j) or (i) that acquires or acquired securities under section 2.18 [*Investment fund reinvestment*];

(o) an investment fund that distributes or has distributed securities under a prospectus in a jurisdiction of Canada for which the regulator or, in Québec, the securities regulatory authority, has issued a receipt;

(p) a trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (S.C. 1991, c. 45) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a fully managed account managed by the trust company or trust corporation, as the case may be;

(q) a person acting on behalf of a fully managed account managed by that person, if that person

(i) is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction, and

(ii) in Ontario, is purchasing a security that is not a security of an investment fund;

(r) a registered charity under the Income Tax Act (R.S.C. 1985, c. 1 (5th Supp.)) that, in regard to the trade, has obtained advice from an eligibility adviser or an adviser registered under the securities legislation of the jurisdiction of the registered charity to give advice on the securities being traded;

(s) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs a to d or paragraph i in form and function;

(t) a person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors;

(u) an investment fund that is advised by a person registered as an adviser or a person that is exempt from registration as an adviser, or

(v) a person that is recognized or designated by the securities regulatory authority or, except in Ontario and Québec, the regulator as an accredited investor;