CSA ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

Multilateral CSA Staff Notice 91-302
Updated Model Rules – Derivatives Product Determination and *Trade Repositories and Derivatives Data Reporting*

June 6, 2013

Introduction

Staff from the Canadian Securities Administrators (CSA) in Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan (Staff or we) are publishing this Notice to invite comment on updated model rules: *Derivatives Product Determination* and *Trade Repositories and Derivatives Data Reporting* (the Updated Model Rules). The Updated Model Rules are attached to this Notice as Appendix "A".

Background

On December 6, 2012, the CSA OTC Derivatives Committee (the Committee) published CSA Staff Consultation Paper 91-301 *Model Provincial Rules – Derivatives Product Determination* and *Trade Repositories and Derivatives Data Reporting* (the Draft Model Rules). The Committee invited public comment on all aspects of the Draft Model Rules. Thirty-five comment letters were received. A chart summarizing the comments and the Committee's responses to them and a list of those who submitted comments are attached as Appendix "B" to this Notice. Copies of the comment letters are posted on both the Ontario Securities Commission and the Autorité des marchés financiers websites.[1]

The Committee has reviewed the comments received and made final determinations on revisions to the Draft Model Rules. The Updated Model Rules that we are publishing include these revisions. Manitoba, Ontario and Quebec have each developed a province-specific rule based on the Updated Model Rules and are publishing them for comment in accordance with local requirements. At the same time, we are publishing the Updated Model Rules to ensure that our market participants have the same opportunity to comment as market participants in those jurisdictions. We are not publishing province-specific rules at this point because we must first implement necessary legislative amendments. The Committee will review all comment letters and decide on changes to the Updated Model Rules at a Committee level. After the Committee agrees on changes, we intend to publish a multilateral instrument that will be based on the amended version of the Updated Model Rules. The multilateral instrument will be published once the necessary legislative amendments have been implemented. It is Staff's intention that the multilateral instrument be, in substance, harmonized with the rules implemented in Manitoba, Ontario and Quebec.

[1] The Ontario Securities Commission's website is located at www.osc.gov.on.ca.
The Autorité des marchés financiers' website is located at http://www.lautorite.qc.ca.

Request for Comment

We welcome your comments about the Updated Model Rules in writing on or before September 6, 2013. Deliver your comments and refer your questions to:

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APPENDIX A

To CSA Staff Notice 91-302 - *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data*

MODEL PROVINCIAL RULE
DERIVATIVES: PRODUCT DETERMINATION

Application

1. This Rule applies to Model Provincial Rule – *Trade Repositories and Derivatives Data Reporting*.

Excluded derivatives

2. A contract or instrument is prescribed not to be a derivative if it is

(a) regulated by,

(i) gaming control legislation of Canada or a jurisdiction of Canada, or

(ii) gaming control legislation of a foreign jurisdiction, if the contract or instrument

(A) is entered into outside of Canada,

(B) is not in violation of legislation of Canada or [applicable province], and

(C) would be regulated under gaming control legislation of Canada or [applicable province] if it had been entered into in [applicable province];

(b) an insurance or annuity contract entered into,

(i) with an insurer holding a licence under insurance legislation of Canada or a jurisdiction of Canada and regulated as insurance under that legislation, or

(ii) outside of Canada with an insurer holding a licence under insurance legislation of a foreign jurisdiction, if it would be regulated as insurance under insurance legislation of Canada or [applicable province] if it had been entered into in Canada;

(c) a contract or instrument for the purchase and sale of currency that,

(i) except where all or part of the delivery of the currency referenced in the contract or instrument is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the parties, their affiliates or their agents, requires settlement by the delivery of the currency referenced in the contract or instrument,

(A) within two business days, or

(B) after two business days provided that the contract or instrument was entered into contemporaneously with a related security trade and the contract or instrument requires settlement on or before the relevant security trade settlement deadline,

(ii) is intended by the counterparties, at the time of the execution of the transaction, to be settled by the delivery of the currency referenced in the contract within the time periods set out in subparagraph (i), and

(iii) does not allow for the contract or instrument to be rolled over;

(d) a contract or instrument for delivery of a commodity other than cash or currency that,

(i) is intended by the counterparties, at the time of execution of the transaction, to be settled by delivery of the commodity, and

(ii) does not allow for cash settlement in place of delivery except where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates, or their agents;

(e) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by an association to which the *Cooperative Credit Associations Act* (Canada) applies or by a company to which the *Trust and Loan Companies Act* (Canada) applies;

(f) evidence of a deposit issued by a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* or a similar statute of Canada or a jurisdiction of Canada (other than Ontario) applies or by a loan corporation or trust corporation registered under the *Loan and Trust Corporations Act* or a similar statute of a jurisdiction of Canada (other than Ontario); or

(g) traded on an exchange recognized by a securities regulatory authority, an exchange exempt from recognition by a securities regulatory authority or an exchange that is regulated in a foreign jurisdiction by a signatory to the

International Organization of Securities Commissions' Multilateral Memorandum of Understanding.

Investment contracts and over-the-counter options

3. A contract or instrument, other than a contract or instrument to which section 2 applies, that is a derivative, and that is otherwise a security solely by reason of being an investment contract under paragraph X of the definition of "security" in subsection X [Definitions] of the Act, or being an option described in paragraph X of that definition, that is not described in section 5, is prescribed not to be a security

Derivatives that are securities

4. A contract or instrument, other than a contract or instrument to which any of sections 2 and 3 apply, that is a security and would otherwise be a derivative is prescribed not to be a derivative.

Derivatives prescribed to be securities

5. A contract or instrument that is a security and would otherwise be a derivative, other than a contract or instrument to which any of sections 2 to 4 apply, is prescribed not to be a derivative if such contract or instrument is used by an issuer or affiliate of an issuer solely to compensate an employee or service provider or as a financing instrument and whose underlying interest is a share or stock of that issuer or its affiliate.

MODEL EXPLANATORY GUIDANCE
TO
MODEL PROVINCIAL RULE - DERIVATIVES: PRODUCT DETERMINATION

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1. General comments

(1) This Model Explanatory Guidance sets out the views of the Canadian Securities Administrators OTC Derivatives Committee ("the Committee", "our" or "we") on various matters relating to Model Provincial Rule - *Derivatives: Product Determination* (the "Model Scope Rule").

(2) The numbering and headings from section 2 on in this Model Explanatory Guidance generally correspond to the numbering and headings in the Model Scope Rule. Any general guidance for a section appears immediately after the section heading. Any specific guidance on a section follows any general guidance.

(3) The Model Scope Rule applies only to the Model Provincial Rule - *Trade Repositories and Derivatives Data Reporting*.

(4) Unless defined in the Model Scope Rule or this Model Explanatory Guidance, terms used in the Model Scope Rule and in this Model Explanatory Guidance have the meaning given to them in securities legislation, including, for greater certainty, in National Instrument 14-101 *Definitions* and OSC Rule 14-501 *Definitions*.[1]

(5) In this Model Explanatory Guidance to the term "contract" is interpreted to mean "contract or instrument".

2. Excluded derivatives

(a) Gaming contracts

Paragraph 2(a) of the Model Scope Rule prescribes certain domestic and foreign gaming contracts not to be "derivatives". While a gaming contract may come within the definition of "derivative", it is generally not recognized as being a financial derivative and typically does not pose the same potential risk to the financial system as other derivatives products. In addition, the Committee does not believe that the derivatives regulatory regime that it expects members of the Canadian Securities Administrators (the "CSA") to implement will be appropriate for this type of contract. Further, gaming control legislation of Canada (or a jurisdiction of Canada), or equivalent gaming control legislation of a foreign jurisdiction, generally has consumer protection as an objective and is therefore aligned with the objective in securities legislation: to provide protection to market participants from unfair, improper or fraudulent practices.

With respect to subparagraph 2(a)(ii), a contract that is regulated by gaming control legislation of a foreign jurisdiction would only qualify for this exclusion if: (1) its execution does not violate legislation of Canada or [applicable province], and (2) it would be considered a gaming contract under domestic legislation. If a contract would be treated as a derivative if entered into in Canada, but would be considered a gaming contract in a foreign jurisdiction, the contract

[1] The reference to OSC Rule 14-501 *Definitions* is only relevant in Ontario. Other jurisdictions may have a similar local rule.

does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction.

(b) Insurance and annuity contracts

Paragraph 2(b) of the Model Scope Rule prescribes qualifying insurance or annuity contracts not to be "derivatives". A reinsurance contract would be considered to be an insurance or annuity contract.

While an insurance contract may come within the definition of "derivative", it is generally not recognized as a financial derivative and typically does not pose the same potential risk to the financial system as other derivatives products. The Committee does not believe that the derivatives regulatory regime that it expects CSA members to implement will be appropriate for this type of contract. Further, a comprehensive regime is already in place that regulates the insurance industry in Canada and the insurance legislation of Canada (or a jurisdiction of Canada), or equivalent insurance legislation of a foreign jurisdiction, has consumer protection as an objective and is therefore aligned with the objective of securities legislation: to provide protection to market participants from unfair, improper or fraudulent practices. Our view is that certain derivatives that have characteristics similar to insurance contracts, including credit derivatives and climate-based derivatives, will be treated as derivatives and not insurance or annuity contracts.

Subparagraph 2(b)(i) requires an insurance or annuity contract to be entered into with a domestically licenced insurer and that the contract be regulated as an insurance or annuity contract under Canadian insurance legislation. Therefore, for example, an interest rate derivative entered into by a licensed insurance company would not be an excluded derivative.

With respect to subparagraph 2(b)(ii), an insurance or annuity contract that is made outside of Canada would only qualify for this exclusion if it would be regulated under insurance legislation of Canada or [applicable province] if made in Canada. Where a contract would otherwise be treated as a derivative if entered into in Canada, but is considered an insurance contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction. Subparagraph 2(b)(ii) is included to address the situation where a local counterparty purchases insurance for an interest that is located outside of Canada and the insurer is not required to be licenced in Canada.

(c) Currency exchange contracts

Paragraph 2(c) of the Model Scope Rule prescribes a short-term contract for the purchase and sale of a currency not to be a "derivative" if it is settled within the time limits set out in subparagraph 2(c)(i). This provision is intended to apply exclusively to contracts that facilitate the conversion of one currency into another currency specified in the contract. These currency exchange services are often provided by financial institutions or other businesses that exchange one currency for another for clients' personal or business use (e.g., for purposes of travel or to make payment of an obligation denominated in a foreign currency).

Timing of delivery (subparagraph 2(c)(i))

To qualify for this exclusion the contract must require physical delivery of the currency referenced in the contract within the time periods prescribed in subparagraph 2(c)(i). If a contract does not have a fixed settlement date or otherwise allows for settlement beyond the prescribed periods or permits settlement by delivery of a currency other than the currency referenced in the contract, it will not qualify for this exclusion.

Clause 2(c)(i)(A) applies to a transaction that settles by delivery of the referenced currency within two business days – being the industry standard maximum settlement period for a spot foreign exchange transaction.

Clause 2(c)(i)(B) allows for a longer settlement period if the foreign exchange transaction is entered into contemporaneously with a related securities trade. This exclusion reflects the fact that the settlement period for certain securities trades can be three or more days. In order for the provision to apply the securities trade and foreign exchange transaction must be related, meaning that the currency to which the foreign exchange transaction pertains was used to facilitate the settlement of the related security purchase.

It is our view that where a contract for the purchase or sale of a currency provides for multiple exchanges of cash flows, all such exchanges must occur within the timelines prescribed in subparagraph 2(c)(i) in order for the exclusion in paragraph 2(c) to apply.

Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(c)(i))

Subparagraph 2(c)(i) requires that a contract must not permit settlement in a currency other than what is referenced in the contract unless delivery is rendered impossible or commercially unreasonable as a result of events not reasonably within the control of the counterparties.

Settlement by delivery of the currency referenced in the contract requires the currency contracted for to be delivered and not an equivalent amount in a different currency. For example, where a contract references Japanese Yen, such currency must be delivered in order for this exclusion to apply. We consider delivery to mean actual delivery of the original currency contracted for either in cash or through electronic funds transfer. In situations where settlement takes place through the delivery of an alternate currency or account notation without actual currency transfer, there is no settlement by delivery and therefore that the exclusion in paragraph 2(c) would not apply.

We consider events that are not reasonably within the control of the counterparties to include events that cannot be reasonably anticipated, avoided or remedied. An example of an intervening event that would render delivery to be commercially unreasonable would include a situation where a government in a foreign jurisdiction imposes capital controls that restrict the flow of the currency required to be delivered. A change in the market value of the currency itself will not render delivery commercially unreasonable.

Intention requirement (subparagraph 2(c)(ii))

Subparagraph 2(c)(ii) excludes from the reporting requirement a contract for the purchase and sale of a currency that is intended to be settled through the delivery of the currency referenced in such contract. The intention to settle a contract by delivery may be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the currency and not merely an option to make or take delivery. Any agreement, arrangement or understanding between the parties, including a side agreement, standard account terms or operational procedures that allow for the settlement in a currency other than the referenced currency or on a date after the time period specified in subsection 2(c)(i) is an indication that the parties do not intend to settle the transaction by delivery of the prescribed security within the specified time periods.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, will not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the contracted currency. Examples of provisions that may be consistent with the intention requirement under subparagraph 2(c)(ii) include:

- a netting provision that allows two counterparties who are party to multiple contracts that require delivery of a currency to net offsetting obligations, provided that the counterparties intended to settle through delivery at the time the contract was created and the netted settlement is physically settled in the currency prescribed by the contract, and
- a provision where cash settlement is triggered by a termination right that arises as a result of a breach of the terms of the contract.

Although these types of provisions permit settlement by means other than the delivery of the relevant currency, they are included in the contract for practical and efficiency reasons.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. Where a counterparty's conduct indicates an intention not to settle by delivery, the contract will not qualify for the exclusion in paragraph 2(c). For example, where it could be inferred from the conduct that counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency, the contract will not qualify for this exclusion. Similarly, a contract would not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency.

Rolling over (subparagraph 2(c)(iii))

Subparagraph 2(c)(iii) provides that a foreign exchange contract must not permit a rollover of the contract if it is to qualify for this reporting exclusion. Therefore, physical delivery of the relevant currencies must occur in the time periods prescribed in subparagraph 2(c)(i). To the extent that a contract does not have a fixed settlement date or otherwise allows the settlement date to be extended beyond the periods prescribed in subparagraph 2(c)(i), the Committee would consider it to permit a rollover of the contract. Similarly, any terms or practice that permits the settlement date of the contract to be extended by simultaneously closing the contract and opening a new contract without delivery of the relevant currencies would also not qualify for the exclusion in paragraph 2(c).

The Committee does not intend that the exclusion in paragraph 2(c) will apply to contracts entered into through platforms that facilitate investment or speculation based on the relative value of currencies. These platforms typically do not provide for physical delivery of the currency referenced in the contract but instead close out the positions by crediting client accounts held by the person operating the platform, often applying the credit using a standard currency.

(d) Commodities

Paragraph 2(d) of the Model Scope Rule prescribes a contract for the delivery of a commodity not to be a "derivative" if it meets the criteria in subparagraphs 2(d)(i) and (ii).

Commodity

The exclusion available under paragraph 2(d) is limited to commercial transactions in goods that can be delivered either in a physical form or by delivery of the instrument evidencing ownership of the commodity. We take the position that commodities include goods such as agricultural products, forest products, products of the sea, minerals, metals, hydrocarbon fuel, precious stones or other gems, electricity, oil and natural gas (and by-products, and associated refined products, thereof), and water. We also consider certain intangible commodities, such as carbon credits and emission allowances, to be commodities. In contrast, this exclusion will not apply to financial commodities such as currencies, interest rates, securities and indexes.

Intention requirement (subparagraph 2(d)(i))

Paragraph 2(d)(i) of the Model Scope Rule requires that counterparties *intend* to settle the contract by delivering the commodity. Intention can be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of an intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the commodity and not merely an option to make or take delivery. Subject to the comments below on subparagraph 2(d)(ii), we are of the view that a contract containing a provision that permits the contract to be settled by means other than delivery of the commodity,

or that includes an option or has the effect of creating an option to settle the contract by a method other than through the delivery of the commodity, would not satisfy the intention requirement and therefore does not qualify for this exclusion.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, may not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the commodity. Examples of provisions that may be consistent with the intention requirement under subparagraph 2(d)(i) include:

- an option to change the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered;
- a netting provision that allows two counterparties who are party to multiple contracts that require delivery of a commodity to net offsetting obligations provided that the counterparties intended to settle each contract through delivery at the time the contract was created,
- an option that allows the counterparty that is to accept delivery of a commodity to assign the obligation to accept delivery of the commodity to a third-party; and
- a provision where cash settlement is triggered by a termination right arising as a result of the breach of the terms of the contract or an event of default thereunder.

Although these types of provisions permit some form of cash settlement, they are included in the contract for practical and efficiency reasons.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. For example, where it could be inferred from the conduct that counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, cash settlement, the contract will not qualify for this exclusion. Similarly, a contract will not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, cash settlement of the original contract.

When determining the intention of the counterparties, we will examine their conduct at execution and throughout the duration of the contract. Factors that we will consider include whether a counterparty is in the business of producing, delivering or using the commodity in question and whether the counterparties regularly make or take delivery of the commodity relative to the frequency with which they enter into such contracts in relation to the commodity.

Situations may exist where, after entering into the contract for delivery of the commodity, the counterparties enter into an agreement that terminates their obligation to deliver or accept delivery of the commodity (often referred to as a "book-out" agreement). Book-out agreements are typically separately negotiated, new agreements where the counterparties have no obligation to enter into such agreements and such book-out agreements are not provided for by the terms of the contract as initially entered into. We will generally not consider a book-out to be "derivative"

provided that, at the time of execution of the original contract, the counterparties intended that the commodity would be delivered.

Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(d)(ii))

Subparagraph 2(d)(ii) requires that a contract not permit cash settlement in place of delivery unless physical settlement is rendered impossible or commercially unreasonable as a result of an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates or their agents. A change in the market value of the commodity itself will not render delivery commercially unreasonable. In general, we consider examples of events not reasonably within the control of the counterparties would include:

- events to which typical *force majeure* clauses would apply,
- problems in delivery systems such as the unavailability of transmission lines for electricity or a pipeline for oil or gas where an alternative method of delivery is not reasonably available, and
- problems incurred by a counterparty in producing the commodity that they are obliged to deliver such as a fire at an oil refinery or a drought preventing crops from growing where an alternative source for the commodity is not reasonably available.

In our view, cash settlement in these circumstances would not preclude the requisite intention under subparagraph 2(d)(i) from being satisfied.

(e) and (f) Evidence of a deposit

Paragraphs 2(e) and (f) of the Model Scope Rule prescribe certain evidence of deposits not to be a "derivative".

Subsection 2(f) refers to "similar statutes of Canada or a jurisdiction of Canada". While the provincial legislation initially referred to in subsection 2(f) is from Ontario, the intention is that all federal or province-specific statutes will receive the same treatment in every province or territory. For example, if a credit union to which the Ontario *Credit Unions and Caisses Populaires Act, 1994* (Ontario) applies issues an evidence of deposit to a market participant that is located in a different province, that province would apply the same treatment under its equivalent legislation.

(g) Exchange-traded derivatives

Paragraph 2(g) of the Model Scope Rule prescribes a contract not to be a derivative if it is traded on certain prescribed exchanges. Exchange-traded derivatives provide pre- and post-trade transparency to regulators and to the public, and for this reason are not required to be reported. We note that where a transaction is cleared through a clearing agency, but not traded on an exchange, it will not be considered to be exchange-traded and will be required to be reported.

(h) Additional contracts not considered to be derivatives

Apart from the contracts expressly prescribed not to be derivatives in section 2 of the Model Scope Rule, there are other contracts that we do not consider to be "derivatives" for the purposes of securities legislation. A feature common to these contracts is that they are entered into for consumer, business or non-profit purposes that do not involve investment, speculation or hedging. Typically, they provide for the transfer of ownership of a good or the provision of a service. In most cases, they are not traded on a market.

These contracts include, but are not limited to:

- a consumer or commercial contract to acquire, or lease real or personal property, to provide personal services, to sell or assign rights, equipment, receivables or inventory, or to obtain a loan or mortgage, including a loan or mortgage with a variable rate of interest, interest rate cap, interest rate lock or embedded interest rate option;
- a consumer contract to purchase non-financial products or services at a fixed, capped or collared price;
- an employment contract or retirement benefit arrangement;
- a guarantee;
- a performance bond;
- a commercial sale, servicing, or distribution arrangement;
- a contract for the purpose of effecting a business purchase and sale or combination transaction;
- a contract representing a lending arrangement in connection with building an inventory of assets in anticipation of a securitization of such assets; and
- a commercial contract containing mechanisms indexing the purchase price or payment terms for inflation such as via reference to an interest rate or consumer price index.

3. Investment contracts and over-the-counter options

Section 3 of the Model Scope Rule prescribes a contract (to which section 2 of the Model Scope Rule does not apply), that is a derivative and a security solely by reason of being an investment contract[2], not to be a security. Some types of contracts traded over-the-counter, such as foreign exchange contracts and contracts for difference meet the definition of "derivative" (because their market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest) but also meet the definition of "security" (because they are investment contracts). This section prescribes that such instruments will be treated as derivatives and therefore be required to be reported to a designated trade repository.

[2] See, for example, paragraph (n) of the definition of "security" in the *Securities Act* (Ontario).

Similarly, options fall within both the definition of "derivative" and the definition of "security". Section 3 of the Model Scope Rule prescribes an option that is only a security by virtue of paragraph (X) of the definition of "security" [3] (and not described in section 5 of the Model Scope Rule), not to be a security. This section prescribes that such instruments will be treated as derivatives and therefore will be required to be reported to a designated trade repository. This treatment will only apply to options that are traded over-the-counter. Under paragraph 2(g), exchange-traded options will not be required to be reported to a designated trade repository. Further, in Ontario, options that are entered into on a commodity futures exchange pursuant to standardized terms and conditions are commodity futures options and therefore regulated under the *Commodity Futures Act* (Ontario) and excluded from the definition of "derivative". This reporting exclusion for exchange-traded options will be implemented in other jurisdictions although the form of the exclusion may differ.

4. Derivatives that are securities

Section 4 of the Model Scope Rule prescribes a contract (to which sections 2 and 3 of the Model Scope Rule do not apply) that is a security and a derivative, not to be a derivative. Derivatives that are securities and which are contemplated as falling within this section include structured notes, asset-backed securities, exchange-traded notes, capital trust units, exchangeable securities, income trust units, securities of investment funds and warrants. This section ensures that such instruments will continue to be subject to applicable prospectus disclosure and continuous disclosure requirements in securities legislation as well as applicable registration requirements for dealers and advisers. The Committee anticipates that it will again review the categorization of instruments as securities and derivatives once the comprehensive derivatives regime has been implemented.

5. Derivatives prescribed to be securities

Section 5 of the Model Scope Rule prescribes a security-based derivative that is used by an issuer or its affiliate to compensate an officer, director, employee or service provider, or as a financing instrument, not to be a derivative. Examples of the compensation instruments that are contemplated as falling within section 5 include stock options, phantom stock units, restricted share units, deferred share units, restricted share awards, performance share units, stock appreciation rights and compensation instruments provided to service providers, such as broker options. Securities treatment would also apply to the aforementioned instruments when used as a financing instrument, for example, rights, warrants and special warrants, or subscription rights/receipts or convertible instruments issued to raise capital for any purpose. The Committee takes the view that an instrument would only be considered a financing instrument if it is used for capital-raising purposes. An equity swap, for example, would generally not be considered a financing instrument. The classes of derivatives referred to in section 5 can have similar or the same economic effect as a securities issuance and are therefore subject to requirements generally applicable to securities. As they are prescribed not to be derivatives they are not subject to the transaction reporting requirements.

[3] See, for example, paragraph (d) of the definition of "security" in the *Securities Act* (Ontario).

MODEL PROVINCIAL RULE
TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

PART 1
DEFINITIONS AND INTERPRETATION

Definitions

1. (1) In this Rule

"asset class" means the broad asset category underlying a derivative including, but not limited to, interest rate, foreign exchange, credit, equity and commodity;

"counterparty information" means the information used to identify a counterparty to a transaction, including information regarding attributes of counterparties that include, at a minimum, the data in the applicable fields listed in Appendix A under the heading "Counterparty Information";

"creation data" means operational data, principal economic terms, counterparty information and event data;

"dealer" means a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as principal or agent;

"derivatives data" means all data related to a transaction that is required to be reported pursuant to Part 3;

"event data" means the information that records the occurrence of an event and, at a minimum, includes the data in the applicable fields listed in Appendix A under the heading "Event Data";

"interim period" has the same meaning as in section 1.1 of National Instrument 51-102 *Continuous Disclosure Obligations*;

"life-cycle data" means changes to creation data resulting from any life-cycle event;

"life-cycle event" means any event that results in a change to derivatives data previously reported to the designated[4] trade repository in respect of a transaction;

"local counterparty" means a counterparty to a transaction if, at the time of the transaction, any of the following applies

(a) the counterparty is a person or company, other than an individual, organized under the laws of [Province x] or that has its head office or principal place of business in [Province x],

[4] Note that the term "designated" would be replaced with "recognized" in certain jurisdictions.

(b) the counterparty is registered under applicable securities legislation as a dealer or subject to regulations providing that a person or company trading in derivatives must be registered in a category of registration prescribed by the regulations,

(c) the counterparty is an affiliate of a person described in paragraph (a) or (b), and such person described in paragraphs (a) or (b) is responsible for the liabilities of that affiliated party;

"operational data" means the data related to how a transaction is executed, confirmed, cleared and settled and, at a minimum, includes the data in the applicable fields listed in Appendix A under the heading "Operational Data";

"participant" means a person that has entered into an agreement with a designated trade repository that allows them to access the designated trade repository services;

"principal economic terms" means the material terms of a transaction and, at a minimum, includes the data in the applicable fields listed in Appendix A under the heading "Principal Economic Terms";

"reporting counterparty" means the counterparty that is required to report derivatives data for a transaction to a designated trade repository as determined under subsections 27(1) and (2);

"transaction" means entering into, assigning, selling or otherwise acquiring or disposing of a derivative or the novation of a derivative;

"user" means, in respect of a designated trade repository, a counterparty (or delegate of a counterparty) to a transaction reported to that designated trade repository pursuant to this Rule; and

"valuation data" means data that reflects the current value of the transaction and, at a minimum, includes the data in the applicable fields listed in Appendix A under the heading "Valuation Data".

(2) In this Rule, each of the following terms has the same meaning as in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*: "accounting principles"; "auditing standards"; "U.S. AICPA GAAS"; "U.S. GAAP"; and "U.S. PCAOB GAAS".

PART 2
TRADE REPOSITORY DESIGNATION AND ONGOING REQUIREMENTS

Trade repository initial filing of information and designation

2. (1) An applicant for designation under section [x][5] of the Act must file

[5] Section x will be the designation or recognition provision in the applicable provincial securities legislation.

(a) a completed Form F1 – *Application For Designation and Trade Repository Information Statement*, and

(b) an application letter that describes how it complies with or will comply with Parts 2 and 4 of this Rule.

(2) In its Form F1 or application letter, the applicant must include information sufficient to demonstrate that

(a) it is in the public interest to designate the applicant under section [x] of the Act,

(b) the applicant is or will be in compliance with securities legislation, and

(c) the applicant has established, implemented, maintained and enforced appropriate written rules, policies and procedures that are in accordance with standards applicable to trade repositories.

(3) In addition to the requirements set out in subsections (1) and (2), an applicant that is located outside of [Province x] that is applying for designation under section [x] of the Act must

(a) certify on Form F1 that it will provide the [applicable local securities regulator] with access to its books and records and will submit to onsite inspection and examination by the [applicable local securities regulator],

(b) certify on Form F1 that it will provide the [applicable local securities regulator] with an opinion of legal counsel that,

(i) the applicant has the power and authority to provide the [applicable local securities regulator] with access to the applicant's books and records, and

(ii) the applicant has the power and authority to submit to onsite inspection and examination by the [applicable local securities regulator], and

(c) file a completed Form F2 – *Submission to Jurisdiction and Appointment of Agent for Service of Process* if it is located outside of Canada.

(4) For the purposes of subsection (3), an applicant is located outside of [Province x] if the applicant does not have its head office or principal place of business anywhere in [Province x].

(5) An applicant for designation under section [x] of the Act must inform the [applicable local securities regulator] in writing immediately of any change to the information provided in Form F1 or if any of the information becomes inaccurate for any reason, and the applicant must file an amendment to the information provided in Form F1 in the manner set out in the Form no later than 7 days after the change occurs or after becoming aware of any inaccuracy.

Change in information

3. (1) Subject to subsection (2), a designated trade repository must not implement a significant change to a matter set out in Form F1 unless it has filed an amendment to the information provided in Form F1 in the manner set out in the Form at least 45 days before implementing the change.

(2) A designated trade repository must file an amendment to the information provided in Exhibit J (Fees) of Form F1 at least 15 days before implementing a change to the information provided in the Exhibit.

(3) For any change to a matter set out in Form F1 other than a change referred to in subsection (1) or (2), a designated trade repository must file an amendment to the information provided in the Form by the earlier of

(a) the close of business of the designated trade repository on the 10th day after the end of the month in which the change was made, and

(b) the time the designated trade repository discloses the change publicly.

Ceasing to carry on business

4. (1) A designated trade repository that intends to cease carrying on business in [Province x] as a trade repository must make an application and file a report in Form F3 – *Cessation of Operations Report For Trade Repository* at least 180 days before the date on which it intends to cease carrying on that business.

(2) A designated trade repository that involuntarily ceases to carry on business in [Province x] as a trade repository must file a report in Form F3 as soon as practicable after it ceases to carry on that business.

Filing of initial audited financial statements

5. (1) A person or company must file, as part of its application for designation as a designated trade repository, together with Form F1, audited financial statements for its most recently completed financial year that

(a) are prepared in accordance with one of the following

(i) Canadian GAAP applicable to publicly accountable enterprises,

(ii) IFRS, or

(iii) U.S. GAAP, if the person or company is incorporated or organized under the laws of the United Stated of America,

(b) identify in the notes to the financial statements the accounting principles used to prepare the financial statements,

(c) disclose the presentation currency, and

(d) are accompanied by an auditor's report and are audited in accordance with one of the following

(i) Canadian GAAS,

(ii) International Standards on Auditing, or

(iii) U.S. AICPA GAAS or U.S. PCAOB GAAS if the person or company is incorporated or organized under the laws of the United Stated of America.

(2) The auditor's report must

(a) if paragraph (1)(d)(i) or (ii) applies, express an unmodified opinion,

(b) if paragraph (1)(d)(iii) applies, express an unqualified opinion,

(c) identify all financial periods presented for which the auditor's report applies,

(d) identify the auditing standards used to conduct the audit and the accounting principles used to prepare the financial statements,

(e) be prepared in accordance with the same auditing standards used to conduct the audit, and

(f) be prepared and signed by a person or company that is authorized to sign an auditor's report under the laws of a jurisdiction of Canada or a foreign jurisdiction, and that meets the professional standards of that jurisdiction.

Filing of annual audited and interim financial statements

6. (1) A designated trade repository must file annual audited financial statements no later than the 90th day after the end of its financial year that comply with the requirements described in section 5.

(2) A designated trade repository must file interim financial statements no later than the 45th day after the end of each interim period that are:

(a) prepared in accordance with accounting principles referred to in any one of the paragraphs 5(1)(a)(i) to (iii), and

(b) identify in the notes to the interim financial statements the accounting principles used to prepare the interim financial statements.

Legal framework

7. (1) A designated trade repository must establish, implement, maintain and enforce written rules, policies and procedures reasonably designed to ensure a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions.

(2) Without limiting the generality of subsection (1), a designated trade repository must establish, implement, maintain and enforce written rules, policies and procedures that are not contrary to the public interest and that are reasonably designed to ensure that

(a) such rules, policies and procedures and the contractual arrangements are supported by the laws applicable to those rules, policies, procedures and contractual arrangements,

(b) the rights and obligations of users, owners and regulators with respect to the use of its information are clear and transparent,

(c) the contractual arrangements that it enters into and supporting documentation clearly state service levels, rights of access, protection of confidential information, intellectual property rights and operational reliability, and

(d) the status of records of contracts in its repository and whether those records of contracts are the legal contracts of record are clearly established.

Governance

8. (1) A designated trade repository must have governance arrangements that

(a) are clear and transparent,

(b) promote the safety and efficiency of the designated trade repository,

(c) ensure effective oversight of the designated trade repository,

(d) support the stability of the broader financial system and other relevant public interest considerations, and

(e) properly balance the interests of relevant stakeholders.

(2) A designated trade repository must establish, implement, maintain and enforce written governance arrangements that are well-defined and that include a clear organizational structure with consistent lines of responsibility and effective internal controls.

(3) A designated trade repository must establish, implement, maintain and enforce written policies and procedures reasonably designed to identify and manage existing and potential conflicts of interest.

(4) A designated trade repository must make the governance arrangements referred to in subsections (2) and (3) available to the public.

Board of directors

9. (1) The board of directors of a designated trade repository must include

(a) individuals who have an appropriate level of skill and experience to effectively and efficiently oversee the management of its operations in accordance with all relevant laws, and

(b) appropriate representation by individuals who are independent of the designated trade repository.

(2) The board of directors of a designated trade repository must, in consultation with the chief compliance officer of the designated trade repository, resolve conflicts of interest identified by the chief compliance officer.

(3) The board of directors of a designated trade repository must meet with the chief compliance officer of the designated trade repository on a regular basis.

Management

10. (1) A designated trade repository must specify, in writing, the roles and responsibilities of management and must establish, implement, maintain and enforce written policies and procedures to ensure that management has the experience, competencies, integrity and mix of skills necessary to discharge such roles and responsibilities.

(2) A designated trade repository must notify the [applicable local securities regulator] no later than the 5th business day after appointing or replacing its chief compliance officer, chief executive officer or chief risk officer.

Chief compliance officer

11. (1) A designated trade repository must have a chief compliance officer and its board of directors must appoint an individual who has the appropriate experience, competencies, integrity and mix of skills necessary to serve in that capacity.

(2) The chief compliance officer of a designated trade repository must report directly to the board of directors of the designated trade repository or, if determined by the board of directors, to the chief executive officer of the designated trade repository.

(3) The chief compliance officer of a designated trade repository must

(a) establish, implement, maintain and enforce written policies and procedures to identify and resolve conflicts of interest and to ensure that the designated trade repository complies with securities legislation and must monitor compliance with these policies and procedures on an ongoing basis,

(b) report to the designated trade repository's board of directors as soon as practicable if he or she becomes aware of any circumstances indicating that the designated trade repository, or any individual acting on its behalf, is not in compliance with the securities or derivatives laws of any jurisdiction in which it operates and any of the following apply

(i) the non-compliance creates a risk of harm to a user,

(ii) the non-compliance creates a risk of harm to the capital markets,

(iii) the non-compliance is part of a pattern of non-compliance,

(iv) the non-compliance may have an impact on the ability of the designated trade repository to carry on business as a trade repository in compliance with securities legislation,

(c) report to the designated trade repository's board of directors as soon as practicable if he or she becomes aware of a conflict of interest that creates a risk of harm to a user or to the capital markets, and

(d) prepare and certify an annual report assessing compliance by the designated trade repository, and individuals acting on its behalf, with securities legislation and submit the report to the board of directors.

(4) Concurrently with submitting a report under paragraphs (3)(b), (c) or (d), the chief compliance officer must file a copy of the report with the [applicable local securities regulator].

Fees

12. All fees and other material costs imposed by a designated trade repository on its participants must be

(a) fairly and equitably allocated among participants, and

(b) publicly disclosed for each service it offers with respect to the collection and maintenance of derivatives data.

Access to designated trade repository services

13. (1) A designated trade repository must have objective, risk-based, and publicly disclosed criteria for participation that permit fair and open access.

(2) Without limiting the generality of subsection (1), a designated trade repository must not do any of the following

(a) unreasonably prohibit, condition or limit access by a person or company to the services offered by it,

(b) permit unreasonable discrimination among its participants,

(c) impose any burden on competition that is not reasonably necessary and appropriate,

(d) require the use or purchase of another service for a person or company to utilize the trade reporting service offered by it.

Acceptance of reporting

14. A designated trade repository must accept derivatives data for reporting purposes from its participants for all derivatives of the asset class or classes set out in its designation order.

Communication policies, procedures and standards

15. A designated trade repository must use or accommodate relevant internationally accepted communication procedures and standards in order to facilitate the efficient exchange of data between its systems and those of

(a) its participants,

(b) other trade repositories,

(c) exchanges, clearing agencies and alternative trading systems, and

(d) other service providers.

Due process

16. For any decision made by a designated trade repository that affects a participant or an applicant that applies to become a participant, the designated trade repository must ensure that

(a) the participant or applicant is given an opportunity to be heard or make representations, and

(b) it keeps records of, gives reasons for, and provides for reviews of its decisions, including, for each applicant, the reasons for granting, denying or limiting access.

Rules

17. (1) The rules and procedures of a designated trade repository must

(a) be clear, comprehensive and provide sufficient information to enable participants to have an accurate understanding of the rights and obligations of participants in accessing the services of the designated trade repository and the risks, fees, and other material costs they incur by using the designated trade repository,

(b) be reasonably designed to govern all aspects of the services offered by the designated trade repository with respect to the collection and maintenance of derivatives data and other information on completed transactions, and

(c) not be inconsistent with securities legislation.

(2) A designated trade repository's rules and procedures, and the processes for adopting new rules and procedures or amending existing rules and procedures, must be transparent to participants and the general public.

(3) A designated trade repository must monitor compliance with its rules and procedures on an ongoing basis.

(4) A designated trade repository must have clearly defined and publicly disclosed processes for sanctioning non-compliance with its rules and procedures.

(5) A designated trade repository must file all of its proposed new or amended rules and procedures for approval in accordance with the terms and conditions of the [applicable local securities regulator]'s designation order, unless the order explicitly exempts the designated trade repository from this requirement.

Records of data reported

18. (1) A designated trade repository must design its recordkeeping procedures so that derivatives data is recorded accurately, completely and on a timely basis.

(2) A designated trade repository must keep, in a safe location and in a durable form, records of derivatives data in relation to a derivative for the life of the derivative and for a further 7 years after the date on which the derivative expires or terminates.

(3) Throughout the period described in subsection (2), a designated trade repository must create and maintain at least one copy of each record of derivatives data required to be kept under subsection (2), in a safe location and in durable form, separate from the location of the original record.

Comprehensive risk-management framework

19. A designated trade repository must establish, implement and maintain a sound risk-management framework for comprehensively managing risks including business, legal, and operational risks.

General business risk

20. (1) A designated trade repository must establish, implement and maintain appropriate systems, controls and procedures to identify, monitor, and manage its general business risk.

(2) Without limiting the generality of subsection (1), a designated trade repository must hold sufficient insurance coverage and liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize.

(3) A designated trade repository must identify scenarios that may potentially prevent it from being able to provide its critical operations and services as a going concern and assess the effectiveness of a full range of options for an orderly wind-down.

(4) A designated trade repository must establish, implement, maintain and enforce written policies and procedures reasonably designed to facilitate its orderly wind-down based on the results of the assessment required by subsection (3).

(5) A designated trade repository must establish, implement, maintain and enforce written policies and procedures to ensure that it or any successor entity, insolvency administrator or other legal representative, will continue to comply with the requirements of section 37 and subsection 4(2) in the event of the bankruptcy or insolvency of the designated trade repository or the wind-down of the designated trade repository's operations.

System and other operational risk requirements

21. (1) A designated trade repository must establish, implement, maintain and enforce appropriate systems, controls and procedures to identify and minimize the impact of all plausible sources of operational risk, both internal and external, including risks to data integrity, data security, business continuity and capacity and performance management.

(2) The systems, controls and procedures established pursuant to subsection (1) must be approved by the board of directors of the designated trade repository.

(3) Without limiting the generality of subsection (1), a designated trade repository must

(a) develop and maintain

(i) an adequate system of internal controls over its systems, and

(ii) adequate information technology general controls, including without limitation, controls relating to information systems operations, information security and integrity, change management, problem management, network support and system software support,

(b) in accordance with prudent business practice, on a reasonably frequent basis and, in any event, at least annually

(i) make reasonable current and future capacity estimates, and

(ii) conduct capacity stress tests to determine the ability of those systems to process transactions in an accurate, timely and efficient manner, and

(c) promptly notify the [applicable local securities regulator] of any material systems failure, malfunction, delay or other disruptive incident, or any breach of data security, integrity or confidentiality, and provide a post-incident report that includes a root-cause analysis as soon as practicable.

(4) Without limiting the generality of subsection (1), a designated trade repository must establish, implement, maintain and enforce business continuity plans, including disaster recovery plans reasonably designed to

(a) achieve prompt recovery of its operations following any disruptions,

(b) allow for the timely recovery of information, including derivatives data, in the event of a disruption, and

(c) cover the exercise of authority in the event of any emergency.

(5) A designated trade repository must test its business continuity plans, including disaster recovery plans, at least annually.

(6) For each of its systems for collecting and maintaining reports of derivatives data, a designated trade repository must annually engage a qualified party to conduct an independent review and prepare a report in accordance with established audit standards to ensure that it is in compliance with paragraphs (3)(a) and (b) and subsections (4) and (5).

(7) A designated trade repository must provide the report resulting from the review conducted under subsection (6) to

(a) its board of directors or audit committee promptly upon the report's completion, and

(b) the [applicable local securities regulator] not later than the 30th day after providing the report to its board of directors or audit committee.

(8) A designated trade repository must make publicly available, in their final form, all technology requirements regarding interfacing with or accessing the designated trade repository,

(a) if operations have not begun, for at least 3 months immediately before operations begin, and

(b) if operations have begun, for at least 3 months before implementing a material change to its technology requirements.

(9) After complying with subsection (8), a designated trade repository must make available testing facilities for interfacing with or accessing the designated trade repository,

(a) if operations have not begun, for at least 2 months immediately before operations begin, and

(b) if operations have begun, for at least 2 months before implementing a material change to its technology requirements.

(10) A designated trade repository must not begin operations in [Province x] until it has complied with paragraphs (8)(a) and (9)(a).

(11) Paragraphs (8)(b) and (9)(b) do not apply to a designated trade repository if the change must be made immediately to address a failure, malfunction or material delay of its systems or equipment and

(a) the designated trade repository immediately notifies the [applicable local securities regulator] of its intention to make the change, and

(b) the designated trade repository publishes the changed technology requirements as soon as practicable.

Data security and confidentiality

22. (1) To ensure the safety and confidentiality of derivatives data, a designated trade repository must establish, implement, maintain and enforce written policies and procedures reasonably designed to protect the privacy and confidentiality of the derivatives data.

(2) A designated trade repository may not release any derivatives data for commercial or business purposes, unless the data has otherwise been disclosed pursuant to section 39 or the counterparties to the transaction have expressly granted to the designated trade repository their written consent to use the derivatives data.

Confirmation of data and information

23. (1) A designated trade repository must establish, implement, maintain and enforce written policies and procedures to confirm with each counterparty to a transaction, or agent acting on behalf of such counterparty, that the derivatives data that the designated trade repository receives from a reporting counterparty, or from a party to whom a reporting counterparty has delegated its reporting obligation under this Rule, is accurate.

(2) Despite subsection (1), a designated trade repository need only confirm the accuracy of the derivatives data it receives with those counterparties that are participants of the designated trade repository.

Outsourcing

24. If a designated trade repository outsources any of its key services or systems to a service provider, including an associate or affiliate of the designated trade repository, it must

(a) establish, implement, maintain and enforce written policies and procedures for the selection of service providers to which key services and systems may be outsourced and for the evaluation and approval of those outsourcing arrangements,

(b) identify any conflicts of interest between the designated trade repository and the service provider to which key services and systems are outsourced, and establish, implement, maintain and enforce written policies and procedures to mitigate and manage those conflicts of interest,

(c) enter into a contract with the service provider that is appropriate for the materiality and nature of the outsourced activities and that provides for adequate termination procedures,

(d) maintain access to the books and records of the service provider relating to the outsourced activities,

(e) ensure that the [applicable local securities regulator] has the same access to all data, information and systems maintained by the service provider on behalf of the designated trade repository that it would have absent the outsourcing arrangements,

(f) ensure that all persons conducting audits or independent reviews of the designated trade repository under this Rule have appropriate access to all data, information and systems maintained by the service provider on behalf of the designated trade repository that such persons would have absent the outsourcing arrangements,

(g) take appropriate measures to determine that a service provider to which key services or systems are outsourced establishes, maintains and periodically tests an

appropriate business continuity plan, including a disaster recovery plan in accordance with section 21,

(h) take appropriate measures to ensure that the service provider protects the designated trade repository users' confidential information and derivatives data in accordance with section 22, and

(i) establish, implement, maintain and enforce written policies and procedures to regularly review the performance of the service provider under the outsourcing arrangements.

PART 3
DATA REPORTING

Duty to Report

25. (1) Subject to subsection (2), section 26 and Part 5, a local counterparty must, in accordance with this Part, report, or cause to be reported, to a designated trade repository, derivatives data for each transaction to which it is a counterparty.

(2) If no designated trade repository accepts derivatives data in respect of a derivative or of a derivative of a particular asset class, the local counterparty must, in accordance with this Part, electronically report, or cause to be reported, such derivatives data to the [applicable local securities regulator].

(3) Each reporting counterparty that is required by this Part to report derivatives data to a designated trade repository must report each error or omission in the derivatives data as soon as technologically possible after discovery of the error or omission.

(4) If a local counterparty, other than the reporting counterparty, discovers any error or omission with respect to any derivatives data reported in accordance with subsections (1) and (2), the local counterparty must promptly notify the reporting counterparty of that error or omission.

(5) For the purpose of complying with this Part, the reporting counterparty must ensure that all reported derivatives data relating to a particular transaction

(a) is reported to the same designated trade repository or [applicable local securities regulator] to which the initial report was made, and

(b) is accurate and contains no misrepresentations.

Pre-existing derivatives

26. Despite subsection 25(1) and subject to subsection 42(4), a local counterparty to a transaction entered into before [*insert date*] that had outstanding contractual obligations on that day must report, or cause to be reported, the data indicated in the column entitled "Required for Pre-

existing Transactions" in Appendix A in relation to that transaction to a designated trade repository in accordance with this Part not later than 365 days after [*insert date*].

Reporting counterparty

27. (1) The counterparty required to report derivatives data for a transaction to a designated trade repository is,

(a) if the transaction is cleared through a clearing agency, the clearing agency,

(b) if the transaction is not cleared through a clearing agency and is between a dealer and a counterparty that is not a dealer, the dealer,

(c) if paragraphs (a) and (b) do not apply and both counterparties agree, in writing or otherwise, that one of them is required to report derivatives data for the transaction to the designated trade repository, the counterparty required to report the derivatives data under that agreement, and

(d) in any other case, both counterparties.

(2) Despite any other provision in this Rule, if the reporting counterparty as determined under subsection (1) is not a local counterparty and that counterparty does not comply with the local counterparties reporting obligations under this Rule, the local counterparty must act as the reporting counterparty.

(3) The reporting counterparty in respect of a transaction is responsible for ensuring that all reporting obligations in respect of that transaction have been fulfilled.

(4) The reporting counterparty may delegate its reporting obligations under this Rule, but remains responsible for ensuring the timely and accurate reporting of derivatives data required by this Rule.

Real-time reporting

28. (1) The reporting counterparty for a transaction, subject to the reporting obligations under this Rule, must make a report required by this Part in real time unless it is not technologically practicable to do so.

(2) If it is not technologically practicable to report in real time, the reporting counterparty must make the report as soon as technologically practicable and in no event later than the end of the next business day following the day of the entering into of the transaction, change or event that is to be reported.

(3) Despite subsections (1) and (2), where a designated trade repository ceases its operations or stops accepting derivatives data for a certain asset class of derivatives, the reporting counterparty will be permitted a reasonable time to fulfill its reporting obligations under this Rule through

reporting the information otherwise required to be provided to the designated trade repository to another designated trade repository or the [applicable provincial securities regulator].

Identifiers, general

29. The reporting counterparty for a transaction must include in every report required by this Part in respect of the transaction

(a) the legal entity identifier of each counterparty to the transaction as set out in section 30,

(b) the unique transaction identifier for the transaction as set out in section 31, and

(c) the unique product identifier for the transaction as set out in section 32.

Legal entity identifiers

30. (1) A designated trade repository must identify each counterparty to a transaction that is subject to the reporting obligation under this Rule in all recordkeeping and all reporting required under this Rule by means of a single legal entity identifier.

(2) Each of the following rules apply to legal entity identifiers

(a) a legal entity identifier must be a unique identification code assigned to a counterparty in accordance with the standards set by the Global Legal Entity Identifier System, and

(b) each local counterparty must comply with all applicable requirements imposed by the Global Legal Entity Identifier System.

(3) Despite subsection (2), if the Global Legal Entity Identifier System is unavailable to a counterparty at the time when a reporting obligation under this Rule arises, all of the following rules apply

(a) each counterparty must obtain a substitute legal entity identifier which complies with the standards established March 8, 2013 by the LEI Regulatory Oversight Committee for pre-legal entity identifiers,

(b) a local counterparty must use the substitute legal entity identifier until a legal entity identifier is assigned to the counterparty in accordance with the standards set by the Global Legal Entity Identifier System as required under paragraph (2)(a), and

(c) after the holder of a substitute legal entity identifier is assigned a legal entity identifier in accordance with the standards set by the Global Legal Entity Identifier System as required under paragraph (2)(a), the local counterparty must

ensure that it is identified only by the assigned identifier in all derivatives data reported pursuant to this Rule in respect of transactions to which it is a counterparty.

Unique transaction identifiers

31. (1) A designated trade repository must identify each transaction that is subject to the reporting obligation under this Rule in all recordkeeping and all reporting required under this Rule by means of a unique transaction identifier.

(2) A designated trade repository must assign a unique transaction identifier to a transaction, using its own methodology or incorporating a unique transaction identifier previously assigned to the transaction.

(3) A designated trade repository must not assign more than one unique transaction identifier to a transaction.

Unique product identifiers

32. (1) A designated trade repository must identify each transaction that is subject to the reporting obligation under this Rule in all recordkeeping and all reporting required under this Rule by means of a unique product identifier.

(2) For the purposes of this section, subject to subsection (4), a unique product identifier is a code that uniquely identifies derivative products and is assigned in accordance with international or industry standards.

(3) The international or industry standard referenced in subsection (2) must be made publicly available by the designated trade repository.

(4) A designated trade repository must not assign more than one unique product identifier to a transaction.

(5) If international or industry standards for unique product identifiers are unavailable for a particular derivative product when a reporting obligation under this Rule arises, a designated trade repository must assign a unique product identifier to the transaction using its own methodology.

Creation data

33. Upon execution of a transaction that is subject to the reporting obligations under this Rule, the reporting counterparty must report the creation data relating to that transaction to a designated trade repository.

Life-cycle data

34. For each transaction that is subject to the reporting obligations under this Rule, the reporting counterparty must report all life-cycle data to a designated trade repository at the end of each business day.

Valuation data

35. (1) For a transaction that is cleared, valuation data must be reported to the designated trade repository daily by both the clearing agency and the local counterparty using industry accepted valuation standards and relevant closing market data from the previous business day.

(2) Valuation data for a transaction that is not cleared must be reported to the designated trade repository

(a) daily using industry accepted valuation standards and relevant closing market data from the previous business day by each local counterparty that is a dealer, and

(b) at the end of each calendar quarter for all local counterparties that are not dealers.

(3) For the purposes of paragraph (2)(b), and despite section 28, the report must set out the valuation data as of the last day of each calendar quarter and must be reported to the designated trade repository not later than 30 days after the end of the calendar quarter.

Records of data reported

36. (1) Reporting counterparties must keep transaction records for the life of each transaction and for a further 7 years after the date on which the transaction expires or terminates.

(2) Records to which these requirements apply must be kept in a safe location and in a durable form.

PART 4
DATA DISSEMINATION AND ACCESS TO DATA

Data available to regulators

37. (1) A designated trade repository must, at no cost

(a) provide to the [applicable local securities regulator] direct, continuous and timely electronic access to such data in the designated trade repository's possession as is required by the [applicable local securities regulator] in order to carry out the [applicable local securities regulator]'s mandate,

(b) accept and promptly fulfil any data requests from the [applicable local securities regulator] in order to carry out the [applicable local securities regulator]'s mandate,

(c) create and make available to the [applicable local securities regulator] aggregate data derived from data in the designated trade repository's possession as required by the [applicable local securities regulator] in order to carry out the [applicable local securities regulator]'s mandate, and

(d) disclose to the [applicable local securities regulator] the manner in which the derivatives data provided under paragraph (c) has been aggregated.

(2) A designated trade repository must conform to internationally accepted regulatory access standards applicable to trade repositories.

(3) A local counterparty must take any action necessary to ensure that the [applicable local securities regulator] has access to all derivatives data reported to a designated trade repository for transactions involving the local counterparty.

Data available to counterparties

38. (1) A designated trade repository must provide counterparties to a transaction with timely access to all derivatives data relevant to that transaction which is submitted to the designated trade repository.

(2) A designated trade repository must have appropriate verification and authorization procedures in place to deal with access pursuant to subsection (1) by non-reporting counterparties or a party acting on behalf of a non-reporting counterparty.

(3) Each counterparty to a transaction is deemed to have consented to the release of all derivatives data required to be reported or disclosed under this Rule.

(4) Subsection (3) applies despite any agreement to the contrary between the counterparties to a transaction.

Data available to public

39. (1) A designated trade repository must, on a periodic basis, create and make available to the public, at no cost, aggregate data on open positions, volume, number and prices, relating to the transactions reported to it pursuant to this Rule.

(2) The periodic aggregate data made available to the public pursuant to subsection (1) must be complemented at a minimum by breakdowns, where applicable, by currency of denomination, geographic location of reference entity or asset, asset class, contract type, whether the transaction is cleared, maturity and geographic location and type of counterparty.

(3) A designated trade repository must make transaction level reports of the data indicated in the column entitled "Required for Public Dissemination" in Appendix A for each transaction reported pursuant to this Rule available to the public at no cost not later than

(a) the end of the day after receiving the data from the reporting counterparty to the transaction, if one of the counterparties to the transaction is a dealer, and

(b) the end of the second day after receiving the data from the reporting counterparty to the transaction in all other circumstances.

(4) In disclosing transaction level reports required by subsection (3), a designated trade repository must not disclose the identity of either counterparty to the transaction.

(5) A designated trade repository must make the data required to be made available to the public under this section available in a usable form through a publicly accessible website or other publicly accessible technology or medium.

(6) Despite subsections (1) to (5), a designated trade repository will not be required to make public any derivatives data for transactions entered into between affiliated companies as defined under subsection x of the [Provincial] *Securities Act*.

PART 5
EXCLUSIONS

40. Despite any other section of this Rule, there is no obligation under this Rule for a local counterparty to report derivatives data in relation to a physical commodity transaction if,

(a) the local counterparty is not a dealer or adviser,

(b) the local counterparty has less than $500,000 aggregate notional value, without netting, under all its outstanding transactions, at the time of the transaction including the additional notional value related to that transaction, and

(c) the local counterparty is not the reporting counterparty under paragraph 27(1)(c).

PART 6
EXEMPTIONS

41. A Director may grant an exemption to this Rule, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

PART 7
EFFECTIVE DATE

Effective date

42. (1) Parts 1, 2, 4, 5 and 6 come into force on [*insert date*].

(2) Part 3 comes into force [*insert date + 6 months]*.

(3) Despite subsection (2), Part 3 does not apply so as to require a reporting counterparty that is not a dealer to make any reports under that Part until [*insert date + 9 months]*.

(4) Despite the foregoing, Part 3 does not apply to a transaction entered into before *[insert date]* that expires or terminates not later than 365 days after that day.

Appendix A of Model Provincial Rule – Trade Repositories and Derivatives Data Reporting
Minimum Data Fields Required to be Reported to a Designated Trade Repository

Instructions:
The reporting counterparty is required to provide a response for each of the fields. Where a field does not apply to the transaction, the reporting counterparty
may respond that the field is non-applicable (N/A).

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
1. Operational data			
Transaction identifier	The unique transaction identifier as provided by the designated trade repository or, the identifier as identified by the two counterparties, electronic trading venue of execution or clearing agency.	N	N
Master agreement type	The type of master agreement, if used for the reported transaction.	N	N
Master agreement version	Date of the master agreement version (e.g. 2002, 2006).	N	N
Cleared	Indicate whether the transaction has been cleared by a clearing agency.	Y	Y
Clearing agency	LEI of the clearing agency where the transaction was cleared.	N	Y
Clearing member	LEI of the clearing member, if the clearing member is not a counterparty.	N	N
Clearing exemption	Indicate whether one or more of the counterparties to the transaction are exempted from a mandatory clearing requirement.	Y	N
End–user exemption	Indicate whether either counterparty to the transaction qualifies as an end-user.	Y	N

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Broker	LEI of the broker acting as an intermediary for the reporting counterparty without becoming a counterparty.	N	N
Electronic trading venue	Indicate whether the transaction was executed on or off an electronic trading venue.	Y	N
Electronic trading venue identifier	LEI of the electronic trading venue where the transaction was executed.	N	Y
Inter-affiliate	Indicate whether the transaction is between two affiliated entities.	N	N
Custodian	LEI of the custodian if collateral is held by a third party custodian.	N	N
Collateralization	Indicate whether the transaction is collateralized Field Values: Fully (initial and variation margin posted by both parties), Partially (variation only posted by both parties), One-way (one party will post some form of collateral), Uncollateralized.	Y	N
2. Counterparty information			
Identifier of reporting counterparty	LEI of the reporting counterparty or, in case of an individual, its client code.	N	Y
Identifier of non-reporting counterparty	LEI of the non-reporting counterparty or, in case of an individual, its client code.	N	Y
Counterparty side	Indicate whether the reporting counterparty was the buyer or seller. In the case of swaps, other than credit default, the buyer will represent the payer of leg 1 and the seller will be the payer of leg 2.	N	Y
Identifier of agent reporting the transaction	LEI of the agent reporting the transaction if reporting of the transaction has been delegated by the reporting counterparty.	N	N

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Reporting counterparty dealer or non-dealer	Indicate whether the reporting counterparty is a dealer or non-dealer.	N	N
Non-reporting counterparty is a local counterparty or not local.	Indicate whether the non-reporting counterparty is a local counterparty or not.	N	N
3. Principal economic terms	**[fields do not have to be reported if the unique product identifier adequately describes those fields]**		
A. Common data			
Unique product identifier	Unique product identification code based on the taxonomy of the product that is used by the trade repository.	Y	N
Contract type	The name of the contract type (e.g. swap, swaption, forwards, options, basis swap, index swap, basket swap, other).	Y	Y
Underlying asset identifier 1	The unique identifier of the asset referenced in the contract.	Y	Y
Underlying asset identifier 2	The unique identifier of the second asset referenced in the contract, if more than one. If more than two assets identified in the contract, report the unique identifiers for those additional underlying assets.	Y	Y
Asset class	Major asset class of the product (e.g. interest rate, credit, commodity, foreign exchange, equity, etc.).	Y	N
Effective date or start date	The date the transaction becomes effective or starts.	Y	Y
Maturity, termination or end date	The date the transaction expires.	Y	Y
Payment frequency or dates	The dates or frequency the transaction requires payments to be made(e.g. quarterly, monthly).	Y	Y

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Reset frequency or dates	The dates or frequency at which the price resets (e.g. quarterly, semi-annually, annually).	Y	Y
Day count convention	Factor used to calculate the payments. (e.g. 30/360, actual/360).	Y	Y
Delivery type	Indicate whether transaction is settled physically or in cash.	N	Y
Price 1	The price, yield, spread, coupon, etc., of the derivative. The price/rate should not include any premiums such as commissions, collateral premiums, accrued interest, etc.	Y	Y
Price 2	The price, yield, spread, coupon, etc., of the derivative. The price/rate should not include any premiums such as commissions, collateral premiums, accrued interest, etc.	Y	Y
Price notation type 1	The manner in which the price is expressed (e.g. percent, basis points etc.).	Y	Y
Price notation type 2	The manner in which the price is expressed (e.g. percent, basis points etc.).	Y	Y
Price multiplier	The number of units of the underlying reference entity represented by 1 unit of the contract.	N	N
Notional amount leg 1	Total notional amount(s) of leg 1 of the contract.	Y	Y
Notional amount leg 2	Total notional amount(s) of leg 2 of the contract.	Y	Y
Currency leg 1	Currency(ies) of leg 1.	Y	Y
Currency leg 2	Currency(ies) of leg 2.	Y	Y
Settlement currency	The currency used to determine the cash settlement amount.	Y	Y
Up-front payment	Amount of any up-front payment.	N	N
Currency or currencies of up-front payment	The currency in which any up-front payment is made by one counterparty to another.	N	N

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
B. Additional asset information			
i) Interest rate derivatives			
Fixed rate leg 1	The rate used to determine the payment amount for leg 1 of the transaction.	N	Y
Fixed rate leg 2	The rate used to determine the payment amount for leg 2 of the transaction.	N	Y
Floating rate leg 1	The floating rate used to determine the payment amount for leg 1 of the transaction.	N	Y
Floating rate leg 2	The floating rate used to determine the payment amount for leg 2 of the transaction.	N	Y
Fixed rate day count convention	Factor used to calculate the fixed payer payments. (e.g. 30/360, actual/360).	N	Y
Fixed leg payment frequency or dates	Frequency or dates of payments for the fixed rate leg of the transaction. (e.g. quarterly, semi-annually, annually).	N	Y
Floating leg payment frequency or dates	Frequency or dates of payments for the floating rate leg of the transaction. (e.g. quarterly, semi-annually, annually).	N	Y
Floating rate reset frequency or dates	The dates or frequency at which the floating leg of the transaction resets (e.g. quarterly, semi-annually, annually).	N	Y
ii) Currency derivatives			
Exchange rate	Contractual rate(s) of exchange of the currencies.	N	Y
iii) Commodity derivatives			

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Sub-asset class	Specific information to identify the type of commodity derivative. (e.g. Agriculture, Energy, Freights, Metals, Index, Environmental, Exotic).	Y	N
Quantity	Total quantity in the unit of measure of an underlying commodity.	Y	Y
Unit of measure	Unit of measure for the quantity of each side of the transaction. (e.g. barrels, bushels, etc.)	Y	Y
Grade	Grade of product being delivered. (e.g grade of oil).	N	Y
Delivery point	The delivery location.	N	N
Delivery connection points	Description of the delivery route.	N	N
Load type	For power, load profile for the delivery of power.	N	Y
Transmission days	For power, the delivery days of the week.	N	Y
Transmission duration	For power, the hours of day transmission starts and ends.	N	Y
C. Options			
Embedded option	Indicate whether the option is an embedded option.	Y	N
Option exercise date	The date(s) on which the option may be exercised.	Y	Y
Option premium	Fixed premium paid by the buyer to the seller.	Y	Y
Strike price (cap/floor rate)	The strike price of the option.	Y	Y
Option style	Indicate whether the option can be exercised on a fixed date or anytime during the life of the contract. (e.g. American, European, Bermudan, Asian).	Y	Y
Option type	Put/call.	Y	Y
4. Event data			
Action	Describes the type of action to the transaction.(e.g. new transaction, modification or cancellation of existing transaction, etc.).	Y	N

Data field	Description	Required for Public Dissemination	Required for Pre-existing Transactions
Execution timestamp	The time and date the transaction was executed on a trading venue, expressed using Coordinated Universal Time (UTC).	Y	Y
Confirmation timestamp	The time and date the transaction was confirmed by both counterparties (for non-electronic transactions), expressed using UTC.	N	N
Clearing timestamp	The time and date the transaction was cleared, expressed using UTC.	N	N
Reporting date	The time and date the transaction was submitted to the trade repository, expressed using UTC.	N	N
5. Valuation data			
Value of contract calculated by the reporting counterparty	Mark-to-market valuation of the contract, or mark-to-model valuation.	N	N
Value of contract calculated by the non-reporting counterparty	Mark-to-market valuation of the contract, or mark-to-model valuation.	N	N
Valuation date	Date of the latest mark-to-market or mark-to-model valuation.	N	N
Valuation type	Indicate whether valuation was based on mark-to-market or mark-to-model.	N	N

FORM F1
TO MODEL PROVINCIAL RULE – *TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING*

APPLICATION FOR DESIGNATION
TRADE REPOSITORY
INFORMATION STATEMENT

Filer: ☐ **TRADE REPOSITORY**

Type of Filing: ☐ **INITIAL** ☐ **AMENDMENT**

1. Full name of trade repository:

2. Name(s) under which business is conducted, if different from item 1:

3. If this filing makes a name change on behalf of the trade repository in respect of the name set out in item 1 or item 2, enter the previous name and the new name.

   Previous name:

   New name:

4. Head office

   Address:

   Telephone:

   Facsimile:

5. Mailing address (if different):

6. Other offices

   Address:

   Telephone:

   Facsimile:

7. Website address:

8. Contact employee

   Name and title:

   Telephone number:

   Facsimile:

E-mail address:

9. Counsel

Firm name:

Contact name:

Telephone number:

Facsimile:

E-mail address:

10. Canadian counsel (if applicable)

Firm name:

Contact name:

Telephone number:

Facsimile:

E-mail address:

EXHIBITS

File all Exhibits with the Filing. For each Exhibit, include the name of the trade repository, the date of filing of the Exhibit and the date as of which the information is accurate (if different from the date of the filing). If any Exhibit required is inapplicable, a statement to that effect shall be furnished instead of such Exhibit.

Except as provided below, if the filer files an amendment to the information provided in its Filing and the information relates to an Exhibit filed with the Filing or a subsequent amendment, the filer must, in order to comply with section 3 of Model Provincial Rule Trade Repositories and Derivatives Data Reporting (the "TR Rule"), provide a description of the change, the expected date of the implementation of the change, and file a complete and updated Exhibit. The filer must provide a clean and blacklined version showing changes from the previous filing.

If the filer has otherwise filed the information required by the previous paragraph pursuant to section 17 of the TR Rule, it is not required to file the information again as an amendment to an Exhibit. However, if supplementary material relating to a filed rule is contained in an Exhibit, an amendment to the Exhibit must also be filed.

Exhibit A – Corporate Governance

1. Legal status:

   ☐ Corporation

   ☐ Partnership

   ☐ Other (specify):

2. Indicate the following:

   1. Date (DD/MM/YYYY) of formation.

   2. Place of formation.

   3. Statute under which trade repository was organized.

   4. Regulatory status in other jurisdictions.

3. Provide a copy of the constating documents (including corporate by-laws), shareholder agreements, partnership agreements and other similar documents, and all subsequent amendments.

4. Provide the policies and procedures to address potential conflicts of interest arising from the operation of the trade repository or the services it provides, including those related to the commercial interest of the trade repository, the interests of its owners and its operators, the responsibilities and sound functioning of the trade repository, and those between the operations of the trade repository and its regulatory responsibilities.

5. An applicant that is located outside of [Province x] that is applying for designation as a trade repository under the Act must additionally provide the following:

   1. An opinion of legal counsel that, as a matter of law the applicant has the power and authority to provide the [applicable local securities regulator] with prompt access to the applicant's books and records and submit to onsite inspection and examination by the [applicable local securities regulator], and

   2. A completed Form F2, Submission to Jurisdiction and Appointment of Agent for Service.

Exhibit B – Ownership

A list of the registered or beneficial holders of securities of, partnership interests in, or other ownership interests in, the trade repository. For each of the persons listed in the Exhibit, please provide the following:

1. Name.

2. Principal business or occupation and title.

3. Ownership interest.

4. Nature of the ownership interest, including a description of the type of security, partnership interest or other ownership interest.

In the case of a trade repository that is publicly traded, if the trade repository is a corporation, please only provide a list of each shareholder that directly owns five percent or more of a class of a security with voting rights.

Exhibit C – Organization

1. A list of partners, officers, governors, and members of the board of directors and any standing committees of the board, or persons performing similar functions, who presently hold or have held their offices or positions during the previous year, indicating the following for each:

    1. Name.

    2. Principal business or occupation and title.

    3. Dates of commencement and expiry of present term of office or position.

    4. Type of business in which each is primarily engaged and current employer.

    5. Type of business in which each was primarily engaged in the preceding five years, if different from that set out in item 4.

    6. Whether the person is considered to be an independent director.

2. A list of the committees of the board, including their mandates.

3. The name of the trade repository's Chief Compliance Officer.

Exhibit D – Affiliates

1. For each affiliated entity of the trade repository provide the name and head office address and describe the principal business of the affiliate.

2. For each affiliated entity of the trade repository

    (i) to which the trade repository has outsourced any of its key services or systems described in Exhibit E – Operations of the Trade Repository, including business recordkeeping, recordkeeping of trade data, trade data reporting, trade data comparison, data feed, or

    (ii) with which the trade repository has any other material business relationship, including loans, cross-guarantees, etc.,

provide the following information:

1. Name and address of the affiliate.

2. The name and title of the directors and officers, or persons performing similar functions, of the affiliate.

3. A description of the nature and extent of the contractual and other agreements with the trade repository, and the roles and responsibilities of the affiliate under the arrangement.

4. A copy of each material contract relating to any outsourced functions or other material relationship.

5. Copies of constating documents (including corporate by-laws), shareholder agreements, partnership agreements and other similar documents.

6. For the latest financial year of any affiliated entity that has any outstanding loans or cross-guarantee arrangements with the trade repository, financial statements, which may be unaudited, prepared in accordance with:

   a. Canadian GAAP applicable to publicly accountable enterprises;

   b. IFRS; or

   c. U.S. GAAP where the affiliated entity is incorporated or organized under the laws of the U.S.

Exhibit E – Operations of the Trade Repository

Describe in detail the manner of operation of the trade repository and its associated functions. This should include, but not be limited to, a description of the following:

1. The structure of the trade repository.

2. Means of access by the trade repository's participants and, if applicable, their clients to the trade repository's facilities and services.

3. The hours of operation.

4. A description of the facilities and services offered by the trade repository including, but not limited to, collection and maintenance of derivatives data.

5. A list of the types of derivatives instruments for which data recordkeeping is offered, including, but not limited to, a description of the features and characteristics of the instruments.

6. Procedures regarding the entry, display and reporting of derivatives data.

7. Description of recordkeeping procedures that ensure derivatives data is recorded accurately, completely and on a timely basis.

8. The safeguards and procedures to protect derivatives data of the trade repository's participants, including required policies and procedures reasonably designed to protect the privacy and confidentiality of the data.

9. Training provided to participants and a copy of any materials provided with respect to systems and rules and other requirements of the trade repository.

10. Steps taken to ensure that the trade repository's participants have knowledge of and comply with the requirements of the trade repository.

11. A description of the trade repository's risk management framework for comprehensively managing risks including business, legal, and operational risks.

The filer must provide all policies, procedures and manuals related to the operation of the trade repository.

Exhibit F – Outsourcing

Where the trade repository has outsourced the operation of key services or systems described in Exhibit E – Operations of the Trade Repository to an arms-length third party, including any function associated with the collection and maintenance of derivatives data, provide the following information:

1. Name and address of person or company (including any affiliates of the trade repository) to which the function has been outsourced.

2. A description of the nature and extent of the contractual or other agreement with the trade repository and the roles and responsibilities of the arms-length party under the arrangement.

3. A copy of each material contract relating to any outsourced function.

Exhibit G – Systems and Contingency Planning

For each of the systems for collecting and maintaining reports of derivatives data, describe:

1. Current and future capacity estimates.

2. Procedures for reviewing system capacity.

3. Procedures for reviewing system security.

4. Procedures to conduct stress tests.

5. A description of the filer's business continuity and disaster recovery plans, including any relevant documentation.

6. Procedures to test business continuity and disaster recovery plans.

7. The list of data to be reported by all types of participants.

8. A description of the data format or formats that will be available to the [applicable local securities regulator] and other persons receiving trade reporting data.

Exhibit H – Access to Services

1. A complete set of all forms, agreements or other materials pertaining to access to the services of the trade repository described in Exhibit E.4.

2. Describe the types of trade repository participants.

3. Describe the trade repository's criteria for access to the services of the trade repository.

4. Describe any differences in access to the services offered by the trade repository to different groups or types of participants.

5. Describe conditions under which the trade repository's participants may be subject to suspension or termination with regard to access to the services of the trade repository.

6. Describe any procedures that will be involved in the suspension or termination of a participant.

7. Describe the trade repository's arrangements for permitting clients of participants to have access to the trade repository. Provide a copy of any agreements or documentation relating to these arrangements.

Exhibit I – Trade Repository Participants

1. Provide an alphabetical list of all the trade repository's participants who are counterparties to a transaction whose derivatives data is required to be reported pursuant to the TR Rule, including the following information:

    1. Name.

    2. Date of becoming a participant.

    3. Describe the type of derivatives reported whose counterparty is the participant.

    4. The class of participation or other access.

2. Provide a list of all local counterparties who were denied or limited access to the trade repository, indicating for each:

    1. Whether they were denied or limited access.

    2. The date the repository took such action.

3. The effective date of such action.

4. The nature and reason for any denial or limitation of access.

Exhibit J – Fees

A description of the fee model and all fees charged by the trade repository, or by a party to which services have been directly or indirectly outsourced, including, but not limited to, fees relating to access and the collection and maintenance of derivatives data, how such fees are set, and any fee rebates or discounts and how the rebates and discounts are set.

CERTIFICATE OF TRADE REPOSITORY

The undersigned certifies that the information given in this report is true and correct.

DATED at _____ this _____ day of _____, 20____

_____
(Name of trade repository)

_____
(Name of director, officer or partner – please type or print)

_____
(Signature of director, officer or partner)

_____
(Official capacity – please type or print)

IF APPLICABLE, ADDITIONAL CERTIFICATE OF TRADE REPOSITORY THAT IS LOCATED OUTSIDE OF [PROVINCE]

The undersigned certifies that

(a) it will provide the [applicable local securities regulator] with access to its books and records and will submit to onsite inspection and examination by the [applicable local securities regulator] ;

(b) as a matter of law, it has the power and authority to

i. provide the [applicable local securities regulator] with access to its books and records, and

ii. submit to onsite inspection and examination by the [applicable local securities regulator].

DATED at _____ this _____ day of _____, 20____

_____
(Name of trade repository)

_____
(Name of director, officer or partner – please type or print)

_____
(Signature of director, officer or partner)

_____
(Official capacity – please type or print)

FORM F2
TO MODEL PROVINCIAL RULE – *TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING*

TRADE REPOSITORY SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE OF PROCESS

1. Name of trade repository (the "Trade Repository"):

_____

2. Jurisdiction of incorporation, or equivalent, of Trade Repository:

_____

3. Address of principal place of business of Trade Repository:

_____

4. Name of the agent for service of process for the Trade Repository (the "Agent"):

_____

5. Address of Agent for service of process in [province]:

_____

6. The Trade Repository designates and appoints the Agent as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding arising out of or relating to or concerning the activities of the Trade Repository in [province]. The Trade Repository hereby irrevocably waives any right to challenge service upon its Agent as not binding upon the Trade Repository.

7. The Trade Repository agrees to unconditionally and irrevocably attorn to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of [province] and (ii) any proceeding in any province or territory arising out of, related to, concerning or in any other manner connected with the regulation and oversight of the activities of the Trade Repository in [province].

8. The Trade Repository shall file a new submission to jurisdiction and appointment of agent for service of process in this form at least 30 days before the Trade Repository ceases to be designated or exempted by the [applicable local securities regulator], to be in effect for six years from the date it ceases to be designated or exempted unless otherwise amended in accordance with section 9.

9. Until six years after it has ceased to be a designated or exempted by the [applicable local securities regulator] from the recognition requirement under the Act, the Trade Repository shall file an

amended submission to jurisdiction and appointment of agent for service of process at least 30 days before any change in the name or above address of the Agent.

10. This submission to jurisdiction and appointment of agent for service of process shall be governed by and construed in accordance with the laws of [province].

Dated: _____

_____
Signature of the Trade Repository

_____
Print name and title of signing officer of the Trade Repository

AGENT

CONSENT TO ACT AS AGENT FOR SERVICE

I, _____ (name of Agent in full; if Corporation, full Corporate name) of _____(business address), hereby accept the appointment as agent for service of process of _____(insert name of Trade Repository) and hereby consent to act as agent for service pursuant to the terms of the appointment executed by _____ (insert name of Trade Repository) on _____ (insert date).

Dated: _____

_____

Signature of Agent

_____

Print name of person signing and, if Agent is not an individual, the title of the person

FORM F3
TO MODEL PROVINCIAL RULE – *TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING*

CESSATION OF OPERATIONS REPORT FOR TRADE REPOSITORY

1. Identification:

   A. Full name of the designated trade repository:

   B. Name(s) under which business is conducted, if different from item 1A:

2. Date designated trade repository proposes to cease carrying on business as a trade repository:

3. If cessation of business was involuntary, date trade repository has ceased to carry on business as a trade repository.

Exhibits

File all Exhibits with the Cessation of Operations Report. For each exhibit, include the name of the trade repository, the date of filing of the exhibit and the date as of which the information is accurate (if different from the date of the filing). If any Exhibit required is inapplicable, a statement to that effect shall be furnished instead of such Exhibit.

Exhibit A

The reasons for the designated trade repository ceasing to carry on business as a trade repository.

Exhibit B

A list of all derivatives instruments for which data recordkeeping is offered during the last 30 days prior to ceasing business as a trade repository.

Exhibit C

A list of all participants who are counterparties to a transaction whose derivatives data is required to be reported pursuant to Model Provincial Rule – Trade Repositories and Derivatives Data Reporting and for whom the trade repository provided services during the last 30 days prior to ceasing business as a trade repository.

CERTIFICATE OF TRADE REPOSITORY

The undersigned certifies that the information given in this report is true and correct.

DATED at _____ this _____ day of _____ 20 _____

_____
(Name of trade repository)

_____
(Name of director, officer or partner – please type or print)

_____
(Signature of director, officer or partner)

_____
(Official capacity – please type or print)

MODEL EXPLANATORY GUIDANCE
TO
MODEL PROVINCIAL RULE
TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

TABLE OF CONTENTS

PART 1
GENERAL COMMENTS

Introduction

1. (1) This Model Explanatory Guidance sets out the views of the Canadian Securities Administrators OTC Derivatives Committee ("the Committee", "our" or "we") on various matters relating to Model Provincial Rule - *Trade Repositories and Derivatives Data Reporting* (the "Model TR Rule") and related securities legislation.

(2) The numbering of Parts, sections and subsections from Part 2 on in this Model Explanatory Guidance generally corresponds to the numbering in the Model TR Rule. Any general guidance for a Part appears immediately after the Part's name. Any specific guidance on a section or subsection follows any general guidance. If there is no guidance for a Part, section or subsection, the numbering in this Model Explanatory Guidance will skip to the next provision that does have guidance.

(3) Unless defined in the Model TR Rule or this Model Explanatory Guidance, terms used in the Model TR Rule and in this Final Model Explanatory Guidance have the meaning given to them in securities legislation, including, for greater certainty, in National Instrument 14-101 *Definitions* and OSC Rule 14-501 *Definitions*.[7]

Definitions and interpretation

2. (1) In this Model Explanatory Guidance,

"CPSS" means the Committee on Payment and Settlement Systems,

"FMI" means a financial market infrastructure, as described in the PFMI Report,

"Global LEI System" means the Global Legal Entity Identifier System,

"IOSCO" means the Technical Committee of the International Organization of Securities Commissions,

"LEI" means a legal entity identifier,

"LEI ROC" means the LEI Regulatory Oversight Committee,

"PFMI Report" means the April 2012 final report entitled *Principles for financial market infrastructures* published by CPSS and IOSCO, as amended from time to time, [8] and

"principle" means, unless the context otherwise indicates, a principle set out in the PFMI Report.

[7] The reference to OSC Rule 14-501 *Definitions* is only relevant in Ontario. Other jurisdictions may have a similar local rule.
[8] The PFMI Report is available on the Bank for International Settlements' website (www.bis.org) and the IOSCO website (www.iosco.org).

(2) A "life-cycle event" is defined in the Model TR Rule as any event that results in a change to derivatives data previously reported to a designated trade repository. Where a life-cycle event occurs, the change must be reported under section 34 of the Model TR Rule as life-cycle data by the end of the business day on which the life-cycle event occurs. When reporting a life-cycle event, there is no obligation to re-report derivatives data that has not changed – only new data and changes to previously reported data need to be reported. Examples of a life-cycle event would include

- a change to the termination date for the transaction,
- a change in the cash flows, payment frequency, currency, numbering convention, spread, benchmark, reference entity or rates originally reported,
- the availability of a legal entity identifier for a counterparty previously identified by name or by some other identifier,
- a corporate action affecting a security or securities on which the transaction is based (e.g. a merger, dividend, stock split, or bankruptcy),
- a change to the notional amount of a transaction including contractually agreed upon changes (e.g. amortizing schedule),
- the exercise of a right or option that is an element of the expired transaction, and
- the satisfaction of a level, event, barrier or other condition contained in the original transaction.

(3) Subsection (c) of the definition of "local counterparty" captures affiliates of parties mentioned in subsections (a) or (b) of the "local counterparty" definition, provided that such party guarantees the liabilities of the affiliate. It is our view that the guarantee must be for all or substantially all of the affiliates' liabilities.

(4) The term "transaction" is defined in the Model TR Rule and used instead of the term "trade", as defined in the *Securities Act* (Ontario), in order to reflect the types of activities that require a unique transaction report, as opposed to the modification of an existing transaction report. The primary difference between the two definitions is that unlike the term "transaction" the term "trade" includes material amendments and terminations.

A material amendment is not referred to in the definition of "transaction" but is required to be reported as a life-cycle event in connection with an existing transaction under section 34. A termination is not referred to in the definition of "transaction", as the expiry or termination of a transaction would be reported to a trade repository as a life-cycle event without the requirement for a new transaction record.

In addition, unlike the definition of "trade", the definition of "transaction" includes a novation to a clearing agency. A novation is required to be reported as a separate, new transaction with reporting links to the original transaction.

(5) The term "valuation data" is defined in the Model TR Rule as data that reflects the current value of a transaction. It is the Committee's view that valuation data can be calculated based

upon the use of an industry-accepted methodology such as mark-to-market or mark-to-model, or another valuation method that is in accordance with accounting principles and will result in a reasonable valuation of a transaction.[9] The valuation methodology should be consistent over the entire life of a transaction.

PART 2
TRADE REPOSITORY DESIGNATION AND ONGOING REQUIREMENTS

Part 2 contains rules for designation of a trade repository and ongoing requirements for a designated trade repository.[10] To obtain and maintain a designation as a trade repository, a person or entity must comply with these rules and requirements in addition to all of the terms and conditions in the designation order made by the [applicable local securities regulator]. In order to comply with the reporting obligations contained in Part 3, market participants must report to a designated trade repository. While there is no prohibition on an undesignated trade repository operating in [Province x], a market participant using it would not be in compliance with its reporting obligations.

Trade repository initial filing of information and designation

2. (1) The legal entity that applies to be a designated trade repository will typically be the entity that owns and operates the facility and collects and maintains records of completed transactions by other persons or companies. In some cases, the applicant may operate more than one trade repository facility. In such cases, the trade repository may file separate forms in respect of each trade repository facility, or it may choose to file one form to cover all of the different trade repository facilities. If the latter alternative is chosen, the trade repository must clearly identify the facility to which the information or changes apply.

In addition to the filing of Form F1, a letter describing how the entity complies with or will comply with Part 2 and Part 4 of the Model TR Rule should be included in the initial filing.

(2) Under paragraph 2(2)(a) in determining whether to designate an applicant a trade repository under section [x] of the Act[11], it is anticipated that the [applicable local securities regulator] will consider a number of factors, including

(a) the manner in which the trade repository proposes to comply with the Model TR Rule,

(b) whether the trade repository has meaningful representation on its governing body,

(c) whether the trade repository has sufficient financial and operational resources for the proper performance of its functions,

(d) whether the rules and procedures of the trade repository ensure that its business is conducted in an orderly manner that fosters both fair and efficient capital markets,

[9] For example, see International Financial Reporting Standard 13, *Fair Value Measurement*.
[10] Certain Canadian jurisdictions "recognize" trade repositories whereas others "designate" them. However, the Committee intends that consistent requirements will be applied in all jurisdictions regardless of whether a trade repository is designated or recognized.
[11] Section [x] would be the designation or recognition provision in the securities legislation of a province.

and facilitates the [applicable local securities regulator]'s objectives of improving transparency in the derivatives market,

(e) whether the trade repository has policies and procedures to effectively identify and manage conflicts of interest arising from its operation or the services it provides,

(f) whether the requirements of the trade repository relating to access to its services are fair and reasonable,

(g) whether the trade repository's process for setting fees is fair, transparent and appropriate,

(h) whether the trade repository's fees are inequitably allocated among the participants, have the effect of creating barriers to access or place an undue burden on any user or class of participants,

(i) the manner and process for the [applicable local securities regulator] and other applicable regulatory agencies to receive or access derivatives data, including the timing, type of reports, and any confidentiality restrictions,

(j) whether the trade repository has robust and comprehensive policies, procedures, processes and systems to ensure the security and confidentiality of derivatives data, and

(k) whether the trade repository has entered into a memorandum of understanding with its local securities regulator.

Under paragraph 2(2)(b), the [applicable local securities regulator] will examine whether the trade repository has been, or will be, in compliance with securities legislation. This includes compliance with the Model TR Rule and any terms and conditions attached to the [applicable local securities regulator]'s designation order in respect of a designated trade repository.

Under paragraph 2(2)(c), a trade repository that is applying for designation must demonstrate that it has established, implemented, maintained and enforced appropriate written rules, policies and procedures that are in accordance with standards applicable to trade repositories. We consider that these rules, policies and procedures include, but not limited to, the principles and key considerations and explanatory notes applicable to trade repositories in the PFMI Report. These principles are set out in the following chart, along with the corresponding sections of the Model TR Rule the interpretation of which we consider ought to be consistent with the principles:

Principle in the PFMI Report applicable to a trade repository	***Relevant section(s) of the Model TR Rule***
Principle 1: Legal Basis	Section 7 – Legal Framework Section 17 – Rules (in part)
Principle 2: Governance	Section 8 – Governance Section 9 – Board of Directors Section 10 – Management
Principle 3: Framework for the comprehensive management of risks	Section 19 – Comprehensive Risk Management Framework Section 20 – General Business Risk (in part)
Principle 15: General business risk	Section 20 – General Business Risk
Principle 17: Operational risk	Section 21 – Systems and Other Operational Risk Requirements Section 22 – Data Security and Confidentiality Section 24 – Outsourcing
Principle 18: Access and participation requirements	Section 13 – Access to Designated Trade Repository Services Section 16 – Due Process (in part) Section 17 – Rules (in part)
Principle 19: Tiered participation arrangements	No equivalent provisions in the Model TR Rule; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 20: FMI links	No equivalent provisions in the Model TR Rule; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 21: Efficiency and effectiveness	No equivalent provisions in the Model TR Rule; however, the trade repository may be expected to

Principle in the PFMI Report applicable to a trade repository	***Relevant section(s) of the Model TR Rule***
	observe or broadly observe the principle, where applicable.
Principle 22: Communication procedures and standards	Section 15 – Communication Policies, Procedures and Standards
Principle 23: Disclosure of rules, key procedures, and market data	Section 17 – Rules (in part)
Principle 24: Disclosure of market data by trade repositories	Sections in Part 4 – Data Dissemination and Access to Data

It is anticipated that the [applicable local securities regulator] will apply the principles in its oversight activities of designated trade repositories. Therefore, in complying with the Model TR Rule, designated trade repositories will be expected to observe the principles.

The forms filed by an applicant or designated trade repository under the Model TR Rule will be kept confidential in accordance with the provisions of securities legislation. The Committee is of the view that the forms generally contain proprietary financial, commercial and technical information, and that the cost and potential risks to the filers of disclosure outweigh the benefit of the principle requiring that forms be made available for public inspection. However, the Committee would expect a designated trade repository to publicly disclose its responses to the CPSS-IOSCO consultative report entitled *Disclosure framework for financial market infrastructures*, which is a supplement to the PFMI report.[12] In addition, much of the information that will be included in the forms that are filed will be required to be made publicly available by a designated trade repository pursuant to the Model TR Rule or the terms and conditions of the designation order imposed by the [applicable local securities regulator].

While Form F1 – *Application for Designation and Trade Repository Information Statement* and any amendments to it will be kept generally confidential, if the [applicable local securities regulator] considers that it is in the public interest to do so, it may require the applicant or designated trade repository to publicly disclose a summary of the information contained in such form, or amendments to it.

Notwithstanding the confidential nature of the forms, an applicant's application itself will be published for comment for a minimum period of 30 days.

[12] Publication available on the BIS website (www.bis.org) and the IOSCO website (www.iosco.org).

Change in information

3. (1) Under subsection 3(1), a designated trade repository is required to file an amendment to the information provided in Form F1 at least 45 days prior to implementing a significant change. The Committee considers a change to be significant when it could impact a designated trade repository, its participants, market participants, investors, or the capital markets (including derivatives markets and the markets for assets underlying a derivative). The Committee would consider a significant change to include, but not be limited to

(a) a change in the structure of the designated trade repository, including procedures governing how derivatives data is collected and maintained (included in any back-up sites), that have or may have a direct impact on participants in [Province x],

(b) a change to services provided by the designated trade repository, including the hours of operation, that have or may have a direct impact on participants in [Province x],

(c) a change to means of access to the designated trade repository's facility and its services, including changes to data formats or protocols, that have or may have a direct impact on participants in [Province x],

(d) a change to the types of derivative asset classes or categories of derivatives that may be reported to the designated trade repository,

(e) a change to the systems and technology used by the designated trade repository that collect, maintain and disseminate derivatives data, including matters affecting capacity,

(f) a change to the governance of the designated trade repository, including changes to the structure of its board of directors or board committees, and their related mandates,

(g) a change in control of the designated trade repository,

(h) a change in affiliates that provide key services or systems to, or on behalf of, the designated trade repository,

(i) a change to outsourcing arrangements for key services or systems of the designated trade repository,

(j) a change to fees and the fee model of the designated trade repository,

(k) a change in the designated trade repository's policies and procedure relating to risk-management, including policies and procedures relating to business continuity and data security, that have or may have an impact on the designated trade repository's provision of services to its participants,

(l) commencing a new type of business activity, either directly or indirectly through an affiliate, and

(m) a change in the location of the designated trade repository's head office or primary place of business or the location where the main data servers and contingency sites are housed.

(2) The Committee generally considers a change in a designated trade repository's fees or fee structure to be a significant change. However, the Committee recognizes that designated trade repositories may frequently change their fees or fee structure and may need to implement fee changes within tight timeframes. To facilitate this process, subsection 3(2) provides that a designated trade repository may provide information that describes the change in fees or fee structure in a shorter timeframe (at least 15 days before the expected implementation date of the change in fees or fee structure). See section 12 of this Model Explanatory Guidance for an explanation of fee requirements applicable to designated trade repositories.

The [applicable local securities regulator] will make best efforts to review amendments to Form F1 required under subsections 3(1) and 3(2) before the proposed date of implementation of the change. However, where the changes are complex, raise regulatory concerns, or when additional information is required, the period for review may exceed these timeframes.

(3) Subsection 3(3) sets out the filing requirements for changes to information other than those described in subsections 3(1) or (2). Such changes to information in Form F1 are not considered significant and include changes that:

(a) would not have an impact on the designated trade repository's structure or participants, or more broadly on market participants, investors or the capital markets; or

(b) are administrative changes, such as

(i) changes in the routine processes, policies, practices, or administration of the designated trade repository that would not impact participants,

(ii) changes due to standardization of terminology,

(iii) corrections of spelling or typographical errors,

(iv) changes to the types of participants in [Province x] of the designated trade repository,

(iv) necessary changes to conform to applicable regulatory or other legal requirements of [Province x] or Canada, and

(v) minor system or technology changes that would not significantly impact the system or its capacity.

For the changes referred to in subsection 3(3), the [applicable local securities regulator] may review these filings to ascertain whether they have been categorized appropriately. If the [applicable local securities regulator] disagrees with the categorization, the designated trade repository will be notified in writing. Where the [applicable local securities regulator] determines that changes reported under subsection 3(3) are in fact significant under subsection 3(1), the designated trade repository will be required to file an amended Form F1 that will be subject to review by the [applicable local securities regulator].

Ceasing to carry on business

4. (1) In addition to filing Form F3 – *Cessation of Operations Report for Trade Repository*, a designated trade repository that intends to cease carrying on business in [Province x] as a designated trade repository must make an application to voluntarily surrender its designation to the [applicable local securities regulator] pursuant to securities legislation. The [applicable local securities regulator] may accept the voluntary surrender subject to terms and conditions.[13]

Legal framework

7. (1) Designated trade repositories are required to have rules, policies, and procedures in place that provide a legal basis for their activities in all relevant jurisdictions, whether within Canada or any foreign jurisdiction where they have activities.

Governance

8. Designated trade repositories are required to have in place governance arrangements that meet the policy objectives set out in subsection 8(1). Subsections 8(2) and 8(3) explain the types of written governance arrangements and policies and procedures that are required from a designated trade repository.

(4) Under subsection 8(4), a designated trade repository is required to make the written governance arrangements required under subsections 8(2) and (3) available to the public. A designated trade repository may fulfil this requirement by posting this information on a publicly accessible website, provided that interested parties are able to locate the information through a web search or through clearly identified links on the designated trade repository's website.

Board of directors

9. The board of directors of a designated trade repository is subject to various requirements, such as requirements pertaining to board composition and conflicts of interest.

[13] In Ontario, for example, section 21.4 of the *Securities Act* (Ontario) provides that the Commission may impose terms and conditions on an application for voluntary surrender. The transfer of trade data/information can be addressed through the terms and conditions imposed by the Commission on such application.

(1) Paragraph 9(1)(a) requires individuals who comprise the board of directors of a designated trade repository to have an appropriate level of skill and experience to effectively and efficiently oversee the management of its operations. This would include individuals with experience and skills in areas such as business recovery, contingency planning, financial market systems and data management.

Under paragraph 9(1)(b), the board of directors of a designated trade repository must include individuals who are independent of the designated trade repository. The Committee would view individuals who have no direct or indirect material relationship with the designated trade repository as independent. The Committee would expect that independent directors of a designated trade repository would represent the public interest by ensuring that regulatory and public transparency objectives are fulfilled, and that the interests of participants who are not dealers are considered.

Chief compliance officer

11. (3) References to harm to the capital markets in subsection 11(3) may be in relation to domestic or international capital markets.

Fees

12. Designated trade repositories are responsible for ensuring that the fees they set are in compliance with section 12. In assessing whether a designated trade repository's fees and costs are fairly and equitably allocated as required under paragraph 12(a), the [applicable local securities regulator] will consider a number of factors, including

(a) the number and complexity of the transactions being reported,

(b) the amount of the fee or cost imposed relative to the cost of providing the services,

(c) the amount of fees or costs charged by other comparable trade repositories, where relevant, to report similar transactions in the market,

(d) with respect to market data fees and costs, the amount of market data fees charged relative to the market share of the designated trade repository, and

(e) whether the fees or costs represent a barrier to accessing the services of the designated trade repository for any category of participant in the derivatives market.

A designated trade repository should provide clear descriptions of priced services for comparability purposes. Other than fees for individual services, a designated trade repository should also disclose other fees and costs related to connecting to or accessing the trade repository. For example, a designated trade repository should disclose information on the system design, as well as technology and communication procedures, that influence the costs of using

the designated trade repository. A designated trade repository is also expected to provide timely notice to participants and the public of any changes to services and fees.

Access to designated trade repository services

13. (2) Under subsection 13(2), a designated trade repository is prohibited from unreasonably limiting access to its services, permitting unreasonable discrimination among its participants or imposing unreasonable burdens on competition. For example, a designated trade repository should not engage in anti-competitive practices, such as requiring the use or purchase of another service in order for a person or company to utilize the trade reporting service offered by it, setting overly restrictive terms of use or anti-competitive price discrimination. A designated trade repository should not develop closed, proprietary interfaces that result in vendor lock-in or barriers to entry with respect to competing service providers that rely on the data maintained by the designated trade repository.

Acceptance of reporting

14. Section 14 requires that a designated trade repository accept derivatives data for all derivatives of the asset class or classes set out in its designation order. For example, if the designation order of a designated trade repository includes interest rate derivatives, the designated trade repository is required to accept transaction data for all types of interest rate derivatives that are entered into by counterparties located in [Province x]. It is possible that a designated trade repository may accept only a subset of a class of derivatives if this is indicated in its designation order. For example, there may be designated trade repositories that accept only certain types of commodity derivatives such as energy derivatives.

Communication policies, procedures and standards

15. Section 15 sets out the required standard of communication to be used by a designated trade repository with other specified entities. The reference in paragraph 15(1)(d) to "other service providers" could include persons or companies who offer technological or transaction processing services.

Rules

17. Subsections 17(1) and (2) require that the publicly disclosed written rules and procedures of a designated trade repository must be clear and comprehensive, and include explanatory material written in plain language so that participants can fully understand the system's design and operations, their rights and obligations, and the risks of participating in the system. Moreover, a designated trade repository should disclose to its participants and to the public, basic operational information and responses to CPSS-IOSCO *Disclosure framework for financial market infrastructures*.

(3) Subsection 17(3) requires that designated trade repositories monitor compliance with its rules and procedures. The methodology of monitoring the compliance should be fully documented.

(4) Subsection 17(4) requires a designated trade repository to have clearly defined and publicly disclosed processes for dealing with non-compliance with its rules and procedures. This subsection does not preclude enforcement action by any other person or company, including the [applicable local securities regulator] or other regulatory body.

(5) Subsection 17(5) requires a designated trade repository to file its rules and procedures with the [applicable local securities regulator] for approval, in accordance with the terms and conditions of the designation order. Upon designation, the [applicable local securities regulator] may develop and implement a protocol with the designated trade repository that will set out the procedures to be followed with respect to the review and approval of rules and procedures and any amendments thereto. Generally, such a rule protocol will be appended to and form part of the designation order. Depending on the nature of the changes to the designated trade repository's rules and procedures, such changes may also impact the information contained in Form F1. In such case, the designated trade repository will be required to file a revised Form F1 with the [applicable local securities regulator]. See section 3 of this Model Explanatory Guidance for a discussion of the filing requirements.

Records of data reported

18. A designated trade repository is a market participant under securities legislation and therefore subject to the record-keeping requirements under securities legislation. The record-keeping requirements under section 18 are in addition to the requirements under securities legislation.

(2) Subsection 18(2) requires that records be maintained for 7 years after the expiration or termination of a transaction. The requirement to maintain records for 7 years after the expiration or termination of a transaction, rather than from the date the transaction was entered into reflects the fact that transactions create ongoing obligations and information is subject to change throughout the life of a transaction.

Comprehensive risk-management framework

19. Requirements for a comprehensive risk-management framework of a designated trade repository are set out in section 19.

Features of framework

A designated trade repository should have a sound risk-management framework (including policies, procedures, and systems) that enable it to identify, measure, monitor, and manage effectively the range of risks that arise in, or are borne by, a designated trade repository. A designated trade repository's framework should include the identification and management of risks that could materially affect its ability to perform or to provide services as expected, such as interdependencies.

Establishing a framework

A designated trade repository should have comprehensive internal processes to help its board of directors and senior management monitor and assess the adequacy and effectiveness of its risk-management policies, procedures, systems, and controls. These processes should be fully documented and readily available to the designated trade repository's personnel who are responsible for implementing them.

Maintaining a framework

A designated trade repository should regularly review the material risks it bears from, and poses to, other entities (such as other FMIs, settlement banks, liquidity providers, or service providers) as a result of interdependencies, and develop appropriate risk-management tools to address these risks. These tools should include business continuity arrangements that allow for rapid recovery and resumption of critical operations and services in the event of operational disruptions and recovery or orderly wind-down plans should the trade repository become non-viable.

General business risk

20. (1) Subsection 20(1) requires a designated trade repository to manage its general business risk appropriately. General business risk includes any potential impairment of the designated trade repository's financial position (as a business concern) as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that must be charged against capital or an inadequacy of resources necessary to carry on business as a designated trade repository.

(2) For the purposes of subsection 20(2), the amount of liquid net assets funded by equity that a designated trade repository should hold is to be determined by its general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services, if such action is taken. At a minimum, however, the Committee is of the view that a designated trade repository must hold liquid net assets funded by equity equal to at least six months of current operating expenses.

(3) For the purposes of subsections 20(3) and (4), and in connection with developing a comprehensive risk-management framework under section 19, a designated trade repository should identify scenarios that may potentially prevent it from being able to provide its critical operations and services as a going concern, and assess the effectiveness of a full range of options for recovery or orderly wind-down. These scenarios should take into account the various independent and related risks to which the designated trade repository is exposed.

Based on the required assessment of scenarios under subsection 20(3) (and taking into account any constraints potentially imposed by legislation), the designated trade repository should prepare appropriate written plans for its recovery or orderly wind-down. The plan should contain, among other elements, a substantive summary of the key recovery or orderly wind-down strategies, the identification of the designated trade repository's critical operations and services, and a description of the measures needed to implement the key strategies. The designated trade

repository should maintain the plan on an ongoing basis, to achieve recovery and orderly wind-down, and should hold sufficient liquid net assets funded by equity to implement this plan (see also subsection 20(2) above). A designated trade repository should also take into consideration the operational, technological, and legal requirements for participants to establish and move to an alternative arrangement in the event of an orderly wind-down.

Systems and other operational risk requirements

21. (1) Subsection 21(1) sets out a general principle concerning the management of operational risk. In interpreting subsection 21(1), the following key considerations should be applied:

- a designated trade repository should establish a robust operational risk-management framework with appropriate systems, policies, procedures, and controls to identify, monitor, and manage operational risks;
- a designated trade repository should review, audit, and test systems, operational policies, procedures, and controls, periodically and after any significant changes; and
- a designated trade repository should have clearly defined operational-reliability objectives and policies in place that are designed to achieve those objectives.

(2) The board of directors of a designated trade repository should clearly define the roles and responsibilities for addressing operational risk and approve the designated trade repository's operational risk-management framework.

(3) Paragraph 21(3)(a) requires a designated trade repository to develop and maintain an adequate system of internal control over its systems as well as adequate general information-technology controls. The latter controls are implemented to support information technology planning, acquisition, development and maintenance, computer operations, information systems support, and security. Recommended Canadian guides as to what constitutes adequate information technology controls include '*Information Technology Control Guidelines'* from the Canadian Institute of Chartered Accountants and '*COBIT*' from the IT Governance Institute. A designated trade repository should ensure that its information-technology controls address the integrity of the data that it maintains, by protecting all derivatives data submitted from corruption, loss, improper disclosure, unauthorized access and other processing risks.

Paragraph 21(3)(b) requires a designated trade repository to thoroughly assess future needs and make systems capacity and performance estimates in a method consistent with prudent business practice at least once a year. The paragraph also imposes an annual requirement for designated trade repositories to conduct periodic capacity stress tests. Continual changes in technology, risk management requirements and competitive pressures will often result in these activities or tests being carried out more frequently.

Paragraph 21(3)(c) requires a designated trade repository to notify the [applicable local securities regulator] of any material systems failure. The Committee would consider a failure, malfunction, delay or other disruptive incident to be "material" if the designated trade repository would in the normal course of its operations escalate the incident to, or inform, its senior management that is

responsible for technology, or the incident would have an impact on participants. The Committee also expects that, as part of this notification, the designated trade repository will provide updates on the status of the failure, the resumption of service, and the results of its internal review of the failure.

(4) Subsection 21(4) requires that a designated trade repository establish, implement, maintain and enforce business continuity plans, including disaster recovery plans. The Committee believes that these plans are intended to provide continuous and undisrupted service, as back-up systems ideally should commence processing immediately. Where a disruption is unavoidable, a designated trade repository is expected to provide prompt recovery of operations, meaning that it resume operations within 2 hours following the disruptive event. Under paragraph 21(4)(c), an emergency event could include any external sources of operational risk, such as the failure of critical service providers or utilities or events affecting a wide metropolitan area, such as natural disasters, terrorism, and pandemics. Business continuity planning should encompass all policies and procedures to ensure uninterrupted provision of key services regardless of the cause of potential disruption.

(5) Subsection 21(5) requires a designated trade repository to test its business continuity plans at least once a year. The expectation is that the designated trade repository would engage relevant industry participants, as necessary, in tests of its business continuity plans, including testing of back-up facilities for both the designated trade repository and its participants.

(6) Subsection 21(6) requires a designated trade repository to engage a qualified party to conduct an annual independent assessment of the internal controls referred to in paragraphs 21(3)(a) and (b) and subsections 21(4) and (5). A qualified party is a person or company or a group of persons or companies with relevant experience in both information technology and in the evaluation of related internal controls in a complex information technology environment, such as external auditors or third party information system consultants. Before engaging a qualified party, the designated trade repository should notify the [applicable local securities regulator].

(8) Subsection 21(8) requires a designated trade repository to make its technology requirements regarding interfacing with, or accessing, the designated trade repository publicly available in their final form for at least 3 months. If there are material changes to these requirements after they are initially made publicly available, the revised requirements should be made publicly available for a new 3-month period prior to implementation, where applicable.

(9) Subsections 21(9) and (10) require a designated trade repository to provide testing facilities for interfacing with, or accessing, the trade repository for at least 2 months immediately prior to operations once the technology requirements have been made publicly available. Should the trade repository make its specifications publicly available for longer than 3 months, it may make the testing available during that period or thereafter as long as it is at least 2 months prior to operations. If the designated trade repository, once it has begun operations, proposes material changes to its technology systems, it is required to make testing facilities publicly available for at least 2 months before implementing the material systems change.

(11) Subsection 21(11) provides that if a designated trade repository must make a change to its technology requirements regarding interfacing with, or accessing, the designated trade repository to immediately address a failure, malfunction or material delay of its systems or equipment, it does not have to comply with paragraphs 21(8)(b) and 21(9)(b) if it immediately notifies the [applicable local securities regulator] of the change and the amended technology requirements are made publicly available as soon as practicable, either while the changes are being made or immediately thereafter.

Data security and confidentiality

22. (1) Subsection 22(1) provides that a designated trade repository must establish policies and procedures to ensure the safety and confidentiality of derivatives data to be reported to it under the Model TR Rule. The policies must include limitations on access to confidential trade repository data and standards to safeguard against persons and companies affiliated with the designated trade repository from using trade repository data for their personal benefit or the benefit of others.

(2) Subsection 22(2) prohibits a designated trade repository from utilizing reported derivatives data that is not required to be publicly disclosed for commercial or business purposes under section 39, without the written consent of the counterparties who supplied the derivatives data. The purpose of this provision is to ensure that participants of the designated trade repository have some measure of control over their derivatives data. This provision is not intended to prevent the use of data for non-commercial research in the public interest, subject to appropriate controls and confidentiality agreements.

Confirmation of data and information

23. Subsection 23(1) requires a designated trade repository to confirm the accuracy of the derivatives data it receives from a reporting counterparty. A designated trade repository must confirm the accuracy of derivatives data with each counterparty to a reported transaction provided that the non-reporting counterparty is a participant of the trade repository. Where the non-reporting counterparty is not a participant of the trade repository, there is no obligation to confirm with such non-reporting counterparty.

Pursuant to section 25, only one counterparty is required to report a transaction. The purpose of the confirmation requirement in subsection 23(1) is to ensure that the reported information is agreed to by both counterparties. However, in cases where a non-reporting counterparty is not a participant of the relevant designated trade repository, the designated trade repository would not be in a position to confirm the accuracy of derivatives data with such counterparty. As such, under subsection 23(2) a designated trade repository will not be obligated to confirm the accuracy of the derivatives data with a counterparty that is not a participant of the designated trade repository. Additionally, similar to the reporting obligations in section 25, confirmation under subsection 23(1) can be delegated to a third-party representative.

Outsourcing

24. Section 24 sets out requirements applicable to a designated trade repository that outsources any of its key services or systems to a service provider. Generally, a designated trade repository must establish policies and procedures to evaluate and approve these outsourcing arrangements. Such policies and procedures include assessing the suitability of potential service providers and the ability of the designated trade repository to continue to comply with securities legislation in the event of bankruptcy, insolvency or the termination of business of the service provider. A designated trade repository is also required to monitor the ongoing performance of the service provider to which it outsources key services, systems or facilities. The requirements under section 24 apply regardless of whether the outsourcing arrangements are with third-party service providers, or affiliates of the designated trade repository. A designated trade repository that outsources its services or systems remains responsible for those services or systems and for compliance with securities legislation.

PART 3
DATA REPORTING

Part 3 deals with reporting obligations for transactions and includes a description of the counterparties that will be subject to the duty to report, requirements as to the timing of reports and a description of the data that is required to be reported.

Duty to report

25. Section 25 outlines the reporting duties and contents of derivatives data.

(2) With respect to subsection 25(2), prior to the reporting rules in Part 3 coming into force, the [applicable local securities regulator] will provide public guidance on how reports for derivatives that are not accepted for reporting by any designated trade repository should be electronically submitted to the [applicable local securities regulator].

(3) The Committee interprets the requirement in subsection 25(3) to report errors or omissions in derivatives data "as soon as technologically possible" after it is discovered, to mean on discovery and in any case no later than the end of the business day on which the error or omission is discovered.

(4) Under subsection 25(4), where a local counterparty that is not a reporting counterparty, discovers an error or omission in respect of derivatives data that is reported to a designated trade repository, such local counterparty has an obligation to report the error or omission to the reporting counterparty. Once the error or omission is reported to the reporting counterparty, the reporting counterparty then has an obligation to report the error or omission to the designated trade repository, in accordance with subsection 25(3) or to the [applicable local securities regulator] in accordance with subsection 25(2). The Committee interprets the requirement in subsection 25(4) to notify the reporting counterparty of errors or omissions in derivatives data "promptly" after it is discovered, to mean on discovery and in any case no later than the end of the business day on which the error or omission is discovered.

(5) Paragraph 25(5)(a) requires that all derivatives data reported for a given transaction must be reported to the same [applicable local securities regulator] or the same designated trade repository to which the initial report is submitted. The purpose of this requirement is to ensure the [applicable local securities regulator] has access to all reported derivatives data for a particular transaction from the same entity. It is not intended to restrict counterparties' ability to report to multiple trade repositories. Where the entity to which the transaction was originally reported is no longer a designated trade repository, all data relevant to that transaction should be reported to another designated trade repository as otherwise required by the Model TR Rule.

Pre-existing derivatives

26. Section 26 requires that pre-existing transactions that have not expired or been terminated 365 days after the date prescribed in subsection 42(1) be reported to a designated trade repository. Transactions that terminate or expire prior to the date prescribed in subsection 42(1) will not be subject to the reporting obligation. Further, pursuant to subsection 42(4), transactions that expire or terminate within 365 days of the date prescribed in subsection 42(1), will not be subject to the reporting obligation. These transactions are exempted from the reporting obligation in the Model TR Rule, to relieve some of the reporting burden for market participants, and because they would provide marginal utility to the [applicable local securities regulator] due to their imminent termination or expiry. In addition, only the data indicated in the column entitled "Required for Pre-existing Transactions" in Appendix A will be required to be reported for pre-existing transactions.

Reporting counterparty

27. Reporting obligations on dealers apply irrespective of whether the dealer is a registrant.

(1) Under paragraphs 27(1)(c) and (d), if the counterparties are unable to identify who should report the transaction, then both counterparties must act as reporting counterparty. However, it is the Committee's view that one counterparty to every transaction should accept the reporting obligation to avoid duplicative reporting.

(2) Subsection 27(2) applies to situations where the reporting counterparty, as determined under subsection 27(1), is not a local counterparty. In situations where a non-local reporting counterparty does not report a transaction or otherwise fails to fulfil the local counterparties reporting duties, the local counterparty must act as the reporting counterparty. The Committee is of the view that non-local counterparties that are dealers or clearing agencies should assume the reporting obligation for non-dealer counterparties. However, to the extent that non-local counterparties are not subject to the reporting obligation under the Model TR Rule, it is necessary to impose the ultimate reporting obligation on the local counterparty.

(3) Under subsection 27(3), the reporting counterparty for a transaction must ensure that all reporting obligations are fulfilled. This includes ongoing requirements such as the reporting of life-cycle events and valuations.

(4) Subsection 27(4) permits the delegation of all reporting obligations of a reporting counterparty. This includes reporting of initial creation data, life-cycle data and valuation data. For example, some or all of the reporting obligations may be delegated to a third-party service provider. However, the local counterparty remains responsible for ensuring that the derivatives data is accurate and reported within the timeframes required under the Model TR Rule.

Real-time reporting

28. (1) Subsection 28(1) requires that reporting be made in real time, which means that derivatives data should be reported as soon as technologically practicable after the execution of a transaction. In evaluating what will be considered to be "technological practicable", the [applicable local securities regulator] will take into account the prevalence of implementation and use of technology by comparable market participants located in Canada and in foreign jurisdictions. The [applicable local securities regulator] may also conduct independent reviews to determine the state of reporting technology.

(2) Subsection 28(2) is intended to take into account the fact that not all market participants will have the same technological capabilities. For example, market participants that do not regularly engage in transactions would, at least in the near term, likely not be as well situated to achieve real-time reporting. In all cases, the outside limit for reporting is the end of the business day following execution of the transaction.

Legal entity identifiers

30. (1) Subsection 30(1) requires that a designated trade repository identify all counterparties to a transaction by a legal entity identifier. It is envisioned that this identifier be a LEI under the Global LEI System. The Global LEI System is a G20 endorsed initiative[14] that will uniquely identify counterparties to transactions. It is currently being designed and implemented under the direction of the LEI ROC, a governance body endorsed by the G20.

(2) The "Global Legal Entity Identifier System" referred to in subsection 30(2) means the G20 endorsed system that will serve as a public-good utility responsible for overseeing the issuance of legal entity identifiers globally to counterparties who enter into transactions.

(3) If the Global LEI System is not available at the time counterparties are required to report their LEI under the Model TR Rule, they must use a substitute legal entity identifier. The substitute legal entity identifier must be in accordance with the standards established by the LEI ROC for pre-LEI identifiers. At the time the Global LEI System is operational, counterparties must cease using their substitute LEI and commence reporting their LEI. It is conceivable that the two identifiers could be identical.

[14] See http://www.financialstabilityboard.org/list/fsb_publications/tid_156/index.htm for more information.

Unique transaction identifier

31. A unique transaction identifier will be assigned by the designated trade repository to which the transaction has been submitted. The designated trade repository may utilize its own methodology or incorporate a previously assigned identifier that has been assigned by, for example, a clearing agency, trading platform, or third-party service provider. However, the designated trade repository must ensure that no other transaction shares a similar identifier.

A transaction in this context means a transaction from the perspective of all counterparties to the transaction. For example, both counterparties to a single swap transaction would identify the transaction by the same single identifier.

Unique product identifier

32. (1) Subsection 32(1) requires that a designated trade repository identify each transaction that is subject to the reporting obligation under the Model TR Rule by means of a unique product identifier. There is currently a system of product taxonomy that could be used for this purpose[15]. To the extent that unique product identifiers are unavailable for a particular transaction type, a designated trade repository would be required to create one using an alternative methodology.

(5) Subsection 32(5) provides relief from the obligation of subsection 32(1) where no industry standards are available.

Valuation data

35. Valuation data is required to be reported by both counterparties to a reportable transaction. For both cleared and uncleared transactions counterparties may, as described in subsection 27(4), delegate the reporting of valuation data to a third-party, but such counterparties remain ultimately responsible for ensuring the timely and accurate reporting of this data.

(1) Subsection 35(1) requires that valuation data for a transaction that is cleared must be reported daily. A transaction is considered to be "cleared" where it has been novated to a clearing agency.

PART 4
DATA DISSEMINATION AND ACCESS TO DATA

Data available to regulators

37. (1) Subsection 37(1) require designated trade repositories to (at no cost to the [applicable local securities regulator]): (i) provide to the [applicable local securities regulator] continuous and timely electronic access to derivatives data; (ii) promptly fulfill data requests from the [applicable local securities regulator]; and (iii) provide aggregate derivatives data. Electronic access includes the ability of the [applicable local securities regulator] to access, download, or receive a direct real-time feed of derivatives data maintained by the designated trade repository.

[15] See http://www2.isda.org/identifiers-and-otc-taxonomies/ for more information.

The derivatives data covered by this subsection are data necessary to carry out the [applicable local securities regulator's] mandate to protect participants in the derivatives market from unfair, improper or fraudulent practice, to foster fair and efficient capital markets, promote confidence in the capital markets, and to address systemic risk. This includes derivatives data with respect to any transaction or transactions that may impact the provincial market.

Transactions that reference an underlying asset or class of assets with a nexus to [Province x] or Canada can impact the provincial market even if the counterparties to the transaction are not local counterparties. Therefore, the [applicable local securities regulator] has a regulatory interest in transactions involving such underlying interests even if such data is not submitted pursuant to the reporting obligations in the Model TR Rule, but is held by a designated trade repository.

(2) Subsection 37(2) requires a designated trade repository to conform to internationally accepted regulatory access standards applicable to trade repositories. Trade repository regulatory access standards are currently being developed by CPSS and IOSCO.[16] It is expected that all designated trade repositories will comply with the access recommendations in the final report.

Data available to counterparties

38. Section 38 is intended to ensure that each counterparty, and any person acting on behalf of a counterparty, have access to all data relating to its transaction in a timely manner and for the duration of the transaction.

Data available to public

39. (1) Subsection 39(1) requires a designated trade repository to make available to the public free of charge certain aggregate data for all transactions reported to it under the Model TR Rule (including open positions, volume, number of transactions, and price). It is expected that a designated trade repository will provide aggregate derivatives data by notional amounts outstanding and level of activity. Such data is anticipated to be available on the designated trade repository's website.

(2) Subsection 39(2) requires that the aggregated data that is disclosed under subsection 39(1), be broken down into various categories. The following are examples of the aggregated data required under subsection 39(2):

- currency of denomination (the currency in which the derivative is denominated);
- geographic location of the underlying reference entity (e.g., Canada for derivatives which reference the TSX60 index);
- asset class of reference entity (e.g., fixed income, credit, or equity);
- product type (e.g. options, forwards, or swaps);
- cleared or uncleared;

[16] See report entitled "Authorities' Access to TR Data" available at http://www.bis.org/publ/cpss108.pdf.

- maturity ranges (broken down into maturity ranges, such as less than one year, 1-2 years, 2-3 years); and
- geographic location and type of counterparty (e.g., the United States, end user).

(3) Subsection 39(3) requires a designated trade repository to publicly report the data indicated in the column entitled "Required for public dissemination" in Appendix A of the Model TR Rule. For transactions where at least one counterparty is a dealer, such data must be publicly reported by the end of the day following the transaction being submitted to the designated trade repository. For transactions where neither counterparty is a dealer, such data must be publicly reported by the end of the second day after the transaction being reported to the designated trade repository. The purpose of the public reporting delays is to ensure that market participants have adequate time to enter into any offsetting transaction that are necessary to hedge their positions. These time delays apply to all transactions, regardless of transaction size.

(4) Subsection 39(4) provides that a designated trade repository must not disclose the identity of either counterparty to the transaction. This means that published data must be anonymized and the names or legal entity identifiers of counterparties must not be published. This provision is not intended to create a requirement for a designated trade repository to determine whether anonymized published data could reveal the identity of a counterparty based on the terms of the transaction.

PART 5
EXCLUSIONS

40. Paragraph 40(a) provides that the reporting obligation for a physical commodity transaction does not apply in certain limited circumstances. This exclusion only applies if a local counterparty to a transaction has less than $500 000 aggregate notional value under all outstanding derivatives contracts, including the additional notional value related to that transaction. In calculating this exposure, the notional value of all outstanding transactions, including transactions from all asset classes and with all counterparties, domestic and foreign, should be included. The notional value of a physical commodity transaction would be calculated by multiplying the quantity of the physical commodity by the price for that commodity. A counterparty that is above the $500 000 threshold is required to act as reporting counterparty for a transaction involving a counterparty that is exempt from the reporting obligation under paragraph 40(a).

This relief applies to physical commodity transactions that are not excluded derivatives for the purpose of the reporting obligation in paragraph 2(d) of Model Rule – *Derivatives: Product Determination*. An example of a physical commodity transaction that is required to be reported (and therefore could benefit from this relief) is a physical commodity contract that allows for cash settlement in place of delivery.

PART 7
EFFECTIVE DATE

Effective date

42. (2) Where the counterparty is a dealer or clearing agency, subsection 42(2) provides that no reporting is required until 6 months after the provisions of the Model TR Rule applicable to designated trade repositories come into force.

(3) For non-dealers, subsection 42(3) provides that no reporting is required until 9 months after the provisions of the Model TR Rule applicable to designated trade repositories come into force. This provisions only applies where both counterparties are non-dealers. Where the counterparties to a transaction are a dealer and a non-dealer, the dealer will be required to report according to the timing outlined in subsection 42(2).

(4) Subsection 42(3) provides that no reporting is required for pre-existing transactions that terminate or expire within 365 days of the date the provisions of the Model TR Rule applicable to designated trade repositories come into force.

APPENDIX B

To CSA Staff Notice 91-302 - *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data*

COMMENT SUMMARY AND CSA RESPONSES

1. The Scope Rule

Section Reference	Issue/Comment	Response
General Comments	Two commenters urged the Committee to expressly provide that exchange-traded derivatives are excluded from the definition of "derivative".	Change made. See new para. 2(g) of the Scope Rule which excludes a derivative traded on certain prescribed exchanges from the definition of "derivative". We note this change was necessary in Ontario because although commodity futures contracts and commodity futures options are excluded from the definition of "derivative" in the *Securities Act* (Ontario), other types of exchange-traded derivatives exist. Such exchange-traded derivatives will not be characterized as "derivatives" as a consequence of the application of para. 2(g) of the Scope Rule.
	One commenter suggested that repurchase transactions or reverse repurchase transactions should be explicitly excluded from the definition of "derivative".	No change. We believe an explicit exclusion for repurchase transactions or reverse repurchase transactions is unnecessary and would cause confusion because these products are not typically considered to be derivatives in the marketplace.
Para. 2(a) - Gaming	Three commenters expressed concern that gaming contracts not regulated by gaming control legislation in Canada should be explicitly excluded from the definition of "derivative".	Change made. See new subpara. 2(a)(ii) of the Scope Rule which provides that gaming contracts or instruments regulated by gaming control legislation of a foreign jurisdiction will be excluded from the definition of "derivative" if the contract was entered into outside Canada, is not in violation of Canadian law and would be regulated under Canadian gaming control legislation if it had been entered into in Canada.

Section Reference	Issue/Comment	Response
Para. 2(b) - Insurance	Five commenters pointed out that in certain situations Canadian entities may enter into an insurance or annuity contract with a foreign insurer not licensed in Canada. For example, a Canadian entity may enter into an insurance contract with a foreign insurer to insure a risk outside of Canada. Commenters suggested that certain insurance contracts issued by foreign insurers should be explicitly excluded from the definition of "derivative".	Change made. See new subpara. 2(b)(ii) of the Scope Rule which provides that insurance or annuity contracts entered into with an insurer licensed in a jurisdiction outside of Canada will be excluded from the definition of "derivative" if the insurance or annuity contract would be regulated as insurance under Canadian insurance legislation if it had been entered into in Canada.
	Two commenters requested additional clarification that reinsurance will not be treated as a derivative.	Change made. Additional clarification has been added to the Scope CP which provides that, to the extent that reinsurance falls within the exemption in para. 2(b) of the Scope Rule, it will be treated as an insurance or annuity contract under that paragraph.
Para. 2(c) – FX Spot Transactions	Three commenters suggested that the Scope Rule should exclude from the definition of "derivative" all deliverable foreign exchange forward contracts provided that there is an intention to physically deliver.	No change. We believe that deliverable foreign exchange forward transactions that are not settled within the timelines prescribed in subpara. 2(c)(i) should be treated as derivatives under the Scope Rule for the purposes of trade reporting. We note that the United States and Europe are similarly requiring the reporting of deliverable foreign exchange forward transactions. We intend to revisit the treatment of deliverable foreign exchange forward transactions for other derivatives regulatory requirements such as clearing and margin requirements.
	One commenter suggested that non-deliverable foreign exchange forward transactions be excluded from the definition of "derivative".	No change. Our view is that non-deliverable foreign exchange forward transactions should be treated as a "derivative".

Section Reference	Issue/Comment	Response
	A number of commenters pointed out that in certain situations foreign exchange transactions are entered into in order to hedge foreign currency risk in connection with the purchase of equity securities. Typically, the settlement cycle for most non-US denominated securities is trade date plus three days. The commenters were concerned that the current two day settlement requirement under subpara. 2(c)(i) of the Scope Rule would prevent these transactions from being excluded for the definition of "derivative".	Change made. See new clause 2(c)(i)(B) of the Scope Rule which allows for settlement of deliverable foreign exchange forward transactions after two days provided such settlement coincides with the settlement of a related securities trade denominated in the underlying currency.
Para. 2(d) – Non-Financial Commodities	A number of commenters raised concerns with the term "physical commodity". Two commenters questioned whether intangible products (such as carbon offset credits, environmental attributes and biofuel components) will be treated as physical commodities.	Change made. See amendment to para. 2(d) of the Scope Rule which removes the term "physical commodity" and replaces it with the phrase "commodity other than cash or currency". The corresponding guidance in the Scope CP also specifies that intangible commodities such as carbon credits and emission allowances will be considered to be non-financial commodities.
	A number of commenters raised concern regarding the requirement under subpara. 2(d)(ii) of the Scope Rule that, in order to be excluded from the definition of "derivative", amongst other things, physical commodity contracts must not allow for cash settlement in place of physical delivery. Commenters provided a number of examples of current transactions terms and market practices that permit some form of cash delivery in lieu of physical settlement, including: • A number of commenters pointed out that parties to physical commodity forward transactions commonly enter into book-out transactions. A book-out transaction	Change made. See amended para. 2(d) and accompanying guidance in the Scope CP which permits cash settlement where physical settlement is rendered impossible or commercially unreasonable as a result of events not reasonably within the control of the parties. Additional guidance has also been provided in the Scope CP outlining our position on the intention requirement in subpara. 2(d)(i). We take the view that a netting provision will not, in and of itself, be evidence of an intention not to settle by delivering the relevant commodity.

Section Reference	Issue/Comment	Response
	is a subsequent, separately negotiated agreement whereby the purchaser under the original agreement sells some or all of the commodity back to the same counterparty or a third-party. The commenters raised concerns that these transactions may result in physical commodity transactions being improperly classified as "derivatives" as they would be considered to be cash settled under subpara. 2(d)(ii). • Two commenters expressed concern that netting arrangements may result in physical commodity transactions being improperly classified as "derivatives" as they would be considered to be cash settled under subpara. 2(d)(ii). The commenters pointed out these arrangements are standard industry practice and allow counterparties with offsetting delivery obligations to deliver just the net amount of commodity obligated to be transferred between the counterparties. • One commenter noted that standard industry contracts such as Gas Electronic Data Interchange Base Contract for Sale and Purchase of Natural Gas and North American Energy Standards Board Base Contract for the Purchase and Sale of Natural Gas contemplate cash settlement in place of physical delivery for reasons other than breach of contract, termination, or impossibility of delivery. • Four commenters pointed out that the Scope Rule does not discuss contracts having an optional-pricing component, such as contracts which include floor or ceiling pricing	

Section Reference	Issue/Comment	Response
	provisions. These commenters were concerned that using optional-pricing may result in the contract being considered to be cash settled and treated as a "derivative". • One commenter requested clarification as to whether power purchase agreements will be treated as derivatives under the Scope Rule. As power purchase agreements may include a take or pay option which in the event that the utility decides to not take full delivery of electricity there may be a requirement to compensate the producer for lost revenue due to reduced production.	
Para. 2(d) – Physically Settled Commodity Transactions	One commenter requested that transactions between provincially-owned utility companies and the Province owning such utility company should be excluded from the definition of "derivative".	No change. The Scope Rule has not been amended to deal specifically with these types of transactions although exemptions may be considered on a case-by-case basis.

2. The TR Rule

Section Reference	Issue/Comment	Response
General Comments	One commenter suggested that there should be an explicit recognition that trade repositories and other service providers may not "tie" or "bundle" mandatory services with the trade repository function. It was argued that bundling of a mandated service with other mandated or ancillary services will only serve to limit reporting party choice and potentially result in data fragmentation as data is sent to multiple repositories complicating the ability of regulators or the public to get a comprehensive view of the market or a single firm's exposures in any one place.	Change made. See new para. 13(2)(d) of the TR Rule which provides that designated trade repositories will not require the use or purchase of another services for a person to utilize the trade reporting service.

Section Reference	Issue/Comment	Response
	A number of commenters suggested that the TR Rule should address the extent to which reporting derivatives data pursuant to foreign rules would satisfy the reporting requirements under the TR Rule. They argued that such "substituted compliance" should be allowed as long as the foreign jurisdiction has a reporting regime substantially similar to the reporting regime in the "home Province".	We agree that where a transaction has been reported to a designated trade repository pursuant to the rules of an equivalent jurisdiction, an exemption from reporting under the TR Rule will be considered where the foreign report contains all of the information otherwise required to be reported under the TR Rule. Such situations will be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule or any other applicable provision under securities or derivatives legislation.
	Two commenters suggested that a system of reciprocity or recognition be developed to allow for a Trade Repository that is designated in any province to be automatically deemed designated in all provinces – "passport system". It was suggested that a principal regulator model should be implemented, similar to that used to determine a principal regulator for registrants and for reporting issuers.	No change. This issue is outside of the scope of the TR Rule.
S. 1 "Local Counterparty"	A number of commenters raised concerns that the definition of "local counterparty" is too broad and has extra-territorial implications. Particular concern was raised that paras. (c), (d), (e) and (f) may capture transactions where there is either no or insufficient connection to Canada.	Change made. See amended definition of "local counterparty" in subsection 1(1) of the TR Rule. The amended definition includes parties to a transaction where (a) the party is a person or company, other than an individual, organized under the laws of Ontario or that has its head office or principal place of business in Ontario, (b) the party is registered as a dealer or subject to regulations providing that a person or company trading in derivatives must be registered in a category of registration prescribed by the regulations, or (c) the party is an affiliate of a person or company described in paragraph (a) or (b), and such person or company is responsible for the liabilities of such affiliated

Section Reference	Issue/Comment	Response
		party.
S. 2 – Initial filing and designation	One commenter suggested that the requirement that the applicable local securities regulator have access to the trade repository's books and records should be limited to matters that directly fall within the regulatory ambit of the local regulator.	Change made. The requirement to provide access to the trade repository's books and records is intended to be limited to matters that directly fall within the regulatory ambit of the local regulator. See amendment to s. 5 of Exhibit A of Form F1 which removes the requirement that an applicant obtain a legal counsel opinion stating that the trade repository will be able to provide prompt access to "data that is required to be reported to the trade repository".
	One commenter suggested that to provide greater legal certainty there should be more precise wording in para. 2(3)(b) to require applicants located outside of a province to certify that it "has the power and authority", not just "is able", to provide access to the regulator of its books and records.	Change made. See amendment made to subsection 2(3) and the certificate in Form F1. The phrase "is able" is replaced by "has the power and authority".
S. 3 – Change in Information	One commenter argued that the requirement to provide 45 days' advance notice of a significant change to Form F1 information is too onerous and in practice will be difficult to comply with.	No change. We believe that 45 days prior notice of significant changes is necessary in order for the Commission to address any potential concerns that may arise with such changes.
S. 23 – Confirmation of Data and Information	Three commenters supported the position that where a transaction is cleared through a clearing agency or traded on an exchange such clearing agency or exchange should be required to confirm the accuracy of any data required to be submitted to a trade repository. One commenter suggested that there be no confirmation requirement where derivatives data is reported by a clearing agency or exchange. Two commenters pointed out that placing an obligation on the trade repository to confirm data without placing a corresponding obligation on	Change made. See new subsection 23(2) of the TR Rule which provides that a designated trade repository will only be required to confirm the accuracy of derivatives data with counterparties that are participants of the designated trade repository. Since clearing agencies, exchanges and dealers that will report derivatives data to a designated trade repository will be required to be participants of such designated trade repository, they will be required to confirm derivatives data. The designated trade repository will only be obligated to confirm the accuracy of derivatives data with an

Section Reference	Issue/Comment	Response
	counterparties to provide such data would make it very difficult for a trade repository to fulfill its obligation. Two commenters took the position that requiring both counterparties to confirm the accuracy of derivatives data placed an unnecessary administrative and compliance burden on end-users.	end-user if the end-user is a participant of the trade repository.
S. 25 – Duty to Report	Three commenters took the position that requiring end-users or non-dealer counterparties to report derivatives data is overly burdensome. Commenters pointed to the fact that dealers will have systems in place for such reporting while end-users will bear substantial costs to develop such expertise and logistic capabilities.	No change. We agree that dealers are in a better position to report transactions than end-users. However, in situations where the dealer is foreign, the Commission may not have jurisdiction over such an entity. As such, the ultimate reporting obligation must fall on a local counterparty. Where a transaction is between two end-users it would be expected that at least one of the counterparties would have reporting capabilities.
S. 26 – Pre-existing Derivatives Data	A number of commenters raised concerns that the requirement to report derivatives data for pre-existing transactions will be problematic since not all information will be readily available to counterparties (for example, counterparties will not likely have in their possession certain creation data).	Change made. The fields required to be reported for pre-existing transactions have been reduced. See column entitled “Required for Pre-existing Transactions” in Appendix A.
	One commenter pointed out that certain pre-existing transactions involving local-counterparties will have already been reported in the United States. They argued that it would be inefficient and costly to re-report such transactions or to require that additional information be provided for transactions which have already been reported.	We agree that where a transaction has been reported to a designated trade repository pursuant to the rules of an equivalent jurisdiction, an exemption from reporting under the TR Rule should be considered when the foreign report contains all of the information otherwise required to be reported under the TR Rule. Such situations will be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule or any other applicable provision under securities or derivatives legislation.

Section Reference	Issue/Comment	Response
S. 27 – Reporting Counterparty	A number of commenters supported the position that where a transaction is cleared through a clearing agency, such clearing agency should be required to report any data required to be submitted to a trade repository.	Change made. See new para. 27(1)(a) of the TR Rule which provides that where a transaction is cleared, the clearing agency will be responsible for reporting derivatives data.
	Four commenters requested that the term "derivatives dealer" be defined in the TR Rule.	Change made. See new definition for "dealer" under subsection 1(1) which specifies that a "dealer" means a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as a principal or agent.
S. 28 – Real-time Reporting	Three commenters suggested that it would be very difficult and costly for end-users to comply with a real-time reporting requirement. It was suggested that additional time be given for end-users reporting derivatives data.	No change. We note that the TR Rule and the accompanying TR CP already provides for a delay where reporting in real time is not technologically practicable.
	One commenter noted that the TR Rule does not contemplate circumstances where the trade repository ceases its operations or stops accepting data for a certain product. It was suggested that in such circumstances the TR Rule should allow a reporting counterparty a reasonable period of time to transition to another trade repository without contravening the timing requirements under s. 28 of the TR Rule provided that the reporting counterparty provides a copy of any notice it receives from the trade repository informing parties that it will be ceasing operations or stop accepting data for a certain product.	Change made. See amendment to subsection 28(3) of the TR Rule.
S. 30 – Legal Entity Identifier	Two commenters suggested that if the Global Legal Entity Identifier System is unavailable when the TR Rule comes into force other existing industry identifiers should be permitted to be used as a substitute pursuant to para. 30(3)(a) of the TR Rule (for example, CFTC Interim Compliant Identifiers,	Change made. See amendments to subsection 30(3) of the TR Rule which allows for the use of substitute legal entity identifiers provided they comply with the standards established by the LEI Regulatory Oversight Committee for pre-LEI identifiers. Substitute legal entity identifiers which adhere to the

Section Reference	Issue/Comment	Response
	Bank Identifier Codes, etc.)	requirements set by the LEI Regulatory Oversight Committee will in all likelihood convert to legal entity identifiers in their same form and will avoid the need for extensive mapping exercises.
S. 31 – Unique Transaction Identifier	Two commenters noted that unique transaction identifiers are commonly created by clearing agencies and exchanges. It was suggested that the TR Rule be amended to take into account such market practices.	Change made. See amendments to subsection 31(2) of the TR Rule which permits the use of unique transaction identifiers previously assigned by a clearing agency or an exchange.
S. 34 – Life-cycle Data	Two commenters suggested that reporting counterparties be given the option of reporting life-cycle events through an end-of-day snapshot data report. Under this approach, lifecycle events that occur during the day would be aggregated to show the final position at the end of the day.	Change made. See amendments to s. 34 of the TR Rule which permits the reporting of life-cycle data at the end of the business day that such life-cycle event occurred.
S. 35 – Valuation Data	Two commenters suggested that the TR Rule should expressly provide that valuation data should be reported using the most current daily mark available. They noted that it is market standard that valuations of transactions are performed overnight and accordingly, the valuation data for a transaction will be first reported on the business day following the transaction date.	Change made. See amendment to para. 35(2)(a) of the TR Rule which requires the reporting of valuation data daily using industry accepted valuation standards and relevant closing market data from the previous trading day.
	One commenter pointed out that para. 35(2)(a) requires valuation data reporting by "each local counterparty if that counterparty is a derivatives dealer". Where both parties are dealers, this paragraph would seem to unnecessarily obligate both of them to do the reporting, despite an arrangement between them that one would be the reporting counterparty. It was recommended that the wording be changed such that the reporting is done by the reporting counterparty where at least one of the	No change. Having two derivative dealers report valuation data is useful from a regulatory perspective as it allows for the relevant Commission to have access to two valuation data points for the same transaction.

Section Reference	Issue/Comment	Response
	counterparties is a dealer.	
S. 36 – Record of Data Reported	A number of commenters requested that the 7 year retention period be lowered to 5 years in order to comply with international practice.	No change. The seven year retention period is common practice in Canada and is in line with timing requirements under the *Limitations Act 2002* (Ontario).
	Three commenters cautioned that it would be overly burdensome for local counterparties to retain all transaction records particularly where they are not acting as reporting counterparty.	Change made. See amendments to subsection 36(1) of the TR Rule which only requires the reporting counterparty to keep records in relation to a transaction. The non-reporting counterparty has no obligation to retain any transaction records.
	Two commenters suggested that clarification is needed with respect to what is required to be retained – whether it is simply whatever records a local counterparty has relating to the transaction, or whether it is all the information that has been reported to the trade repository under the TR Rule.	Change made. See amendment to subsection 36(1) of the TR Rule which requires the reporting counterparty to keep records of a transaction.
S. 37 – Data available to Regulators	One commenter pointed out that a number of foreign jurisdictions place restrictions on the counterparty details that may be reported to a trade repository under local data protection and confidentiality laws. It was suggested that either (1) the reporting obligations be exempt where such conflicts exist or (2) reporting counterparties be permitted to mask confidential data in their reports where necessary.	No change. We note that this issue is currently being addressed at the international level. To the extent that a reporting counterparty encounters obstacles complying with the TR Rule as a result of foreign confidentiality laws, exemptions may be available on a case-by-case basis under the exemption power in s. 41 of the TR Rule or any other applicable provision under securities or derivatives legislation.
S. 38 – Data available to Counterparties	Two commenters pointed out that the consent provided under subsection 38(3) is limited to the release by the trade repository to counterparties to the transaction of the data relevant to that transaction only. The consent does not cover the initial disclosure by a counterparty to the transaction under its obligation to report derivatives data to a trade repository under s. 25, disclosure	Change made. See amendment to subsection 38(3) of the TR Rule which deems consent of a counterparty for all data required under the Rule.

Section Reference	Issue/Comment	Response
	by the trade repository to regulators under s. 37 or disclosure to the public under s. 39.	
	One commenter recommended that s. 38 expressly include the imposition of timely requirements of the trade repository to make data available to the transacting counterparties.	Change made. Subsection 38(1) of the TR Rule has been amended to require timely access to derivatives data by counterparties.
S. 39 – Data available to the Public	Many commenters were concerned that the requirement under subsection 39(3) to publicly provide data regarding the principal economic terms of a transaction does not go far enough to ensure confidentiality and anonymity of the derivatives data.	Change made. The fields required to be publically disseminated have been reduced. See "Required for Public Dissemination" in Appendix A.
	Two commenters suggested that the TR Rule specify that the trade repository must not publicly disseminate inter-affiliate transaction data.	Change made. See new subsection 39(6) which exempts transactions between affiliates from public reporting. We agree that reporting inter-affiliate transactions may skew pricing information and note that the United States also exempts public reporting of these types of transactions.
	Four commenters questioned how data regarding block trades would be made available to the public. They argued that the current time frame under subsection 39(3) is not enough time in certain circumstances for a party to hedge its position in the market.	No change. The TR Rule has not been amended to deal specifically with these block trades. Exemptions may be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule or any other applicable provision under securities or derivatives legislation.
S. 40 – Exemption	Three commenters pointed out that the term physical commodity transaction is not defined in the TR Rule and that physical commodity contracts are excluded from the definition of "derivative" under the Scope Rule. Further guidance was requested as to what types of physical commodity	Change made. See amendment to TR CP which clarifies that the provision applies to all un-exempted physical commodity transactions.

Section Reference	Issue/Comment	Response
	transactions this exemption applies to.	

3. List of Commenters

1. Alternative Investment Management Association
2. BC Hydro
3. BP Canada Energy Group ULC
4. Canadian Bankers Association
5. Canadian Electricity Association
6. Canadian Life and Health Insurance Association Inc.
7. Canadian Market Infrastructure Committee
8. Canadian Oil Sands Limited
9. Capital Power Corporation
10. Central 1 Credit Union
11. The Depository Trust & Clearing Corporation
12. Deutsche Bank AG, Canada Branch
13. Direct Energy Marketing Limited
14. Encana Corporation
15. Fidelity Investments Canada ULC
16. FIRMA Foreign Exchange Corp.
17. FortisBC Energy Inc.
18. Global Foreign Exchange Division
19. ICE Trade Vault, LLC
20. International Swaps and Derivatives Association, Inc.
21. Investment Industry Association of Canada
22. Just Energy Group Inc.
23. MarkitSERV LLC
24. Mouvement des caisses Desjardins
25. Natural Gas Exchange Inc.
26. Ontario Teachers' Pension Plan
27. Pension Investment Association of Canada

28. RBC Global Asset Management Inc.
29. SaskPower
30. Shell Energy North America (Canada) Inc./Shell Trading Canada
31. State Street Global Advisors, Ltd.
32. Stewart McKelvey
33. Stikeman Elliott LLP
34. Suncor Energy Inc.
35. TransAlta Energy Marketing Corp.

INCLUDES COMMENT LETTERS

Comments on Multilateral CSA Staff Notice 91-302

(For Comments to other Jurisdictions on
Rule 91-506 go to page 250)

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September 20, 2013

Alberta Securities Commission
British Columbia Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

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Dear Members of the CSA Derivatives Committee:

Re: Monetary Authority of Singapore ("MAS") Consultation Paper on Draft Regulations Pursuant to the Securities and Futures Act for Reporting of Derivatives Contracts ("MAS Consultation Paper")

This letter sets out the comments of BP Canada Energy Group ULC and its affiliates ("BP Canada") with respect to the MAS Consultation Paper on the regulation of over-the-counter ("OTC") derivatives.[1] This letter supplements our comments previously

[1] Monetary Authority of Singapore, *Consultation Paper on Draft Regulations Pursuant to the Securities and Futures Act for Reporting of Derivatives Contracts*, dated June 26, 2013, online at link: http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/AnnexReportingRegs.pdf

submitted to members of the Canadian Securities Administrators ("CSA") Derivatives Committee on the CSA Consultation Paper 91-302 – Updated Model Rules: Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting ("Updated Model Rules"), dated on September 6th, 2013.

BP Canada is appreciative of this opportunity to provide comments, and we commend the CSA for considering the proposed regulatory policies by other major foreign jurisdictions in its own regulation of OTC derivatives. BP Canada recommends that the CSA continue to consult market participants, and allow them to stay engaged in the process as rules continue to be developed by Canadian jurisdictions.

BP Canada agrees that appropriate reporting requirements are essential to the regulation of the OTC derivatives market; however, it also recognizes that not all OTC derivative asset classes pose systemic risk and some, such as commodity derivatives, and in particular energy derivatives, have unique characteristics. To recognize the differences between various derivative classes and the contribution that each class and counterparty may have to systemic risk; BP Canada recommends the adoption of two MAS policy proposals.

The first MAS proposal is the implementation of a *de minimis* threshold that would subject a non-financial specified person[2] to reporting requirements only where specified derivatives contracts traded or booked in Singapore exceed S$8 billion. BP Canada believes that regulators of OTC derivatives markets can best provide protection of the markets and participants by focusing on reporting requirements for certain key entities with significant enough presence in the market to create systemic risk. Limiting reporting requirements to such significant entities serves to create a more meaningful picture of market activity and potential systemic risk. BP Canada agrees that overly broad reporting requirements can impose an undue burden on smaller entities and could potentially supress market activity.

Second, BP Canada recommends the adoption of a phased-in reporting obligation by asset class and by the type of counterparty. As proposed by the MAS, as well as other jurisdictions with large OTC derivative markets such as the United States and Europe, interest rates and credit derivatives contracts are to be reported initially in the first phase of implementation, and other asset classes of derivatives contracts, including foreign exchange, equity and commodity contracts, are to be reported in phase II. Moreover, the MAS has recognized and customized its regulation to the unique characteristics of market participants and their aptitude to prepare for trade reporting. The MAS has recommended three categories of market participants: (i) banks, (ii) other financial entities, and (iii) non-financial specified person, *infra*. For specific timing of the proposed phased-in process, please see pages 6 and 7 of the MAS Consultation Paper.

To the extent that market registrants pose systemic risk, BP Canada agrees with the CSA that provincial market regulators should be able to supervise, regulate and enforce against market misconduct. However, BP Canada is of the view that effective regulation in these areas, including the reporting requirements and exemptions from registration and regulation, should contemplate the degree of systemic risk posed by both the asset

[2] "Specified person" is defined under section 124 of the *Securities and Futures (Amendment) Act 2012* and regulation 6 of the draft Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013, online at link: *http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2013/Consultation-Paper-on-Draft-Regulations-for-Reporting-of-Derivatives-Contracts.aspx*

class and the type of counterparty in OTC derivatives transactions. BP believes that the MAS has successfully captured this consideration within its proposed regulations, and recommends that the CSA consider the two above MAS policies.

In summary, BP Canada supports tailored, fit-for-purpose rules that ensure market transparency and regulatory certainty. We appreciate the balance that the CSA and MAS must strike between effective regulation and not hindering OTC derivative markets.

If you have any questions, or if we may be of further assistance, please contact the undersigned.

Respectfully submitted,

Krista Friesen
Partnerships and Regulatory Affairs Manager
Global Oil Canada
BP Canada Energy Group ULC

Cheryl Worthy
Vice President, Regulatory Affairs
BP Canada Energy Group ULC

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September 6, 2013

Sent via EMAIL

Ontario Securities Commission

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Secretary
Ontario Securities Commission
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Re: Ontario Securities Commission ("OSC" or the "Commission") Proposed Rule 91-506 Derivatives Product Determination and Companion Policy 91-506CP; and Proposed Rule 91-507 Trade Repositories and Derivatives Data Reporting and Companion Policy 91-507CP ("Updated Model Rules")

Dear Members of the OSC Derivatives Committee:

BP Canada Energy Group ULC and its affiliates ("BP Canada") are appreciative of this opportunity to provide comments on the aforementioned rules and companion policies, and would like to advise the OSC that its substantive comments on the revised Updated Model Rules have been captured in its letter to the Canadian Securities Administrators ("CSA") dated September 6, 2013, attached herein.

To enable a smooth transition and efficient implementation of the Updated Model Rules, BP Canada recommends to the OSC that the effective date for the proposed rules be concurrent with the implementation of similar rules in other Canadian jurisdictions, and that reasonable notice in advance of implementation be provided to market participants.

BP Canada respectfully requests that the Commission consider its comments as set forth in the attached comment letter to the CSA, and if any questions or concerns arise, or if we may be of further assistance, please do not hesitate to contact the undersigned.

Respectfully submitted,

Krista Friesen
Partnerships and Regulatory Affairs Manager
Global Oil Canada
BP Canada Energy Group ULC

A. A. Deakin for

Cheryl Worthy
Vice President, Regulatory Affairs
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September 6, 2013

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Re: Canadian Securities Administrators ("CSA" or "Committee") Consultation Paper 91-302 – Updated Model Rules: Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting ("Updated Model Rules")

Dear Members of the CSA Derivatives Committee:

This letter sets out the comments of BP Canada Energy Group ULC and its affiliates ("BP Canada") with respect to the CSA Updated Model Rules. Specifically, BP Canada provides comments on the CSA Derivatives: Product Determination rule ("Scope Rule"), the Trade Repositories and Derivatives Data Reporting rule ("TR Rule"), as well as the Model Explanatory Guidance as it relates specifically to the Scope Rule and the TR Rule ("Explanatory Guidance").

BP Canada is appreciative of this opportunity to provide comments on the aforementioned rules, and looks forward to continually engaging and cooperating with the regulators and market participants on future regulation related to Over-The-Counter ("OTC") derivatives markets.

In Canada, BP Canada buys and sells hydrocarbon production and requirements for the BP group of companies. It is a major purchaser, marketer and trader of Canadian natural gas and power, and is a major trader of crude oil and purchaser of Canadian crude oil for BP's refineries in the United States. As such, BP Canada participates in the Canadian OTC energy derivatives markets and manages risk and optimizes value across physical and financial OTC markets.

BP Canada commends the Committee for its detailed consideration of the public comments received in respect of CSA Consultation Paper 91-301 - Model Provincial Rules: *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* ("Rule 91-301"), and the resulting revisions and clarity offered within the Updated Model Rules. We also strongly support the CSA's view that instruments requiring physical delivery of an underlying commodity should be excluded from the requirements attaching to derivatives contracts, and appreciate the efforts this Committee has used to better capture the needs of industry participants transacting in physical commodities.

Nevertheless, BP Canada continues to be concerned that the exclusionary language of the Scope Rule and associated Explanatory Guidance has the potential to inadvertently capture physical transactions as derivatives - particularly physical commodity transactions within standardized industry contracts. As well, BP Canada wishes to express the need for the Updated Model Rules to explicitly consider and incorporate the principle of substituted compliance and consistency across Canadian and foreign jurisdictions. The certainty of reporting requirements, derivative classification and treatment of market participants across jurisdictions will encourage and foster access into the Canadian OTC derivatives market, as well as maintain existing market activities and liquidity.

BP Canada appreciates the revisions and additional clarification provided by the Committee within the Explanatory Guidance; however, it is still not clear as to the weight such supplementary material will be given by the regulators, and should be applied by market participants, when interpreting and implementing the Updated Model Rules. As such, BP Canada continues to seek clarification on the force and effect of the Explanatory Guidance.

To remedy the limitations of the Updated Model Rules and the uncertainties as to the role of the Explanatory Guidance, BP Canada proposes that:

(i) the Explanatory Guidance for the Scope Rule, as well as the Scope Rule itself, be amended to more precisely capture the various events of default defined within standardized industry contracts for physical commodities and the counterparties' options in dealing with such events of default;

(ii) the TR Rule include a provision that captures the CSA's recognition of substituted compliance by a market participant reporting to an equivalent foreign trade repository, and the adoption of globalized reporting standards by jurisdictional regulators; and

(iii) Explicit force and effect be provided to the Explanatory Guidance to allow for consistent interpretation and implementation by the local regulator(s), affected market participants, as well as other Canadian and foreign regulators.

In addition to the general comments above and for further clarity, BP Canada has provided more specific comments on the proposed Scope Rule and TR Rule below.

Scope Rule

Definition of Excluded Derivatives and Guidance

Section 2(d)(i) of the Scope Rule states that a physical commodity transaction is characterized as an *excluded derivative* if the counterparties intend to physically settle the transaction at the time of execution. The Explanatory Guidance clarifies that when determining whether counterparties meet the "intention" requirement of Section 2(d)(i), regulators may consider a provision allowing cash settlement triggered by a termination right that results from an event of default to be consistent with the required *intent* to physically deliver.

BP Canada suggests that while this language could be interpreted by industry participants to include standardized industry contracts for physical commodities within the *excluded derivative* category, greater clarity is required in the Explanatory Guidance to form this interpretation. Standardized contracts such as (but not restricted to) the Gas Electronic Data Interchange Base Contracts ("EDI") and North American Energy Standards Board Base Contract for the Purchase and Sale of Natural Gas ("NAESB") both contemplate a cash settlement in place of physical delivery where certain situations occur. For example, both types of contracts allow a counterparty to demand cash settlement for: non-payment of a monthly invoice; insolvency or bankruptcy; failure to provide and maintain Performance Assurance; or a default under any credit annex. BP Canada believes that the language of the Explanatory Guidance should capture these types of circumstances, which reflect the reality of commercial relationships between counterparties, and seeks clarity of this interpretation.

Moreover, the Explanatory Guidance pertaining to Section 2(d)(ii) of the Scope Rule does not clearly capture all of the instances in which a standardized physical energy contract could provide for cash settlement without negating an intent to deliver. The examples provided in the Explanatory Guidance are commonly items listed in physical industry standard force majeure clauses; as such, one might regard the exception as only applying in force majeure circumstances. Although there are some circumstances in which counterparties will cash settle a physical energy contract that has been frustrated by a force majeure, it is more often the case that a declaration of force majeure will relieve counterparties from contractual obligations and neither cash nor physical settlement occurs.

Therefore, BP Canada recommends that the Explanatory Guidance be amended to make clear that Canadian regulators will not consider the various circumstances allowing for cash settlement which are common to standardized industry contracts such as non-payment, insolvency, failure to provide performance assurance, or a default under a credit annex to indicate a negation of the counterparties intent to physically settle under that contract.

In addition, BP Canada requests that the Scope Rule itself be redrafted in Section 2(d)(ii) to incorporate the Committee's intention to allow the cash settlement of certain physical commodity transactions. As it currently stands, the language of Section 2(d)(ii) is narrow. Consistent with its prior comments to the CSA on Rule 91-301 dated February 4, 2013, BP Canada continues to advocate the following definition for a "physical commodity contract" within the Scope Rule in order to ensure that standardized industry physical commodity contracts are included in the derivatives exemption:

2(d) a contract or instrument for delivery of a commodity other than cash or a currency that,

(i) is intended by the counterparties to be settled by delivery of the commodity, and

(ii) does not allow for cash settlement in place of delivery except (A) upon events of default in accordance with the contractual terms or provisions agreed upon between the parties and where such cash settlement is not the ordinary method of settlement for such contracts, or (B) where all or part of the delivery is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates, or their agents.

Providing further clarity in the language and intention within Section 2(d) of the Scope Rule and the associated Explanatory Guidance will provide certainty and reduce confusion for market participants relying on standardized industry contracts for physical commodities, such as EDI and NAESB contracts. BP Canada cautions the CSA that such provisions for cash settlement within standardized contracts facilitates trading and where certainty as to the treatment of such contracts is not provided, this may discourage market participants from entering into, or maintaining, commercial activities within the Canadian OTC derivatives market.

BP Canada would also like to note that its concerns regarding restrictions on cash settlement are shared by others such as the International Swaps and Derivatives Association, Inc. ("ISDA") as will be evidenced in a forthcoming ISDA comment letter.

TR Rule

1. Reporting of Derivatives Transactions

BP continues to seek clarification from the Committee as to the timing and frequency of the required reporting, as well as the recognition of, and harmonization with, foreign reporting standards.

Inconsistencies continue to exist between the timing of reporting required within Section 33 of the TR Rule, directed towards general reporting requirements, and Section 26, directed towards reporting of pre-existing derivatives. For example, in circumstances where timestamps are not available for pre-existing transactions, Section 33 requirements would not be satisfied. This concern will also be highlighted by ISDA in its comment letter.

Further, BP Canada wishes to restate its comments made in its prior submissions to the CSA regarding Rule 91-301 on providing sufficient time to market participants to make necessary technological and systems modifications, as well as harmonizing reporting identifiers and data fields in accordance with international standards and practice. For example, further clarity is required within Section 28 of the TR Rule to incorporate the Explanatory Guidance note that the interpretation of the term "technologically practicable" will consider and respect differences between standards used in different industries and the differences in sophistication of various market participants. As well, BP Canada wishes to express the need for consistency between Canadian regulatory reporting requirements and the reporting requirements set out in the U.S. *Dodd-Frank Wall Street Reform and*

Consumer Protection Act[1] in order to foster commercial efficiency in the North American OTC derivatives market.

2. Data Dissemination and Access to Data

BP Canada seeks further clarification from the CSA within the TR Rule as to which jurisdictional repositories are considered equivalent to the local jurisdictions' reporting regime(s).

Clear rules and guidance on repository reporting requirements are critical for certainty and risk mitigation by market participants in the OTC derivatives market. In particular, clarity on which Canadian and foreign jurisdictional repositories are considered equivalent to the local jurisdiction reporting regime is necessary given the complexity of multiple Canadian and foreign jurisdictions and agencies that will have oversight responsibility for the OTC derivatives market. BP Canada suggests the CSA include a provision within the TR Rule that captures the principle of substituted compliance and establishes a process between Canadian and foreign jurisdictional regulators. This process should ensure transparency and facilitate access to trade data necessary for each regulator to fulfil its respective oversight objectives.

Section 39 of the TR Rule sets out the parameters for disclosures of data to the public. BP Canada is of the opinion that the CSA has addressed its concerns regarding public disclosure by revising the data fields in Appendix A to the Updated Model Rules required to be publically disseminated by market participants; however, BP Canada would like to caution the CSA that the need to preserve confidentiality and anonymity of the data being provided to and disseminated by the trade repository is of utmost priority.

Conclusion

We appreciate this opportunity to comment, and BP Canada respectfully requests that the CSA consider its comments set forth herein regarding the Updated Model Rules.

To enable a smooth transition and efficient implementation, BP Canada recommends that the effective date for the TR Rule be concurrent with the implementation of similar rules in other Canadian jurisdictions, and that reasonable notice in advance of implementation be provided to market participants.

If you have any questions, or if we may be of further assistance, please contact the undersigned.

Respectfully submitted,

for

Krista Friesen
Partnerships and Regulatory Affairs Manager
Global Oil Canada
BP Canada Energy Group ULC

[1] Pub.L.III-203, H.R. 4173, sec. 721(a)(47), online: U.S. Government Printing Office: http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf.

A. A. Derksen for

Cheryl Worthy
Vice President, Regulatory Affairs
BP Canada Energy Group ULC

Canadian Market Infrastructure Committee

To: The Addressees set out in Appendix A

September 6, 2013

Re: Multilateral CSA Staff Notice 91-302 Updated Model Rules – Derivatives Product Determination (the "Updated Model Scope Rule") and Trade Repositories and Derivatives Data Reporting (the "Updated Model TR Rule", and together with the Updated Model Scope Rule, the "Updated Model Rules")[1]; Proposed Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination (the "Proposed Manitoba Scope Rule") and Proposed Manitoba Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Manitoba TR Rule", and together with the Proposed Manitoba Scope Rule, the "Proposed Manitoba Rules")[2]; Proposed Ontario Securities Commission Rule 91-506 Derivatives: Product Determination (the "Proposed Ontario Scope Rule") and Proposed Ontario Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Ontario TR Rule", and together with the Proposed Ontario Scope Rule, the "Proposed Ontario Rules")[3]; Draft Regulation 91-506 respecting Derivatives Determination (the "Proposed Quebec Scope Regulation") and Draft Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting (the "Proposed Quebec TR Regulation", and together with the Proposed Quebec Scope Regulation, the "Draft Quebec Regulations")[4], in each case, under the Quebec *Derivatives Act* (collectively, the Draft Quebec Regulations, the Proposed Manitoba Rules and the Proposed Ontario Rules, being the "Proposed Provincial Model Rules")

INTRODUCTION

The Canadian Market Infrastructure Committee ("CMIC") welcomes the opportunity to comment on the Canadian Securities Administrators' ("CSA") Updated Model Rules and Proposed Provincial Model Rules, each dated June 6, 2013. While we specifically refer to the provisions of the Updated

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[1] Canadian Securities Administrators, Multilateral CSA Staff Notice 91-302 Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting (June 6, 2013). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[2] Manitoba Securities Commission, Proposed Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination and Proposed Manitoba Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting, MSC Notice 2013-21 (June 6, 2013). Available at: http://www.msc.gov.mb.ca/legal_docs/legislation/notices/91_506_91_507_notice_rfq.pdf.

[3] Ontario Securities Commission, Proposed Ontario Securities Commission Rule 91-506 Derivatives: Product Determination and Proposed Ontario Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting, 36 OSCB 5737 (June 6, 2013). Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20130606_91-506_91-507_rfc-derivatives.pdf.

[4] Autorité des marchés financiers, Draft Regulation 91-506 respecting Derivatives Determination and Draft Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting (June 6, 2013). Available at: http://www.lautorite.qc.ca/files/pdf/consultations/derives/septembre-2013/2013juin06-91-506-91-507-derives-cons--en.pdf.

Model Rules along with the related model explanatory guidance in this response letter, unless otherwise indicated, all of our comments apply equally to each of the Proposed Provincial Model Rules and related guidance.

CMIC was established in 2010, in response to a request from public authorities, to represent the consolidated views of certain Canadian market participants on proposed regulatory changes. The membership of CMIC consists of the following: Bank of America Merrill Lynch, Bank of Montreal, Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Deutsche Bank A.G., Canada Branch, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, OMERS Administration Corporation, Ontario Teachers' Pension Plan Board, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank.

CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian OTC derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, as well as both domestic and foreign owned banks operating in Canada. As it has in all of its submissions, this letter will reflect the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

OTC derivatives are an important product class used by both financial intermediaries and commercial end-users to manage risk and exposure. Systemic risk oversight of the OTC derivatives markets is an essential component of the long term financial stability and growth of Canadian financial markets and their participants.

CMIC appreciates the consultative approach being taken by the CSA in considering the proposed regime for derivatives product determination and data reporting. CMIC believes that this approach will lay the foundation for the development of a Canadian regulatory structure[5] that will satisfy Canada's G-20 commitments by addressing systemic risk concerns in OTC derivatives markets.

OVERVIEW

CMIC supports the regulatory progress that has been made internationally towards meeting the G-20 commitments and we encourage the CSA to continue to work closely with its global counterparts and other international bodies towards the common goal of meeting the G-20 commitments. In our response letters on prior CSA consultation papers[6], we emphasized the need for rules that are

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[5] References to "regulation" or "regulators" within this document will be considered to include market, prudential and systemic risk regulators.

[6] Response of CMIC dated September 9, 2011 to the consultation paper relating to OTC derivatives trade repositories. Available at:
http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20110909_91-402_cmic.pdf;
Response of CMIC dated January 25, 2012 to the consultation paper on surveillance and enforcement. Available at:
http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120125_91-403_cmic.pdf;
Response of CMIC dated April 10, 2012 to the consultation paper on segregation and portability in OTC derivatives clearing. Available at:
http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120410_91-404_cmic.pdf;
Response of CMIC dated June 15, 2012 to the consultation paper on end user exemptions from certain regulatory requirements. Available at:
http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120615_91-405_cmic.pdf;
Response of CMIC dated September 21, 2012 to the consultation paper on central clearing counterparties. Available at

aligned with global standards, except where dealing with a unique feature of the Canadian market. Canadian adoption, in a harmonized fashion, of standards and protocols developed by international bodies[7] will eliminate the risk of a Canadian framework that is not compatible with global standards. In particular, many CMIC members are currently reporting OTC derivatives transactions with US persons under the rules of the U.S. Commodity Futures Trading Commission ("CFTC") under Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank"). Using significant resources, Canadian market participants have developed operational systems and trade processes to satisfy the CFTC requirements. Adopting Canadian reporting requirements that are harmonized with the CFTC requirements will enable Canadian market participants to leverage existing systems. Furthermore such an approach will ensure that Canadian regulators receive derivatives data in a format that is consistent with other jurisdictions. The goal of collecting data that can be aggregated has been highlighted by the Financial Stability Board as being hampered by "jurisdictional differences in data elements required to be reported..."[8]

We are concerned with differences that continue to exist between the Updated Model TR Rule and the CFTC rules. Because of Canada's relative position in the global market, unless required because of particular features of the Canadian market, any requirements unique to Canada may impede Canadian market participants' access to global markets. It is for this reason only we feel the Canadian rules should be aligned as closely as possible with the US rules.

As described more fully below, we submit that the CSA's approach to the definition of "local counterparty" will place Canadian participants at a disadvantage. Notwithstanding the changes made to this definition it remains overly broad. It has extra-territorial implications that will likely result in a dual-reporting regime for certain non-Canadian entities with potentially inconsistent laws applicable to such entities.

The data field requirements under Appendix A of the Updated Model TR Rule contain a "Custodian" data field which is not required under the CFTC rules. This will place pressure on the existing reporting infrastructure by creating an operational burden for market participants to report data which exceeds what other regulators require, and what non-domestic dealers are currently set up to report. In CMIC's view, this additional cost far outweighs the minimal benefit received by adding the "Custodian" data field.

However, there are circumstances where the Canadian market requires a different approach. In our view, for public disclosure of trade information, it is more appropriate for Canada to align itself with markets similar in composition and size to Canada, such as Australia and Hong Kong. Accordingly, CMIC submits that it is more appropriate that public disclosure of trade information occur on a weekly

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http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120921_91-406_cmic.pdf; Response of CMIC dated February 4, 2013 to the model rules (the "Initial Model Rules") on product determination (the "Initial Model Scope Rule") and trade repositories and data reporting (the "Initial Model TR Rule"). Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_cmic.pdf; Response of CMIC dated June 17, 2013 to the consultation paper relating to registration of derivatives market participants. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130617_91-407_cmic_en.pdf.

[7] Inclusive of CPSS-IOSCO, ISDA, ODRF, ODSG. CMIC considers CPSS-IOSCO standards as the international standards for trade repository framework, ODRF (OTC Derivatives Regulators' Forum) the international standard for regulatory requirements, ODSG (OTC Derivatives Supervisors Group) standards as the international standard for implementation and IIGC (ISDA Industry Governance Committee) as the international standard for governance structure.

[8] FSB OTC Derivatives Market Reforms- Fifth Progress Report on Implementation (April 15, 2013) at page 16.

basis, which is the proposed time frame for such disclosure by market regulators in Australia and Hong Kong.

The most developed OTC derivatives reporting regulatory regime is currently in the U.S., but only with respect to the OTC derivatives over which the CFTC has exclusive jurisdiction. The rules relating to those derivatives under the jurisdiction of the United States Securities and Exchange Commission (the "SEC") are not yet finalized. CMIC recommends that, to the extent the US reporting rules have not been finalized, the Updated Model TR Rule contain a phased-in implementation. Trade reporting for a specific product should only be reported after final rules for that product have been implemented in the US.

Finally, CMIC is pleased that each of the Proposed Provincial Model Rules would appear to be substantively the same as the Updated Model Rules.

UPDATED MODEL RULE – DERIVATIVES: PRODUCT DETERMINATION

Intention to Physically Settle; Obligation Netting Agreements

CMIC appreciates and acknowledges the changes made to the explanatory guidance for the scope rule to confirm that payment obligation netting arrangements are permitted in respect of physically-settled transactions without disqualifying such transactions as excluded derivative transactions under the Updated Model Rules. However, there are still some statements in the explanatory guidance which are of concern, in particular, those relating to the way that the institutional foreign exchange ("FX") market operates. In the institutional FX market, deliverable FX spot transactions are entered into on a daily basis for settlement T+2. Prior to the settlement date of one or more spot FX transactions, each counterparty to such transactions will assess and re-evaluate its currency requirements and, if changed, may enter into one or more deliverable FX spot transactions to off-set, in whole or in part, the net currency positions in one or more currencies. In doing so, counterparties will rely upon payment obligation netting arrangements. This activity occurs daily and has been the basis on which the institutional FX market has operated for many years.

CMIC is very concerned about statements in the explanatory guidance that look to a counterparty's "course of conduct" or "intention" to determine whether a spot FX transaction is being "physically-settled". Specifically, it is CMIC's view that the entering into of such off-setting deliverable spot FX transactions described above (and in reliance upon payment obligation netting arrangements) should not be determinative of whether any prior transactions, or that off-setting transaction, is physically-settled. It should also not be determinative of whether a transaction is physically-settled even if the economic effect of entering into such off-setting transactions is that a counterparty may have, at the end of the day, one payment in a single currency. Such payment netting mechanic is a funding tool in order to settle obligations under transactions, allowing parties to reduce settlement risk. We note that such activity does <u>not</u>, in any way, (i) change the obligations under each individual deliverable spot FX transaction to net cash settle in a single currency, (ii) change the settlement date under each individual deliverable spot FX transaction (i.e. there is no postponement of the settlement date; each transaction settles and there is no unrealized profit/loss, which contrasts with a "rollover" of an FX transaction which is the common practice in the retail FX market where the settlement date remains "open", resulting in unrealized profit/loss), or (iii) cancel and replace original contracts with new contracts reflecting the net currency positions (which are commonly referred to as "book-outs" or "legal novation netting" or "trade compression"). Such obligations, legally speaking, remain gross obligations to deliver currency under each individual spot FX transaction. Payment netting is simply a funding tool which allows each multiple gross obligation to settle upon payment of the reduced amount of currency, thus reducing the value at risk.

CMIC's view is that the purpose or intention behind each deliverable spot FX transaction is irrelevant. If, in legal terms, a deliverable spot FX transaction is entered into for settlement in T+2, it should be excluded from the trade reporting requirements. As long as the parties do not amend the terms of the original transaction, it should continue to be excluded from trade reporting requirements, even if subsequent transactions are entered into which, together with all other outstanding transactions, may have the economic benefit of funding, on a particular day, in currencies and amounts that are different than the gross obligations under each deliverable spot FX transaction.

It is CMIC's view that all such deliverable spot FX transactions should qualify for the exclusion and, thus, would not need to be reported under the Updated Model TR Rule. Our suggested amendments to incorporate these points are set out below.

Drafting Comments:

[2nd paragraph under subheading, "Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(c)(i))"][9]

"Settlement by delivery of the currency referenced in the contract requires the currency contracted for to be delivered and not an equivalent amount in a different currency. For example, where a contract references Japanese Yen, such currency must be delivered in order for this exclusion to apply. We consider delivery to mean actual delivery of the original currency contracted for either in cash or through electronic funds transfer. In situations where settlement takes place through the delivery of an alternate currency or account notation without actual currency transfer, there is no settlement by delivery and therefore that the exclusion in paragraph 2(c) would not apply. For greater certainty, the netting of delivery obligations pursuant to a netting provision (as discussed below under "Intention requirement (subparagraph 2(c)(ii))"), whether on a bilateral basis or on a multilateral basis (such as settlements conducted using CLS Bank's foreign exchange payment netting platform) is not considered to be "an account notation without actual currency transfer"."

[last paragraph under the subheading "Intention requirement (subparagraph 2(c)(ii))"].[10] CMIC's view is that the following paragraph should be deleted from the explanatory guidance for the reasons stated above. However, if that approach is not accepted, we strongly believe that the explanatory guidance should clarify that the above practice would not constitute conduct which indicates an "intention not to settle by delivery".

"In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. Where a counterparty's conduct indicates an intention not to settle by delivery, the contract will not qualify for the exclusion in paragraph 2(c). For example, where it could be inferred from the conduct that counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency, the contract will not qualify for this exclusion. Similarly, a contract would not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency. However, the Committee intends that where a counterparty engages in the market practice of executing two or more separate and succeeding foreign exchange contracts which legally do not amend an existing foreign exchange contract, the net effect of which is to change the funding requirements of a counterparty, all such foreign exchange contracts would qualify for this exclusion."

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[9] Updated Model Rules, *supra* note 1 at 7; Proposed Manitoba Rules, *supra* note 2 at 4; Proposed Ontario Rules, *supra* note 3 at 5754; Draft Quebec Regulations, *supra* note 4 at 3.

[10] Updated Model Rules, *supra* note 1 at 8; Proposed Manitoba Rules, *supra* note 2 at 5; Proposed Ontario Rules, *supra* note 3 at 5755; Draft Quebec Regulations, *supra* note 4 at 4.

UPDATED MODEL RULE – TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Obligation to Report – definition of "local counterparty"

CMIC acknowledges that the definition of "local counterparty" under the Initial Model TR Rule has been amended to reduce its scope. However, in CMIC's view, the definition of "local counterparty" still has an extra-territorial reach that is inconsistent with the approach taken in global OTC derivatives markets.

Paragraph (c)

Under paragraph (c) of the definition of "local counterparty"[11], if a transaction is entered into by a non-Canadian affiliate of a Canadian party who is "responsible for the liabilities" of that non-Canadian affiliate, such non-Canadian affiliate will be responsible for ensuring all of its transactions are reported under section 25[12] of the Updated Model TR Rule, even if there is no connection with Canada (other than the fact that the parent company is Canadian). For example, an affiliate of a Canadian bank operating in China that is generally supported by its parent, and that enters into an interest rate swap with a Chinese party would be required to report all of its transactions to a designated trade repository pursuant to the Updated Model TR Rule. This approach is inconsistent with the approach adopted by regulators in larger OTC derivatives jurisdictions, such as by the CFTC under Dodd-Frank.

The CFTC definition of "US person" encompasses persons within the United States as well as persons that may be domiciled or operate outside the United States but whose swap activities nonetheless have a "direct and significant connection with activities in, or effect on, commerce of the United States". Under the Proposed Guidance[13], the term "U.S. person" includes an entity in which the direct or indirect owners thereof are "responsible for the liabilities" of such entity and one or more of such owners is a U.S. person. However, in the Final Cross-Border Guidance[14], the CFTC has expressly clarified that its interpretation of the phrase "responsible for the liabilities" would not extend to a non-U.S. affiliate guaranteed by a U.S. person, and is meant to extend to unlimited liability companies and similar types of entities in which a U.S. person has a direct or indirect majority ownership interest.[15] By contrast, the CFTC has also said in the Final Cross-Border Guidance that limited liability corporations or limited liability partnerships would not generally be covered under this particular branch of the definition of "U.S. person".[16] In CMIC's view, this is the approach that should be adopted for purposes of determining the meaning of "responsible for the liabilities of that affiliated party" in the Updated Model TR Rule and the applicable explanatory guidance should be clarified to that effect. Without such clarification, the CSA will be taking a position on extra-territoriality that is

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[11] Updated Model TR Rule, *supra* note 1, s 1(1); Proposed Manitoba TR Rule, *supra* note 2, s 1(1); Proposed Ontario TR Rule, *supra* note 3, s 1(1); Draft Quebec TR Regulation, *supra* note 4, s 1(1).

[12] Updated Model TR Rule, *supra* note 1, s 25; Proposed Manitoba TR Rule, *supra* note 2, s 25; Proposed Ontario TR Rule, *supra* note 3, s 25; Draft Quebec TR Regulation, *supra* note 4, s 25.

[13] See CFTC, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 F.R. 41214 (July 12, 2012) (the "Proposed Guidance"). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[14] See CFTC, Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 F.R. 45292 (July 26, 2013) (the "Final Cross-Border Guidance"). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf.

[15] *Ibid* at 45312.

[16] *Ibid*. The Final Cross-Border Guidance expressly recognizes the principle of international comity, and that the relevant foreign jurisdiction has a strong supervisory interest in regulating the activities of that foreign entity.

more intrusive and far-reaching, and is more likely to cause conflicts, than the approach taken by the CFTC. Given the extent to which the Financial Stability Board has indicated its concern over inconsistencies or duplicative regulatory requirements between national approaches to the implementation of G20 requirements,[17] CMIC submits that the CSA should remove such extra-territorial features in its proposed rule which could lead to inconsistencies and duplicative regulatory requirements.

Paragraph (b)

Under paragraph (b) of the definition of "local counterparty", any counterparty that is "subject to" regulations providing that a person trading in derivatives must be registered is considered a "local counterparty". CMIC submits that this wording is ambiguous and may result in unnecessary dual-reporting. In particular, it would appear that even if a party is exempt from any registration requirements under provincial law, it would still be "subject to" such regulations and thus be included within the definition of "local counterparty". For example, a foreign dealer may be exempt from registration under applicable provincial law because it is subject to comparable regulations in its "home" jurisdiction, but based on the current wording of paragraph (b) of the definition of "local counterparty", such foreign dealer would have a duty to report trades under both the Canadian rules and the rules of its home jurisdiction.

Substituted Compliance

In our response letter on the Initial Model Rules, CMIC suggested that substituted compliance should be expressly addressed with the explicit result that the reporting of trades under approved designated non-Canadian regimes should satisfy the reporting requirements under the Initial Model TR Rule. The CSA has responded[18] that such substitute compliance will be addressed by providing exemptions on a case-by-case basis from the reporting requirements under the Updated Model Rules. In CMIC's view, this approach is not practical and, since substitute compliance is not counterparty specific but would apply to all parties reporting under such non-Canadian regime, no purpose is served by doing this on a case-by-case basis. The case-by-case approach does not take into account the fact that the vast majority of OTC derivatives market participants will need to comply with either Dodd-Frank or the *European Market Infrastructure Regulation* ("EMIR")[19]. CMIC strongly believes that the Updated Model TR Rule should expressly provide that a counterparty is exempt from the requirements under the Updated Model TR Rule if such counterparty complies with "recognized" data reporting requirements of another jurisdiction and if such counterparty submits a letter to the applicable securities regulator stating that it is relying upon such exemption. From time to time, the relevant securities regulator would publish a list of such "recognized" data reporting requirements. For example, this published list could recognize the swap data repository reporting rules of the CFTC as set out under Dodd-Frank. CMIC submits that the explanatory guidance should clarify that the securities regulator will, from time to time, examine the data reporting rules of other jurisdictions, whether at the instigation of the securities regulator or at the request of a market participant, and determine whether or not compliance with such rules will substantially satisfy the requirements under the Updated Model Rules. If the answer is yes, such data reporting requirements rules will be deemed to be "recognized" by the securities regulator and added to the list. Such an approach will

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[17] See FSB, OTC Derivatives Market Reforms: Fifth Progress Report on Implementation (April 15, 2013) at 45. Available at: http://www.financialstabilityboard.org/publications/r_130415.pdf.

[18] Updated Model Rules, *supra* note 1 at 56.

[19] See Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (July 4, 2012). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF.

reduce the administrative burden on the part of each securities regulator by not having to process exemptions from each market participant and will ensure a level playing field for all market participants.[20]

Trade Repository Initial Filing and Designation

The CSA has indicated[21] that a system of reciprocity or recognition which allows for a trade repository that is designated in any province to be automatically deemed designated in all provinces is outside the scope of the Updated Model Rules. CMIC continues to support the implementation of such a passport system. As the Canadian OTC derivatives market represents only approximately 3% of the global market,[22] in order to remain competitive, care should be taken to ensure that Canadian regulations do not present unnecessary obstacles for parties (whether trade counterparties or trade repositories) to be able to deal with Canadian market participants. Trade repositories seeking to work with Canadian market participants will need to be designated under the rules or regulations of all Canadian provinces and territories, thus requiring them to deal with potentially 13 different regulators. This requirement alone may constitute enough of an administrative burden for some trade repositories to decide not to do business with Canadian market participants. Adopting a process that is as streamlined and efficient as possible would clearly mitigate this risk.

Confirmation of Data and Information

Section 23[23] of the Updated Model TR Rule requires that a designated trade repository must establish written policies and procedures to confirm with each counterparty that is a participant that reported derivatives data is correct. As indicated in our prior submissions, CMIC continues to support the position that if trade information is received by the trade repository from a clearing agency or a swap execution facility ("SEF"), there should not be a positive requirement on the trade repository to confirm the accuracy of the reported data with both counterparties. Removing this requirement in such circumstances would produce a result that is consistent with Dodd-Frank.[24] Under Dodd-Frank, communication need not be direct and affirmative where the trade repository has formed a reasonable belief that the data is accurate, the data or accompanying information reflects that both counterparties agreed to the data and the counterparties were provided with a 48-hour correction period. However, under Dodd-Frank, the trade repository must affirmatively communicate with both parties to the transaction when creation data is submitted directly by a swap counterparty. For swap continuation data, a trade repository has confirmed the accuracy of such data for Dodd-Frank purposes if the trade repository has notified both counterparties of the data that was submitted and provided both counterparties with a 48-hour correction period, after which a counterparty is assumed to have

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[20] If such an exemption is not provided in the Updated Model Rules, the applicable securities regulator may not be able to efficiently grant relief as it may be prohibited from granting an order of general application. See, for example, section 143.11 of the *Ontario Securities Act*.

[21] Updated Model Rules, *supra* note 1 at 56.

[22] Based on published unaudited financial statements for the second quarter of fiscal 2013 for the 6 largest Canadian banks and derivatives market statistics for end-December 2012 published by The Bank for International Settlements. This figure is an approximation only and has not been adjusted to reflect double-counting or timing issues.

[23] Updated Model TR Rule, *supra* note 1, s 23; Proposed Manitoba TR Rule, *supra* note 2, s 23; Proposed Ontario TR Rule, *supra* note 3, s 23; Draft Quebec TR Regulation, *supra* note 4, s 23.

[24] See CFTC, Final Rule, Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 F.R. 54,538 (September 1, 2011) at 54,579. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-20817a.pdf ("SDR Registration Rule").

acknowledged the accuracy of the data. CMIC supports this approach used under Dodd-Frank and recommends that the Updated Model TR Rule incorporate this Dodd-Frank model.

Duty to Report; Reporting Counterparty

Subsection 27(1)

CMIC welcomes the CSA's amendment to subsection 27(1)[25] of the Updated Model TR Rule, which introduces a hierarchy of counterparty types for the purposes of determining reporting obligations. As suggested in our prior submission, CMIC supports the hierarchical approach of determining reporting obligations, which is consistent with Dodd-Frank[26] and other international regimes. While CMIC believes that subsection 27(1) of the Updated Model TR Rule is an improvement over the Initial Model TR Rule, it remains concerned that the CSA's proposed hierarchy does not sufficiently recognize counterparty types. In particular, CMIC has reservations about the omission of SEFs/designated contract markets ("DCMs") from the CSA's proposed hierarchy. SEFs and DCMs figure prominently in the Dodd-Frank reporting regime.

One of the animating principles behind the Dodd-Frank reporting hierarchy is to ensure that reporting is conducted "by the registered entity or counterparty having the easiest, fastest and cheapest access to the data in question, and most likely to have automated systems suitable for reporting."[27] Consistent with this principle, the CFTC has determined that a SEF/DCM should be designated as the reporting counterparty wherever a swap is executed over the facilities of a SEF/DCM.[28] Under Dodd-Frank, SEFs/DCMs are responsible for reporting certain swap creation data immediately after the execution of a transaction, including all of the primary economic terms of that transaction.[29] The CFTC noted that SEFs/DCMs would be well positioned to report such primary economic terms, given that the contract certification process associated with execution over a SEF/DCM would define many of these terms.[30] Separately, the CFTC recognized a number of additional benefits to making a SEF/DCM the reporting counterparty, including utilization of the technology of the execution platform, increased speed of reporting (and by extension, increased transparency), and the ability for "straight-through" processing.[31]

CMIC agrees with these views and submits that the SEF/DCM be the reporting counterparty. Although a reporting counterparty can delegate its reporting obligations under subsection 27(4)[32], including to a SEF/DCM, it is CMIC's view that if a trade is executed pursuant to the facilities of a SEF/DCM, the SEF/DCM should exclusively have the reporting obligations, just as in the U.S. Accordingly, CMIC submits that subsection 27(1)(a) of the Updated Model TR Rule should expressly include a SEF/DCM as the reporting counterparty. Further, it can be anticipated that SEFs will play an important role in the Canadian OTC derivative market and the CSA should give serious

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[25] Updated Model TR Rule, *supra* note 1, s 27(1); Proposed Manitoba TR Rule, *supra* note 2, s 27(1); Proposed Ontario TR Rule, *supra* note 3, s 27(1); Draft Quebec TR Regulation, *supra* note 4, s 27(1).

[26] See CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 17 C.F.R. 45 (January 13, 2012). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33199a.pdf.

[27] *Ibid* at 2138.

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid* at 2142.

[31] See CFTC, Final Rlue, Real-Time Public Reporting of Swpa Transaction Data, 17 C.F.R. Part 43 (June 27, 2012) at 1198. Available at: http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/ssLINK/2012-15481a.

[32] Updated Model TR Rule, *supra* note 1, s 27(4); Proposed Manitoba TR Rule, *supra* note 2, s 27(4); Proposed Ontario TR Rule, *supra* note 3, s 27(4); Draft Quebec TR Regulation, *supra* note 4, s 27(4).

consideration to formulating an appropriate regulatory regime relating to SEFs, as has been done under Dodd-Frank.

Subsection 27(2)

CMIC continues to have reservations regarding the responsibilities of local counterparties under subsection 27(2)[33] of the Updated Model TR Rule, particularly as it relates to end-user local counterparties. If a reporting counterparty (as determined under subsection 27(1)(a) (a central clearing agency) or subsection 27(1)(b) (a dealer)) fails to comply with the reporting obligations under the Updated Model TR Rule, end-user local counterparties are required to act as the reporting counterparty. End-user local counterparties do not, and are not expected to, have the infrastructure to perform the reporting counterparty's obligations. In addition, such end-user local counterparties will have serious practical challenges in monitoring a foreign counterparty's compliance with reporting obligations under the Updated Model TR Rule.

CMIC submits that subsection 27(2) should be removed entirely or, in the alternative, amended such that the local counterparty is not responsible in the event that a central clearing agency fails to comply with its reporting obligations. As mentioned above, CMIC is of the view that where parties to a transaction have agreed to clear such transaction using a CCP, the CCP should exclusively have the reporting obligations, and by extension, any liabilities associated with a default in those obligations. If part of the CSA's motivation for making a local counterparty liable in these circumstances is to ensure that local securities regulators are able to assert jurisdiction over the reporting counterparty, such an approach is unnecessary. Where the reporting counterparty is a foreign central clearing agency, that foreign central clearing agency will need to have sought and obtained approval or designation by a local Canadian securities regulator under the relevant province's Securities Act (or Derivatives Act). Thus, such entities will have submitted and become subject to the jurisdiction of such regulator. As a result, local regulators will have a very real basis for asserting jurisdiction over these entities, and for monitoring and sanctioning their conduct.

Drafting comment: CMIC submits that subsection 27(2) should be removed entirely or, in the alternative, amended to read:

> Despite any other provision in this Rule, if the reporting counterparty as determined under subsection (1) (i) is not a clearing agency, (ii) is not a local counterparty and (iii) that counterparty does not comply with the reporting obligations of a local counterparty under this Rule, the local counterparty must act as the reporting counterparty.

Drafting comments: In the explanatory guidance for the Updated Model TR Rule, we suggest revising subsection 27(1), (2) and (4)[34] as follows:

> (1) ~~Under paragraphs 27(1)(d), if~~If the counterparties are unable to ~~identify~~agree who should report the transaction under paragraph 27(1)(c), then under paragraph 27(1)(d), both counterparties must act as reporting counterparty. However, it is the Committee's view that one counterparty to every transaction should accept the reporting obligation to avoid duplicative reporting.
>
> (2) Subsection 27(2) applies to situations where the reporting counterparty, as determined under subsection 27(1), is not a local counterparty. In situations where a non-local reporting counterparty

[33] Updated Model TR Rule, *supra* note 1, s 27(2); Proposed Manitoba TR Rule, *supra* note 2, s 27(2); Proposed Ontario TR Rule, *supra* note 3, s 27(2); Draft Quebec TR Regulation, *supra* note 4, s 27(2).

[34] Updated Model Rules, *supra* note 1 at 49; Proposed Manitoba Rules, *supra* note 2 at 18; Proposed Ontario Rules, *supra* note 3 at 5783-84; Draft Quebec Regulations, *supra* note 4 at 14-15.

does not report a transaction or otherwise fails to fulfil the local ~~counterparties~~counterparty's reporting duties~~.~~ under section 25, the local counterparty must act as the reporting counterparty. The Committee is of the view that non-local counterparties that are dealers or clearing agencies should assume the reporting obligation for non-dealer counterparties. However, to the extent that non-local counterparties ~~are not subject to~~, other than a clearing agency **[designated/registered]** under **[the applicable local securities legislation]**, fail to fulfil the local counterparty's reporting ~~obligation under the Model TR Rule~~duties, it is necessary to impose the ultimate reporting obligation on the local counterparty.

(4) Subsection 27(4) permits the delegation of all reporting obligations of a reporting counterparty. This includes reporting of initial creation data, life-cycle data and valuation data. For example, some or all of the reporting obligations may be delegated to a third-party service provider. However, ~~the local~~subject to subsection 27(2), the reporting counterparty remains responsible for ensuring that the derivatives data is accurate and reported within the timeframes required under the Model TR Rule.

Unique Transaction Identifiers (UTI)

Under subsection 31(2), a trade repository can incorporate a UTI previously assigned to the transaction. It is CMIC's view that where a transaction has been reported with a "unique swap identifier", the rules should provide that the UTI will be that "unique swap identifier".

Reporting of Valuation Data

Subsection 35(1)[35] of the Updated Model TR Rule provides that, if a transaction is cleared, both the clearing agency and the local counterparty must report valuation data. Subsection 35(2)[36] provides that if a transaction is not cleared, valuation data must be provided daily by a dealer and quarterly for all non-dealer counterparties. As mentioned above, end-user local counterparties do not have the infrastructure to report derivatives data and in some cases, may not have the expertise to generate valuation data. In CMIC's view, only the reporting party identified by the hierarchy set out under subsection 27(1) (as augmented by our above comments regarding the hierarchy) should have the obligation to report valuation data. Such reporting party will then have the obligation to report valuation data within the time frame set out in subsections 35(1) and (2).

Drafting comments: To incorporate the above changes, CMIC recommends that subsections 35(1) and (2) be amended as follows:

(1) For a transaction that is cleared, valuation data must be reported to the designated trade repository daily by ~~both~~ the clearing agency ~~and the local counterparty~~ using industry accepted valuation standards and relevant closing market data from the previous business day.

(2) Valuation data for a transaction that is not cleared must be reported to the designated trade repository

(a) daily using industry accepted valuation standards and relevant closing market data from the previous business day by each reporting~~local~~ counterparty that is a dealer, and

[35] Updated Model TR Rule, *supra* note 1, s 35(1); Proposed Manitoba TR Rule, *supra* note 2, s 35(1); Proposed Ontario TR Rule, *supra* note 3, s 35(1); Draft Quebec TR Regulation, *supra* note 4, s 35(1).

[36] Updated Model TR Rule, *supra* note 1, s 35(2); Proposed Manitoba TR Rule, *supra* note 2, s 35(2); Proposed Ontario TR Rule, *supra* note 3, s 35(2); Draft Quebec TR Regulation, *supra* note 4, s 35(2).

(b) at the end of each calendar quarter for all reporting~~local~~ counterparties that are not dealers.

Data Available to Public

Timing of Public Dissemination of Data

Unlike Dodd-Frank, the CSA's Updated Model TR Rule does not explicitly contemplate that transactions be publicly reported on an immediate or real-time basis. However, while the rule does not require real-time public reporting, subsection 39(3)[37] provides that such public dissemination of information must be made available "not later than" one or two days after execution, depending on whether one of the counterparties to the transaction is a dealer. Therefore, a trade repository could cause data to be reported to the public *sooner* than this two-day deadline, for example, on a real-time or near real-time basis pursuant to requirements under Dodd-Frank, and still comply with subsection 39(3) of the Updated Model TR Rule.

As indicated in its response letter on the Initial Model Rules, CMIC strongly believes that there should be a delay in the public dissemination of transaction level information. In CMIC's view, the regulatory objective of enhanced post-trade transparency does not necessarily require that transactions be reported to the public on a real-time basis. While the CFTC and SEC have decided that real-time public reporting is an appropriate regulatory measure for the U.S. marketplace, other regulators have reached different decisions with respect to their local markets. The Australian Securities & Investment Commission ("ASIC"), for example, recently informed market participants that it would not require trade repositories to report to the public on a real-time basis.[38] ASIC stated that in light of the purpose of the reporting obligation, the practicalities of reporting on a shorter timeframe, and the equivalence of the Australian regime with other jurisdictions, it was more appropriate that aggregate statistical data be provided to the public on a weekly basis.[39] Regulators in Hong Kong[40] have formed similar conclusions. In addition, in the European Union, EMIR requires the weekly publication of derivatives data by trade repositories.[41] CMIC submits that the decisions of these foreign regulators may provide a useful template for the CSA's rulemaking, given that the derivatives markets of Australia and Hong Kong are highly comparable to the Canadian market in terms of size, product and participant composition. As such, CMIC submits that subsection 39(3) should be amended to provide that public dissemination by a trade repository of transaction level data occur no sooner than one week after the data is received from the reporting counterparty. Alternatively, CMIC submits that (i) subsection 39(3) should be amended to provide that public dissemination by a trade repository occur only in respect of *aggregated* data no sooner than the one or two day time frame, as applicable, and (ii) there should be a one year delay in the public dissemination of *transaction level* data in order to

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[37] Updated Model TR Rule, *supra* note 1, s 39(3); Proposed Manitoba TR Rule, *supra* note 2, s 39(3); Proposed Ontario TR Rule, *supra* note 3, s 39(3); Draft Quebec TR Regulation, *supra* note 4, s 39(3).

[38] See ASIC, Consultation Paper 205, Derivative Transaction Reporting (March, 2013) at 17. Available at: http://www.financialstabilityboard.org/publications/r_130415.pdf.

[39] *Ibid.*

[40] See HKMA-SFC, Joint consultation conclusions on the proposed regulatory regime for the over-the-counter derivatives market in Hong Kong (July, 2012) at 26, 28. Available at: http://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2012/20120711e3a34.pdf.

[41] See Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data (February 23, 2013), Article 1(2). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0033:0036:EN:PDF.

allow the CSA time to consult with market participants and study data so that block trade rules and the risk of reverse engineering of trades can be assessed. See below for further discussion relating to block trade rules and the ability to reverse engineer trades.

Block Trade Rules

If the foregoing recommendation for weekly dissemination to the public of transaction level data is not adopted, CMIC submits that it is necessary that the Updated Model TR Rule provide for delays in disclosure of large notional or "block" transactions. As suggested in CMIC's response letter to the Initial Model Rules, disclosure of block trades on an immediate or real-time basis may negatively impact market function, by impairing the ability of a counterparty to hedge its exposure to a transaction.[42] A number of studies have demonstrated that reduced ability to hedge may have negative effects on the derivatives marketplace, including decreased liquidity, reduced ability to trade, and increased costs for end users.[43] In order to avoid these outcomes, CMIC submits that it is necessary for the CSA to adopt rules providing for delays in disclosure, comparable to those found under the Dodd-Frank reporting regime. Under Dodd-Frank, counterparties to transactions with notional values above the minimum block sizes set by the CFTC will be permitted delays in reporting their transactions to the public. The length of the reporting delays will vary depending on the type of counterparty and whether or not the transaction is subject to clearing requirements. For transactions that are subject to mandatory clearing and involve at least one counterparty that is a dealer, for example, the CFTC rules ultimately contemplate a reporting delay of 15 minutes.[44] Careful study of the Canadian market will be necessary to determine what are appropriate minimum block sizes and delay periods for Canadian market participants, as pointed out in CMIC's earlier submission.

While the CSA has indicated that it anticipates providing relief from the public reporting requirements under the discretionary exemption power in section 41,[45] CMIC submits that this is not a workable solution when considering the number of market participants and transactions that may potentially be subject to relief. Requiring market participants to file requests for relief on a routine basis would not only place a considerable burden on those participants in terms of time and money, it would place great strains on the administrative efficiency of local securities regulators. In addition, it is difficult to conceive how a discretionary exemption could work in the context of reporting obligations that may potentially be real-time, as discussed above. This means that market participants may face operational challenges in complying with the obligation to report while simultaneously seeking an exemption.

Content of Data to be disclosed publicly

CMIC supports the goal of post-trade transparency. However, in CMIC's view, in a relatively small OTC derivatives market such as Canada, with only a small number of sell-side market participants, public disclosure of aggregate data on open positions, transaction volumes, number of transactions and average prices will create an ability to employ reverse-engineering trading strategies and, through a reverse-engineering analysis of such trade data, may cause what is tantamount to inadvertent

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[42] See, for example, ISDA, Block trade reporting for over-the-counter markets (January 11, 2011) at 4. Available at: http://www.isda.org/speeches/pdf/block-trade-reporting.pdf.

[43] *Ibid.*

[44] See CFTC, Final Rule, Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 17 C.F.R. Part 43 (May 31, 2013). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-12133a.pdf.

[45] Updated Model TR Rule, *supra* note 1, s 41; Proposed Manitoba TR Rule, *supra* note 2, s 41; Proposed Ontario TR Rule, *supra* note 3, s 41; *Derivatives Act*, RSQ, c I-14.01, s 86.

disclosure of confidential information. The Canadian market is, in relative terms, quite small. CMIC would be supportive of such public disclosure of information only if the trade reporting rules preserve the anonymity of market participants and ensure there is no detrimental impact on market liquidity or function. Confidential information can be preserved and not disclosed inadvertently by limiting the type of information to be disclosed publicly under subsection 39(2)[46] of the Updated Model TR Rule. According to the CPSS-IOSCO Report on OTC Derivatives Data Reporting and Aggregation Requirements, the nature of data disclosed should "take due regard of concerns about revealing individual firm positions or providing the public with sufficient information to indirectly infer those positions".[47] Given the volume in the Canadian market and the small number of market participants, CMIC submits that it will be easy to identify the counterparties to certain transactions if aggregate data by (i) geographic location and (ii) type of counterparty is required to be reported. CMIC therefore submits that these requirements should be removed from subsection 39(2) of the TR Rule. Disclosure of this type of information is not a requirement under Dodd-Frank.

Data Available to Counterparties

The members of CMIC continue to have concerns over conflicts between the Updated Model TR Rule and foreign laws that prohibit disclosure of certain information. At least two types of foreign laws may potentially conflict with the Updated Model TR Rule: (1) privacy laws, which typically prevent the disclosure of information about a natural person or entity; and (2) blocking statutes (including secrecy laws), which may prevent the disclosure of information regarding entities in the jurisdictions to third parties and or foreign governments.[48] Although privacy laws may often be overridden through contractual mechanisms such as consent, the consent of a counterparty may not be sufficient to override the effect of a blocking statute.[49] In at least some cases, then, derivatives market participants may find themselves in the unfortunate position of being subject to two legal obligations that are incompatible: complying with one will violate the other, and vice versa. CMIC submits that it is neither fair nor reasonable to place market participants in a position of having to choose which set of rules to comply with, thus exposing market participants to potential liabilities that could include both civil and criminal penalties.[50]

While issues around conflicts between reporting laws and foreign privacy or blocking laws are being explored at an international level, there has been relatively little progress to date in reaching a consensus regulatory position globally. As the Financial Stability Board notes in its most recent progress report on derivatives market reforms, responses to the issue are still at "an early stage" with "few...regulatory solutions...in force"[51]. Given the prevailing state of uncertainty and the lack of international consensus on an appropriate regulatory response, CMIC would like to reiterate its earlier recommendation that the CSA provide limited relief from reporting obligations in these types of conflict-of-law situations. Although the CSA has suggested that conflict-of-law issues may be

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[46] Updated Model TR Rule, *supra* note 1, s 39(2); Proposed Manitoba TR Rule, *supra* note 2, s 39(2); Proposed Ontario TR Rule, *supra* note 3, s 39(2); Draft Quebec TR Regulation, *supra* note 4, s 39(2).

[47] See CPSS-IOSCO, Report on OTC Derivatives Data Reporting and Aggregation Requirements (January, 2012) at 22. Available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf.

[48] *Supra* note 17 at 48.

[49] *Ibid.*

[50] See ISDA, Comment Letter on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (August 27, 2012) at 3. Available at: http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww2.isda.org%2Fattachment%2FNDc1Mw%3D%3D%2FComment%2520Letter%2520-%2520CFTC%2520Reporting%2520Obligations%2520FINAL%2520082712.pdf&ei=tWsCUsnkA_KgyAH6l4DoAQ&usg=AFQjCNG3ZXVs8Od2rs7sX6QcpexkPJy3Aw&sig2=B86rivMVEacfoYVjcYHbQw&bvm=bv.50310824,d.aWc.

[51] *Supra* note 17 at 49.

adequately addressed through the discretionary exemption under section 41, CMIC submits that this is not a workable solution, given the large number of market participants that may potentially need to avail themselves of such an exemption.

Rather, in cases of conflict between reporting laws and foreign privacy or blocking laws, CMIC submits that the CSA should allow the reporting counterparty to withhold disclosure of certain identity information without having to seek the explicit approval of the regulator. Under this approach, market participants would continue to report all information in relation to a derivatives transaction except for identity information, serving to protect the privacy interests of counterparties, but also to substantially promote the regulatory objective of enhanced transparency. In addition, CMIC requests that the CSA continue to monitor and participate in the implementation of solutions on the international stage, and that it coordinate with international regulators on the development of regulatory, legislative and other changes that will protect market participants from unnecessarily being exposed to liabilities as a result of conflicting laws.

Implementation Timelines

As mentioned above, to the extent the Updated Model Rules differ from the requirements under Dodd-Frank, market participants will need to amend their operational systems and procedures in order to comply with the Updated Model Rules. In particular, due to the breadth of the local counterparty definition currently in the Updated Model TR Rule, this will mean capturing entities that are not currently required to report transactions under Dodd-Frank or any other jurisdiction's reporting regime. In addition to the "Custodian" data field difference between the Updated Model TR Rule and the data fields under Dodd-Frank, the trade reporting rules under Dodd-Frank have been finalized only for asset classes falling under the CFTC's jurisdiction. Trade reporting rules for asset classes falling under the jurisdiction of the SEC under Dodd-Frank have not been finalized; however, such asset classes are included as a "derivative" under the Updated Model Rules. As a result, even though some market participants are already reporting under Dodd-Frank, their systems will need to be amended to cover both the additional "Custodian" data field and these additional asset classes. As mentioned in CMIC's response letter on the Initial Model Rules, this will mean adding a patch to an existing reporting system in order to add or remove data fields to comply with Canadian reporting requirements. Even where a "patch" is sufficient to comply with the Updated Model Rules, this is not a simple task, as many counterparties have multiple trade capture systems depending on the specific product type, asset class or jurisdiction involved. Once a patch has been created, it needs to be tested, which involves running parallel systems. As well, many such systems are provided by third-party vendors with the result that the timing of completion of any changes is not within the control of the local counterparty. CMIC would therefore recommend that the effective date for reporting such additional data field and additional asset classes be deferred for a period of at least one year following the date on which data is otherwise required to be reported under section 42 of the Updated Model TR Rule. As mentioned above, due to the small size of the Canadian OTC derivatives market relative to the global OTC derivatives market, CMIC submits that Canadian regulators should not be setting precedent in this area. Providing such a delay in the implementation date for such additional data field and asset classes allows Canadian regulators to examine the final trade reporting rules of the SEC and assess the extent to which Canadian rules are harmonized with the SEC's rules.

Exemptions

CMIC urges the CSA to reconsider the $500,000 exemption under subsection 40(b)[52] of the Updated Model TR Rule. As mentioned in our previous response letter, we submit that the $500,000

[52] Updated Model TR Rule, *supra* note 1, s 40(b); Proposed Manitoba TR Rule, *supra* note 2, s 40(b); Proposed Ontario TR Rule, *supra* note 3, s 40(b); Draft Quebec TR Regulation, *supra* note 4, s 40(b).

exemption with respect to aggregate notional value is too low. Small businesses may be inadvertently caught by these rules and would be adversely affected. Under subsection 27(2), a local counterparty that completes a trade with a dealer that is not a local counterparty will ultimately have responsibility for reporting if the non-local counterparty does not complete the reporting. This could result in an onerous burden on any buy-side participant, but in particular, on smaller market participants. CMIC submits that any final determination of this threshold amount should be determined after the reporting regime has been implemented and the data studied for a period of 3 years. In the absence of an understanding as to why the exemption is cast as applying only to physical commodity transactions, CMIC submits that the threshold, once determined, should apply to all types of OTC derivatives.

Data Fields

In addition to the comments relating to the harmonization of data fields with Dodd-Frank, CMIC has the following comments with respect to specific data fields set out in Appendix A of the Updated Model TR Rule:

(i) Electronic Trading Venue Identifier. In Appendix A, the "Electronic Trading Venue Identifier" data field is selected as applicable with respect to pre-existing transactions, however the previous data field ("Electronic Trading Venue") is not applicable, which would seem to be inappropriate. The "Electronic Trading Venue Identifier" should therefore be changed to not being applicable for pre-existing transactions.

(ii) Execution Timestamp. As this is defined as being the time executed on a trading venue, this implies that the "Execution Timestamp" is not applicable to transactions not executed on a trading venue. CMIC would like this confirmed by the CSA. Also, it is not always the case that this information is available when a counterparty is backloading pre-existing trades. Accordingly, it is CMIC's view that this should be changed to "No" for pre-existing trades, or indicate that this should be included for pre-existing trades only when available.

(iii) Confirmation Timestamp. This is defined as the time the transaction was confirmed by both parties. However, in reality, it will be the time that the Reporting Party has reported as when confirmed, which could be different from the timestamp of the other party.

CONCLUSION

CMIC believes that continued engagement with the CSA is fundamental to the development of a regulatory framework that meets the G20 commitments and achieves the intended public policy purposes. Thoughtful inclusion by regulators of the points raised throughout this letter will meaningfully contribute to the success of the development of the final rules relating to designation of trade repositories and trade reporting.

As we have noted in our prior submissions, each subject relating to OTC derivatives regulation is interrelated with all other aspects. As such, CMIC reserves the right to make supplementary submissions relating to the Updated Model Rules following publication of further consultation papers and model and draft rules.

CMIC hopes that its comments are useful in the development of rules relating to designation of trade repositories and trade reporting and that the CSA takes into account the practical implications for all market participants who will be subject to such rules. CMIC welcomes the opportunity to discuss this response with representatives from the CSA. The views expressed in this letter are the views of the following members of CMIC:

Bank of America Merrill Lynch
Bank of Montreal
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Deutsche Bank A.G., Canada Branch
Healthcare of Ontario Pension Plan
HSBC Bank Canada
JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
Royal Bank of Canada
The Bank of Nova Scotia
The Toronto-Dominion Bank

APPENDIX A

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Comité de l'infrastructure du marché canadien

Dest. : Liste des destinataires en annexe A

Le 6 septembre 2013

Objet : Avis multilatéral 91-302 du personnel des ACVM, *Mise à jour – Modèle de règle sur la détermination des produits dérivés* (le « modèle de règle sur le champ d'application mis à jour ») et *Modèle de règle sur les répertoires des opérations et la déclaration de données sur les produits dérivés* (le « modèle de règle sur les répertoires des opérations mis à jour » et, collectivement avec le modèle de règle sur le champ d'application mis à jour, les « modèles de règles mis à jour »)[1]; *Proposed Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination* (le « projet de règle sur le champ d'application du Manitoba ») et *Proposed Manitoba Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting* (le « projet de règle du Manitoba » et, collectivement avec le projet de règle sur le champ d'application du Manitoba, les « projets de règles du Manitoba »)[2]; *Projet de règle 91-506 sur la détermination des produits dérivés* de la Commission des valeurs mobilières de l'Ontario (le « projet de règle sur le champ d'application de l'Ontario ») et *Projet de règle 91-507 sur les référentiels centraux et la déclaration de données sur les produits dérivés* de la Commission des valeurs mobilières de l'Ontario (le « projet de règle sur les répertoires des opérations de l'Ontario » et, collectivement avec le projet de règle sur le champ d'application de l'Ontario, les « projets de règles de l'Ontario »)[3]; *Projet de Règlement 91-506 sur la détermination des dérivés* (le « projet de règlement sur le champ d'application du Québec ») et *Projet de Règlement 91-507 sur les référentiels centraux et la déclaration de données sur les dérivés* (le « projet de règlement sur les répertoires des opérations du Québec » et, collectivement avec le projet de règlement sur le champ d'application du Québec, les « projets de règlements du Québec »)[4], dans chaque cas, en vertu de la *Loi sur les instruments dérivés* (collectivement, les projets de règlements du Québec, les projets de règles du Manitoba et les projets de règles de l'Ontario, soit les « projets de modèles de règles provinciaux »)

INTRODUCTION

Le Comité de l'infrastructure du marché canadien (Canadian Market Infrastructure Committee) (« CMIC ») se réjouit de l'occasion qui lui est donnée de présenter des observations sur les modèles de règles mis à jour des Autorités canadiennes en valeurs mobilières (« ACVM ») et les projets de modèles de règles provinciaux,

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[1] Autorités canadiennes en valeurs mobilières, *Avis multilatéral 91-302 du personnel des ACVM, Mise à jour – Modèle de règle sur la détermination des produits dérivés et Modèle de règle sur les répertoires des opérations et la déclaration de données sur les produits dérivés* (6 juin 2013). Disponible à l'adresse suivante : http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[2] Commission des valeurs mobilières du Manitoba, *Proposed Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination* et *Proposed Manitoba Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting*, Avis de la CVMM 2013-221 (6 juin 2013). Disponible à l'adresse suivante : http://www.msc.gov.mb.ca/legal_docs/legislation/notices/91_506_91_507_notice_rfq.pdf.

[3] Commission des valeurs mobilières de l'Ontario, *projet de règle 91-506 sur la détermination des produits dérivés* de la Commission des valeurs mobilières de l'Ontario et *projet de règle 91-507 sur les référentiels centraux et la déclaration de données sur les produits dérivés* de la Commission des valeurs mobilières de l'Ontario, 36 OSCB 5737 (6 juin 2013). Disponible à l'adresse suivante : http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20130606_91-506_91-507_rfc-derivatives.pdf.

[4] Autorité des marchés financiers, projet de *Règlement 91-506 sur la détermination des dérivés* et projet de *Règlement 91-507 sur les référentiels centraux et la déclaration de données sur les dérivés* (6 juin 2013). Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files/pdf/consultations/derives/septembre-2013/2013juin06-91-506-91-507-derives-cons--fr.pdf.

datés du 6 juin 2013. Bien que nous fassions expressément référence dans la présente lettre de réponse aux modèles de règles mis à jour et aux indications interprétatives s'y rapportant, sauf indication contraire, tous nos commentaires s'appliquent de même à chacun des projets de modèles de règles provinciaux et aux indications interprétatives s'y rapportant.

Le CMIC a été créé en 2010, en réponse à une demande des pouvoirs publics, pour représenter les points de vue consolidés de certains participants au marché canadien sur les changements proposés à la réglementation. Le CMIC est composé des membres suivants : Bank of America Merrill Lynch, la Banque de Montréal, la Caisse de dépôt et placement du Québec, l'Office d'investissement du régime de pensions du Canada, la Banque Canadienne Impériale de Commerce, la succursale canadienne de Deutsche Bank A.G., Healthcare of Ontario Pension Plan, la Banque HSBC Canada, la succursale de Toronto de JP Morgan Chase Bank, N.A., la Société Financière Manuvie, la Banque Nationale du Canada, OMERS Administration Corporation, le Régime de retraite des enseignantes et des enseignants de l'Ontario, la Banque Royale du Canada, La Banque de Nouvelle-Écosse et La Banque Toronto-Dominion.

Le CMIC apporte une voix unique dans le dialogue concernant le cadre approprié de réglementation du marché des dérivés de gré à gré au Canada. La composition du CMIC a été volontairement établie pour présenter les points de vue aussi bien du côté « achat » que du côté « vente » du marché canadien des dérivés de gré à gré, ainsi que des banques nationales et étrangères actives au Canada. À l'instar de tous ses mémoires, la présente lettre se veut l'opinion générale de tous les membres du CMIC quant au cadre approprié de réglementation du marché des dérivés de gré à gré au Canada.

Les dérivés de gré à gré constituent une importante catégorie de produits utilisés tant par les intermédiaires financiers que par les utilisateurs finaux commerciaux pour gérer le risque et l'exposition au risque. La surveillance du risque systémique sur les marchés des dérivés de gré à gré représente une composante essentielle de la croissance et de la stabilité financières à long terme des marchés financiers canadiens et de leurs participants.

Le CMIC salue l'approche consultative que les ACVM ont retenue pour examiner le projet de réglementation sur la détermination des produits dérivés et la déclaration de données sur les produits dérivés. Le CMIC estime que cette approche posera les fondations pour l'élaboration d'une structure réglementaire canadienne[5] qui honorera les engagements que le Canada a pris dans le cadre du G20, compte dûment tenu des inquiétudes relatives au risque systémique sur les marchés des dérivés de gré à gré.

APERÇU

Le CMIC se réjouit de l'évolution de la réglementation internationale en vue de respecter les engagements pris dans le cadre du G20 et encourage les ACVM à continuer de travailler en étroite collaboration avec les organismes de réglementation analogues mondiaux et autres organismes internationaux à l'objectif commun de respecter les engagements du G20. Dans nos lettres de réponse relatives aux précédents documents de consultation[6] des ACVM, nous avons souligné l'importance d'harmoniser les règles aux normes

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[5] Les renvois à la « réglementation » ou aux « organismes de réglementation » dans le présent document seront réputés inclure les organismes de réglementation prudentiels, du marché et du risque systémique.

[6] Réponse du CMIC datée du 9 septembre 2011 au document de consultation sur les référentiels centraux de données. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-402/Comite_infrastucture_91-402.pdf.
Réponse du CMIC datée du 25 janvier 2012 au document de consultation sur la surveillance et l'application de la loi. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-403/91-403_comite-infrastucture-marche-canadien.pdf.
Réponse du CMIC datée du 10 avril 2012 au document de consultation sur la séparation et la transférabilité. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-404/cmic/91-404_fr.pdf.
Réponse du CMIC datée du 15 juin 2012 au document de consultation sur les utilisateurs finaux. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/Commentaires_91-405/cmic_fr.pdf.
Réponse du CMIC datée du 21 septembre 2012 au document de consultation sur la compensation des dérivés de gré à gré par contrepartie centrale. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files/pdf/consultations/anterieures/derives/91-406/91-406-cmic-fr.pdf.
Réponse du CMIC datée du 4 février 2013 aux modèles de règles (les « modèles de règles initiaux ») sur la détermination des produits dérivés (le « modèle de règle sur le champ d'application initial ») et au modèle de règle sur les répertoires des opérations et la déclaration de données sur les produits dérivés (le « modèle de règle sur les répertoires des opérations initial »). Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/derives/91-301/CMIC_91-301_fr.pdf.

internationales, sauf dans le cas de caractéristiques propres au marché canadien. L'adoption harmonisée au Canada de normes et de protocoles élaborés par des organismes internationaux[7] écartera le risque d'incompatibilité du cadre canadien. À l'heure actuelle, bon nombre de membres du CMIC déclarent notamment des données sur les opérations sur dérivés de gré à gré avec des personnes des États-Unis en vertu des règles de la *Commodity Futures Trading Commission* des États-Unis (« CFTC ») aux termes du Titre VII de la loi intitulée *Dodd-Frank Wall Street Reform and Consumer Protection Act* (« Dodd-Frank »). Au prix de ressources considérables, des participants au marché canadien ont mis au point des systèmes opérationnels et des méthodes de traitement des opérations pour se conformer aux exigences de la CFTC. L'adoption d'exigences de déclaration canadiennes harmonisées aux exigences de la CFTC permettra aux participants au marché canadien d'exploiter les systèmes existants. Cette solution permettra en outre de veiller à ce que des organismes de réglementation canadiens reçoivent des données sur les dérivés en un format qui est compatible avec celui d'autres territoires. Le Conseil de stabilité financière a souligné que « [traduction] les différences territoriales quant aux données qui doivent être déclarées... »[8] risquent de compromettre l'objectif de la collecte de données qui peuvent être agrégées.

Nous nous inquiétons des différences qui existent toujours entre le modèle de règle sur les répertoires des opérations mis à jour et les règles de la CFTC. Compte tenu de la position relative du Canada dans le marché mondial, à moins que des caractéristiques propres au marché canadien ne le prescrivent, des exigences uniques au Canada peuvent empêcher des participants au marché canadien d'accéder aux marchés mondiaux. C'est pourquoi nous estimons que les règles canadiennes doivent aussi étroitement que possible être harmonisées aux règles américaines.

Comme il est plus amplement décrit ci-après, nous soutenons que la définition de « contrepartie locale » au sens où l'entendent les ACVM nuira aux participants canadiens. Malgré les modifications apportées à cette définition, elle n'en demeure pas moins beaucoup trop large et d'une portée extraterritoriale qui donnera vraisemblablement lieu à un régime de double déclaration pour certaines entités non canadiennes assujetties à des lois potentiellement incompatibles.

Les champs de données obligatoires conformément à l'annexe A du modèle de règle sur les répertoires des opérations mis à jour comprennent le champ de données « Dépositaire » qui n'est pas obligatoire en vertu des règles de la CFTC. L'infrastructure de déclaration existante sera soumise à une pression par la création d'un fardeau opérationnel imposant aux participants au marché des obligations d'information plus rigoureuses que ne l'exigent d'autres organismes de réglementation et que ne le permettent actuellement les systèmes opérationnels de courtiers étrangers. De l'avis du CMIC, les frais supplémentaires connexes sont nettement disproportionnés par rapport à l'avantage minimal de l'ajout du champ de données « Dépositaire ».

Il existe toutefois des circonstances propres au marché canadien qui exigent une solution différente. Pour la divulgation au public d'informations sur les opérations, nous sommes d'avis que le Canada devrait plutôt se comparer à des marchés de mêmes composition et taille, comme l'Australie et Hong-Kong. C'est pourquoi le CMIC soutient qu'il est préférable que l'information sur les opérations soit divulguée au public hebdomadairement, comme le proposent les organismes de réglementation du marché en Australie et à Hong-Kong.

Le régime réglementaire de déclaration sur les dérivés de gré à gré le plus élaboré se trouve actuellement aux États-Unis, mais vise seulement les dérivés de gré à gré qui relèvent de la compétence exclusive de la CFTC. Les règles relatives à ces dérivés relevant de la compétence de la *Securities and Exchange Commission* des États-Unis (la « SEC ») ne sont pas encore dans leur version définitive. Le CMIC recommande que, dans la mesure où les règles de déclaration aux États-Unis n'ont pas encore été définitivement arrêtées, le modèle de règle sur les répertoires des opérations mis à jour devrait prévoir une

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Réponse du CMIC datée du 17 juin 2013 au document de consultation sur l'inscription des participants au marché des dérivés. Disponible à l'adresse suivante : http://www.lautorite.qc.ca/files//pdf/consultations/juin2013/comite-infrastructure-du-marche-canadien-91-407-fran.pdf.

[7] Y compris CSPR–OICV, ISDR, ODRF, ODSG. Le CMIC considère les normes CSPR–OICV comme les normes internationales pour le cadre des répertoires des opérations, l'ODRF (OTC Derivatives Regulators' Forum) comme la norme internationale pour les obligations réglementaires, les normes de l'ODSG (OTC Derivatives Supervisors Group) comme la norme internationale de mise en œuvre et l'IIGC (ISDA Industry Governance Committee) comme la norme internationale pour la structure de gouvernance.

[8] FSB *OTC Derivatives Market Reforms- Fifth Progress Report on Implementation* (le 15 avril 2013) à la p. 16.

mise en œuvre progressive. La déclaration des opérations à l'égard d'un produit précis ne devrait être faite qu'après que les règles définitives relatives à ce produit auront été mises en application aux États-Unis.

Le CMIC applaudit enfin à la quasi-homogénéité entre les projets de modèles de règles provinciaux et les modèles de règles mis à jour.

MODÈLE DE RÈGLE SUR LA DÉTERMINATION DES PRODUITS DÉRIVÉS MIS À JOUR

Intention de régler par livraison physique; accords de compensation d'obligations

Le CMIC se réjouit des modifications apportées aux indications interprétatives de la règle sur le champ d'application et confirmant que les accords de compensation d'obligations de paiement sont permis à l'égard des opérations réglées par livraison physique sans pour autant les écarter comme des opérations sur dérivés exclus aux termes des modèles de règles mis à jour. Toutefois, certains énoncés dans les indications interprétatives sont toujours préoccupants, notamment quant au fonctionnement du marché des contrats de change institutionnels. Dans le marché des contrats de change institutionnels, des opérations sur contrats de change au comptant livrables sont conclues à tous les jours pour règlement le deuxième jour. Avant la date de règlement d'une ou de plusieurs opérations sur contrats de change au comptant, chaque contrepartie à ces opérations appréciera et réévaluera ses besoins en devises et, s'il y a lieu, pourra conclure une ou plusieurs opérations sur contrats de change au comptant livrables pour compenser, en totalité ou en partie, les positions nettes sur devises dans une ou plusieurs devises. Ce faisant, les contreparties compteront sur des accords de compensation d'obligations de paiement. Ce genre d'activité a lieu quotidiennement et est à la base du fonctionnement du marché des contrats de change institutionnel depuis nombre d'années.

Le CMIC a de sérieuses préoccupations quant aux indications interprétatives voulant que l'on doive établir si une opération sur contrats de change au comptant est ou non « réglée par livraison physique » en fonction d'une appréciation du « comportement » ou de l'« intention » d'une contrepartie. Le CMIC est notamment d'avis que la conclusion de pareilles opérations sur contrats de change livrables de liquidation décrites ci-dessus (et sur la foi d'accords de compensation d'obligations de paiement) ne saurait déterminer si des opérations antérieures, ou cette opération de liquidation, sont ou non réglées par livraison physique. Il devrait en être ainsi même si la conclusion de pareilles opérations de liquidation a pour effet économique qu'une contrepartie peut obtenir, à la fin de la journée, un paiement en une seule devise. Ce mécanisme de compensation de paiement est un moyen de financer le règlement des obligations dans le cadre des opérations, les parties pouvant ainsi réduire le risque de non-règlement. Nous soulignons qu'en aucun cas ce genre d'activité i) ne change les obligations de règlement au comptant net en une seule devise dans le cadre de chaque opération sur contrats de change au comptant livrables, ii) ne change la date de règlement dans le cadre de chaque opération sur contrats de change au comptant livrables (c.-à-d. aucun report de la date de règlement; chaque opération est liquidée et il n'y a aucun profit ni aucune perte non réalisés, contrairement à une « reconduction » d'une opération sur contrats de change qui est pratique courante dans le marché des contrats de change où la date de règlement reste « ouverte », donnant lieu à un profit/une perte non réalisé), ni iii) n'annule les contrats originaux ni ne les remplace par de nouveaux contrats tenant compte des positions sur devises nettes (couramment appelés « conventions d'annulation », ou « compensation par novation » ou « compression d'opérations »). Juridiquement, ces obligations restent des obligations brutes de livrer la devise dans le cadre de chaque opération sur contrats de change au comptant. La compensation par règlement n'est qu'un moyen de financement qui permet le règlement de chaque obligation brute multiple moyennant le paiement du montant en devises réduit, réduisant ainsi la valeur exposée au risque.

Le CMIC est d'avis que l'objet ou l'intention dans le cadre de chaque opération sur contrats de change au comptant livrables n'est pas pertinent en l'espèce. Si, juridiquement, une opération sur contrats de change au comptant livrables est conclue pour règlement le deuxième jour, elle devrait être exclue des obligations de déclaration des opérations. Tant que les parties ne modifient pas les conditions de l'opération originale, elle devrait toujours être exclue des obligations de déclaration des opérations, même si sont conclues des opérations ultérieures qui, collectivement avec toutes les autres opérations en cours, peuvent avoir l'intérêt économique d'un financement, un jour donné, en devises et de montants qui sont différents des obligations brutes dans le cadre de chaque opération sur contrats de change au comptant livrables.

Le CMIC est d'avis que toutes ces opérations sur contrats de change au comptant livrables devraient être admissibles à l'exclusion et, ne devraient donc pas être déclarées aux termes du modèle de règle sur les répertoires des opérations mis à jour. Nous proposons d'intégrer ces points de la manière décrite ci-après.

Observations de rédaction :

[2e paragraphe du sous-titre « Règlement au moyen de la livraison sauf lorsque celle-ci est impossible ou déraisonnable sur le plan commercial (sous-alinéa *i* de l'alinéa *c* de l'article 2 »][9]

« Le règlement au moyen de la livraison de la monnaie prévue dans le contrat suppose la livraison de la monnaie originale faisant l'objet du contrat, et non la livraison d'une somme équivalente dans une monnaie différente. Ainsi, si le contrat prévoit la livraison de yens japonais, cette monnaie doit être livrée afin que l'exclusion s'applique. Selon nous, la livraison s'entend de la livraison réelle de la monnaie originale faisant l'objet du contrat en numéraire ou au moyen d'un transfert électronique de fonds. Si le règlement s'effectue au moyen de la livraison d'une autre monnaie ou d'une note dans le compte sans transfert réel de monnaie, il n'y a pas règlement au moyen de la livraison et l'exclusion prévue à l'alinéa *c* de l'article 2 ne s'applique pas. Il est entendu que la compensation des obligations de livraison conformément à une clause de compensation (dont il est question ci-après au sous-titre « Critère de l'intention (sous-alinéa *ii* de l'alinéa *c* de l'article 2) »), de façon bilatérale ou multilatérale (notamment des règlements effectués au moyen de la plateforme de compensation de paiement de contrats de change de CLS Bank) n'est pas censée être « une note dans le compte sans transfert réel de monnaie. »

[Dernier paragraphe du sous-titre « Critère de l'intention (sous-alinéa *ii* de l'alinéa *c* de l'article 2) »].[10] Le CMIC est d'avis que le paragraphe suivant devrait être supprimé des indications interprétatives pour les motifs indiqués ci-dessus. Toutefois, si cette solution n'est pas retenue, nous croyons fortement que les indications interprétatives devraient préciser que la pratique décrite ci-dessus ne constituerait pas un comportement d'une contrepartie indiquant « qu'elle n'entend pas effectuer le règlement au moyen d'une livraison ».

« Outre le contrat lui-même, le comportement des contreparties peut être un indice de leur intention. Si le comportement d'une contrepartie indique qu'elle n'entend pas effectuer le règlement au moyen d'une livraison, le contrat ne sera pas admissible à l'exclusion prévue à l'alinéa *c* de l'article 2. Ce sera notamment le cas si le comportement des contreparties permet de conclure qu'elles entendent invoquer les clauses relatives à l'inexécution ou à l'inexécutabilité du contrat pour obtenir un résultat financier qui est un règlement par un autre moyen que la livraison de la monnaie visée ou qui s'y apparente. De même, un contrat ne sera pas admissible à l'exclusion lorsqu'il est possible de déduire du comportement des contreparties qu'elles ont l'intention de conclure des conventions accessoires ou modificatives qui, avec le contrat original, ont un résultat financier qui est un règlement par un autre moyen que la livraison de la monnaie visée ou qui s'y apparente. Toutefois, le Comité précise que, si une contrepartie exerce l'activité commerciale de conclure deux ou plusieurs contrats de change distincts et consécutifs qui ne modifient pas juridiquement un contrat de change existant et dont l'effet net est de modifier les obligations de financement d'une contrepartie, tous ces contrats de change seraient admissibles à cette exclusion. »

MODÈLE DE RÈGLE MIS À JOUR SUR LES RÉPERTOIRES DES OPÉRATIONS ET LA DÉCLARATION DE DONNÉES SUR LES PRODUITS DÉRIVÉS

Obligation de déclaration – définition de « contrepartie locale »

Le CMIC applaudit à la modification de la définition de « contrepartie locale » du modèle de règle sur les répertoires des opérations initial visant à en réduire la portée. Le CMIC est toutefois d'avis que la définition de « contrepartie locale » a toujours une portée extraterritoriale qui est incompatible avec la position qu'ont adoptée les marchés des dérivés de gré à gré internationaux.

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[9] Modèles de règles mis à jour, *supra* note 1 à la p. 7; projets de règles du Manitoba, *supra* note 2 à la p. 4; projets de règles de l'Ontario, *supra* note 3 à la p. 5754; projets de règlements du Québec, *supra* note 4 à la p. 3.

[10] Modèles de règles mis à jour, *supra* note 1 à la p. 8; projets de règles du Manitoba, *supra* note 2 à la p. 5; projets de règles de l'Ontario, *supra* note 3 à la p. 5755; projets de règlements du Québec, *supra* note 4 à la p. 4.

Alinéa *c*

Aux termes de l'alinéa *c* de la définition de « contrepartie locale »[11], si une opération est conclue par une entité non canadienne appartenant au même groupe qu'une partie canadienne qui est « responsable des passifs » de cette entité du même groupe non canadienne, cette dernière devra veiller à ce que toutes ses opérations soient déclarées conformément à l'article 25[12] du modèle de règle sur les répertoires des opérations mis à jour, même si elle n'a aucun lien avec le Canada (si ce n'est que la société mère est canadienne). Par exemple, une entité appartenant au même groupe qu'une banque canadienne ayant des activités en Chine qui est en général soutenue par sa société mère et qui conclut un swap de taux d'intérêt avec une partie chinoise serait tenue de déclarer toutes ses opérations à un répertoire des opérations désigné conformément au modèle de règle sur les répertoires des opérations mis à jour. Cette position est incompatible avec celle qu'ont adoptée les organismes de réglementation de marchés des dérivés de gré à gré plus importants, notamment la position qu'a adoptée la CFTC en vertu de Dodd-Frank.

Au sens de la définition de la CFTC, « personne des États-Unis (*US person*) » s'entend notamment de personnes aux États-Unis et de personnes qui peuvent être domiciliées ou exercer leurs activités à l'extérieur des États-Unis, mais dont les activités de swap ont néanmoins « [traduction] un lien direct et notable avec des activités exercées aux États-Unis. » Aux termes des indications interprétatives proposées (*Proposed Guidance*)[13], « personne des États-Unis » s'entend notamment d'une entité dont les propriétaires directs ou indirects sont « [traduction] responsables du passif » et dont au moins un de ces propriétaires est une personne des États-Unis. Toutefois, dans les indications interprétatives transfrontalières définitives (*Final Cross-Border Guidance*)[14], la CFTC a expressément indiqué que son interprétation de la phrase « responsable des passifs » ne vise pas une entité non américaine du même groupe cautionnée par une personne des États-Unis, et vise plutôt les sociétés à responsabilité illimitée et les types d'entités analogues dans lesquelles une personne des États-Unis détient une participation majoritaire directe ou indirecte.[15] En revanche, la CFTC a également indiqué dans les indications interprétatives transfrontalières définitives que les sociétés à responsabilité limitée ou sociétés de personnes à responsabilité limitée ne seraient en général pas visées par cette disposition particulière de la définition de « personne des États-Unis ».[16] Le CMIC est d'avis qu'il s'agit de la position à adopter quant au sens de « responsable des passifs de la partie [membre du même groupe] » du modèle de règle sur les répertoires des opérations mis à jour et que les indications interprétatives applicables devraient contenir des précisions en ce sens. Faute de telles précisions, les ACVM adopteront une position quant à l'extraterritorialité plus tranchée et plus lourde de conséquences et potentiellement plus conflictuelle que la position qu'a adoptée la CFTC. Le Conseil de stabilité financière ayant lui-même exprimé de profondes préoccupations quant au manque de cohérence et au chevauchement des obligations réglementaires entre les différents mécanismes nationaux de mise en œuvre des engagements du G20[17], le CMIC soutient que les ACVM devraient retirer de leur projet de règle cet aspect extraterritorial qui pourrait entraîner un manque de cohérence et un chevauchement des obligations réglementaires.

Alinéa *b*

Au sens de l'alinéa *b* de la définition de « contrepartie locale », est considérée être une « contrepartie locale » une contrepartie « assujettie aux règles prévoyant qu'une personne qui effectue des opérations sur produits

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[11] Modèles de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 1(1); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 1(1); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 1(1); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 1(1).

[12] Modèles de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 25; projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 25; projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 25; projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 25.

[13] Voir CFTC, *Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act*, 77 F.R. 41214 (12 juillet 2012) (les « indications interprétatives proposées »). Disponible à l'adresse suivante : http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[14] Voir CFTC, *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 F.R. 45292 (26 juillet 2013) (les « indications interprétatives transfrontalières définitives »). Disponible à l'adresse suivante : http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf.

[15] *Ibid* à la p. 45312.

[16] *Ibid*. Les indications interprétatives transfrontalières définitives reconnaissent expressément le principe de courtoisie internationale, et que le territoire étranger visé a tout intérêt à réglementer les activités de cette entité étrangère.

[17] Voir FSB, *OTC Derivatives Market Reforms: Fifth Progress Report on Implementation* (15 avril 2013) à la p. 45. Disponible à l'adresse suivante : http://www.financialstabilityboard.org/publications/r_130415.pdf.

dérivés doit être inscrite dans une catégorie d'inscription prescrite par la règle ». Le CMIC soutient que cet alinéa est ambigu et peut donner lieu à une double déclaration inutile. Il semblerait notamment que, même si une partie est dispensée des exigences d'inscription en vertu de la législation provinciale, elle serait toujours « assujettie » à ces règles et par conséquent visée par la définition de « contrepartie locale ». Par exemple, un courtier étranger peut être dispensé de l'exigence d'inscription en vertu de la législation provinciale applicable au motif qu'il est assujetti à une réglementation analogue dans son territoire « d'origine », mais d'après le libellé actuel de l'alinéa *b* de la définition de « contrepartie locale », ce courtier étranger serait tenu de déclarer des opérations en vertu des règles canadiennes et des règles de son territoire d'origine.

Conformité substitutive

Dans sa lettre de réponse à l'égard des modèles de règles initiaux, le CMIC proposait que la conformité substitutive devrait prévoir expressément que la déclaration d'opérations en vertu de régimes non canadiens déterminés et approuvés devrait satisfaire aux obligations de déclaration prévues dans les modèles de règles mis à jour. Les ACVM ont répondu[18] que cette conformité substitutive sera évaluée au cas par cas en vertu du pouvoir de dispense des exigences de déclaration prévu dans les modèles de règles mis à jour. Le CMIC est d'avis qu'il n'est pratiquement pas possible de procéder ainsi et que, la conformité substitutive n'étant pas propre à une contrepartie en particulier, mais applicable à toutes les parties assujetties à des obligations de déclaration en vertu de ce régime non canadien, l'évaluation au cas par cas ne sert aucun intérêt. L'évaluation au cas par cas ne tient pas compte non plus du fait que la grande majorité des participants au marché des dérivés de gré à gré devront se conformer soit à Dodd-Frank, soit au *European Market Infrastructure Regulation* (« EMIR »).[19] Le CMIC croit fortement que le modèle de règle sur les répertoires des opérations mis à jour devrait prévoir expressément qu'une contrepartie est dispensée des exigences en vertu du modèle de règle sur les répertoires des opérations mis à jour si cette contrepartie se conforme à des obligations de déclaration de données « reconnues » d'un autre territoire et si cette contrepartie remet à l'organisme de réglementation en valeurs mobilières compétent une lettre selon laquelle il a recours à cette dispense. Les organismes de réglementation en valeurs mobilières compétents publieraient de temps à autre une liste des obligations de déclaration de données « reconnues ». Par exemple, cette liste publiée pourrait reconnaître les règles sur la déclaration et les répertoires de données sur les swaps de la CFTC en vertu de Dodd-Frank. Le CMIC soutient que les indications interprétatives devraient préciser que les organismes de réglementation en valeurs mobilières examineront de temps à autre les règles de déclaration de données d'autres territoires, soit à l'initiative de l'organisme de réglementation en valeurs mobilières, soit à la demande d'un participant au marché, et établiront si la conformité à ces règles satisfait ou non essentiellement aux obligations en vertu des modèles de règles mis à jour. Dans l'affirmative, ces obligations de déclaration de données seront réputées être « reconnues » par l'organisme de réglementation en valeurs mobilières et ajoutées à la liste. Cette solution permettra de réduire le fardeau administratif de chaque organisme de réglementation en valeurs mobilières qui n'aura plus à examiner les dispenses de chaque participant au marché et d'assurer des conditions équitables pour tous les participants au marché.[20]

Dépôt initial et désignation d'un répertoire des opérations

Les ACVM ont indiqué[21] qu'un régime de réciprocité ou de reconnaissance dans le cadre duquel un répertoire des opérations qui est désigné dans une province est automatiquement réputé désigné dans toutes les provinces dépasse le cadre des modèles de règles mis à jour. Le CMIC continue d'appuyer la mise en œuvre d'un tel régime de passeport. Comme le marché des dérivés de gré à gré canadien ne représente qu'environ 3 % du marché mondial,[22] pour rester concurrentiel, il faut veiller à ce que la réglementation canadienne n'impose pas aux parties (qu'il s'agisse de contreparties à des opérations ou de répertoires d'opérations) des

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[18] Modèles de règles mis à jour, *supra* note 1 à la p. 56.

[19] Voir le *Règlement (UE) n° 648/2012 du Parlement européen et du Conseil du 4 juillet 2012 sur les produits dérivés de gré à gré, les contreparties centrales et les référentiels centraux* (4 juillet 2012). Disponible à l'adresse suivante : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:FR:PDF.

[20] Si une telle dispense n'est pas offerte dans les modèles de règles mis à jour, l'organisme de réglementation en valeurs mobilières compétent peut ne pas être en mesure d'accorder efficacement une dispense, étant peut-être lui-même empêché de rendre une ordonnance d'application générale. Voir, par exemple, l'article 143.11 de la *Loi sur les valeurs mobilières* (Ontario).

[21] Modèles de règles mis à jour, *supra* note 1 à la p. 56.

[22] D'après les états financiers non audités publiés pour le deuxième trimestre de l'exercice 2013 des six premières banques canadiennes en importance et des données statistiques sur le marché des dérivés pour la fin de décembre 2012 publiées par la Banque des règlements internationaux. Il s'agit d'une approximation seulement qui n'a pas été rajustée compte tenu de comptages doubles et de délais.

obstacles inutiles les empêchant de négocier des opérations avec des participants au marché canadien. Les répertoires d'opérations qui voudraient faire affaire avec des participants au marché canadien devront être désignés en vertu des règles ou des règlements de toutes les provinces et de tous les territoires du Canada, ce qui les obligerait potentiellement à négocier avec 13 organismes de réglementation différents. Cette obligation à elle seule peut constituer pour certains répertoires des opérations un fardeau administratif suffisant pour ne pas faire affaire avec des participants au marché canadien. L'adoption d'un processus qui soit aussi simplifié et efficace que possible atténuerait nettement ce risque.

Confirmation des données et de l'information

L'article 23[23] du modèle de règle sur les répertoires des opérations mis à jour prévoit qu'un répertoire des opérations désigné doit établir des politiques et des procédures écrites permettant d'obtenir de chaque contrepartie qui est un participant, confirmation que les données sur les produits dérivés déclarées sont exactes. Comme nous l'avons indiqué dans nos mémoires précédents, le CMIC continue de défendre la position voulant que, si le répertoire des opérations reçoit l'information sur l'opération d'une chambre de compensation ou d'une plateforme d'exécution de swaps (« PES »), le répertoire des opérations ne devrait pas avoir l'obligation formelle de confirmer l'exactitude des données déclarées avec les deux contreparties. Le retrait de cette obligation dans ces circonstances produirait un résultat conforme à Dodd-Frank.[24] En vertu de Dodd-Frank, la communication n'a pas à être directe et affirmative lorsque le répertoire des opérations croit raisonnablement que les données sont exactes, que les données ou l'information jointe font état du fait que les deux contreparties ont convenu des données et que les contreparties se sont vue accorder un délai de correction de 48 heures. Toutefois, en vertu de Dodd-Frank, le répertoire des opérations doit communiquer affirmativement avec les deux parties à l'opération lorsque les données sur la création sont soumises directement par une contrepartie à un swap. Pour les données sur la continuation de swaps, le répertoire des opérations a confirmé l'exactitude de ces données pour les fins de Dodd-Frank si le répertoire des opérations a informé les deux contreparties des données qui ont été soumises et leur a accordé un délai de correction de 48 heures, après quoi une contrepartie est présumée avoir reconnu l'exactitude des données. Le CMIC appuie cette façon de faire en vertu de Dodd-Frank et recommande que le modèle de règle sur les répertoires des opérations mis à jour intègre ce modèle de Dodd-Frank.

Obligation de déclaration; contrepartie déclarante

Paragraphe 27(1)

Le CMIC se réjouit de la modification que les ACVM ont apportée au paragraphe 27(1)[25] du modèle de règle sur les répertoires des opérations mis à jour, qui introduit une hiérarchie de types de contreparties aux fins d'établir les obligations de déclaration. Comme nous l'avons indiqué dans notre mémoire précédent, le CMIC appuie l'approche hiérarchique de détermination des obligations de déclaration qui est compatible avec Dodd-Frank[26] et d'autres régimes internationaux. Bien que le CMIC estime que le paragraphe 27(1) du modèle de règle sur les répertoires des opérations est une amélioration par rapport au modèle de règle sur les répertoires des opérations initial, le CMIC craint toujours que la hiérarchie proposée par les ACVM ne reconnaisse pas suffisamment de types de contreparties. Le CMIC a notamment des réserves quant à l'omission des PES/marchés de contrats désignés (« MCD ») dans la hiérarchie proposée par les ACVM. Les PES et MCD figurent en bonne place dans le régime de déclaration de Dodd-Frank.

L'un des principes fondamentaux de la hiérarchie de déclaration de Dodd-Frank est de veiller à ce que la déclaration soit effectuée « [traduction] par l'entité ou la contrepartie inscrite qui a le moyen le plus facile, le plus rapide et le plus économique d'accéder aux données en question, et qui est le plus susceptible d'avoir

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[23] Modèle de règles sur les répertoires des opérations mis à jour, *supra* note 1, art. 23; projet de règles sur les répertoires des opérations du Manitoba, *supra* note 2, art. 23; projet de règles sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 23; projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 23.

[24] Voir CFTC, Final Rule, Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 F.R. 54,538 (1er septembre 2011), à 54,579. Disponible à l'adresse suivante : http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-20817a.pdf (le « règlement sur l'inscription des répertoires de données sur swaps »).

[25] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 27(1); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 27(1); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 27(1); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 27(1).

[26] Voir CFTC, *Final Rule, Swap Data Recordkeeping and Reporting Requirements*, 17 C.F.R. 45 (13 janvier 2012). Disponible à l'adresse suivante : http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33199a.pdf.

des systèmes automatisés adaptés à la déclaration ».[27] Conformément à ce principe, la CFTC a établi qu'une PES/un MCD devrait être désigné comme contrepartie déclarante chaque fois qu'un swap est exécuté par l'intermédiaire des services d'une PES/d'un MCD.[28] En vertu de Dodd-Frank, les PES/MCD sont responsables de la déclaration de certaines données de création de swaps immédiatement après l'exécution d'une opération, notamment toutes les principales conditions économiques de cette opération.[29] La CFTC souligne que les PES/MCD seraient plus à même de déclarer ces principales conditions économiques du fait que bon nombre d'entre elles seraient établies dans le cadre du processus de certification de contrats associé à l'exécution par l'intermédiaire d'une PES/d'un MCD.[30] Par ailleurs, la CFTC a reconnu un certain nombre d'autres avantages de constituer une PES/un MCD contrepartie déclarante, notamment l'utilisation de la technologie de la plateforme d'exécution, la communication accélérée des déclarations (et par extension une plus grande transparence) et la possibilité de traitement direct des valeurs.[31]

Le CMIC souscrit à ces prises de position et soutient que la PES/le MCD doit être la contrepartie déclarante. Bien qu'une contrepartie déclarante puisse déléguer ses obligations de déclaration aux termes du paragraphe 27(4)[32], notamment à une PES/à un MCD, le CMIC est d'avis que, si une opération est exécutée par l'intermédiaire des services d'une PES/d'un MCD, les obligations de déclaration devraient revenir exclusivement à la PES/au MCD, comme c'est le cas aux États-Unis. C'est pourquoi le CMIC soutient que l'alinéa 27(1)*a)* du modèle de règle sur les répertoires des opérations mis à jour devrait expressément inclure une PES/un MCD en tant que contrepartie déclarante. Il est en outre à prévoir que les PES joueront un rôle important dans le marché des dérivés de gré à gré canadien, et les ACVM devraient sérieusement en tenir compte dans la formulation d'un régime réglementaire approprié visant les PES, comme c'est le cas en vertu de Dodd-Frank.

Paragraphe 27(2)

Le CMIC a toujours des réserves quant aux responsabilités des contreparties locales aux termes du paragraphe 27(2)[33] du modèle de règle sur les répertoires des opérations mis à jour, notamment quant aux contreparties locales qui sont des utilisateurs finaux. Si une contrepartie déclarante (établie conformément à l'alinéa 27(1)*a*) (une chambre de compensation centrale) ou conformément à l'alinéa 27(1)*b*) (un courtier)) ne remplit les obligations de déclaration aux termes du modèle de règle sur les répertoires des opérations mis à jour, les contreparties locales qui sont des utilisateurs finaux doivent agir en tant que contreparties déclarantes. Les contreparties locales qui sont des utilisateurs finaux n'ont pas ni ne sont censées avoir l'infrastructure leur permettant de remplir les obligations d'une contrepartie déclarante. De plus, les contreparties locales qui sont des utilisateurs finaux auront énormément de difficulté à vérifier si une contrepartie étrangère remplit les obligations de déclaration aux termes du modèle de règle sur les répertoires des opérations mis à jour.

Le CMIC soutient que le paragraphe 27(2) doit être supprimé intégralement ou encore modifié de manière à ce que la contrepartie locale ne soit plus responsable si une chambre de compensation centrale ne remplit pas ses obligations de déclaration. Comme il a été indiqué ci-dessus, le CMIC estime que, si les parties à une opération conviennent de compenser cette opération par contrepartie centrale, il revient exclusivement à la contrepartie centrale de remplir les obligations de déclaration et, par extension, d'accepter quelque responsabilité associée à une omission de remplir ces obligations. Si, pour les ACVM, la responsabilité de la contrepartie locale dans ces circonstances vise notamment à veiller à ce que les organismes de réglementation en valeurs mobilières locaux puissent faire valoir leur compétence à l'égard de la contrepartie déclarante, cette disposition est inutile. Si la contrepartie déclarante est une chambre de compensation centrale étrangère, cette dernière devra demander et obtenir l'approbation ou la désignation d'un organisme

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[27] *Ibid* à la p. 2138.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid* à la p. 2142.
[31] Voir CFTC, *Final Rlue, Real-Time Public Reporting of Swpa Transaction Data*, 17 C.F.R. Part 43 (27 juin 2012) à la p. 1198. Disponible à l'adresse suivante : http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/ssLINK/2012-15481a.
[32] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 27(4); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 27(4); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 27(4); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 27(4).
[33] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 27(2); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 27(2); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 27(2); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 27(2).

de réglementation en valeurs mobilières canadien local en vertu de la législation en valeurs mobilières (ou de la législation sur les dérivés) de la province compétente. Aussi, ces entités devront se soumettre à la compétence de cet organisme de réglementation. Les organismes de réglementation locaux seront ainsi effectivement fondés à faire valoir leur compétence à l'égard de ces entités et à surveiller et à sanctionner leur comportement.

Observations de rédaction : Le CMIC soutient que le paragraphe 27(2) doit être entièrement retiré ou, sinon, modifié comme suit :

> Malgré toute autre disposition de la présente règle, si la contrepartie déclarante visée au paragraphe (1) i) n'est pas une chambre de compensation, ii) n'est pas une contrepartie locale et iii) qu'elle ne remplit pas les obligations de déclaration qui incombent aux contreparties locales en vertu de la présente règle, la contrepartie locale agit en tant que contrepartie déclarante.

Observations de rédaction : Dans les indications interprétatives du modèle de règle sur les répertoires des opérations mis à jour, nous proposons de modifier les paragraphes 27(1), (2) et (4)[34] comme suit :

> (1) ~~En vertu des alinéas *c* et *d* du paragraphe 1 de l'article 27, les~~ En vertu de l'alinéa *d* du paragraphe 1 de l'article 27, les deux contreparties doivent agir comme contreparties déclarantes si elles ne peuvent ~~déterminer celle~~ convenir de laquelle d'entre elles devrait déclarer l'opération en vertu de l'alinéa c du paragraphe 1) de l'article 27. Toutefois, le Comité est d'avis, que dans chaque opération, l'une des contreparties devrait accepter d'être la contrepartie déclarante afin d'éviter les déclarations doubles.
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> (2) Le paragraphe 2 de l'article 27 s'applique lorsque la contrepartie déclarante, déterminée conformément au paragraphe 1 de l'article 27, n'est pas une contrepartie locale. Lorsqu'une telle contrepartie ne déclare pas l'opération ou manque aux obligations de déclaration qui incombent ~~aux contreparties locales~~ à la contrepartie locale en vertu de l'article 25, la contrepartie locale doit agir comme contrepartie déclarante. Le Comité estime que le courtier ou la chambre de compensation qui n'est pas une contrepartie locale devrait remplir l'obligation de déclaration pour la contrepartie qui n'est pas courtier. Cependant, ~~s'il n'est pas tenu à l'obligation de déclaration prévue par le modèle de règle~~ si la contrepartie qui n'est pas locale, sauf une chambre de compensation **[désignée/inscrite]** en vertu **[de la législation en valeurs mobilières locale applicable]**, ne remplit pas l'obligation de déclaration de la contrepartie locale, c'est la contrepartie locale qui devrait l'assumer.
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> (4) Le paragraphe 4 de l'article 27 autorise la contrepartie déclarante à déléguer toutes ses obligations de déclaration. Ces obligations comprennent notamment la déclaration initiale de l'information à communiquer à l'exécution, des données sur le cycle de vie et des données de valorisation. À titre d'exemple, tout ou partie des obligations de déclaration pourrait être délégué à un tiers fournisseur de services. Toutefois, sous réserve du paragraphe 2 de l'article 27, la contrepartie ~~locale~~ déclarante demeure responsable de veiller à ce que les données sur les produits dérivés soient exactes et déclarées dans les délais prescrits par le modèle de règle.

Identifiants uniques d'opérations (UTI)

Aux termes du paragraphe 31(2), un répertoire des opérations peut intégrer un UTI attribué antérieurement à l'opération. Le CMIC est d'avis que lorsqu'une opération a été déclarée avec un « identifiant unique de swap », les règles doivent prévoir que l'UTI sera cet « identifiant unique de swap ».

Déclaration de données de valorisation

Le paragraphe 35(1)[35] du modèle de règle sur les répertoires des opérations mis à jour prévoit que, si une opération est compensée, la chambre de compensation et la contrepartie locale doivent déclarer des données de valorisation. Le paragraphe 35(2)[36] prévoit que, si une opération n'est pas compensée, des données de valorisation doivent être déclarées quotidiennement pour chaque contrepartie locale qui est courtier et trimestriellement pour toutes les contreparties locales qui ne sont pas courtiers. Comme il est

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[34] Modèles de règles mis à jour, *supra* note 1 à la p. 49; projets de règles du Manitoba, *supra* note 2 à la p. 18; projets de règles de l'Ontario, *supra* note 3 aux p. 5783-84; projets de règlements du Québec, *supra* note 4 aux p. 14-15.

[35] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 35(1); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 35(1); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 35(1); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 35(1).

[36] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 35(2); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 35(2); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 35(2); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 35(2).

indiqué ci-dessus, les contreparties locales qui sont des utilisateurs finaux n'ont pas l'infrastructure pour déclarer des données sur les produits dérivés et, dans certains cas, n'ont peut-être pas les moyens de produire des données de valorisation. Le CMIC est d'avis que seule la partie déclarante identifiée selon la hiérarchie prévue au paragraphe 27(1) (en notre version modifiée ci-dessus quant à la hiérarchie) devrait avoir l'obligation de déclarer des données de valorisation. Cette partie déclarante aura alors l'obligation de déclarer des données de valorisation dans les délais prescrits aux paragraphes 35(1) et (2).

Observations de rédaction : Le CMIC recommande d'apporter ces modifications aux paragraphes 35(1) et (2) comme suit :

> (1) Les données de valorisation d'une opération compensée sont déclarées au répertoire des opérations désigné quotidiennement par la chambre de compensation ~~et la contrepartie locale~~ selon les normes de valorisation reconnues dans le secteur et à l'aide des données pertinentes de clôture du marché du jour ouvrable précédent.
>
> (2) Les données de valorisation d'une opération non compensée sont déclarées au répertoire des opérations désigné dans les délais suivants :
>
> a) quotidiennement selon les normes de valorisation reconnues dans le secteur et à l'aide des données pertinentes de clôture du marché du jour ouvrable précédant par chaque contrepartie ~~locale~~ déclarante qui est courtier;
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> b) à la fin de chaque trimestre civil pour toutes les contreparties ~~locales~~ déclarantes qui ne sont pas courtier.

Données mises à la disposition du public

Délai de diffusion des données mises à la disposition du public

À l'instar de Dodd-Frank, le modèle de règle sur les répertoires des opérations mis à jour des ACVM n'envisage pas expressément la déclaration publique d'opérations instantanée ou en temps réel. Toutefois, bien que la règle ne prescrive pas la déclaration publique en temps réel, le paragraphe 39(3)[37] prévoit que l'information requise pour diffusion publique doit être mise à la disposition du public « au plus tard » un ou deux jours après l'exécution, selon que l'une des contreparties à l'opération est un courtier ou non. Un répertoire des opérations pourrait rendre de l'information publique *plus tôt* que ce délai de deux jours, notamment en temps réel ou presque conformément aux exigences de Dodd-Frank, et toujours respecter le paragraphe 39(3) du modèle de règle sur les répertoires des opérations mis à jour.

Comme nous l'avons indiqué dans notre lettre de réponse à l'égard des modèles de règles initiaux, le CMIC estime qu'il devrait y avoir un délai dans la diffusion publique de l'information relative à une opération. Le CMIC est d'avis qu'il n'est pas nécessaire de rendre les opérations publiques en temps réel pour atteindre l'objectif réglementaire d'une plus grande transparence après les opérations. Même si la CFTC et la SEC ont décidé que la déclaration publique en temps réel est une mesure réglementaire appropriée pour le marché américain, d'autres organismes de réglementation ont pris des décisions différentes à l'égard de leurs marchés locaux. L'*Australian Securities & Investment Commission* (« ASIC »), par exemple, a récemment informé les participants au marché qu'elle n'obligerait pas les répertoires des opérations à diffuser de l'information au public en temps réel.[38] L'ASIC a indiqué que, compte tenu de l'objet de l'obligation de déclaration, de considérations pratiques de la déclaration dans un délai plus court et de l'équivalence du régime australien par rapport à celui d'autres territoires, il était plus approprié de diffuser au public des données statistiques agrégées hebdomadairement.[39] Les organismes de réglementation de Hong-Kong[40] ont adopté des conclusions analogues. De plus, au sein de l'Union européenne, aux termes de l'EMIR, les

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[37] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 39(3); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 39(3); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 39(3); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 39(3).

[38] Voir ASIC, *Consultation Paper 205, Derivative Transaction Reporting* (mars 2013) à la p. 17. Disponible à l'adresse suivante : http://www.financialstabilityboard.org/publications/r_130415.pdf.

[39] *Ibid.*

[40] Voir HKMA-SFC, *Joint consultation conclusions on the proposed regulatory regime for the over-the-counter derivatives market in Hong Kong* (juillet 2012) aux pages 26 à 28. Disponible à l'adresse suivante : http://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2012/20120711e3a34.pdf.

répertoires d'opérations doivent publier des données sur les produits dérivés hebdomadairement.[41] Le CMIC soutient que les ACVM devraient s'inspirer des décisions de ces organismes de réglementation étrangers dans l'établissement de ses règles, les marchés des dérivés de l'Australie et de Hong-Kong étant à bien des égards comparables au marché canadien quant à la taille, aux produits et aux participants. C'est pourquoi le CMIC soutient que le paragraphe 39(3) devrait être modifié de manière à prévoir qu'un répertoire des opérations ne peut rendre publiques des données sur les opérations qu'au plus tôt une semaine après les avoir reçues de la contrepartie déclarante. Subsidiairement, le CMIC soutient i) que le paragraphe 39(3) doit être modifié de manière à prévoir qu'un répertoire des opérations ne peut rendre publiques que des données *agrégées* au plus tôt dans le délai de un ou deux jours, selon le cas, et ii) qu'un délai d'un an doit s'appliquer à la diffusion publique de données *sur les opérations* afin de donner aux ACVM le temps de consulter des participants au marché et d'étudier des données leur permettant d'évaluer des règles relatives aux opérations en bloc et le risque de décompilation des opérations. Les règles relatives aux opérations en bloc et la possibilité de décompilation des opérations sont plus amplement décrites ci-après.

Règles relatives aux opérations en bloc

Si la recommandation qui précède concernant la diffusion hebdomadaire au public de données sur les opérations n'est pas adoptée, le CMIC soutient que le modèle de règle sur les répertoires des opérations mis à jour devrait impérativement prévoir des délais pour la divulgation d'opérations notionnelles ou « en bloc » importantes. Comme il est proposé dans la lettre de réponse du CMIC à l'égard des modèles de règles initiaux, la divulgation instantanée ou en temps réel d'opérations en bloc peut nuire au fonctionnement du marché, la capacité d'une contrepartie de couvrir son risque dans le cadre d'une opération étant ainsi compromise.[42] Bon nombre d'études ont démontré qu'une capacité de couverture limitée peut avoir des effets défavorables sur le marché des dérivés, notamment une baisse de la liquidité, une capacité limitée d'effectuer des opérations et une augmentation des frais pour les utilisateurs finaux.[43] Afin d'éviter ces difficultés, le CMIC soutient que les ACVM doivent impérativement adopter des règles prévoyant des délais de divulgation comparables à ceux du régime de divulgation de Dodd-Frank. En vertu de Dodd-Frank, les contreparties à des opérations dont les valeurs notionnelles sont supérieures aux tailles minimales des opérations en bloc fixées par la CFTC disposeront de délais pour rendre leurs opérations publiques. La longueur des délais de déclaration variera selon le type de contrepartie et selon qu'il s'agisse ou non d'une opération assujettie à des obligations de compensation. Pour les opérations assujetties à la compensation obligatoire et dans le cadre de laquelle au moins une contrepartie est un courtier, par exemple, les règles de la CFTC prévoient à la limite un délai de déclaration de 15 minutes.[44] Il faudra étudier en profondeur le marché canadien pour établir les tailles minimales d'opérations en bloc et les délais appropriés pour les participants au marché canadien, comme le faisait remarquer le CMIC dans un mémoire précédent.

Bien que les ACVM aient indiqué qu'elles prévoient accorder une dispense des exigences de déclaration au public en vertu du pouvoir de dispense discrétionnaire prévu à l'article 41,[45] le CMIC soutient qu'il s'agit là d'une solution difficilement applicable compte tenu du nombre de participants au marché et d'opérations susceptibles de dispense. Obliger les participants au marché à déposer régulièrement des demandes de dispense reviendrait non seulement à leur imposer d'importants délais et coûts, mais aussi à paralyser l'efficacité administrative des organismes de réglementation en valeurs mobilières locaux. Il est de plus difficile de concevoir comment une dispense discrétionnaire s'appliquerait à des obligations de déclaration potentiellement en temps réel, comme il est indiqué ci-dessus. Les participants au marché pourraient ainsi devoir surmonter des difficultés opérationnelles pour respecter leurs obligations de déclaration tout en essayant simultanément d'obtenir une dispense.

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[41] Voir *Règlement délégué (UE) n° 151/2013 de la Commission du 19 décembre 2012 complétant le règlement (UE) n° 648/2012 du Parlement européen et du Conseil sur les produits dérivés de gré à gré, les contreparties centrales et les référentiels centraux par des normes techniques de réglementation précisant les informations à publier et à mettre à disposition pour les référentiels centraux, ainsi que les normes opérationnelles à respecter pour l'agrégation, la comparaison et l'accessibilité des données*. (23 février 2013), Article 1(2). Disponible à l'adresse suivante : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0033:0036:FR:PDF.

[42] Voir, par exemple, ISDA, *Block trade reporting for over-the-counter markets* (11 janvier 2011) à la p. 4. Disponible à l'adresse suivante : http://www.isda.org/speeches/pdf/block-trade-reporting.pdf.

[43] *Ibid.*

[44] Voir CFTC, *Final Rule, Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades*, 17 C.F.R. Part 43 (31 mai 2013). Disponible à l'adresse suivante : http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-12133a.pdf.

[45] Modèle de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 41; projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 41; projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 41; *Loi sur les instruments* dérivés, L.R.Q., ch. I-14.01, art. 86.

Contenu des données qui doivent être rendues publiques

Le CMIC souscrit à l'objectif de transparence après les opérations. Le CMIC est toutefois d'avis que, dans un marché des dérivés de gré à gré relativement petit comme le Canada, comptant seulement un petit nombre de participants au marché vendeurs, la divulgation au public de données agrégées sur les positions ouvertes, les volumes des opérations, le nombre d'opérations et les cours moyens créera une possibilité de décompilation des stratégies de négociation dont l'analyse pourrait donner lieu au pire à la divulgation par inadvertance de renseignements confidentiels. Le marché canadien étant relativement assez petit, le CMIC n'appuierait une telle divulgation publique d'information que si les règles de déclaration d'opérations permettent de préserver l'anonymat des participants au marché et de veiller à ce qu'il n'y ait aucune incidence défavorable sur la liquidité ou le fonctionnement du marché. Il est possible de protéger et de ne pas divulguer par inadvertance de l'information confidentielle en limitant le type d'information qui doit être rendue publique en vertu du paragraphe 39(2)[46] du modèle de règle sur les répertoires des opérations mis à jour. Selon le rapport CPSS-IOSCO sur les obligations de déclaration et d'agrégation de données sur les dérivés de gré à gré, la nature des données divulguées doit « [traduction] dûment tenir compte de préoccupations quant à la révélation des positions de chaque firme et à la divulgation au public de trop d'information lui permettant de supposer indirectement ces positions. »[47] Compte tenu du volume du marché canadien et du petit nombre de participants au marché, le CMIC estime qu'il sera facile d'identifier les contreparties à certaines opérations si l'on exige la déclaration de données agrégées i) par région géographique et ii) par type de contrepartie. C'est pourquoi le CMIC soutient que ces obligations devraient être retirées du paragraphe 39(2) du modèle de règle sur les répertoires d'opérations mis à jour. La divulgation de ce type d'information n'est pas obligatoire en vertu de Dodd-Frank.

Données mises à la disposition des contreparties

Les membres du CMIC s'inquiètent toujours de l'incompatibilité entre le modèle de règle sur les répertoires des opérations mis à jour et la législation étrangère qui interdit la divulgation de certains renseignements. Au moins deux types de législation étrangère sont potentiellement incompatibles avec le modèle de règle sur les répertoires des opérations mis à jour : 1) la législation sur la protection des renseignements personnels, qui empêche généralement la divulgation d'information sur une personne physique ou une entité; et 2) la législation de blocage (notamment la législation sur la confidentialité) qui peut empêcher la divulgation à des tiers et/ou à des gouvernements étrangers d'information concernant des entités dans les territoires visés.[48] Même s'il est souvent possible de déroger à la législation sur la protection des renseignements personnels au moyen de mécanismes contractuels comme le consentement, le consentement d'une contrepartie n'est pas suffisant pour annuler l'effet d'une législation de blocage.[49] Dans au moins certains cas, des participants au marché des dérivés pourraient alors se retrouver dans la fâcheuse position de devoir respecter deux obligations juridiques conflictuelles : le respect de l'une violant l'autre, et vice versa. Le CMIC soutient qu'il n'est ni équitable ni raisonnable de placer des participants au marché dans une position où ils doivent choisir à quel ensemble de règles se conformer, les participants au marché s'exposant ainsi à de possibles sanctions civiles et criminelles.[50]

Bien que les questions d'incompatibilité entre la législation sur la déclaration, d'une part, et la législation sur la protection des renseignements personnels et la législation de blocage étrangères, d'autre part, soient examinées à un niveau international, à ce jour, on peine toujours à s'entendre sur une réglementation mondiale consensuelle. Comme le Conseil de stabilité financière le fait remarquer dans son dernier rapport d'étape sur la réforme des marchés des dérivés, les solutions au problème en sont toujours « [traduction] au stade initial », « [traduction] bien peu de solutions de réglementation étant en vigueur. »[51] Vu l'incertitude

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[46] Modèles de règle sur les répertoires des opérations mis à jour, *supra* note 1, art. 39(2); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 39(2); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 39(2); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 39(2).

[47] Voir CPSS-IOSCO, *Report on OTC Derivatives Data Reporting and Aggregation Requirements* (janvier 2012) à la p. 22. Disponible à l'adresse suivante : http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf.

[48] *Supra* note 16 à la p. 48.

[49] *Ibid.*

[50] Voir ISDA, *Comment Letter on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act* (27 août 2012) à la p. 3. Disponible à l'adresse suivante : http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww2.isda.org%2Fattachment%2FNDc1Mw%3D%3D%2FComment%2520Letter%2520-%2520CFTC%2520Reporting%2520Obligations%2520FINAL%2520082712.pdf&ei=tWsCUsnkA_KgyAH6l4DoAQ&usg=AFQjCNG3ZXVs8Od2rs7sX6QcpexkPJy3Aw&sig2=B86rivMVEacfoYVjcYHbQw&bvm=bv.50310824,d.aWc.

[51] *Supra* note 16 à la p. 49.

actuelle et l'absence de consensus international sur une réglementation appropriée, le CMIC souhaiterait réitérer la recommandation qu'il a déjà faite aux ACVM d'offrir une dispense des obligations de déclaration dans ces types de situations conflictuelles. Bien que les ACVM aient laissé entendre que les questions de conflits de lois peuvent être adéquatement réglées au moyen de la dispense discrétionnaire prévue à l'article 41, le CMIC soutient qu'il s'agit là d'une solution inapplicable, compte tenu du grand nombre de participants au marché qui pourraient potentiellement vouloir se prévaloir d'une telle dispense.

En cas d'incompatibilité entre la législation de déclaration, d'une part, et la législation sur la protection des renseignements personnels ou la législation de blocage étrangères, d'autre part, le CMIC soutient plutôt que les ACVM devraient permettre à la contrepartie déclarante de surseoir à la déclaration de certains renseignements permettant d'identifier une personne physique ou morale sans avoir à demander l'approbation expresse de l'organisme de réglementation. Ainsi, les participants au marché continueraient de déclarer tous les renseignements relatifs à une opération sur des dérivés sauf l'information permettant d'identifier une personne physique ou morale, ce qui permettrait non seulement de préserver la confidentialité des renseignements des contreparties, mais aussi de promouvoir l'objectif réglementaire d'une plus grande transparence. Le CMIC demande en outre que les ACVM continuent de surveiller et de participer à la mise en œuvre de solutions à l'international, et de travailler en collaboration avec les organismes de réglementation internationaux à l'élaboration de réformes, notamment réglementaires et législatives, qui préserveront les participants au marché d'éventuelles responsabilités en raison de conflits de lois.

Calendrier de mise en œuvre

Comme il est mentionné plus haut, dans la mesure où les modèles de règles mis à jour diffèrent des exigences prévues en vertu de Dodd-Frank, les participants au marché devront modifier leurs procédures et systèmes opérationnels pour se conformer aux modèles de règles mis à jour. En raison notamment de la portée de la définition de contrepartie locale que prévoit actuellement le modèle de règle sur les répertoires des opérations mis à jour, seront alors visées des entités qui ne sont pas actuellement tenues de déclarer des opérations en vertu de Dodd-Frank ou de quelque régime de déclaration d'un autre territoire. En plus des champs de données différents entre le modèle de règle sur les répertoires des opérations mis à jour et Dodd-Frank, notamment le champ de données « Dépositaire », les règles de déclaration des opérations de Dodd-Frank n'ont été arrêtées définitivement que pour des catégories d'actifs qui relèvent de la compétence de la CFTC. Les règles de déclaration des opérations pour des catégories d'actifs qui relèvent de la compétence de la SEC en vertu de Dodd-Frank n'ont pas encore été définitivement arrêtées. Ces catégories d'actifs sont toutefois incluses en tant que « produits dérivés » en vertu des modèles de règles mis à jour. Aussi, même si certains participants au marché font déjà des déclarations en vertu de Dodd-Frank, leurs systèmes devront être mis à jour pour inclure le champ de données « Dépositaire » supplémentaire et ces autres catégories d'actifs. Comme il a été mentionné dans la lettre de réponse du CMIC à l'égard des modèles de règles initiaux, cela signifiera l'ajout d'une retouche à un système de déclaration existant afin d'ajouter ou de supprimer des champs de données pour se conformer aux obligations de déclaration canadiennes. Même s'il suffit d'une simple « retouche » pour se conformer aux modèles de règles mis à jour, cette tâche n'est pas aussi simple qu'il n'y paraît, de nombreuses contreparties comptant plusieurs systèmes de saisie de données sur les opérations selon le type de produits, la catégorie d'actif ou le territoire visé. Dès qu'une retouche est créée, elle doit être mise à l'essai, ce qui fait intervenir l'exploitation de systèmes en parallèle. De plus, bon nombre de ces systèmes proviennent de tiers fournisseurs, de sorte que le délai d'achèvement des modifications est indépendant de la volonté de la contrepartie locale. C'est pourquoi le CMIC recommande de reporter la date d'effet pour la déclaration de ce champ de données supplémentaire et de ces autres catégories d'actifs pour une période d'au moins un an qui suit la date à laquelle les données doivent par ailleurs être déclarées aux termes de l'article 42 du modèle de règle sur les répertoires des opérations mis à jour. Comme il est indiqué ci-dessus, en raison de la petite taille du marché des dérivés de gré à gré canadien par rapport au marché des dérivés de gré à gré mondial, le CMIC soutient qu'il ne revient pas aux organismes de réglementation canadiens d'établir le modèle de référence dans ce domaine. Reporter ainsi la date de mise en œuvre de ce champ de données supplémentaire et de ces autres catégories d'actifs permettrait aux organismes de réglementation canadiens d'examiner les règles de déclaration des opérations définitives de la SEC et d'évaluer dans quelle mesure les règles canadiennes sont harmonisées aux règles de la SEC.

Exclusions

Le CMIC prie instamment les ACVM de reconsidérer l'exclusion prévue à l'alinéa 40(b)[52] du modèle de règle sur les répertoires des opérations mis à jour lorsque la valeur notionnelle globale des opérations est inférieure à 500 000 $. Comme nous l'avons indiqué dans notre lettre de réponse précédente, nous sommes d'avis que la valeur notionnelle globale requise pour bénéficier de l'exclusion n'est pas assez élevée. De petites entreprises pourraient par inadvertance être touchées par ces règles et en subir des effets défavorables. Aux termes du paragraphe 27(2), une contrepartie locale qui réalise une opération avec un courtier qui n'est pas une contrepartie locale sera en fin de compte responsable de la déclaration si la contrepartie non locale ne fait pas la déclaration. Cela pourrait se traduire par un lourd fardeau pour tout participant du côté achat, mais en particulier pour les plus petits participants au marché. Le CMIC estime que toute décision finale quant au montant de ce seuil devrait être prise après que le régime de déclaration aura été mis en œuvre et que les données auront été étudiées pendant une période de trois ans. Le CMIC ne saisissant pas très bien pourquoi l'exclusion ne s'appliquerait qu'aux opérations sur marchandises, il estime que le seuil, une fois établi, devrait s'appliquer à tous les types de dérivés de gré à gré.

Champs de données

En plus des observations relatives à l'harmonisation des champs de données avec ceux de Dodd-Frank, le CMIC soumet les observations suivantes quant aux champs de données expressément prévus en annexe A du modèle de règle sur les répertoires des opérations mis à jour :

i) Identifiant de la plateforme de négociation électronique. Dans l'annexe A, le champ de données « Identifiant de la plateforme de négociation électronique » est requis pour les opérations préexistantes, tandis que le champ de données précédent « Plateforme de négociation électronique » n'est pas requis pour les opérations préexistantes, ce qui nous semble inapproprié. Le champ de données « Identifiant de la plateforme de négociation électronique » ne devrait donc pas être requis pour les opérations préexistantes.

ii) Horodatage de l'exécution. L'horodatage de l'exécution correspondant à la date et à l'heure de l'exécution des opérations sur une plateforme de négociation, il n'est donc pas requis pour les opérations qui ne sont pas exécutées sur une plateforme de négociation. Le CMIC aimerait que les ACVM le confirment. Aussi, ce renseignement n'est pas toujours disponible lorsqu'une contrepartie compense des opérations préexistantes. Le CMIC est donc d'avis que ce champ de données ne doit pas être requis pour les opérations préexistantes, ou il faudrait préciser qu'il n'est requis pour les opérations préexistantes que lorsque l'information est disponible.

iii) Horodatage de la confirmation. L'horodatage de la confirmation correspond à l'heure et à la date de la confirmation de l'opération par les deux contreparties. Toutefois, en réalité, il s'agira de l'heure et de la date auxquelles la partie déclarante a confirmé l'opération, date et heure qui peuvent être différentes de l'horodatage de l'autre partie.

CONCLUSION

Le CMIC considère qu'un engagement continu auprès des ACVM est déterminant pour l'élaboration d'un cadre réglementaire qui respecte les engagements du G20 et atteint les objectifs prévus de politiques publiques. L'inclusion judicieuse par les organismes de réglementation des points soulevés dans la présente lettre contribuera sensiblement à la réussite de l'élaboration des règles définitives sur la désignation des répertoires des opérations et la déclaration des opérations.

Comme nous l'avons souligné dans des mémoires précédents, chaque sujet relatif à la réglementation des dérivés de gré à gré est en corrélation avec tous les autres aspects. À cet égard, le CMIC se réserve le droit de présenter des observations supplémentaires sur les modèles de règles mis à jour après la publication d'autres documents de consultation et de modèles et projets de règles.

[52] Modèle de règles sur les répertoires des opérations mis à jour, *supra* note 1, art. 40(b); projet de règle sur les répertoires des opérations du Manitoba, *supra* note 2, art. 40(b); projet de règle sur les répertoires des opérations de l'Ontario, *supra* note 3, art. 40(b); projet de règlement sur les répertoires des opérations du Québec, *supra* note 4, art. 40(b).

Le CMIC espère que ses observations seront utiles à l'élaboration des règles sur la désignation des répertoires des opérations et la déclaration des opérations et que les ACVM tiendront compte des incidences pratiques pour tous les participants au marché qui seront assujettis à ces règles. Le CMIC se réjouit de la possibilité de discuter de la présente réponse avec des représentants des ACVM.

Les points de vue exprimés dans la présente lettre sont ceux des membres du CMIC indiqués ci-dessous :

Bank of America Merrill Lynch
Banque de Montréal
Caisse de dépôt et placement du Québec
L'Office d'investissement du Régime de pensions du Canada
Banque Canadienne Impériale de Commerce
Succursale canadienne de Deutsche Bank A.G.
Healthcare of Ontario Pension Plan
Banque HSBC Canada
Succursale de Toronto de JP Morgan Chase Bank, N.A.
Société Financière Manuvie
Banque Nationale du Canada
OMERS Administration Corporation
Régime de retraite des enseignantes et des enseignants de l'Ontario
Banque Royale du Canada
La Banque de Nouvelle-Écosse
La Banque Toronto-Dominion

ANNEXE A

DESTINATAIRES

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Direct Energy.

September 6, 2013

VIA ELECTRONIC MAIL

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Saskatchewan Financial Services Commission

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Re: Multilateral CSA Staff Notice 91-302: Updated Model Rules - *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting*.

Dear Members of the Canadian Securities Administrators:

Direct Energy Marketing Limited ("Direct") hereby submits comments to the Canadian Securities Administrators (the "Administrators") with respect to CSA Staff Consultation Paper: Model Provincial Rules - *Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting*, published on June 6, 2013 (the "Proposed Model Rules").[1] Direct offers these comments on the present proceeding and looks forward to working with the Administrators throughout the derivatives regulatory reform process.

[1] Canadian Securities Administrators, CSA Staff Consultation Paper 91-301, *Model Provincial Rules - Derivatives: Products Determination and Trade Repositories and Derivatives Data Reporting*, December 6, 2012.

Direct appreciates the Administrators receptiveness to public comment and the beneficial changes that the Administrators made to the Proposed Model Rules in response to such comment. However, in order to avoid a patchwork derivatives regulatory regime, the current version of the Proposed Model Rules requires further adjustments.

I. Direct Energy.

Direct is one of North America's largest energy and energy-related services providers with over 6 million residential and commercial customer relationships. A subsidiary of Centrica plc (LSE: CNA), one of the world's leading integrated energy companies, Direct operates in 10 provinces in Canada and 46 states, plus the District of Columbia in the United States. In addition to owning and operating over 4,600 wells in Alberta with total natural gas production of 172 MMcfe per day, Direct's Midstream and Trading group performs a variety of physical and financial energy management activities, including production marketing and hedging, wholesale energy supply, transportation and storage.

II. Technical Comments on Reporting Obligations.

A. A Coordinated Approach to Reporting of Swap Data is Necessary

A coordinated approach to the reporting of derivatives across international jurisdictions is essential for a well-functioning Canadian reporting regime. As Direct stated in its comments to the initial Proposed Model Reporting Rules,[2] permitting trade repositories located outside Canada to serve as designated trade repositories is critical. Allowing them to do so will significantly reduce the burden on multi-national companies that trade derivatives in Canada and other international markets. However, for that burden to be measurably reduced, Canadian regulators must ensure that data fields and data format required under Canadian regulations are at least functionally comparable to those required by the U.S. Commodity Futures Trading Commission ("CFTC") under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[3]

Many Canadian companies, including Direct, have already undertaken, and in some cases completed, efforts to build the reporting infrastructure necessary to comply with reporting requirements imposed by the CFTC under the Dodd-Frank Act.[4] Any significant deviation between Canadian reporting requirements and the CFTC's final reporting regulations would likely require companies that participate in both Canadian and U.S. markets to build duplicative and costly reporting and recordkeeping systems. In this respect, Direct has identified approximately twenty-three data fields that appear inconsistent with, or may not be included in, the CFTC's swap data reporting requirements. In addition, there are a number of seemingly

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[2] Direct Energy Public Comment Letter to CSA (Jan. 25, 2012), http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120125_91-403_kimj.pdf.

[3] In addition, the CFTC and ESMA have announced efforts to coordinate and harmonize their approaches to the regulation of derivatives, including the reporting of derivatives. *See* Cross-Border Regulation of Swaps/Derivatives Discussions between the Commodity Futures Trading Commission and the European Union – A Path Forward (July 11, 2013), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/jointdiscussionscftc_europeanu.pdf.

[4] *See* Parts 43 and 45 of CFTC Regulation 17 C.F.R.§§ 45 et al. and §§45 et. al.

equivalent or similar data fields that, if required to be reported in a different format, will be functionally different.

Finally, and perhaps most important to the Administrators, in addition to reducing the compliance burdens imposed on market participants, the adoption of substantially similar reporting requirements in Canada and the United States will allow regulators in these countries to share and compare uniform data with respect to market participants that engage in significant cross-border derivatives activity in an effective and efficient manner. The uniform supervision of significant cross-border derivatives market participants will facilitate administrative efficiency and reduce regulatory gaps.

B. Proper Protections Must be Used When Disseminating Data in Real-Time

Direct appreciates the CSA's incorporation of market participants' comments regarding the potential for real-time dissemination of transaction data to reveal the identity of counterparty or their trading strategy. Specifically, not disclosing information such as the exact delivery location referenced in a commodity derivative will limit the potential harmful impacts that real-time disclosure of transaction information can have on market integrity.

The Administrators should, however, take additional steps to ensure that real-time disclosure of transaction data does not hinder liquidity in Canadian derivatives and commodities markets. For example, disclosure of the value of trades with large notional values in certain commodities or delivery location can provide enough information to the market so that hedging such transactions can become uneconomical.

Direct respectfully requests that the Administrators effectively "mask" trades by establishing a notional ceiling above which the notional value of a derivative is only reported as being above that threshold and disclosure of such trades should be delayed an appropriate period of time. In addition, for less liquid sub-commodities, (*e.g.,* [Alberta power]) that notional threshold might be significantly lower than for other more liquid commodities (*e.g.,* [WCS]) and the necessary time delay may be longer for less liquid commodities. As such, Direct requests that the CSA sets disclosure delays and associated notional thresholds at appropriate levels for individual sub-commodities. Given the importance and complexity involved with setting appropriate thresholds, Direct requests that the CSA seek additional public comment specifically addressing appropriate timing delays and notional thresholds with respect to less liquid commodities.

C. Market Participants Should Only be Obligated to Report Historical Data in Their Possession

Direct understands the Administrators' rationale for requiring the reporting of unexpired derivatives entered into prior to the effective date of Part 3 of the Proposed Model Rules. Reporting of such trades will provide the Administrators with a picture of the current risk in the Canadian derivatives markets.

Direct also appreciates the CSA amending the model reporting rules to limit the number of data fields required to be reported with respect to pre-existing swaps. In addition, the exemption in Proposed Model Rule 41.4 for transactions that expire within 365 days of the

effective date of Part 3 of the Model Rules and allowing both counterparties to serve as reporting party for a transaction will limit the burden with reporting pre-existing derivatives.

However, Proposed Model Rule 26 may still impose an unnecessary burden on market participants. Specifically, the proposed model rule still may require entities to create data not in their possession and to modify the format of existing data in their possession as the swaps at issue were entered into prior to the model rules being finalized. Direct respectfully requests that the Administrators amend Proposed Model Rule 26 to require market participants to report only creation data currently in their possession and to allow such reporting to be in the format in which market participants currently keep the relevant data.

III. Implementation and Reporting Timelines Should Reflect Associated Compliance Burdens.

A. Reporting Timeframes Should be Phased-In and Should Reflect a Market Participant's Role

The Proposed Model Rules require market participants to report a derivatives transaction as soon as technologically practicable and no later than the business day following execution of the derivative.[5] Direct requests that the CSA, recognize that interpretation of the phrase "as soon as technologically practicable" is dependent on the nature of the reporting counterparty. Specifically, the reporting timeline for registered derivatives dealers should be shorter than the deadline applicable to end-users. Phasing in the reporting timelines in this manner reflects the resources available to different classes of market participants and their ability to realistically meet the mandatory reporting deadlines. Accordingly, the Administrators should (i) amend the ultimate reporting timeframe so that dealers and other market participants are subject to different reporting timeframes, and (ii) gradually phase-in reporting timeframes to allow market participants to adjust to the new obligations and requirements.

In this respect, dealers should be required to report derivatives by no later than the business day following execution, and non-dealers should be required to report derivatives by no later than the second business day following execution. However, prior to the time that the final, mandatory reporting requirements go into effect, market participants should be granted an interim period to operationally adjust to the new reporting paradigm. Direct requests that the Administrators require dealers to report derivatives by no later than the second business day following execution for an interim period of six months after the reporting rules applicable to the dealers become effective. Non-dealers should be required to report derivatives by no later than the third business day following execution for an interim six month period after the reporting rules applicable to these market participants become effective.

B. Reporting Compliance Should be Phased In by Market Role

The Proposed Model Rules set forth a six month time delay from the publication of final rules until dealers must begin reporting derivatives and non-dealers must begin reporting three months after that. Direct respectfully requests that the Administrators amend the Proposed

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5 *See* Proposed Model Rule at Section 28.

Model rules to provide that non-dealers begin reporting derivatives six months after dealers begin reporting.

Large derivatives dealers are likely counterparties to a significant majority of derivatives transactions in Canadian markets. To ensure that reporting infrastructure is functional and operational, trade repositories are best served focusing on interfacing with the small set of large financial derivatives dealers first. Only once those entities are actively reporting should other market participants begin to interface with trade repositories and then report. Such an approach will allow trade repositories to focus on beta testing with a small set of market participants before focusing on other market participants that will likely require more customer service resources to properly "on board" with trade repositories. This recommendation is a product of Direct's "lessons learned" from the implementation of reporting requirements in the U.S. where a small period of time between swap dealer and end-user compliance with regard to the reporting of commodity swaps resulted in the CFTC having to delay end-user compliance.

Moreover, this recommended approach is consistent with the proposed approach of the Monetary Authority of Singapore ("MAS"). Under the MAS proposal, reporting of credit and interest rate derivatives will be phased in over a six month period from October 2013 to April 2014 with banks beginning reporting in October, other financial entities in January, and non-financial end-users beginning reporting in April 2014.[6] In fact, Direct's recommended approach may actually be more ambitious than the MAS proposal as that proposal will only apply to banks, other financial entities, and non-financial entities with $8 billion SGD notional of derivatives booked in Singapore.

C. Compliance Dates Should Reflect Degree of Variation From U.S. Reporting Requirements

The appropriateness of compliance dates for the Proposed Model Rules is a function of the amount of work that will be necessary to come into compliance with such rules. The compliance dates proposed in Part 7 of the Proposed Model Rules[7] should be sufficient to the extent that the ultimate Canadian reporting requirements are functionally identical to those in the U.S. If that is the case, and since U.S.-registered Swap Data Repositories ("SDRs") will be able to register as trade repositories in Canada, much of the build-out and testing necessary to get those trade repositories to a state where they are able to interface and beta test with market participants will be completed. The majority of the time remaining before compliance is necessary will be needed for market participants to (i) put in place the documentation necessary to designate reporting counterparties or otherwise establish reporting relationships, (ii) develop the systems necessary to report, if not already in place to comply with the CFTC's requirements, and (iii) conduct necessary testing of the SDR interface.

However, if Canadian reporting requirements are substantively different than those in the U.S., Direct requests an extension of each of the compliance deadlines in Part 7 of the Proposed Model Rules by six months as trade repositories will need the additional time to develop the systems necessary for market participants to start to interface with the repositories. Such an

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[6] *See* MAS Consultation Paper on Draft Regulations Pursuant to the Securities and Futures Act for Reporting of Derivatives Contracts, June 2013, at Section 16.

[7] *See* Proposed Model Rules at Section 42.

extension would be consistent with, though shorter than, the amount of time ultimately provided to end-user reporting counterparties in the U.S.[8]

Finally, as a general matter, the Administrators should provide the ability for non-dealer market participants to petition their regulator for a one-time three month compliance deadline extension with respect to the reporting of derivatives. That extension should be available to any non-dealer market participant as long the market participant has made a good faith effort to meet the original reporting deadline. Providing the ability to petition for an extension will avoid negative regulatory consequences for entities that are trying to comply with complex requirements, but are unable to do so in the allotted period of time.

IV. Conclusion.

Direct thanks the Administrators for the opportunity to provide comments on the Proposed Model Rules. Direct is looking forward to working with the Administrators in crafting the new regulatory environment for derivatives in Canada. If Direct can offer any assistance to the Administrators as regulatory reform efforts move forward, please do not hesitate to contact me at 403-776-2246.

Sincerely,

/s/ Bill Rutherford

Bill Rutherford
Credit Risk Officer
Direct Energy Marketing Limited

[8] The CFTC's swap data reporting rules were published on January 13, 2012, and will ultimately go into effect for end-user reporting counterparties almost twenty-one months later, on September 9, 2013.

FpML Response to:

Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting dated June 6, 2013

1. Introduction

Financial product Markup Language (FpML), through the FpML Standards Committee, appreciates the opportunity to provide the Canadian Securities Administrators (CSA) with comments and recommendations on the Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting.

We fully support the response submitted by ISDA. The analysis conducted and provided in this comment letter is an addition to the ISDA response with a focus on technical implementation. We also note that the engagement with regulators in the US, Europe and Asia on various reporting requirements through the FpML Regulatory Reporting Working Group[1] has been very beneficial .
We would welcome a similar engagement with the CSA, preferably early on in the process.

FpML (Financial products Markup Language) is the freely licensed business information exchange standard for electronic dealing and processing of privately negotiated derivatives and structured products. It establishes the industry protocol for sharing information on, and dealing in, financial derivatives and structured products. It is based on XML (Extensible Markup Language), the standard meta-language for describing data shared between applications. The standard is developed under the auspices of ISDA, using the ISDA derivatives documentation as the basis. As a true open standard, the standards work is available to all at no cost and open to contribution from all. The standard evolution and development is overseen and managed by the FpML Standards Committee, following W3C rules of operations guidelines. The Standards Committee has representatives from dealers, buy side, clearing houses large infrastructures, vendors, Investment managers and custodians. To find additional information on FpML, visit www.fpml.org.

Within in the broader standards landscape, we collaborate actively with ISO on the further development of the ISO 20022 standard and with standard organizations that cover other parts of the financial standards landscape such as Swift (payments, settlements, securities) and FIX (securities).

A variety of changes have been made to the FpML standard to allow for coverage of the reporting requirements in different jurisdictions with an initial focus on the Dodd-Frank regulation and CFTC reporting requirements. A core design principle has always been to implement a robust technical framework that could be leveraged by global regulators, as new regulations become available. To that effect we have tracked requirements that are specific for a particular reporting regime in a structure that accommodates the needs of multiple regulators. Over a period of time FpML has been actively

[1] The meeting materials and minutes of the various FpML working groups, including the reporting working group are publicly available at: www.fpml.org in the working group section
See e.g. http://www.fpml.org/pipermail/rptwg/

involved with other regulatory bodies in devising compliant solutions in order to report the specific data fields for various regulatory regimes.
As mentioned previously, the work done has benefitted greatly from regulatory involvement in the FpML working groups and we believe that a similar process in Canada would be very positive for the regulatory community and the industry.

We value the references made to data standards in the Updated Model Rules and appreciate the acknowledgement of the ISDA Product Taxonomy. Particularly in the area of identifiers we strongly suggest to leverage the work done by the industry and regulatory community to date with unique identifiers on a global basis. This includes:

- **Legal Entity Identifier (LEI):** support for LEI / GLEI and if an interim identifier is needed, leverage the CICI that the industry is implementing for CFTC reporting.

- **Unique Trade Identifier (UTI):** Most value will be derived by the regulatory community and the industry if there is one global UTI and we fully support the ISDA UTI workflow paper which sets out the principles for a global UTI[2]. The comments in this response focus on compatibility of the CSA requirements with requirements in other jurisdictions. In addition we strongly believe that CSA, together with other regulators should push for a global solution, potentially under the auspices of the FSB, as has been done for LEI.

  The UTI constructs contain two parts: A first part to uniquely identify the entity that assigns the UTI; and as second part a trade identifier that is unique for that entity. The combination gives a Unique Trade Identifier.

  The first part to uniquely identify the entity through the *issuerIdScheme* specifically for use in the UTI context, e.g. *issuerIdScheme* =http://www.fpml.org/coding-scheme/external/issuer-identifier.

```
<trade>
    <tradeHeader>
      <partyTradeIdentifier> <!-- UTI -->
    <issuer issuerIdScheme="http://www.fpml.org/coding-scheme/external/issuer-
identifier">FCHUXIINML</issuer>
    <tradeId tradeIdScheme="http://www.fpml.org/coding-scheme/external/unique-
transaction-identifier">12345678901234567890123456789012</tradeId>
     </partyTradeIdentifier>

</tradeheader>
```

Domains that can change are modeled using FpML "Coding Schemes". An FpML scheme type contains a data value, typically a string and a scheme URI, which identifies the domain from which the value is coming.

Coding schemes can be standard FpML schemes or they can be external coding schemes. External coding schemes provide the ability to indicate explicitly within the scheme URI that they are external to FpML.

[2] http://www2.isda.org/functional-areas/technology-infrastructure/data-and-reporting/

As seen below an external coding scheme is identified by the text ***ext*** in the coding scheme URI

- http://www.fpml.org/**ext**/moodys
- http://www.fpml.org/**ext**/iso4217-2001-08-15 (ISO currency codes)

In addition FpML supports fields with data values chosen from a "domain" (defined list). Small, fixed domains are modeled using XML Schema Enumerations.

For an overview see: http://www.fpml.org/spec/coding-scheme/index.html

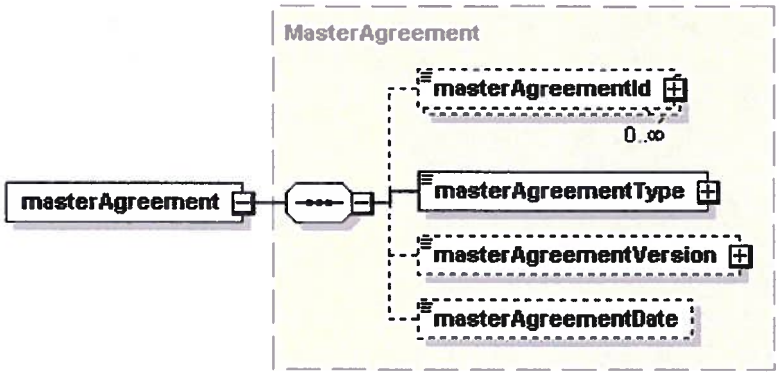
2. Analysis

The analysis presented in the remainder of this document is a detailed analysis and impact assessment on a standards level of the CSA requirements against the coverage as defined in FpML version 5.5, which is the FpML version that covers US and European reporting requirements.

This analysis takes into account all minimum data fields required to be reported to a designated trade repository for derivatives data reporting.
We highlight below the fields that need additional clarification, with suggested changes where appropriate.

Operational Data: Master Agreement Type

FpML defines a set of standard Master Agreement Types which can be found in the FpML documentation in the scheme section, also copied below. We strongly recommend the use of the existing coding scheme for the description of Master Agreement Type. The use of free text as a format definition is not recommended.



The MasterAgreement Type as specified below contains a reference to several master agreements used in the industry.

MasterAgreementType	Explanation
AFB	AFB Master Agreement for Foreign Exchange and Derivatives Transactions

German	German Master Agreement for Financial derivatives and Addendum for Options on Stock Exchange Indices or Securities
ISDA	ISDA Master Agreement
LEAP	Leadership in Energy Automated Processing
Swiss	Swiss Master Agreement for OTC Derivatives Instruments
EFETGas	EFET General Agreement Concerning The Delivery And Acceptance of Natural Gas
EFETElectricity	EFET General Agreement Concerning the Delivery and Acceptance of Electricity
GTMA	FOA Grid Trade Master Agreement
EEIPower	EEI Master Power Purchase and Sale Agreement
NAESBGas	NAESB Base Contract for Sale and Purchase of Natural Gas
NBP	Short Term Flat NBP Trading Terms and Conditions
ZBT	Zeebrugge Hub Natural Gas Trading Terms and Conditions
SCoTA	globalCOAL Standard Coal Trading Agreement
MCPSA	CTA Master Coal Purchase and Sales Agreement
LBMA	International Bullion Master Agreement Terms published by the London Bullion Market Association

As shown in the example below, the representation of MasterAgreementType in FpML includes the Type, Version and Agreement Date. All three might be needed to uniquely identify the Master Agreement in question.

XML Example

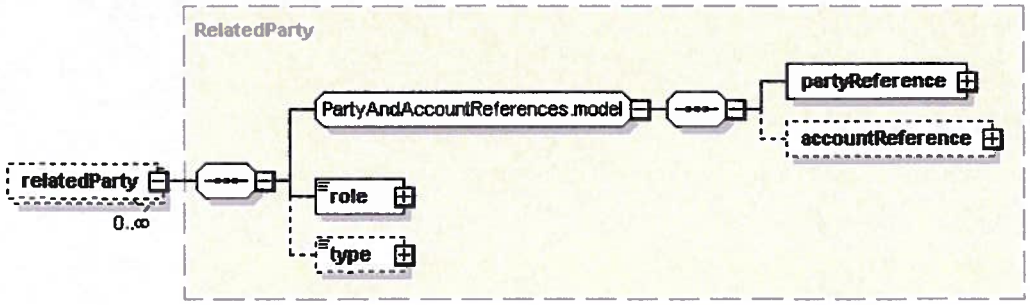
```
<masterAgreement>
  <masterAgreementType>ISDA</masterAgreementType>
  <masterAgreementVersion>1992</masterAgreementVersion>
  <masterAgreementDate>2006-01-03</masterAgreementDate>
</masterAgreement>
```

Ref: http://www.fpml.org/coding-scheme/master-agreement-type

Operational Data: Clearing exemption

- Indicate whether one or more of the counterparties to the transaction are exempted from a mandatory clearing requirement.

This information can be obtained from the relatedParty /Role element which specifies the relationship of the counterparty. If the counterparty is exempted from mandatory clearing requirement this can be indicated via the coding scheme by assigning the Role element to the value ClearingExceptionParty. The ClearingExceptionParty is a party that claims a clearing exception.



Ref: http://www.fpml.org/coding-scheme/party-role

Operational Data: Inter-affiliate

- Indicate whether the transaction is between two affiliated entities.

This can be represented in FpML using a related party reference or possibly as part of an end user exception declaration (using an organization characteristic).

This needs further discussion at the FpML Reporting Working Group.

Operational Data: Collateralization

- Indicate whether the transaction is collateralized
- Field Values: Fully (initial and variation margin posted by both parties), Partially (variation only posted by both parties), One-way (one party will post some form of collateral), Uncollateralized."

While we agree with the field values we strongly advise reusing the codes currently defined by FpML.

FpML	Description
Fully	Both initial margin (independent amount) and variation margin will be posted. For Transparency view, both parties will do this; for Recordkeeping view, this party will do this (a separate indicator in the other partyTradeInformation block is used for the other side)
Partially	Variation margin (but not initial margin) will be posted. For Transparency view, both parties will do this; for Recordkeeping view, this party will do this (a separate indicator in the other partyTradeInformation block is used for the other side).
OneWay	Applies to Transparency view only. One party will post some form of collateral (initial margin or variation margin.)
Uncollateralized	No collateral is posted for this trade. In Transparency view, no collateral is posted by either party; in Recordkeeping view, no collateral is posted by the counterparty.

Ref: http://www.fpml.org/coding-scheme/collateral-type

Counterparty Information: Reporting counterparty dealer or non-dealer

- Indicate whether the reporting counterparty is a dealer or non-dealer.

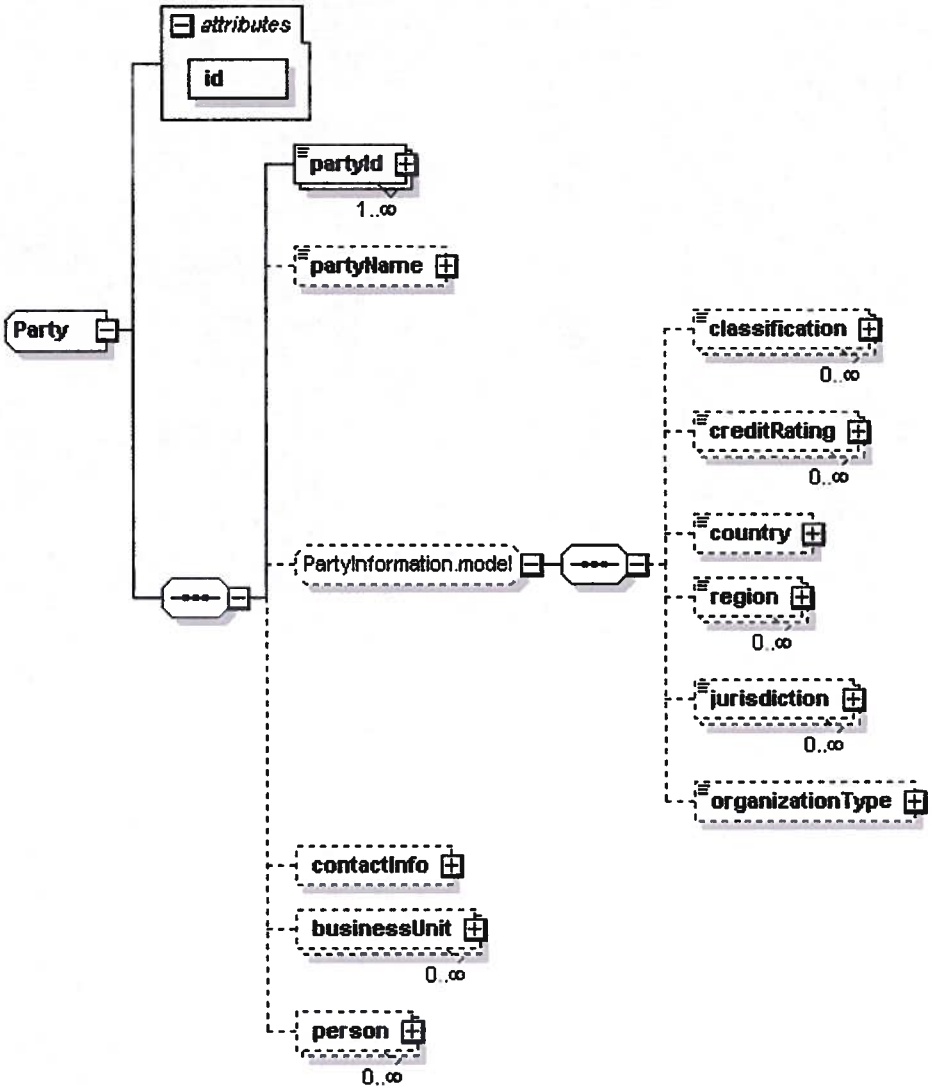
Counterparty Information: Non-reporting counterparty is a local counterparty or not local.

- Indicate whether the non-reporting counterparty is a local counterparty or not.

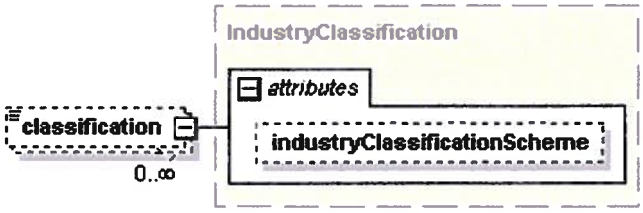
Although FpML does not have specific fields to indicate details of the counterparty- whether it is a dealer/non-dealer or local/non-local this information can be derived from the party structure.

Party Structure:

INCLUDES COMMENT LETTERS



The information whether a counterparty is a dealer vs. non-dealer can be obtained from the classification element above.. The industry classification coding scheme specifies corporate sector as defined by or for regulators including ESMA and CFTC.



Ref: http://www.fpml.org/coding-scheme/regulatory-corporate-sector

The information whether a counterparty is local vs. non-local can be obtained from the party/country element.

Common data: Contract Type

- The name of the contract type (e.g. swap, swaption, forwards, options, basis swap, index swap, basket swap, other).

The information regarding the contract Type is derived from the product messages in FpML.
We propose to derive this field from the ISDA product taxonomy classification. FpML can work with regulators to map existing ISDA product taxonomy codes to the Contract Type Codes.

By way of example, for an IRD Vanilla swap with a fixed and floating leg:

```
<swap>

<primaryAssetClass>InterestRate</primaryAssetClass>

      <productType productTypeScheme="http://www.fpml.org/coding-scheme/product-
      taxonomy">InterestRate:IRSwap:FixedFloat</productType>
      <swapStream>

                           <-- Details of the fixed leg -- >
      </swapStream>
      <swapStream>

                          <-- Details of the floating leg -- >
      </swapStream>

</swap>
```

ISDA Product Taxonomy:
The ISDA product taxonomy went through a public comment period; is freely available and has rules of operations that allow for further evolution of the taxonomy through a transparent process. In addition the rules of operations are open to further input from regulators. The ISDA taxonomy is currently used for CFTC and JFSA reporting and has been integrated into FpML. The ISDA OTC taxonomy and Taxonomy Rules of Operations are freely available on the ISDA website: http://www2.isda.org/otc-taxonomies-and-upi/

In addition to complex derivative products, the FpML standard has a representation for a fairly large number of standardized financial instruments. These instruments, called "UnderlyingAssets" in FpML, can be used for a variety of purposes:

- As underlying assets in various derivatives, including:

    - Equity options
    - Equity swaps
    - Asset swaps
- As reference obligations in credit default swaps
- For a variety of purposes in pricing and risk, including:
    - For describing curve inputs
    - For describing benchmark asset prices

The underlying asset framework is very similar to the product framework. In places where underlying assets are used, a substitution group allows the asset to be substituted as required. The structure contains standard data fields available for all assets (e.g., instrumentId can be used to capture the ISIN, CUSIP, ... code) and fields specific to each asset (e.g., currency, maturity, coupon rate).

By way of example: "equity" is an FpML underlying asset and can be used as a basket component in the following way:

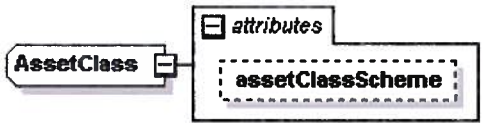
```
<basketConstituent>
      <equity>
       <instrumentId instrumentIdScheme="http://www.fpml.org/coding-
          scheme/external/instrument-id-bloomberg">TIT.ME</instrumentId>
            <description>Telecom Italia spa</description>
            <currency>EUR</currency>

       <exchangeId exchangeIdScheme="http://www.fpml.org/coding-
      scheme/external/exchange-id-MIC">Milan Stock Exchange</exchangeId>

      </equity>
   <constituentWeight>
                <openUnits>432000</openUnits>
   </constituentWeight>
</basketConstituent>
```

Common Data: Asset Class

- Major asset class of the product (e.g. interest rate, credit, commodity, foreign exchange, equity, etc.).



The current FpML standard has an existing assetClassScheme which is used to represent a simple asset class categorization. Further information can be found at the coding scheme link below.

Ref: http://www.fpml.org/coding-scheme/asset-class

Commodities: Up-front payment

- The amount of any upfront payment

Currency: currencies of up-front payment

- The currency in which any up-front payment is made by one counterparty to another.

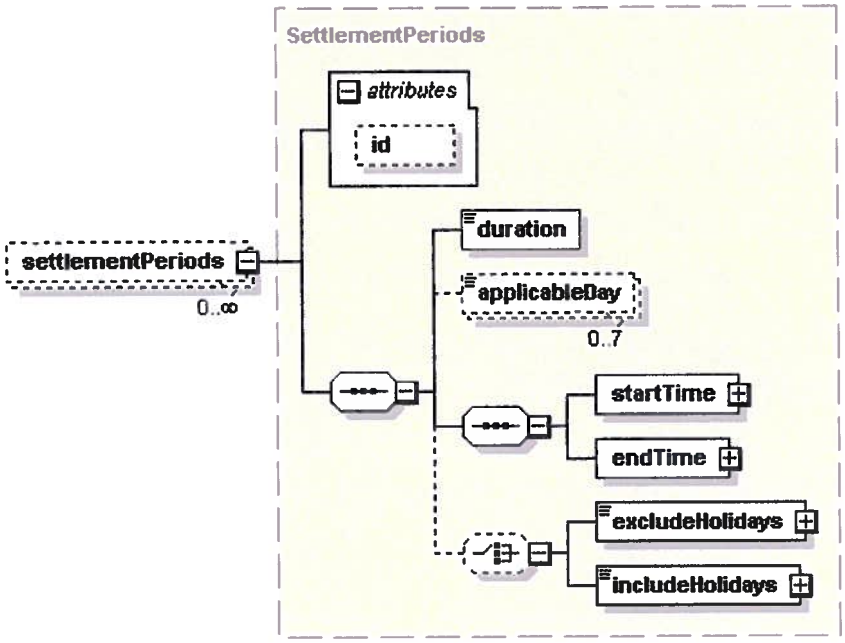
The above two fields have been previously identified as gaps in FpML compared to the European and Australian reporting requirements. The FpML Commodities Working Group is in the process of consulting with the ISDA commodities steering committee.

Data fields specific to each asset class

Commodity derivatives: Transmission duration

- For power, the hours of day transmission starts and ends.

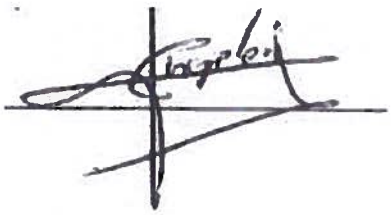
The current FpML "ElectricityDeliveryPeriods" structure reports this information via the 'settlement Periods' element. The settlement Periods element can provide the start and end time / duration of the transmission.



3. Conclusion

The FpML standard - in particular version 5.5 - is well equipped to represent all the reportable data fields CSA recognizes. The gaps and suggestions identified are few. We expect to include these in the next release of the standard.

We hope that you will find our comments and suggestions useful, and we are available if you would like to discuss these in further detail.



Karel Engelen
Director and Global Head Technology Solutions
International Swaps and Derivatives Association

Global Foreign Exchange Division
St Michael's House
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EC3V 9DH

TO:

John Stevenson
Secretary
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M5H 3S8
comments@osc.gov.on.ca

6 September 2013

Re: Proposed OSC Rule 91-506 Derivatives: Product Determination and Companion Policy 91-506CP; and Proposed OSC Rule 91-507 Trade Repositories and Derivatives Data Reporting and Companion Policy 91-507CP

Attached please find a copy of our comment letter to the Canadian Securities Administrators on CSA Staff Notice 91-302 – Updated Model Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting. We appreciate your consideration of these comments to Proposed OSC Rule 91-506 and Companion Policy 91-506CP, and Proposed OSC Rule 91-507 and Companion Policy 91-507CP. Please do not hesitate to contact me at +44 (0) 207 743 9319 or at jkemp@gfma.org with any questions.

Yours sincerely,

James Kemp
Managing Director
Global Foreign Exchange Division, GFMA[1]

[1] The Global Finanical Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA.

Attachment

Copy of
September 6, 2013 Letter from GFMA Global FX Division
to Canadian Securities Administrators

Global Foreign Exchange Division
St Michael's House
1 George Yard
London
EC3V 9DH

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6 September 2013

Re: Canadian Securities Administrators. CSA Staff Notice 91-302 – Updated Model Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting

The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) welcomes the opportunity to comment on behalf of its members on the Updated Model Rules issued by the Canadian Securities Administrators (CSA, or, the Committee). The GFXD was formed in cooperation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial

Markets Association (ASIFMA). Its members comprise 22 global FX market participants,[1] collectively representing more than 90% of the FX market.[2] Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators. The GFXD welcomes the opportunity to set out its views in response to your consultation paper.

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As discussed in our response dated 4 February 2013 to the CSA Consultation Paper 91-301 (Draft Model Rules), the FX market presents some unique challenges for reporting when compared with other asset classes: notably the high volume of transactions and the wide universe of participants, especially as FX forms the basis of the global payments system. Given the cross-border nature of the FX market, participants face significant challenges in being able to report in multiple jurisdictions.

We broadly support the proposed approach outlined in the Updated Model Rules (and Model Guidance) and, specifically, the various amendments made to reflect our comments on the Draft Model Rules. Our comments below are limited to key issues which we believe remain, or are newly raised, by CSA Consultation Paper 91-302.

MODEL PROVINCIAL RULE (AND EXPLANATORY GUIDANCE) – DERIVATIVES: PRODUCT DETERMINATION

1. Clause 2(c)(i)(B) – FX security conversion transactions

We welcome the addition of clause 2(c)(i)(B) which allows for a longer settlement period (*i.e.*, > T+2) for an FX trade entered into to facilitate the settlement of a securities transaction ("FX Security Conversions"). Although the treatment of an FX Security Conversion as a spot trade and therefore an "excluded derivative" under the Updated Model Rules is generally consistent with the approach taken by the CFTC and SEC in their adopting release of the final product definitions in the United States,[3] market participants would nonetheless be challenged with interpretive and practical issues surrounding the "contemporaneously with a related securities trade" and "security purchase" language in the Updated Model Rules and Guidance.[4] The CFTC acknowledged these issues when it granted time-based no-action relief to market participants in May 2013.[5] Unfortunately, these issues remain today, as evidenced by the concerns recently raised to the CFTC in a letter from the SIFMA Asset Management Group requesting interpretive guidance on the types of FX trades which constitute FX Security Conversions.[6] We strongly urge the CSA to clarify or confirm that the types of examples set forth in the SIFMA AMG Letter would fall within the definition of "excluded derivatives." We believe this would ensure that the original objectives behind the recognition of FX Securities Conversions as "excluded derivatives" in the Updated Model Rules and Guidance are fully achieved.

2. Clause 2(c)(ii) and (iii) – intention and rollover

We welcome the revisions in Clause 2(c) relating to the contractual obligations of two transacting parties with respect to transactions in currency and, in particular, the delivery aspects and relevant settlement periods. However, language in the Updated Model Rules

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[1] Bank of America Merrill Lynch, Bank of New York Mellon, Bank of Tokyo Mitsubishi, Barclays Capital, BNP Paribas, Citi, Credit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds, Morgan Stanley, Nomura, RBC, RBS, Société Générale, Standard Chartered Bank, State St., UBS, and Westpac.

[2] According to Euromoney league tables

[3] *See* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-18003a.pdf (pages 48256-48258).

[4] Analogous terms/concepts in the final product definitions of the CFTC and SEC are "executed contemporaneously," "purchase and sale".

[5] http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-13.

[6] Available at http://www.sifma.org/comment-letters/2013/sifma-amg-submits-comments-to-the-cftc-requesting-interpretive-guidance-relating-to-certain-foreign-exchange-transactions/ ("SIFMA AMG Letter").

and Guidance continues to create a high degree of uncertainty for market participants surrounding the long-standing practice of payment netting in the institutional FX market – specifically, whether the use of payment netting undermines the characteristics of an FX trade executed as a deliverable, short-term (spot) trade as such and therefore as an "excluded derivative". It is also worth noting that similar concerns have been raised with regulatory authorities in the United States with respect to Commodities Exchange Act, as amended by Dodd-Frank, and recent implementing regulations.

Payment Netting in the Settlement Process. As raised in the our original comment letter[7] to the Draft Model Rules, bilateral payment netting is "[a] form of netting where two counterparties agree (via a legally-enforceable netting agreement) to settle transactions by making or receiving a **single** payment in **each** of the currencies (*i.e.* each counterparty has an obligation to pay a single amount in those currencies in which it is a bilateral net seller).[8] This reduces the value at risk by replacing multiple gross obligations (that would, otherwise, be settled on a trade-by-trade basis) with one netted obligation [in each currency]" (emphasis added)[9] Such netting can also be performed on a multilateral basis, *e.g.*, through a multi-currency settlement provider for payments like CLS Bank.

For well over a decade, payment netting has been, and continues to be, encouraged by prudential regulators in the FX market as a tool for reducing the size of principal risk exposures, and is part of best practices for the market.[10] These arrangements are entirely distinguishable from agreements between two counterparties (i) to net cash settle in a single currency, *i.e.*, to settle one or more FX trades by netting all obligations (in multiple currencies) to a single or reference currency; (ii) to net offsetting obligations and cancel and replace the original contracts which created such obligations with new contract (commonly referred to as "book-outs", or legal novation netting/compression); and/or (iii) to continuously or automatically "roll forward" the settlement date of such contracts by amending the settlement dates to a later date (often referred to as "rolling FX spot", a common practice in the retail FX market which involves historical rate rollovers).

The view of the GFXD's members is that when transacting parties execute deliverable FX trades, such as FX spot, an agreement to apply payment netting to currency obligations due between the parties for **settlement** purposes does not, and should not, be considered as "result[ing] in a transaction not being physically settled." Clarification in the Updated Model Guidance is required on this point. Further, while the effectiveness of payment netting in reducing risk in the funding process is a direct result of the trading activity of a client with dealer, it should be clear these factors do not "negate the intention to deliver" and is not relevant to any "facts and circumstances" test in the Updated Model Guidance.[11] These concepts, which are raised in the Updated Model Guidance under "Intention requirement (subparagraph 2(c)(ii))," are not appropriate to apply to the institutional FX market for the reasons described below.

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[7] http://www.gfma.org/correspondence/item.aspx?id=518.

[8] *See* Basel Committee on Banking Supervision (BCBS) *Supervisory Guidance for managing risks associated with the settlement of foreign exchange transactions*, consultative document (August 2012). http://www.bis.org/publ/bcbs229.pdf.

[9] This can also be achieved by a group of counterparties in a multilateral setting, as recognized by the US Treasury in its final determination to exempt FX swaps and forwards from most requirements of the Dodd-Frank Act. *See http://www.gpo.gov/fdsys/pkg/FR-2012-11-20/pdf/2012-28319.pdf* (page 69704): "Applying appropriate mechanisms during the settlement process to net qualifying foreign exchange swap and forward transactions conducted by a group of parties should satisfy the limitations under the CEA because the essential elements of each of those transactions—namely, an exchange of two different currencies at a predefined, fixed rate—are left intact."

[10] *See Guidelines for Foreign Exchange Trading Activities* and *Management of Operational Risk in Foreign Exchange*, each revised in November 2010 by The Foreign Exchange Committee (FXC) and published at http://www.ny.frb.org/fxc/about.html. The FXC is an industry group that has been providing guidance and leadership to the global FX market since its founding in 1978, and includes representatives of major financial institutions engaged in foreign currency trading in the United States and is sponsored by the Federal Reserve Bank of New York.

[11] Where payment netting is not applied, there would be no uncertainty or interpretive issues with respect to FX trades retaining their characteristic as deliverable FX spot trades; however, payment netting functions as a vital risk mitigant for this systemically important market.

Because trading in deliverable FX spot serves a critical role in the global payment system, confirmation from the CSA of our members' view, and appropriate revisions to the Updated Model Guidance by the CSA, are needed to ensure a level of consistency among market participants with respect to the treatment of the same products/activities under the Updated Model Rules and, as a result, both preserve payment netting and minimize any unnecessary disruption to the current institutional FX market structure.

Policy implications. We believe there are serious policy repercussions which must be carefully considered by the CSA, in consultation with the Bank of Canada, if the CSA were to consider adopting a contrary view.

- *Risk of undermining well-established use of payment netting as an effective risk mitigant for settling deliverable FX – which would increase risk to the financial system.* In some instances, clients are requesting funding on a gross basis (no payment netting) to ensure its FX spot trades are not at risk of being characterized as financially settled products. Should the historical trend of payment netting be reversed, credit risk, settlement risk, liquidity risk and systemic risk in the financial system would increase.

- *Risk of bifurcating the current single, well-functioning, deliverable FX market – which would be unnecessarily disruptive.* If the current institutional G10 FX spot market were to be split into a "deliverable (physically settled)" and "non-deliverable (non-physically settled)" market based on concepts raised in the Updated Model Guidance, this would result in decreased volume, decreased liquidity and increased prices. The potential impact on the dealers, specifically their ability to differentiate between deliverable and trades, etc., is not known. Likewise, the potential impact on CLS Bank, the FX market's systemically important financial market infrastructure, is also not known although volumes can be expected to decrease significantly.

- *Risk of negatively impacting common policy objectives of central banks.* Central banks globally have had a historical interest in institutional FX market practices, with particular emphasis on risk management, and the impact of these practices for several reasons, including the efficiency of interbank settlements and markets; the stability and containment of systemic risk; and the effectiveness of policy instruments (*i.e.*, the ability to maintain effectiveness of policy instruments used to pursue ultimate objective of stability of central bank's currency; and to ensure continued ability to oversee developments in markets through which monetary and exchange rates policies are implemented).[12] For these reasons, it is important that central banks and treasury functions fully understand the implications of the CSA recharacterizing historical FX spot trading activity as non-deliverable, financially settled products on these policy objectives.

Core Attributes in Institutional FX Market, with Key Distinction between Gross Obligations and Funding. There is a set of core attributes in the single, deliverable institutional (*i.e.*, non-retail) FX market which is shared among institutional market participants and which contribute to this deep, liquid and well-functioning global payment system. These core attributes include trade execution, operational processing (confirmation and matching), and funding (to discharge obligations under the each trade), while maintaining a fundamental key distinction between individual FX trades (or contracts) and funding.

- Each deliverable FX spot/forward/swap trade between two transacting parties is an agreement to deliver one currency in exchange for another on a gross basis at a pre-determined fixed rate of exchange. With respect to FX spot, the agreed settlement date is T+2 and, for some currency pairs, T+1.

[12] *See* BIS 1990 Lamfalussy Report (available at http://www.bis.org/list/cpss/index.htm).

- Funding is a separate and distinct, but related, process to the settlement of underlying gross obligations due under the terms of each trade executed between the transacting parties.[13]
- Funding enables/leads to settlement, *i.e.*, the discharge of obligations due between the transacting parties.
- Payment netting is a risk mitigation technique which makes the funding process more efficient and safer. Payment netting can be performed on a bilateral or multilateral basis, and multilateral payment netting is typically more efficient than bilateral payment netting.[14]
- Payment netting never affects or modifies the gross obligations due between the transacting parties under an FX trade.

Key Distinction is Important. These core attributes, with the key distinction between settlement and funding, are extremely important and relevant:

- *Netting of payments for funding purposes does not change gross obligations due under each trade.* Payment netting only reduces settlement risk, liquidity risk and systemic risk in the settlement process. As noted above, payment netting does not change or reduce credit risk of gross obligations on a transacting party's books, nor does it change or reduce the legal obligations to deliver and receive gross obligations between two transacting parties on the agreed settlement date.[15] Global regulatory policy statements evidence support of payment netting in the institutional FX market for well over two decades,[16] and the FX industry has promoted and implemented payment netting through published industry guidelines and best practices.[17]

- *Each deliverable FX trade settles.* Each trade is individually confirmed and processed through to the agreed settlement date, at which time appropriate credits and debits entries are made to reflect settlement of the gross obligations due under that trade for trade. The amounts and rate of the gross currency obligations due under each trade are always agreed, known and fixed throughout the life of each trade, from trade date to

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[13] To further illustrate this point, CLS Bank is a multilateral payment netting system. CLS Bank processes and settles payments relates to underlying trades, such as FX. CLS Bank does not settle trades, *i.e.*, the gross obligations due under the trades. Processing the payments related to the trades does lead to eventual discharge of the gross obligations due under the trade. In this way, CLS is no different than a multi-currency version of LVTS in Canada, Fedwire/CHIPS for USD, CHAPS for GBP, TARGET in Europe or any other payment system that processes payments – none of these payment systems actually process or settle underlying trades, relating to FX or otherwise.

[14] Payment netting of funding is a means for participants to manage their exposure to credit risk, settlement risk and liquidity risk. CLS Bank provides a multilateral means for doing so. However, because not all institutional market participants use CLS Bank and not all currencies are eligible for settlement in CLS Bank, participants often apply payment netting on a bilateral basis to their funding requirements.

[15] By way of illustration, when funding is performed on a net basis (*e.g.*, net funding of 100 USD and 50 EUR), if only some of this is funded by one party, none of the underlying trades are in fact settled. If this were to constitute an event of default under a master agreement between the two parties, such party could be considered in default and subject to close-out under the master agreement. All the trades would be *valued* and netted to single currency amount. In contrast to other markets where there are "book-outs"/compression/tear-ups via legal novation netting which results in the creation of a new trade which cancels and replaces previously executed trades – which would actually change legal obligations and credit risk.

[16] *See, e.g.*, 1989 BIS Angell Report, 1990 BIS Lamfalussy Standards, 1993 BIS Noel Report, 2001 BIS Core Principles for Systemically Important Payment Systems, 2012 BIS Principles for FMIs; and 1996 BIS Allsopp Report, 1998 BIS FX Progress Report and 2008 BIS FX Progress Report (available at http://www.bis.org/list/cpss/index.htm) – which promote payment netting as an effective mechanism for reducing credit, settlement, liquidity and systemic risk in the institutional FX market given its unique settlement features (namely, settlement risk which is the risk of principal); track bilateral and multilateral payment netting statistics over the years, noting that the increase in payment netting practices not only reduces risk, but increases volume of trading activity and thus liquidity in deliverable FX products; recognize that payment netting reduces payments, and extent of reduction is dependent on trading behaviors of participants (specifically, if result of payment netting in any particular currency is greater than zero, payment will be made in that currency from one party to the other); and note that financial market infrastructures (FMIs) can perform bilateral or multilateral netting (multilateral netting simply provides greater netting efficiencies and therefore opportunity for risk reduction, and presents cross-border complexities and implications).

[17] *See, e.g.* FXC Guidelines (1997 FX Netting; and 2001/2002/2004/2010 Trading; 1999/2004 Recs for Non-dealers; 2004/2010 Ops Best Practices; 2010 Tools for Credit Risk available at http://www.ny.frb.org/fxc/about.html).

the agreed, specified settlement date. This is in contrast to traditional OTC derivatives where settlement is based on valuation, *i.e.*, by reference to something thing else, including a reference currency. Further, because each trade represents a gross obligation to deliver one currency in exchange for another, that is not only the legal obligation but also, and importantly, the risk and exposure that the transacting parties face until settlement is completed on the settlement date. This is not settlement by valuation, or by reference to something else, as is the case for traditional derivative products, nor is the settlement date of the trade being changed, as is the case in retail FX.

With respect to the credits and debits referred to in the preceding paragraph, we are concerned with language in the Updated Model Guidance which states "delivery to mean actual delivery of the original currency contracted for either cash or though electronic funds transfer. In situations where settlement takes place though delivery of an alternate currency or account notation without actual currency transfer, there is no settlement by delivery and therefore that the exclusion in paragraph 2(c) would not apply." When applying payment netting to the funding required to discharge gross obligations due under any number of FX trades across several currencies, the net funding due in one or more currencies could be zero. We do not believe this is, or should be, relevant to determining whether an FX spot trade is a bona fide deliverable (physically settled) FX spot trade when such trade is not executed as such but all the legal obligations and associated risks are of a deliverable FX spot trade (and not a financially settled product or product of a longer duration).[18] However, because this language in the Updated Model Guidance could suggest otherwise, we request confirmation or clarification on this point.[19]

Unique to Institutional FX Market. These core attributes, with the key distinction between settlement and funding, is unique to the institutional FX market.

- *Retail FX.* First, in contrast to the retail FX market, the settlement date (T+2) for an FX spot trade are not changed in the institutional FX market. Each institutional FX trade is a separate trade/ticket that reaches maturity when it is settle on its (original) specified settlement date, with profit/loss realized on that date. Second, in the retail FX context, the settlement date of any FX spot trade which remains open is required to be rolled forward, *i.e.*, its settlement date is changed to a future date, *automatically and only with the service provider.* Third, each institutional FX trade is

[18] There is a wide spectrum of market participants who transact in the institutional FX market for singular or mixed reasons, including to acquire a foreign currency in connection with commercial or financial transactions, access a source of funding, hedge investments in different currencies, maintain a benchmark in a foreign currency market, enhance the liquidity of investments in its portfolio, enhance returns, etc. Any suggestion or expectation expressed in the Model Rules or Guidance that the underlying reason for trading is relevant to the treatment of a deliverable FX spot trade in the institutional FX market as an "excluded derivative" would be unprecedented. For the reasons raised in this letter, it is more appropriate, as well as practical and feasible, to focus on the core attributes which exist in the institutional FX market which distinguish these FX spot trades from other markets regulated, historically and most recently, by the CSA.

[19] It is also worth noting that the language in the Model Rules may raise questions concerning CLS Bank, where settlement is conducted on a gross basis for each matched pair of payment instructions relating to a single underlying FX trade. Specifically, CLS Bank settles such payments when it simultaneously (i) debits a gross amount of one currency to the single multi-currency account of one Settlement Member and credits such amount in such currency to the single multi-currency account of another Settlement Member; and (ii) debits the gross amount of another, countercurrency to the second Settlement Member's account and credits such gross amount in such countercurrency to the first Settlement Member's Account. Each Settlement Member's multi-currency account is an account on the books and records of CLS. Settlement is performed in reliance on funding CLS Bank receives from its Settlement Members which is calculated on a multilateral netted basis. Settlement Members satisfy their funding requirements to CLS Bank using central bank funds via RTGS systems, but this funding process is an entirely separate (albeit related) process to settlement of payment instructions in CLS Bank. We request confirmation or clarification that the language in the Model Guidance ("account notation without actual currency transfer") does not intended to capture these facts, whether in a multilateral context like CLS Bank or a bilateral context outside CLS Bank and including circumstances when payment netting results in funding being zero in one or more currencies.

entered into at then current market rates whereas retail FX involves historical rate rollovers[20] which results in unrealized profit/loss.

Stylized Examples. For illustrative purposes, we have included two simple examples of institutional FX spot trading in Appendix 1 which highlight the concepts and issues described above. We welcome an opportunity to review these examples with the CSA in greater detail.

MODEL PROVINCIAL RULE – TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Part 3 – Data Reporting

1. **Clause 27(2) – reporting counterparty**

We would like to reiterate our previous comments regarding the sophistication of a local counterparty to a trade. It is highly likely that a local counterparty will find it difficult to monitor compliance with this rule and, as such, we suggest that the local counterparty be given a limited time period within which to verify non-compliance and to report the relevant trade and suggest this be within T+2 of the trade execution, excluding any non-business days. We would also like to comment that it would be beneficial for the reporting counterparty to adhere to a single approach rather than having to adhere to individual jurisdictional requirements.

2. **Clause 31(2) – unique transaction identifiers (UTIs)**

Since the Draft Model Rules were published, trade reporting is now operational in the United States and is expected to go live in Europe in January 2014. It is now clear that scenarios exist where counterparties to a trade could be required to produce/consume and report different trade identifiers to different regulatory bodies for the same trade, for example a unique swap identifier (USI) to the CFTC and a UTI to ESMA. In order to promote global harmonisation, we suggest that the CSA support the model whereby the reporting counterparty leverages an already existing trade identifier, in the event one already exists for other regulatory reporting in another jurisdiction.

3. **Clause 35(1) – valuation data**

The current text does not make reference to a specific close when referencing the point at which valuation data must be reported. We therefore seek guidance that the previous business day quoted refers to the home jurisdiction of the reporting counterparty.

Part 4 – Data dissemination and access to data

1. **Clause 39 – data available to the public**

We welcome the changes made to the fields "Required for Public Dissemination". However, we still have strong reservations with respect to the unintended disclosure of, or the ability or positions to be derived from public reporting. It is not clear for FX where the notional of a trade will be reported as the principal economic terms seem more aligned to other fixed income products. We seek clarification on the suitability of such fields for FX products. Further, we seek clarity on the timing of such data being reported publicly. In particular, the phrase "no later than" in clause 39(3) could be interpreted as being reported

[20] Historical rate rollovers involve the extension of an FX contract by a dealer on behalf of his customer at off-market rates According to the FXC, rolling contracts at historical rates is a dangerous practice which should be avoided absent compelling justification and procedural safeguards. As a result, the FXC recommended that non-market rates should not be permitted in interbank dealing and should be permitted in other circumstances only with strict management oversight. *See* FXC letter dated December 26, 1991, titled "Historical Rate Rollovers: A Dangerous Practice" (http://www.newyorkfed.org/fxc/annualreports/ar1995/fxar9526.html).

sometime between real-time (or as soon as technically possible), or the end of trade day after receiving the data, or the second day after receiving the data. The implications of real-time without the ability to protect the positional data or conduct trading strategies are critical. For instance, we previously recommended a process of notional capping and rounding of trade sizes to help ensure the anonymity of counterparties. We note the CSA commentary under S.39 of Appendix B of the Updated Model Rules and seek further clarity around the treatment of block trades.

Appendix A – Data fields

We would like to request clarification on the "Instructions" in populating the fields listed in Appendix A. In order to promote global harmonisation with respect to the format of responses, we request that instead of populating fields that are not applicable with "N/A", such fields are left blank. We note that this is how such fields are currently reported under the trade reporting rules in the United States.

We also wish to note that the Counterparty data field "Counterparty side" and fields under principal economic terms "Common data" are not suitable for FX products. We draw the CSA's attention to the fields reported currently under CFTC 17 CFR Part 45, as well as those listed in Exhibit B Primary Economic Terms published specifically for "Foreign Exchange Transactions." We would like to suggest that the CSA adopt an approach similar to the CFTC's for purposes of the Updated Model Rules. In furtherance of additional transparency and harmonisation, we also recommend that FpML is set as the standard, thus leveraging the additional detailed fields that are currently reported under the final trade reporting rules in the United States for FX.[21]

MODEL EXPLANATORY GUIDANCE TO MODEL PROVINCIAL RULE – TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Part 1 – General Comments

1. **Clause 2(4) – Definition of transaction**

In light of our comments in response to the Draft Model Rules, we continue to assume that it is sufficient to link the UTI of a novated trade to the UTI of the original bilateral trade.

In addition, we would like to draw attention to clause 27(1)(a) with respect to the role played by a clearing agency and its reporting obligations for a cleared transaction, specifically, the view of the GFXD members that the reporting party (and not the clearing agency) should retain responsibility for determining the repository to which the cleared trade is to be reported. We seek confirmation from the CSA that it agrees with our view by providing greater clarity on this point in the Updated Model Guidance.[22]

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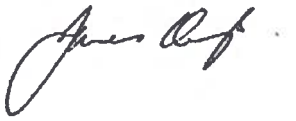
[21] 17 CFR Part 45.

[22] *See* GFXD letter dated January 7, 2013 to Chairman Gensler of the CFTC regarding the Chicago Mercantile Exchange Inc. ("CME") Submission #12-391. GFXD views the proposed CME rule which requires that trades cleared by it be submitted to its affiliated trade repository as (i) shifting the choice of trade repository from the reporting party (swap dealer (SD) or major swap participant (MSP)) to the CCP, (ii) forcing SDs and MSPs to use the CCP's affiliated trade repository – the result of which is anti-competitive and would weaken reporting infrastructure and increase costs). www.gfma.org/Initiatives/Foreign-Exchange-(FX)/GFMA-Submits-Comments-to-the-CFTC-on-the-CME-Group-Proposal-to-Require-Reporting-of-All-Swaps-Cleared-with-the-CME-SDR/

We appreciate the opportunity to share our views on this consultation paper issued by Canadian Securities Administrators. Please do not hesitate to contact me at +44 (0) 207 743 9319 or at jkemp@gfma.org should you wish to discuss any of the above.

Yours sincerely,



James Kemp
Managing Director
Global Foreign Exchange Division, GFMA[23]

[23] The Global Finanical Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA.

Appendix 1

Stylized Example

Illustration 1 – FX spot

TRADING ACTIVITY								
	Trade Date	Settlement Date	Product	Party A		Rate	Party B	
				Buy	Sell		Buy	Sell
Trade 1	June 1	June 3	FX spot	GBP 100	USD 175	1.75	USD 175	GBP 100
Trade 2	June 1	June 3	FX spot	USD 170	GBP 95	1.79	GBP 95	USD 170
Trade 3	June 1	June 3	FX spot	USD 150	EUR 125	1.20	EUR 125	USD 150
Trade 4	June 1	June 3	FX spot	EUR 125	GBP 115	0.92	GBP 115	EUR 125

OBLIGATIONS (GROSS BASIS)					
Party A	Settlement Date	Buy	Sell	From/To	Total # trades for settlement
	June 3	GBP 100	USD 175	Party B	Four
	June 3	USD 170	GBP 95	Party B	
	June 3	USD 150	EUR 125	Party B	
	June 3	EUR 125	GBP 115	Party B	

FUNDING (GROSS BASIS)						
Party A	Date	CCY	Outgoing	Incoming	From/To	Total # payments made to discharge obligations
	June 3	USD	175	170	Party B	Up to eight
	June 3	USD		150	Party B	
	June 3	GBP	95		Party B	
	June 3	GBP	115	100	Party B	
	June 3	EUR	125	125	Party B	

compared to

FUNDING(NET BASIS)				
CCY	Outgoing	Incoming	From/To	Total # payments made to discharge obligations
USD		145	Party B	Two
GBP	110		Party B	
EUR			Party B	

Illustration 2 – FX spot

TRADING ACTIVITY								
	Trade Date	Settlement Date	Product	Party A		Rate	Party B	
				Buy	Sell		Buy	Sell
Trade 1	June 1	June 3	FX spot	GBP 100	USD 175	1.75	USD 175	GBP 100
Trade 2	June 1	June 3	FX spot	USD 170	GBP 95	1.79	GBP 95	USD 170
Trade 3	June 1	June 3	FX spot	USD 150	EUR 125	1.20	EUR 125	USD 150
Trade 4	June 1	June 3	FX spot	EUR 125	GBP 115	0.92	GBP 115	EUR 125
Trade 5	*June 1*	*June 3*	*FX spot*	*GBP 110*	*USD 198*	*1.80*	*USD 198*	*GBP 110*

OBLIGATIONS(GROSS BASIS)					
Party A	Settlement Date	Buy	Sell	From/To	Total # trades for settlement
	June 3	GBP 100	USD 175	Party B	*Five*
	June 3	USD 170	GBP 95	Party B	
	June 3	USD 150	EUR 125	Party B	
	June 3	EUR 125	GBP 115	Party B	
	June 3	*GBP 110*	*USD 198*	*Party B*	

FUNDING (GROSS BASIS)						
Party A	Date	CCY	Outgoing	Incoming	From/To	Total # payments made to discharge obligations
	June 3	USD	175	170	Party B	Up to *ten*
	June 3	USD	*198*	150	Party B	
	June 3	GBP	95	*110*	Party B	
	June 3	GBP	115	100	Party B	
	June 3	EUR	125	125	Party B	

compared to

FUNDING (NET BASIS)				
CCY	Outgoing	Incoming	From/To	Total # payments made to discharge obligations
USD	*53*		Party B	*One*
GBP			Party B	
EUR			Party B	

Illustration 3 – FX spot + FX swap

TRADING ACTIVITY								
	Trade Date	Settlement Date	Product	Party A		Rate	Party B	
				Buy	Sell		Buy	Sell
Trade 1	June 1	June 3	FX spot	GBP 100	USD 175	1.75	USD 175	GBP 100
Trade 2	June 1	June 3	FX spot	USD 170	GBP 95	1.79	GBP 95	USD 170
Trade 3	June 1	June 3	FX spot	USD 150	EUR 125	1.20	EUR 125	USD 150
Trade 4	June 1	June 3	FX spot	EUR 125	GBP 115	0.92	GBP 115	EUR 125
Trade 5	*June 1*	*June 3 (near leg)* *June 4 (far leg)*	*FX swap**	*GBP 110* *USD 198*	*USD 198* *GBP 110*	*1.80*	*USD 198* *GBP 110*	*GBP 110* *USD 198*

**"derivative" under Model Rules*

OBLIGATIONS (GROSS BASIS)					
Party A	Settlement Date	Buy	Sell	From/To	Total no. trades for settlement
	June 3	GBP 100	USD 175	Party B	*Five*
	June 3	USD 170	GBP 95	Party B	
	June 3	USD 150	EUR 125	Party B	
	June 3	EUR 125	GBP 115	Party B	
	June 3	*GBP 110*	*USD 198*	*Party B*	
	June 4	*USD 198*	*GBP 110*	*Party B*	

FUNDING (GROSS BASIS)						
Party A	Date	CCY	Outgoing	Incoming	From/To	Total # payments made to discharge obligations
	June 3	USD	175	170	Party B	Up to *ten*
	June 3	USD	*198*	150	Party B	
	June 3	GBP	95	*110*	Party B	
	June 3	GBP	115	100	Party B	
	June 3	EUR	125	125	Party B	
	June 4	*USD*		*198*	*Party B*	*Two*
	June 4	*GBP*	*110*		*Party B*	

compared to

FUNDING (NET BASIS)				
CCY	Outgoing	Incoming	From/To	Total # payments made to discharge obligations
USD	*53*		Party B	*One*
GBP			Party B	
EUR			Party B	
USD		*198*	*Party B*	*Two*
GBP	*110*		*Party B*	

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September 6, 2013

VIA electronic submission

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Re: Proposed Ontario Securities Commission Rules 91-506 Derivatives: Product Determination and 91-507 - Derivatives: Trade Repositories and Derivatives Data Reporting

Dear Members of the Canadian Securities Administrators Derivatives Committee:

Just Energy Group Inc. ("Just Energy"), on behalf of itself and its subsidiaries, welcomes this opportunity to submit comments to the Canadian Securities Administrators Derivatives Committee (the "Committee") on Proposed Ontario Securities Commission Rules 91-506 – *Derivatives: Product Determination* and 91-507 – *Derivatives: Trade Repositories and Derivatives Data Reporting* published on June 6, 2013 (the "Proposed Rules"). Please note that our comments apply equally to the other proposed model rules and regulations published on June 6, 2013 by or on behalf of the other Canadian securities regulatory authorities.

Just Energy

Just Energy, through its subsidiaries, is a leading independent supplier of electricity and natural gas to residential and small to mid-size commercial consumers in Canada, the United States and the United Kingdom. In Canada, the Just Energy family of companies provides electricity in Alberta and Ontario and offers natural gas in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec. Just Energy also is one of the largest competitive green energy retailers in North America.

To meet its delivery obligations to its Canadian customers, Just Energy purchases power and natural gas on a wholesale basis. Just Energy also periodically sells power and natural

gas back into the wholesale markets when it has more supply than is needed to meet its customers' demands.

Just Energy provides power and natural gas to residential and commercial consumers under long-term fixed-price or price-protected contracts. The provision of such services is subject to Provincial utility regulations in each of the provinces in which Just Energy conducts its business. Just Energy also hedges its cross-border cash flow.

We have two comments with respect to Proposed Rule 91-506:

1. We applaud the accommodation of the notion of intent to deliver, including the notion of a book-out, that will align Canadian regulation with that in the United States. We note however that Section 2 (c) of Proposed Rule 91-506 continues to exclude foreign exchange derivatives that require settlement by delivery of the currency referenced in the contract provided that such settlement essentially take place within two business days but does not extend this exemption to ALL foreign exchange derivatives that require settlement by delivery of the reference currency. This is a departure from the exemption that the US Secretary of the Treasury issued on November 16, 2012. We acknowledge that these transactions will still be subject to reporting in the US as noted in the Appendix A - *Comment Summary and CSA Responses* and note the Committee's intention to revisit the treatment of deliverable foreign exchange derivatives for other regulatory requirements. We question whether having multiple definitions of derivatives for the purposes of different rules is desirable and urge consideration of a consistent definition of derivatives.

2. We continue to be concerned regarding the Committee's view that exempt derivatives do not include contracts related to hedging. As mentioned in our prior comments on Consultation Paper 91-301, the largest practical matter that we saw in the Consultation Paper (and which remains unchanged in the current Proposed Companion Policy) is contained in Part 2(h) of the Proposed Companion Policy 91-506 CP:

> *"Apart from the contracts and instruments expressly prescribed not to be derivatives in section 2 of the Scope Rule, there are other contracts or instruments which we would not be considered to be "derivatives" for the purposes of the Act. A feature common to these contracts and instruments is that they are entered into for consumer, business or non-profit purposes that do not involve investment, speculation or hedging. Typically, they provide for the transfer of ownership of a good or the provision of a service." (emphasis added)*

Although we agree that the exemption should not be extended to derivatives entered into for investment or speculative purposes, we do not believe that it was the intent of the Committee to exclude from the exemption contracts that are entered into for hedging purposes. Hedging, as conducted by Just Energy and other companies, removes risk from the market. Furthermore, the end-user exemption under Dodd-Frank expressly accommodates hedges for commercial purposes, which is contrary to the view in taken in the Proposed Companion Policy. In our view, to require reporting and clearing of derivatives that are entered into expressly for hedging

purposes will cause companies to question the use of such hedges given the additional costs to report and clear. This has the potential to increase overall market risk, contrary to these reforms' stated objective of reducing systemic risk.

We also have several comments with respect to Proposed Rule 91-507:

1. The definition of a dealer encompasses a "person or company engaging in ... the business of trading in derivatives as principal or agent". Just Energy is not in the business of trading derivatives; it is in the business of selling electricity and natural gas to consumers. It should not be captured in the definition of a dealer merely because certain hedging activities ancillary to its main business might be characterized as engaging in dealing in derivatives. Nor should it be captured as a dealer as a result of the way in which the electricity and natural gas markets are structured. In order to sell electricity and natural gas, Just Energy must participate as an agent in some markets.

2. The revised definition of "local counterparty" does not appear to eliminate concerns regarding undue extra-territorial effect or multiple reporting obligations. Just Energy has several affiliates within Canada and abroad which have their head offices located in Ontario. The current definition will capture all these affiliates. This is not of concern for the non-Canadian subsidiaries of Just Energy since it is only Canadian entities that trade for the Canadian business and the Proposed Rules are therefore not applicable to these foreign subsidiaries. However if we trade through our Alberta subsidiary, as an example, we believe that there will be duplicative reporting requirements even under the revised definition. Our Alberta subsidiary will be captured by parts (a) and (c) of the definition, will be considered a local counterparty for OSC and ASC purposes and will need to report both in Alberta and in Ontario as a result of this definition. While this may not be unduly onerous if the reporting requirements in each Canadian jurisdiction are identical, it highlights the importance of uniformity across Canada.

3. We note that the definition of a "transaction" includes the novation of a derivative. As noted in our comments on CSA Consultation Paper 91-301, we do not believe that it is the intent of the Proposed Rules, where the novation is required as a result of other requirements (e.g. novation of the transport of a commodity between a utility and a retailer, or where assignment is required as part of credit and collateral arrangements) to have these activities trigger data reporting requirements.

4. We note that life-cycle data must be reported by the end of the day the life-cycle event occurred rather than affording a Reporting Counterparty the ability to report at the end of the day following the life-cycle change as is permitted for transactions under Section 28. Furthermore, we note that errors are also required to be reported no later than the end of the business day on which the error or omission is discovered. This can be problematic if discovery is at 4:50pm. We suggest there be greater consistency in reporting timetables.

5. The commentary on Section 39 in Appendix A implies that inter-affiliate trades require reporting, however we note that the CFTC has issued no-action relief in

respect of inter-affiliate trades exempting them from reporting requirements in specified circumstances[1]. We encourage consistency in regulation between Canada and the US in this regard.

6. We note that collateralization reporting does not consider the possibility of bespoke arrangements that are outside of the current definitions of fully, partially and one-way collateral arrangements described in Appendix A to Rule 91-507 and encourage the Committee to make a bespoke alternative available.

7. The reporting requirements for options appear to require bifurcation and separate reporting for embedded options. We request clarity as to whether this is the intent.

***

Just Energy asks the Committee to reflect on these comments. Please contact us if you have any questions or concerns.

Respectfully submitted,

/s/ Stephanie Bird
Stephanie Bird
SVP, Corporate Risk Officer

[1] CFTC Letter No. 13-09 No Action. April 5, 2013.

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September 6, 2013

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Dear Sirs / Madames,

Re: Canadian Securities Administrators ("CSA") June 6, 2013 Multilateral CSA Staff Notice 91-302 Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting (the "Proposed Model Rules")

About Nexen

Nexen Inc. is a wholly owned subsidiary of CNOOC Limited, which ultimately is 64.43% owned by the Chinese 'state' and 35.57% owned by investors through shares traded on the Hong Kong and New York stock exchanges. CNOOC Limited has also applied for listing on the Toronto Stock Exchange.

Under CNOOC Limited, Nexen Inc. and its subsidiaries ("Nexen") is part of one of the largest independent oil and gas exploration and production companies in the world with production in excess of 900,000 BOE/day and a market capitalization in excess of $80 Billion. Nexen, in its own right, also operates in various countries including Canada, the US. Columbia, the United Kingdom, Yemen and Africa. As such, Nexen brings a unique

perspective as a Canadian company with global operating and marketing experience, expertise and exposure.

Introduction

Nexen welcomes the opportunity to comment on the Proposed Model Rules. In this comment letter, Nexen intends to provide specific comments on a few outstanding areas of concern. Overall, Nexen commends the CSA for considering and acting on the comment letters it previously received and the helpful manner in which it was set out at the end of the Proposed Model Rules.

Specific Comments

a. Section 1 – Definition of "dealer"

While Nexen appreciates the definition of "dealer" included in the Proposed Model Rules was adopted in an attempt to ensure consistency with the use of that term elsewhere and, in particular, the registration requirements in Consultation Paper 91-407, it is an outstanding issue for resolution as to whether the registration categories set out in Consultation Paper 91-407, including the dealer category, are the correct categories to be applied. Nexen's position in this regard is set out in our comment letter to the CSA dated June 17, 2013 in detail at page 9, a copy of which is attached. In summary, Nexen proposes an end-user category similar to the US *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "*Dodd-Frank Act*") be created, which categorization applies to most of the major energy companies. It is important to resolve the categorization issue in order to determine the extent to which it will impact the "dealer" terminology in the Proposed Model Rules. It is Nexen's position that failure to create an end user distinction could put companies such as Nexen at a competitive disadvantage to those in the U.S. and Europe and could reduce the number of cross border derivatives or swaps that occur between foreign and domestic markets if there is not a consistent treatment of the definition of dealer.

b. Reporting Parties Determination – Section 27

A "local counterparty"[1] shall report, or cause to be reported, to a designated trade repository (or the local securities regulator if no repository accepts the data), derivatives data for each transaction to which it is a party.[2]

The appropriate reporting party for each derivatives transaction is determined as follows:
(a) if the transaction is cleared through a clearing agency, the clearing agency;
(b) if the transaction is between a dealer and a non-dealer, the dealer[3] ;

[1] A "local counterparty" is defined by the Proposed Model Rules as (i) any person or company (other than an individual) organized under the laws of, or has its head office or principal place of business in, a Province; (ii) any dealers registered under applicable securities legislation or any person required to register under derivatives trading regulations; or (iii) any affiliate of a person or company falling under clause (i) or (ii) if such person or entity is responsible for the liability of such affiliate. See Proposed Model Rules Part 1 Section 1.
[2] Proposed Model Rules Part 3 Section 25.

(c) if paragraphs (a) and (b) do not apply, then as the parties agree in writing; and
(d) in any other cases, both parties.

If a reporting party is not a "local counterparty," and that reporting party does not comply with the reporting requirement, then the local counterparty must act as the reporting party.[4]

In general, the *Dodd Frank* Rules impose the reporting obligations in the following order: clearing house; swap dealer, major swap participant; non-swap dealer/non-major swap participant financial entity; and non-swap dealer/non-major swap participant other U.S. person. The *Dodd Frank* Rules place the reporting responsibility, which includes creation and valuation reporting, on the "reporting party" determined under the rules.

The CSA should clarify data reporting responsibilities by requiring valuation data to be reported by the "reporting counterparty," as opposed to by the local counterparty.[5]

The CSA should also ease the requirement on the local counterparty to serve as the reporting party if a non-local counterparty dealer fails to comply with its obligations to report derivatives data. A local counterparty should not have to be responsible for monitoring a non-local counterparty dealer's compliance.

Prong (b) of the definition of "local counterparty" should be clarified to refer to a dealer registered under Canadian law. Otherwise, any dealer required to be registered under the *Dodd-Frank Act* or *European Market Infrastructure Regulation* ("*EMIR*") would also be a "local counterparty."

c. Data Reported and Valuation Data – Section 35

For each derivative transaction, the Proposed Model Rules provide that the reporting party should report (i) the legal entity identifiers for the parties; (ii) the unique transaction identifiers; (iii) the unique product identifier; and (iv) at the onset of a transaction, certain prescribed operational, economic, counterparty and event data, and thereafter, any change to such data (creation data and life-cycle data)[6]. The local counterparty must also report valuation data (i.e., mark-to-market valuation) for any cleared transaction on a daily basis if it is a dealer, and on a quarterly basis if it is not a dealer.[7] Furthermore, a new requirement has been inserted that valuation data must be reported by <u>both</u> the clearing agency and the local counterparty.

While the reporting obligations with respect to specific data are generally consistent between the Proposed Model Rules and the *Dodd-Frank* Rules, they are not identical. For example, the delivery point of a commodity derivative is required under the Proposed

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[3] A "dealer" is defined as a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as principal or agent. See Proposed Model Rules Part 1 Section 1.
[4] Proposed Model Rules Part 3 Section 27(2).
[5] Contrast Proposed Model Rules Part 3 Section 25(1) and Section 27.
[6] Proposed Model Rules Part 3 Sections 29, 33 and 34.
[7] Proposed Model Rules Part 3 Section 35. Reporting of valuation data must be done by both the clearing agency and the local counterparty.

Model Rules but not under the *Dodd-Frank* Rules. This is not significant on its own, but Nexen proposes the CSA should consider harmonizing the specifics of reportable derivatives data under the Proposed Model Rules with those under the *Dodd-Frank* Rules such that the same data feed can satisfy both sets of rules. This would have a significant practical and cost impact to reporting requirements.

A more significant inconsistency between the Proposed Model Rules and the *Dodd-Frank* Rules is the new requirement in s.35(1) of the Proposed Model Rules requiring reporting of valuation data by both the local counterparty and the clearing agency. Under the *Dodd-Frank* Rules only one party is required to report and when it is a cleared transaction, only the clearing agency is required to report. As currently proposed, the double reporting requirement will significantly increase the burden on a local counterparty who may not otherwise be a reporting party. Nexen respectfully requests the double reporting requirement be amended so that only one party is required to report.

In addition, the daily valuations applicable under the Model Rules are not consistent with the treatment for end users under the *Dodd Frank Act* (which categorization applies to most major companies in the oil and gas sector), pursuant to which end users need only report valuations quarterly (actually within 30 days following the end of a quarter). Although under the Proposed Model Rules the local counterparty must report valuation data for any OTC derivative transaction on a daily basis only if it is a dealer, and on a quarterly basis if it is not a dealer, the inconsistency with the *Dodd Frank Act* ties back to the problem with definition of "dealer" under the Proposed Model Rules as discussed above. If left unchanged, many companies in the energy sector will be impacted because they will be an end user under the *Dodd Frank Act* and only required to report valuations quarterly while having to report valuations daily in Canada. This will particularly impact small producers who are conducting these transactions to mitigate their own risk.

d. Section 37(3)

The requirement in Section 37(3) that "a local counterparty must take any action necessary to ensure the [applicable local securities regulator] has access to all derivatives data reported to a designated trade depository for transactions involving the local counterparty" is an unduly harsh standard. Nexen proposes a revised standard reflecting "commercially reasonable efforts" be substituted for "any action necessary".

e. $500,000 exclusion – Section 40

Until the CSA response to the comments on Consultation Paper 91-407 is received, it is difficult to determine whether the $500,000 exclusion under Part 5, Section 40(b) of the Proposed Model Rules is the only form of exemption that will apply or whether there will be a *de minimis* exemption similar to the *Dodd Frank Act* introduced. Nexen's position with respect to the inclusion of a *de minimis* exemption similar to the *Dodd Frank Act* , and the justification for it, was set out in detail in our letter submitted to the CSA dated June 17, 2013 at pages 4 to 9, a copy of which at attached to this letter.

Conclusion

Nexen thanks the Committee for considering the comments set out in this letter and would be pleased to discuss any aspect of our comments in further detail should the Committee so wish. Nexen has full confidence that further clarifications from the Committee will be provided based on the comments received from the public.

All of which is respectfully submitted,

T. Henry

for Susan L. Schulli,
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September 6, 2013

SENT BY ELECTRONIC MAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumers Affairs Authority of Saskatchewan
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Dear Sirs/Mesdames:

Comments on Model and Proposed Rules Concerning Derivatives Data Reporting

This letter is in response to the request for comments regarding Multilateral CSA Staff Notice 91-302 – *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* published on behalf of the Alberta Securities Commission, the British Columbia Securities Commission, the New Brunswick Securities Commission, the Nova Scotia Securities Commission and the Financial and Consumer Affairs Authority of Saskatchewan as well as the province-specific proposed rules concerning derivatives data reporting published by the Autorité des marchés financiers of Quebec[1], the Manitoba Securities Commission[2] and the Ontario Securities Commission[3] (collectively referred to herein as the "TR Rule").

As counsel to counterparties ranging from global financial institutions and pension plans to commodity producers and investment funds, Osler, Hoskin & Harcourt LLP has had extensive involvement with derivatives transactions, albeit from a legal perspective. In this letter, we comment from a regulatory standpoint on certain aspects of the proposed TR Rule. Our comments address the following:

- harmonization within Canada;
- process for obtaining exemptive relief;
- definition of Local Counterparty;

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1 Draft AMF Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting.

2 Proposed MSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting*.

3 Proposed OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting*.

- reporting by Local Counterparties;
- data availability;
- public dissemination of block trade data;
- reporting derivatives transactions with securities underliers; and
- data to be reported.

I. Need for Harmonization within Canada

It remains unclear the extent to which "minor variances" to the TR Rule will be made by securities regulatory authorities in finalizing and adopting their own local rules. Variances introduced at the adaptation and implementation stages may result in non-trivial distinctions in the regimes ultimately adopted by the jurisdictions. While we appreciate that local environments differ, we respectfully submit that the national (and, indeed, global) scope of the derivatives market argues for regulation that is harmonized to the greatest extent possible across the country.

There is also a lack of guidance on whether the final rules to be adopted by each province will be brought into force simultaneously. Given the inter-provincial nature of many derivative transactions, implementation that does not occur simultaneously may lead to uncertainty regarding which rules apply to a given transaction or counterparty, as well as the potential for regulatory arbitrage.

Finally, we note that CSA responses to comments received on CSA Staff Consultation Paper 91-301 Model Provincial Rules – *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (the "Draft Model Rules") suggest that the establishment of a "passport"-type system for facilitating inter-provincial recognition of orders and exemptions is outside the scope of the TR Rule. We would respectfully submit that such a system is necessary, particularly in light of the CSA's current position that certain matters be considered on a case-by-case basis under the exemption power in section 41 of the TR Rule (discussed in greater detail in item II below).

II. Process for Exemptive Relief

In the CSA responses to comments received on the Draft Model Rules, there were several references to matters that would be considered on a case-by-case basis under the exemption power in section 41 of the TR Rule. These include:

- "substituted compliance" when reporting derivatives data, including reporting data concerning pre-existing trades, reported pursuant to foreign rules;

- reporting information that may not be disclosed due to foreign data and confidentiality laws; and
- public dissemination of block trade data.

It must be emphasized that derivatives transactions increasingly occur in a high-paced, electronic trading environment. It is uncommon for a particular derivatives transaction to have a lead time of weeks or months. Moreover, once a transaction occurs, section 28 of the TR Rule requires real-time reporting. Given this reality, we are concerned that there will be insufficient time for a local counterparty to obtain exemptive relief from the TR Rule in order to, for example, (i) comply with data protection and confidentiality laws of a foreign jurisdiction or (ii) prevent the disclosure of block trade data that, if disclosed, would frustrate a party's ability to properly hedge its position. In addition to these timing concerns, we are also concerned that the process for obtaining discretionary exemptive relief under section 41 of the TR Rule would be expensive and the results would vary by province and territory.

We therefore respectfully submit that the CSA should develop a process for local counterparties to seek exemptive relief in a timely and efficient manner, with such exemptive relief 'passported' into other CSA jurisdictions. In the alternative, the CSA should amend the TR Rule to specifically address issues of substituted compliance, confidentiality laws, and public dissemination of block trade data.

III. Definition of "Local Counterparty"

We appreciate the many changes made to the definition of "local counterparty" in the TR Rule in response to comments received on the Draft Model Rules. However, we are concerned that the revised definition remains somewhat vague and overly broad.

In part (a) of the definition, it is not clear as to why a person or company should be considered a "local counterparty" simply by virtue of being organized under the laws of the local province. There are many examples of limited partnerships, trusts and corporate entities that are organized under provincial law, but have a head office or principal place of business outside that province, or that have all or substantially all of their trustees, partners, shareholders, directors and/or officers located outside that province. Inclusion of the reference to being organized under the laws of a particular province also does not take into account federal entities, such as corporations incorporated under the *Canada Business Corporations Act*. We therefore respectfully submit that part (a) of the definition should instead refer to "a person or company, other than an individual, that has its head office or principal place of business in [Province X]".

With respect to part (b) of the definition, we respectfully suggest that the following wording is unclear and potentially misleading:

> "[a counterparty] subject to regulations providing that a person or company trading in derivatives must be registered in a category of registration prescribed by the regulations".

First, it is not clear to which regulations this wording refers. Second, in certain provinces, such as Ontario, the requirement to register is found in the provincial securities act, not regulations promulgated under that act. On the assumption that part (b) is designed to capture entities registered as derivatives dealers and perhaps large derivatives participants, we would suggest the following alternative wording:

> "the counterparty is registered under [Province X] securities legislation as a dealer, large derivatives participant or an equivalent category of registration prescribed by [Province X] securities legislation".

IV. Reporting by Local Counterparties

Section 35 of the TR Rule requires all local counterparties to a reportable transaction to report valuation data. While we acknowledge that reporting can be delegated to a third party under subsection 27(4) of the TR Rule, we nevertheless expect it to be burdensome for certain local counterparties to comply with the valuation data reporting requirement. We therefore respectfully request that the CSA consider whether the potential benefit in receiving (potentially) two valuation points for a particular transaction outweighs the significant cost and challenge for local counterparties, particularly small end users, to report valuation data. We respectfully suggest that the TR Rule should be implemented in such a way that valuation data is initially reported only by the reporting counterparty. If, after a period of time, the CSA concludes that more data is necessary, it could require valuation data reporting by all local counterparties.

Related to the point above, we question whether it is necessary for local counterparties that are affiliated entities to report valuation data. Local counterparties may not have, and may not need, processes for calculating and reporting valuation data for transactions with affiliated entities. We would therefore respectfully suggest that, in transactions between affiliated entities, only one local counterparty need report valuation data. Also, we would respectfully request that the CSA consider modifying the timing requirements for reporting both life-cycle data and valuation data for transactions between affiliated entities. We would suggest that data from such transactions need be reported on a quarterly, not daily, basis.

Finally, subsection 35(1) requires a local counterparty (including a local counterparty that is not a dealer) to report valuation data on a daily basis if the transaction is cleared. However, subsection (2) permits a local counterparty that is not a dealer to report valuation data on a quarterly basis if the transaction is not cleared. In our view, this discrepancy will create a significant disincentive for local counterparties that are not dealers to engage in cleared transactions. Therefore, section 35(1) should be modified to

permit a local counterparty that is not a dealer to report valuation data for a cleared transaction on a quarterly, not daily, basis.

V. Data Availability

Subsection 37(3) of the TR Rule requires that a local counterparty must take any action necessary to ensure that the securities regulatory authority has access to all derivatives data reported to a designated trade repository for transactions involving the local counterparty. It is unclear why such a provision is necessary. All data reported to a designated trade repository will already be available to the securities regulatory authority under subsection 37(1) and it is uncertain what action a local counterparty could take to make that data available. Therefore, we respectfully submit that subsection 37(3) should be struck from the TR Rule.

VI. Public Dissemination of Block Trade Data

As drafted, section 39 of the TR Rule does not provide any exceptions for block trade data. In the CSA responses to comments received on the Draft Model Rules, CSA Staff rejected an exception for block trade data on the basis that case-by-case exemptions under section 41 would be satisfactory. We respectfully submit that section 39 should be amended to provide certain exceptions to public reporting for block trades.

As recognized by CSA Staff, the purpose of publication delays in section 39 is to provide counterparties with sufficient time to enter into any offsetting transaction that may be necessary to hedge their positions. However, large transactions may require additional time to hedge, and reporting the full notional value of such transactions could have distortive effects on the market. In the United States, the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC") are currently phasing in public reporting requirements that contemplate certain exceptions for block trades of sufficient size. We are therefore concerned that, to the extent that U.S. regulators do not require certain public disclosures, to do so in Canada, even with a delay, would lead to inadvertent signalling to the international derivatives market.

We respectfully suggest that the CSA should amend the TR Rule to provide that notional caps be applied to public reporting of large transactions. Together with a mechanism for delaying reporting, the advantage of this approach is that it will provide transparency as well as preserve the ability of large investors and companies to hedge their risks in a cost-effective way.

We acknowledge that transaction data is necessary to determine the appropriate level of any notional caps. We therefore respectfully suggest that public reporting of transaction data under section 39 be delayed for a period of one year from the implementation date of the TR Rule, during which time the CSA can analyze transaction data and determine

appropriate caps and thresholds, as well as identify any other amendments to the TR Rule that may be necessary.

VII. Reporting Derivatives Transactions with Securities Underliers

We recognize that the model and proposed rules for derivatives product determination do not distinguish between securities-based derivatives and other underlying asset classes of derivatives. Nevertheless, we respectfully request that amendments be made to the TR Rule to delay the implementation date for transaction reporting on securities-based derivatives (e.g., security-based swaps based on a single-name or narrow-based index). We make this request on the basis that these types of transactions are not yet reported in the United States. While Canadian securities regulators are not beholden to their U.S. counterparts, it must be reiterated that there will be significant technology, legal, compliance and related business costs for parties to comply with the TR Rule. Due to the global nature of derivatives trading, these costs will be aggravated by an inconsistent approach to regulation between Canadian and non-Canadian securities regulators. A delayed, or phased-in, approach to transaction reporting in Canada that is synchronized with United States reporting requirements would facilitate efficient global markets and defray some of the costs that local counterparties will otherwise face.

VIII. Data to be Reported

Further to items II and VII above, we respectfully request that the CSA work with the CFTC and SEC to adopt a system of "substituted compliance", which would apply where a transaction reportable under the TR Rule is also reported to a designated trade repository pursuant to CFTC or SEC rules. Under this system of substituted compliance, there would be no need for separate reports to a designated trade repository for Canadian purposes, since Canadian securities regulators would have access to CFTC and SEC transaction data.

The alternative to a substituted compliance regime would be to provide for the data fields required pursuant to the TR Rule to be identical to the data fields required pursuant to equivalent CFTC and SEC rules. With due respect to Canadian and U.S. securities regulators, we see no reason for there to be any substantive differences between the data fields required under the TR Rule and under CFTC and SEC rules. If there are any reasons for there to be differences in data fields, such reasons must be weighed against the significant costs that reporting counterparties will incur to create similar, but not identical, reporting applications and processes for the two countries.

Given the already considerable costs for derivatives counterparties to comply with the TR Rule, we respectfully request that the CSA adopt the system of substituted compliance described above, or, in the alternative, modify data fields required pursuant to the TR Rule to be identical to data fields required pursuant to equivalent CFTC and SEC rules.

OSLER

* * * *

Thank you for the opportunity to comment on the TR Rule. If you have any questions or comments, please contact Mark DesLauriers (416-862-6709 or mdeslauriers@osler.com) or Blair Wiley (416-862-5989 or bwiley@osler.com).

Yours very truly,

Osler, Hoskin &Harcourt LLP

RBC Global Asset Management

RBC Global Asset Management Inc.
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September 6, 2013

Via Email

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Dear Sir or Madam:

Re: Updated Model Rules and Provincial Model Rules – *Derivatives: Product Determination; Trade Repositories and Derivatives Data Reporting*

We are writing on behalf of RBC Global Asset Management Inc. in response to the Multilateral Canadian Securities Administrators ("CSA") Staff Notice 91-302 as well as the proposed provincial rules issued by the Ontario Securities Commission, Autorité des marchés financiers and Manitoba Securities Commission with respect to *Derivatives Product Determination* and *Trade Repositories and Derivatives Data Reporting* published on June 6, 2013. We appreciate the opportunity to provide our comments on this important initiative.

Derivatives Data Reporting Rule – Public Dissemination of Transaction Level Data

As stated in our February 4, 2013 submission to the CSA concerning the proposed Model Rules, we are supportive of regulators obtaining transaction-level data to gain a better understanding of derivatives trading. We reiterate, however, that transaction-level data should only be made publicly available after an appropriate minimum time delay so as to avoid unintended negative impacts on price discovery and liquidity in derivatives markets, particularly in relation to instruments which are bespoke and therefore less liquid.

In this regard, we strongly support the comments submitted by the Canadian Market Infrastructure Committee ("CMIC") on this subject. CMIC has indicated that regulators in Europe, Asia and Australia, where the derivatives markets are comparable to the Canadian derivatives market in terms of size, product and participant composition, are in favour of publication of aggregated trade data a week after such data has been submitted to a trade repository.

It is also our view that the proposed time delay outlined under proposed section 39(3) of the TR Rule would not be adequate for all types of Canadian derivative instruments. The minimum time delay should, instead, be tailored by type of derivatives instrument and take into consideration the liquidity of a contract, the liquidity of the underlying interest, and the size and value of the trade being reported. We encourage the CSA to also consider publishing an adoption timeline for its public trade-reporting requirements that provides initially for longer public trade-reporting time delays.

We thank the CSA for considering our comments on the proposal. If you have any questions or require further information, please do not hesitate to contact the undersigned.

Sincerely,

Daniel E. Chornus, CFA
Chief Investment Officer
RBC Global Asset Management Inc.

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September 6, 2013

Our File: S927

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Dear Sirs/Mesdames:

RE: Multilateral CSA Staff Notice 91-302 –Updated Model Rules: Product Determination and Trade Repositories and Derivatives Data Reporting

SaskEnergy Incorporated ("SaskEnergy") and TransGas Limited ("TransGas") welcome the opportunity to comment on Multilateral CSA Staff Notice 91-302 –Updated Model Rules: Product Determination and Trade Repositories and Derivatives Data Reporting.

The current Staff Notice revisits the Model Rules first outlined in CSA Staff Consultation Paper 91-301, published in Saskatchewan on January 15, 2013.

SaskEnergy notes that its 91-301 submissions are not accounted for in the appendices to Staff Notice 91-302. We hope those comments have been considered, or will be considered by the Committee at this time. SaskEnergy encloses its original reply to Staff Paper 91-301. Please see Appendix A.

About SaskEnergy and TransGas

SaskEnergy is a Saskatchewan Crown Corporation and operates as a natural gas distribution utility. TransGas is a wholly owned subsidiary of SaskEnergy and operates

primarily as a natural gas transmission utility. Additional information on SaskEnergy, its subsidiaries, and our use of derivatives is included in Appendix "A".

Comments on Staff Notice 91-302 – Product Determination

Gas Supply

The Model Rules appear to contemplate a very broad definition of derivatives, such as that reflected in the proposed amendment to clause 2(1)(o) of *The Securities Act, 1988* (Saskatchewan). The Model Rules then exclude specific contracts and instruments from trade repository and derivatives data reporting requirements.

The updated Model Rules preserve most of the substance of the original. In particular, exemptions are maintained for certain types of foreign exchange transactions, commodity contracts where there is an intent to deliver, and small physical commodity transactions generally when the party's aggregate outstanding notional amount of derivatives is less than $500,000.00.

As a supplier of natural gas, SaskEnergy maintains its support for a physical delivery exemption. However, in order for a delivery exemption to have any benefit in terms of cost and administration, the application of that exemption must be clear. The clarifications with respect to netting, offsets, options as to volume or timing, force majeure, cash settlement on termination, and book-outs are therefore welcome.

The decision to both preclude and allow forms of optionality, with intent to physically deliver, will create some difficulties in interpretation.

The explanatory guidance states that a provision that creates "an option to change the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered" "may" fall within the exemption. However, the explanatory guidance also "take[s] the position that the contract must create an obligation on the counterparties to make or take delivery of the commodity and not merely an option to make or take delivery."

The problem with catching everything in the definition of derivative, and then exempting only specific things, is that any errors occur on the side of over regulation. It may also create a chilling effect on certain types of contracts, beyond those which are actually caught by the regulation, as companies seek to avoid uncertainty or complex analysis.

For example, contracts with small producers of gas are very common in Saskatchewan. Contracts with small consumers of gas are also very common. Those contracts are typically meter and location specific, may provide for fixed or indexed pricing, and do not require a minimum delivery or receipt. What SaskEnergy is gaining on these contracts is exclusivity, in that any gas purchased by the customer must be from SaskEnergy, or any gas sold by the producer at that metering point must be to SaskEnergy. The small

producer or consumer is gaining flexibility to periodically shut-in wells or to suspend operations. SaskEnergy is facilitating gas production, commerce and industry within the province.

The intent of the rule is likely not to regulate natural gas speculation at a stranded meter proximate to a hamlet in Saskatchewan. Any further clarification that can be provided in that regard would be helpful. A meaningful *de minimis* exemption would also help.

SaskEnergy repeats its concerns with respect to the small physical commodity transaction thresholds.

Gas Transportation

The gas transportation and storage issue raised in our original submissions on March 15, 2013 has not been expressly addressed. These would seem to be contracts entered into for business purposes, which relate to provision of a service, and which do not involve investment, speculation or hedging. Despite this they seem to have become an issue in the United States, unless a very particular test is met.

There is a tendency to view this regulation through the perspective of our professions, our training, or our type of business. However, any characterization of transport and storage contracts as an option or derivative is arguably an application of form over substance and we would like further clarification on this matter

Comments on Staff Notice 91-302 – Trade Repositories

With respect to trade repositories and derivatives data reporting, the Rule arguably does not go far enough in terms of inter-provincial cooperation, and inter-provincial designation of trade repositories.

SaskEnergy remains concerned that trade repositories will not promptly seek Saskatchewan designation. The original clarification that reporting would then be made directly to the regulator helps, but this may or may not be of benefit to the local counterparty.

Similarly, SaskEnergy is pleased that the reporting obligation will reside first with the derivatives dealer, and not the end user, and that the reporting party can be agreed upon. However, where a non-local reporting counterparty does not report or does not properly fulfill its duties, it ultimately falls to the local counterparty, and in some provinces the availability of other local counterparties is limited.

SaskEnergy repeats its concerns with respect to affiliate reporting.

Conclusion

SaskEnergy and TransGas are thankful for the opportunity to provide these comments.

Where any doubt exists that the benefits of the new regulatory regime will not warrant its cost, direct and indirect, SaskEnergy would argue for some caution, some care, and potentially a narrower scope.

Respectfully submitted,

SASKENERGY INCORPORATED

Mark H. J. Guillet
Vice President, General Counsel & Corporate Secretary

MHJG/TJ/tdr

cc: Christine Short, Vice President, Finance and CFO
Dean Reeve, Executive Vice President
Lori Christie, Executive Director, Gas Supply, Marketing & Rates
Dan Parent, Director, Gas Supply and Marketing
Dennis Terry, Senior Vice President, TransGas Business Services
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Cory Little, Treasurer

SaskEnergy

APPENDIX "A"

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March 15, 2013

Our File: S9279

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And to:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Dear Sirs/Mesdames:

RE: CSA STAFF CONSULTATION PAPER 91-301 - MODEL PROVINCIAL RULES – DERIVATIVES: PRODUCT DETERMINATION AND TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

SaskEnergy Incorporated ("SaskEnergy") and TransGas Limited ("TransGas") welcome the opportunity to comment on the proposed model provincial rules, as set out in CSA Staff Consultation Paper 91-301 - Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting, published in Saskatchewan on January 15, 2013.

The potential economic and administrative burden on natural gas market participants associated with trade repositories and derivatives data reporting make product determination, or regulatory scope, of particular interest to SaskEnergy and its subsidiaries, including TransGas.

without applying any margin or additional costs. No profit or loss should be incurred by the utility on the sale of natural gas.

The difference between SaskEnergy's cost of gas and the revenue generated from commodity rates is tracked in the Gas Cost Variance Account (GCVA). The outstanding balance in the GCVA is refunded to or collected from customers in the next commodity rate application. This process supports the principle that no profit or loss is made by SaskEnergy on the sale of natural gas. The corporation's independent auditors on behalf of the Provincial Auditor, as well as the Saskatchewan Rate Review Panel, monitor the GCVA to ensure this principle is followed.

Natural gas utilities across Canada have different rate setting processes. SaskEnergy's process is to recommend a rate based on the forward natural gas market and reduction of the GCVA balance to zero over that same 12 month time period. The rate is established for November 1 of each year and then reviewed for a potential change on April 1 if the GCVA continues to be too large or if market conditions change materially. Rate applications are reviewed by the Saskatchewan Rate Review Panel, which makes a recommendation to the Provincial Cabinet.

SaskEnergy purchases its customers' gas on the open market. The primary pricing point of natural gas in North America is Henry Hub in Louisiana. Because of its pipeline connections to high consuming regions in the United States, a futures contract based on Henry Hub trades on the New York Mercantile Exchange (NYMEX). AECO is the largest natural gas hub in Canada and is located in Alberta. AECO is priced as a basis (differential) to NYMEX which typically represents regional differences in supply and demand and usually considers the cost to transport gas from western Canada to the high consuming regions in the east. When a large volume of transactions occur at a hub, such as AECO, it becomes a pricing reference point for smaller hubs such as in Saskatchewan. SaskEnergy purchases its natural gas supply from producers and suppliers in Saskatchewan and Alberta. In Saskatchewan, this gas is exchanged at the TransGas Energy Pool (TEP) and the price is quoted as a basis (differential) to AECO prices in Alberta. The Alberta purchases are made primarily at AECO and the natural gas is shipped to Saskatchewan. Therefore factors affecting the price of gas in North America, reflected in the NYMEX natural gas price, affect the price of gas in Saskatchewan, and the price of gas paid by SaskEnergy's customers.

Natural Gas prices are extremely volatile, even relative to other commodities. They are influenced by a number of variables including demand, production, storage levels, and economic conditions. These variables are affected by other variables such as weather. To aid in mitigating this volatility, to provide our customers with greater price certainty and to enable annual or twice annual rate changes, SaskEnergy uses a number of mechanisms which include the physical storage of gas, physically settled gas forwards or options, or the purchase of financially settled derivatives to hedge risk.

rather contract for storage service and TransGas manages the flow of gas based on system requirements. All TransGas storage customers benefit from the flexibility and reliability that these diversified facilities provide.

Storage and transport rates are tariff based on a cost of service model, with approved rates of return. This differs from the model typically used for storage, which is market based. Rates are approved by the Saskatchewan Cabinet, with prior input from a customer dialogue process.

Comments

1. Physical Gas Exemption

Natural gas is sold on a forward basis for practical reasons inherent in the natural gas sector. It will continue to be sold on a forward basis, even if every financial institution were to retreat from the energy sector. Almost all sales are going to be "derivatives", as defined, and the financially versus physically settled distinction is really an artificial one from a price risk perspective. Our price "risk" and price "speculation" is occurring largely in circumstances where physical delivery must occur.

A contract or instrument prescribed under the definition of "derivative" is deemed not to be a derivative under the Model Provincial Rule if it is:

> 2(d) a contract or instrument for immediate or deferred delivery of a physical commodity other than cash or a currency
>
> (i) that requires the counterparties to make or take physical delivery,
> (ii) that does not allow for cash settlement in place of physical delivery, and
> (iii) that is intended by the counterparties to be physically settled,

Under a model where gas is effectively sold at cost, administrative costs, such as the cost of interpreting complex regulations and of reporting gas transactions, must be included in the cost of gas. SaskEnergy supports a model that exempts contracts with an intent to physically deliver from the scope of this legislation, so as to best avoid a level of administrative expense from reporting granular details of a gas purchase strategy that is already available to the Saskatchewan Rate Review Panel, and therefore relatively transparent.

Similarly, the proposed physical exemption model is preferred as it will allow SaskEnergy to continue to trade in physical gas with its affiliates without the administrative, reporting and other burdens of regulation. These intra-affiliate trades, it

If the instances of legitimate, commercially necessary exemptions start to outnumber the rule, and we start to see exemptions that are multiple paragraphs or pages in length as is occurring elsewhere, then some fresh thought has to be given as to the harm we are trying to prevent in this particular context, and if this regulation is the best way of achieving it.

We would frankly prefer a short list of things we cannot do without regulation to a list of things we can.

With respect to options or embedded options, SaskEnergy would also like to see a general exception for options, where there is an intent to physically take delivery of the commodity.

SaskEnergy strongly supports a model that exempts from the scope of this legislation contracts with an intent to physically deliver, so as to avoid a level of administrative expense from reporting transaction level details of a gas purchase strategy. If that cannot ultimately be achieved, or cannot be achieved without a great deal of complexity, then a public interest exemption specific to the utility might be considered.

2. Financially Settled Commodity Transactions

By internal policy, SaskEnergy's financially settled transactions are limited to hedging with counterparties with the very highest credit ratings. SaskEnergy itself is a Crown Corporation, and an agency of the Government of Saskatchewan. We are buying physical gas at index because of a number of credit and contextual factors, including the particular constitution of the Saskatchewan market, with a lot of supply from producers and small producers. The whole purpose of the true (rather than commercially incidental) "financially settled" transaction is to mitigate SaskEnergy's risk, and the price risk faced by SaskEnergy's customers, in a volatile natural gas market. Anything that affects cost of this service, liquidity generally or the availability of counterparties, is directly harmful to SaskEnergy's customers.

Any mischief to be addressed by regulation should be weighed against the effect of that regulation in determining appropriate scope.

If reporting requirements are to be imposed, it is submitted that they be tiered as they are in the United States with financial institutions effectively having the first obligation to report in most instances. Anything that can be done to limit SaskEnergy's trading, reporting, report verification and record keeping obligations is welcome.

SaskEnergy likely opposes any initiative that, intentionally or unintentionally, directly or as an end result, imposes what is effectively a securities dealer between SaskEnergy and its counterparty.

> *These contracts or instruments include, but are not limited to ... a consumer or commercial contract or instrument to acquire, or lease real or personal property ... a commercial sale, servicing, or distribution arrangement ... a contract or instrument for the purpose of effecting a business purchase and sale or combination transaction . . .*

Depending on the type of service required, both SaskEnergy delivery and TransGas transportation or storage contracts may contain either single or tiered pricing.

Under a single pricing model, customers pay for capacity whether or not they actually flow, receive or store gas, and this capacity has value and may or may not be assignable, depending on the contract. The customer pays exactly the same amount whether or not they use the capacity, and there is no additional usage fee.

Under a tiered pricing model, a basic monthly charge is paid to preserve the right to use facilities, and for administrative costs, and the SaskEnergy "delivery" or TransGas "commodity" fee is based on the volumetric usage of the facility.

These fees are completely separate and apart from the cost of the gas commodity and relate only to transport or distribution of that commodity.

If natural gas pipeline services or storage transactions are derivatives as defined (and we do not agree that they are), or are treated as derivatives, a new layer of regulatory oversight and regulatory reporting would require investment in staff and resources not traditionally associated with pipeline or storage operations. It seems to have the potential to be extremely complex. We do not want to be in a position of hiring people and buying systems, solely to interpret and administer this additional regulatory obligation. Nor do we wish to reorganize our entire way of doing business, simply to achieve some regulatory test or exemption.

In the United States there has been a great deal of confusion on this point, as guidance from the CFTC initially seems to suggest that the two-tiered transport or storage contracts prevalent in the United States may be "commodity options", by default, and that transport and storage capacity is a commodity. The original test provided an exemption for "exclusive" use of a specified facility, "or portion thereof", but had a restrictive "however" clause. The later clarification with respect to the "however" clause reads, in part:

> *In OGC's view, if (1) a facility usage agreement, contract or transaction discussed herein includes a two-part fee structure, (2) the right to use the specified portion of the facility for the term of the agreement, contract or transaction is legally established upon entering into the agreement, contract or transaction, (3) the party who has legally established the right to use the specified portion of the facility for the term of the agreement, contract or transaction pays the Demand Charge/Reservation Fee in a commercially*

beneficial, rather than something more complex. The Corporation again asks that the application of these provisions be targeted to circumstances where the mischief to be addressed outweighs the cost, and clarification be given where appropriate.

Conclusion

SaskEnergy and TransGas are thankful for the opportunity to provide these comments. SaskEnergy recognizes that there are considerations in play which are much broader than the energy sector, SaskEnergy's interests, or the cost consumers pay for natural gas or gas transport and storage.

At SaskEnergy's level and from SaskEnergy's perspective, the existing energy sector practices have worked well. They have allowed us to successfully meet our corporate and customer objectives in an efficient way.

Increased regulatory burden ultimately increases costs for our customers. Even the prospect of new regulation in Canada is drawing on staff resources, and affecting the way we do business, as are the new regulations elsewhere. The Committee must make sure the benefit of any mischief to be avoided justifies the cost.

Where any doubt exists that the benefits of the new regulatory regime will not warrant its cost, direct and indirect, SaskEnergy would argue for some caution, some care, and potentially a narrower scope. A public interest exemption or exemptions specific to the utility might also be considered.

Respectfully submitted,

SASKENERGY INCORPORATED

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Vice President, General Counsel & Corporate Secretary

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September 5, 2013

Alberta Securities Commission

In care of:

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For further distribution to other Canadian securities regulators and the OTC Derivatives Committee of the Canadian Securities Administrators ("CSA")

Re: Multilateral CSA Staff Notice 91-302
Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting ("the Rules")

Shell Energy North America (Canada) Inc. ("Shell Energy") and Shell Trading Canada, a division of Pennzoil-Quaker State Canada Incorporated ("STC") (collectively, "Shell Trading") make this submission to comment on the Rules proposed by the CSA. Shell Trading commends the CSA for amending the Rules to adopt many of the comments previously submitted by stakeholders. The following comments focus on aspects that remain of concern.

Description of Shell Trading

The Shell Trading companies are indirect subsidiaries of Royal Dutch Shell, plc ("Shell") which is impacted by, and participating in, the global efforts to reform financial markets regulation. Shell Energy markets and trades natural gas, electricity, and environmental products, including the natural gas produced by its affiliates in Canada. STC trades various grades of crude oil, refinery feed stocks, bio-components, and finished oil-related products, including such commodities that are produced, manufactured, or imported by affiliates. Both entities also participate in the Canadian energy derivatives markets and together they manage risk and optimize value across physical and financial, exchange-traded and OTC markets.

Energy companies such as Shell often use an integrated approach to physical trading, supply management, and financial hedging in which different entities in the corporate group participate

as a producer, trader, and marketer in the relevant commodity markets. Separate legal entities within the group are designated to enter into physical and financial transactions to help manage risk and optimize the physical portfolio of commodity assets owned and controlled by the corporate group. Such an approach achieves economies of scale, reduces and consolidates risk, and lowers administrative and transactional costs. By consolidating such physical and financial trading activity through hedging affiliates like Shell Trading, this model reduces overall risk to the company and the markets. Inter-affiliate swaps are an important, practical, and efficient component of this process.

Trade Repositories and Derivatives Data Reporting

Section 1 – Definitions

Shell Trading is concerned that the definition of a "dealer" has been inserted into these final Rules prior to its determination as part of the registration consultation under CSA Paper 91-407. Stakeholders have commented that "trading" does not equal "dealing", however, the definition of dealer in the Rules includes the reference that a dealer is engaged in the business of trading derivatives.

Section 35 – Valuation Data

The wording of subsection 35(1) has been changed to state that both the clearing agency and the local counterparty must report valuation data on a daily basis when the transaction has been cleared. This obligation on the local counterparty is unnecessary based on subsection 27(1)(a) stipulating that the clearing agency is the reporting counterparty for cleared transactions. The clearing agency has become a party to the transaction and holds the obligation to value and manage all transactional exposures as part of its operations and as part of the services it provides to the market and the original parties to the transactions. Maintaining such an obligation on local counterparties will remove one of the incentives for these parties to clear transactions and undermine the CSA objective of moving OTC transactions to centralized clearing agencies. This part of the Rule should be amended such that clearing agencies alone bear this obligation.

Shell Trading continues to object[1] to the requirement in subsection 35(2)(a) to have valuation data submitted by both parties where both are dealers, for non-cleared transactions. This is inefficient and the burden to do so does not justify the expressed curiosity of the CSA to be able to compare the submissions. It also undermines the agreement reached by the parties to designate one of them as the reporting counterparty for the transaction. This part of the Rule should be amended such that valuation data is submitted by the reporting counterparty chosen by the two dealers.

Similarly, subsection 35(2)(b) expands this inefficient burden on participants by requiring both non-dealer parties to a transaction to report valuation data on a quarterly basis. These parties, including end-users, would have agreed that one of them would be the reporting counterparty, and so the non-reporting counterparty should not bear this obligation. It will also require that all

[1] Shell Trading comments on Consultation Paper 91-301 page 4; http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_kerrp.pdf

parties to OTC derivative transactions become participants of trade repositories, which could cause participants to leave these markets. This part of the Rule should be amended to place the obligation on the dealer counterparty where one of the two parties to the transaction is a dealer, and specify quarterly reporting by the reporting counterparty where neither of the parties is a dealer.

More generally related to all parts of section 35, Shell Trading encourages the CSA to consider the language used (and obligations established) in this section in light of the outcomes of section 27, in comparison to the language used in sections 33, 34, and 36, and with respect to the Explanatory Guidance provided for all of these sections.

Section 37 – Data Available to Regulators

Subsection 37(3) is a new inclusion, and is not clear if the obligation on the local counterparty is to ensure regulator access to data that resides at, a) the trade repository, or b) the reporting counterparty for the transaction, or c) the local counterparty that did not report the transaction. If the intent is either a) or b), this section is not practical because the local counterparty should not, and cannot, be expected to ensure the regulator has access to data residing at a trade repository or another party to the transaction. If the intent is to ensure the regulator has access to data residing at the local counterparty, the wording should be amended to specify that the reporting counterparty (rather than local counterparty) should ensure access to derivatives data it holds, as reported to a trade repository by that reporting counterparty.

Section 39 – Data Available to the Public

Shell Trading reiterates concerns regarding the wording used in subsection 39(3).[2] The Explanatory Guidance provided with the Rule states,

> *"The purpose of the public reporting delays is to ensure that market participants have adequate time to enter into any offsetting transaction that are necessary to hedge their positions. These time delays apply to all transactions, regardless of transaction size."*

However, the current version of the Rule maintains the previous language requiring the trade repository to publicly report transaction level detail "not later than" the stipulated timing. "Not later than" does not accomplish the creation of a mandated delay in reporting, rather, it sets an outer boundary for reporting. Within this time limit, the trade repository could report transactions within hours or even minutes of receiving this data, undermining the objective of the CSA to establish a delay in reporting. Shell Trading recommends the inclusion of a "not sooner than" requirement to establish the desired delay.

Shell Trading commends the CSA for adding subsection 39(6) regarding transactions between affiliates. Unfortunately, the wording used does not achieve the expressed desire to exclude this data from publication. The Rule states that the trade repository "will not be required to make public" the data for transactions between affiliates. Such a statement is not restrictive and seems to provide the trade repository with discretion or the option to publish the data if it chooses. Shell Trading recommends the Rule wording be changed to state the trade repository "must not"

[2] Ibid page 4

make public any derivatives data for transactions between affiliates, considtent with the approach used in subsection 39(4) to establish a restriction.

Section 40 – Exclusions

The addition of subsection 40(c) to this latest version of the Rules will result in the reporting of every OTC commodity derivative transaction, regardless of transaction size or type of participant involved. Since all three requirements must be met for exclusion, the addition of part (c) renders the other two criteria inconsequential – that is, even if a non-dealer party has aggregate notional value under $500,000 it is not excluded if it is the reporting counterparty, and thus fails criteria (c). This new criteria also effectively creates a singular exclusion where one already exists – that is, it says if the counterparty is not the reporting counterparty, then it is excused from reporting obligations.

Shell Trading recommends the CSA adopt a simplified approach to exclusions based solely on a de minimis threshold for all participant types, including dealers that are not financial institutions. An example of a threshold proposal that could inform the direction of the CSA is that being considered in Singapore.[3]

Conclusion

Shell Trading appreciates the opportunity to provide these comments, and welcomes the opportunity to work with the CSA on the future regulation of commodity derivatives, including the critically important treatment of commercial energy firms within the reforms. Please contact me at (416) 227-7312 if you have any questions regarding these comments or would like to explore any of the issues further.

Respectfully submitted,

Submitted electronically

Paul Kerr
General Manager – Market Affairs
for Shell Energy North America (Canada) Inc.
and Shell Trading Canada

[3] Monetary Authority of Singapore, consultation on derivatives reporting; http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/CPReportingRegs.pdf

sifma

Invested in America

| asset management group

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6 September 2013

Re: Proposed OSC Rule 91-506 Derivatives: Product Determination and Companion Policy 91-506CP; and Proposed OSC Rule 91-507 Trade Repositories and Derivatives Data Reporting and Companion Policy 91-507CP

Attached please find a copy of our comment letter to the Canadian Securities Administrators on CSA Staff Notice 91-302 – Updated Model Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting. We appreciate your consideration of these comments to Proposed OSC Rule 91-506 and Companion Policy 91-506CP, and Proposed OSC Rule 91-507 and Companion Policy 91-507CP. Should you have any questions, please do not hesitate to contact Tim Cameron at 212-313-1389 or Matt Nevins at 212-313-1176.

Sincerely,

Timothy W. Cameron, Esq.
Managing Director,
Asset Management Group
Securities Industry and Financial Markets Association

Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel,
Asset Management Group
Securities Industry and Financial Markets Association

Canadian Securities Administrators
September 6, 2013

Copy of

September 6, 2013 Letter from SIFMA AMG

to Canadian Securities Adminstrators

September 6, 2013

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Dean Murrison
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Re: Canadian Securities Administrators
CSA Staff Notice 91-302 – Updated Model Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting

The Asset Management Group (the "AMG")[1] of the Securities Industry and Financial Markets Association ("SIFMA") welcome the opportunity to comment on the Updated Model Rules issued by the Canadian Securities Administrators ("CSA", or, the "Committee") in CSA Consultation Paper 91-302.

Our commentary is limited to the topic of FX security conversion transactions in Clause 2(c)(i)(B) of the Model Provincial Rule (and Explanatory Guidance) – Derivatives: Product Determination. The addition of this clause 2(c)(i)(B) which allows for an FX trade entered into to facilitate the settlement of a securities transaction which settles beyond trade date + 2 (T+2) as a spot trade, and therefore an "excluded derivative," is consistent with the approach taken by the CFTC and SEC.[2] However, our members continue to experience interpretive issues in applying the US interpretation of "security conversion transactions"[3] to FX trades that our members believe are bona fide FX spot trade

[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans and state and local government pension funds, many of whom invest in commodity futures, options, and swaps as part of their respective investment strategies.

[2] *See* http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-18003a.pdf (pages 48256-48258).

[3] The CFTC will consider the following to be a "Securities Conversion Transaction" (and therefore a spot FX transaction): "An agreement, contract or transaction for the purchase or sale of an amount of foreign currency equal to the price of a foreign security with respect to which (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline and (ii) actual delivery of the foreign security and foreign currency occurs by such deadline." Further Definition of "Swap," "Security-Based Swap," and "Security-
(….continued)

and we believe these very same issues are raised by proposed Clause 2(c)(i)(B) of the Model Provincial Rule (and Explanatory Guidance).

We refer your attention to our most recent letter filed with the CFTC on this issue, a copy of which is attached as *Appendix 1* hereto ("AMG August 27th letter").[4] Significant uncertainty has arisen in the industry as to the proper interpretation of bona fide FX spot transactions under U.S. regulations, in general, and the "securities conversion transactions" language in the Swap Definition Rule, in particular, and whether many types of FX transactions that are commonly entered into by asset managers in connection with the purchase, sale or ownership of a security qualify as bona fide FX spot transactions. We believe that treating such transactions as bona fide FX spot transactions is consistent with current market practices and our members' clients' guidelines and expectations. We think it would be extremely helpful for the Canadian Securities Administrators to confirm in the Model Rules or Explanatory Guidance that certain common FX transactions are appropriately categorized as FX spot transactions. To that end, we are suggesting adoption of the principles included in Appendix 1 hereto that could be utilized by market participants as guidance in determining whether an FX trade is a bona fide FX spot transaction in the manner and for the reasons set forth in the AMG August 27th Letter.

* * *

(continued....)

Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48257 (Aug. 13, 2012) (the "Swap Definition Rule").

[4] Published at http://www.sifma.org/comment-letters/2013/sifma-amg-submits-comments-to-the-cftc-requesting-interpretive-guidance-relating-to-certain-foreign-exchange-transactions/.

We appreciate your consideration of this request, and stand ready to provide any additional information or assistance that you might find useful. Should you have any questions, please do not hesitate to contact Tim Cameron at 212-313-1389 or Matt Nevins at 212-313-1176.

Sincerely,

Timothy W. Cameron, Esq.
Managing Director,
Asset Management Group
Securities Industry and Financial Markets Association

Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel,
Asset Management Group
Securities Industry and Financial Markets Association

Appendix 1

Canadian Securities Administrators
September 6, 2013

sifma
Invested in America

| asset management group

August 27, 2013

Gary Barnett
Director of Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Request for Interpretive Guidance Relating to Certain Foreign Exchange Transactions

Dear Mr. Barnett:

The Asset Management Group (the "**AMG**")[1] of the Securities Industry and Financial Markets Association ("**SIFMA**") requests that the Commodity Futures Trading Commission (the "**Commission**") provide interpretive guidance with respect to the status of certain types of foreign exchange ("**FX**") transactions as bona fide spot foreign exchange transactions. The Commission, in the adopting release for its rules further defining the term "swap" (hereinafter, the "**Product Definitions**") set forth a distinction between FX spot transactions and FX forwards, including providing guidance as to "securities conversion transactions" which are entered into in connection with a related foreign securities transaction.[2] We are seeking clarification that FX

[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans and state and local government pension funds, many of whom invest in commodity futures, options, and swaps as part of their respective investment strategies.

[2] *See* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48256-58 (Aug. 13, 2012), stating, in relevant part that the Commission is:

> . . . providing an interpretation that a bona fide foreign exchange spot transaction, *i.e.*, a foreign exchange transaction that is settled on the customary timeline of the relevant spot market, is not within the definition of the term "swap." In general, a foreign exchange transaction will be considered a bona fide spot transaction if it settles via an actual delivery of the relevant currencies within two business days. In certain circumstances, however, a foreign exchange transaction with a longer settlement period concluding with the actual delivery of the relevant currencies may be considered a bona fide spot transaction depending on the customary timeline of the relevant market. In particular, as discussed below, the Commissions will consider a foreign exchange transaction that is entered into solely to effect the purchase or sale of a foreign security to be a bona fide spot transaction where certain conditions are met.

transactions which conform to certain parameters set forth below would be treated as bona fide FX spot transactions for purposes of compliance with the Commission's rules.

Dialogue among market participants on this topic has been ongoing, with a tremendous amount of attention focused on the "securities conversion transactions" language set forth in the Product Definitions. Significant uncertainty has arisen in the industry as to the proper interpretation of bona fide FX spot transactions, in general, and the "securities conversion transactions" language, in particular, and whether many types of FX transactions that are commonly entered into by asset managers in connection with the purchase, sale or ownership of a security qualify as bona fide FX spot transactions. We believe that treating such transactions as bona fide FX spot transactions is consistent with the intent of the Product Definitions, current market practices and our members' clients' guidelines and expectations.[3] In order to alleviate the market uncertainty that exists, we think it would be extremely helpful to the market for the Commission to publish further interpretive guidance, confirming that certain common FX transactions are appropriately categorized as FX spot transactions. To that end, we are suggesting adoption of the following principles that could be utilized by market participants as guidance in determining whether an FX trade is a bona fide FX spot transaction. To illustrate the type of transactions encompassed by these principles and that we believe should appropriately be considered FX spot transactions[4], we have included some examples in the attached Exhibit 1.

(1) The "securities conversion transaction" language which states that the amount of foreign currency bought or sold should be "equal to the price" of the related securities transaction should not be read to exclude as a FX spot transaction an FX transaction where an amount of currency bought or sold is less than the price of the related securities transaction, provided the FX transaction is executed in

(continued...)

The CFTC will consider the following to be a bona fide spot foreign exchange transaction: An agreement, contract or transaction for the purchase or sale of an amount of foreign currency equal to the price of a foreign security with respect to which (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline and (ii) actual delivery of the foreign security and foreign currency occurs by such deadline (such transaction, a "Securities Conversion Transaction"). For Securities Conversion Transactions, the CFTC will consider the relevant foreign exchange spot market settlement deadline to be the same as the securities settlement deadline.

[3] For example, Section 408(b)(18) of the Employee Retirement Income Security Act of 1974, as amended, permits pension plans to engage in foreign currency transactions "in connection with" securities transactions. Because pension plans routinely acquire foreign securities that require currency exchanges, the Department of Labor created an exemption for FX which permits "any foreign currency transaction" between a plan and a party in interest that is a bank or broker-dealer (or affiliate of either) if the foreign exchange transaction is "in connection with" the purchase, holding or sale of securities. 29 U.S.C. §1108 (b)(18)(A). Some of our members' clients, therefore, may have guidelines based on the language in this statute.

[4] The examples in Exhibit 1 are for illustrative purposes and are not intended to be inclusive of all FX spot transactions that may be implicated by the principles set forth herein.

connection with and for the purpose of converting funds into or out of the settlement currency of the securities trade (See Example 1 and Example 2).[5]

(2) The requirement that a "securities conversion transaction" is entered into "solely to effect the purchase or sale of a security" should not be read to exclude as an FX spot transaction an FX transaction executed in connection with the termination, cancellation, or unwind of a securities transaction (See Example 3). [6]

(3) The "securities conversion transaction" language which states that "actual delivery" of both the foreign currency and related security should occur by the relevant securities settlement deadline should not be read to exclude as an FX spot transaction an FX transaction executed in connection with the termination, cancellation, or unwind of a securities transaction (See Example 3).

(4) FX transactions executed in order to convert payment obligations and cash flows that arise in connection with the purchase, sale or ownership of a security (such as transaction fees or taxes, dividends, coupon payments, other distributions with respect to securities, or capital calls) should be deemed bona fide FX spot transactions, provided that such FX transactions are executed in connection with and for the purpose of converting funds into or out of the currency of the payment flow, and such FX transactions will settle within seven local business days (absent unintentional settlement error or delay) (See Example 4).

(5) The "securities conversion transaction" language which states that both the FX transaction and the related foreign securities transaction should be "executed contemporaneously" should be read to include an FX transaction executed in connection with and for the purpose of converting funds into or out of the settlement currency of the securities transaction, notwithstanding that the FX trade may not be entered into on the same day or same time as the related securities transaction, provided the FX transaction and related securities transaction occur within one or two local business days of each other (See Example 2).

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[5] For example, an FX transaction executed to settle a foreign securities transaction may not be "equal to the price of the foreign security" because the purchaser already holds a currency balance in reserve, or receives a currency payment in connection with other trades in the same currency as the foreign security being purchased, that can be used to settle the foreign security purchase (See Example 1). Further, an FX transaction may be executed on a net basis in connection with the purchase or sale of multiple foreign securities that is then allocated to each foreign security for settlement (See Example 2).

[6] For example, in the event a securities transaction is canceled in part prior to settlement, market participants commonly will execute a subsequent FX transaction in order to partially offset the initial FX transaction that was entered into in connection with the original securities trade. Such offsetting FX transactions may be the only way to ensure that the correct amount of currency is delivered at settlement.

(6) The "securities conversion transaction" language which states that the amount of foreign currency bought or sold should be "equal to the price" of the related securities transaction should not be read to exclude as a FX spot transaction an FX transaction that is executed as a net trade, where the net trade is comprised of multiple FX transactions that individually would have satisfied the conditions of the securities conversion transaction if executed on a gross basis, provided that such FX transactions are then allocated on a gross basis for settlement (See Example 2).

(7) The "securities conversion transaction" language which states that the amount of foreign currency bought or sold should be "equal to the price" of the related securities transaction should not be read to exclude as a FX spot transaction an FX transaction where an amount of currency bought or sold is greater than the price of the related securities transaction, provided the FX transaction is executed in connection with and for the purpose of converting funds into or out of the settlement currency of the related securities trade, and the entity executing the FX transaction has estimated the amount of FX needed in good faith (See Example 5).

* * *

Based on the foregoing, we respectfully request that the staff of the Commission provide the guidance requested in this letter. We appreciate your consideration of this request, and stand ready to provide any additional information or assistance that you might find useful. Should you have any questions, please do not hesitate to contact Tim Cameron at 212-313-1389 or Matt Nevins at 212-313-1176.

Sincerely,

Timothy W. Cameron, Esq.
Managing Director,
Asset Management Group
Securities Industry and Financial Markets Association

Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel,
Asset Management Group
Securities Industry and Financial Markets Association

cc: Hon. Gary Gensler, Chairman, Commodity Futures Trading Commission Hon.
Bart Chilton, Commissioner, Commodity Futures Trading Commission Hon.
Scott O'Malia, Commissioner, Commodity Futures Trading Commission Hon.
Mark Wetjen, Commissioner, Commodity Futures Trading Commission
Frank Fisanich, Chief Counsel, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission
David E. Aron, Counsel, Office of General Counsel, Commodity Futures Trading Commission

* * *

Commodity Futures Trading Commission
September 6, 2013

Certification Pursuant to Commission Regulation 140.99(c)(3)

As required by Commission Regulation 140.99(c)(3), we hereby (i) certify that the material facts set forth in the attached letter dated August 27, 2013 are true and complete to the best of our knowledge; and (ii) undertake to advise the Commission, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Sincerely,

Timothy W. Cameron, Esq.
Managing Director, Asset Management Group
Securities Industry and Financial Markets Association

Matthew J. Nevins, Esq.
Managing Director and Associate General Counsel,
Asset Management Group
Securities Industry and Financial Markets Association

Exhibit 1
Securities Conversion Transaction Examples

Example 1 – FX Trade Not Equal to the Price of Security Trade

Asset manager purchases or sells a foreign security and needs to purchase or sell the foreign currency in which that security is denominated in order to either: (i) settle the security purchase or (ii) repatriate the funds arising from the security sale into the base currency of the fund. If the asset manager has or will have available amounts of the required foreign currency in its account at the time of the settlement of the security trade (possibly due to the settlement of earlier transactions in the same currency pair), or the asset manager wishes to leave a portion of the proceeds in the foreign currency to cover future needs, the manager may instruct its trading desk to purchase or sell only the difference needed for settlement of the security trade or repatriation of the funds, rather than the entire amount due or to be received.

Example 2 –Bulk Trades, Net Settlement and Delayed Trade Execution

Asset manager purchases and sells foreign securities denominated in a particular currency with a settlement date of T+4 for various accounts throughout the day. This can either be a single bulk transaction which is allocated for settlement to the particular accounts, or multiple transactions over the course of the day. In order to facilitate settlement and avoid increased transaction costs (in the form of a bid-offer spread) associated with executing FX transactions concurrently with each separate securities transaction, the asset manager will aggregate, net, price and execute one or more covering FX transactions in a net amount as needed to meet the requirements for settlement of the foreign securities purchased (or repatriation of funds into the base currency of the account if the overall transaction is a sale) with settlement intended to occur on the same day as the settlement date of the foreign securities transaction. These FX transactions are typically executed during the same trading day or, if the securities transactions are executed late in the trading day, during the morning of the next following trading day (i.e., with a maturity of either T+4 or, if the FX transaction is entered into the next day, T+3).

Example 3 – Cancellations and Modifications

Asset manager purchases foreign securities on behalf of an account. Suppose the securities are South African securities. The securities market convention for South Africa is T+7 settlement and this purchase requires settlement in South African Rand (ZAR). In order to ensure that the USD/ZAR trade settles on the same day as the securities, the asset manager executes an USD/ZAR FX transaction for settlement on T+7 and in a notional amount equal to the purchase price of the security. Following the initial trade on T+0, due to changing market conditions, the asset manager determines as a fiduciary matter that it needs to terminate all (or part of) the securities trade. Suppose this termination takes place on T+3 (i.e., 4 days before the original planned settlement date). Consequently, the covering FX trade also needs to be modified or cancelled. Market practice for this type of modification or cancellation in the FX market is to enter into an offsetting transaction rather than cancel and terminate the original trade (e.g., the account would sell back all (or a portion of) the ZAR it bought rather than unwind the original FX trade). Therefore, once the securities transaction is modified or cancelled, the account will enter into a new FX trade with a maturity of T+4 and a notional amount equal to the ZAR

equivalent amount of the portion of the securities trade that was canceled. If it is a complete cancellation, the entire ZAR amount will be sold back with a maturity of T+4.

Example 4 – Dividends, Coupons and Other Corporate Actions

Asset manager may execute (or instruct the custodian to execute) FX transactions in connection with corporate actions or income repatriation related to foreign securities holdings on behalf of an account. These conversions are necessary to facilitate the normal business and operations of the account with respect to transaction fees or taxes, dividends, coupon payments, other distributions with respect to securities, or capital calls. For example, if a dividend is paid on a foreign security, the asset manager will issue instructions to the custody bank (or its trading desk) upon its receipt of notice of such event, to enter into an FX transaction with settlement linked to the payment of the dividend. The same rationale that requires entering into a FX transaction with respect to the purchase of a foreign security equally applies in connection with the receipt of dividend payments with respect to the holding of a foreign security. Among other things, the FX transaction minimizes operational risk for the client account. The same would be true of other situations giving rise to payment flows such as coupon payments, tax payments, class action settlements, capital calls and other routine corporate actions, such as stock splits, mergers and acquisitions, rights issues and spin-offs, arising from the ownership of securities which result in foreign currency payments to shareholders whose accounts are denominated in another currency.

Example 5 – FX Trade Exceeding the Price of Securities Transaction

An asset manager may need to enter into an FX transaction in an amount different than the price of the related securities transaction to cover taxes, fees or other transactional costs related to the securities transaction. Further, an asset manager may believe it is best for the client to enter into an FX transaction relating to an outstanding unfilled securities transaction order prior to execution of the securities transaction order. In such a situation, the asset manager will necessarily have to estimate the amount of currency that will be needed or received. While the securities transaction will typically be executed shortly after the asset manager decides to buy or sell, in certain market conditions it may take longer for the securities transaction to be fully executed, and therefore the FX transaction may occur on an earlier business day than the related securities transaction.

STATE STREET GLOBAL ADVISORS.

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September 6, 2013

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

c/o
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RE: Comments to the Proposed Ontario Securities Commission Rule 91-506 and Proposed Companion Policy and Proposed Ontario Securities Commission Rule 91-507 and Proposed Companion Policy

Dear Sir or Madam

State Street Global Advisors Ltd. ("SSgA") welcomes the opportunity to comment on Ontario Securities Commission (the "Commission") proposed rules 91-506 and 91-507 and companion polices appurtenant thereto which establish the (i) Commission determination of which products and financial contracts or arrangements are within the scope of the trade repository and reporting requirements ("Scope Rule"); and (ii) designation and operation of trade repositories and mandatory reporting of derivatives (the "TR Rule") (collectively, the "Proposed Rules").

SSgA has previously commented on the Canadian Securities Administrators Staff Consultation Paper 91-301 Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting. We are at this time responding to the

request for comment to ask that the Commission clarify or amend the Proposed Rules as set forth herein.

SSgA is a recognized leader and ranks as a major investment manager in Canada. Our clients are located across the country and include corporations, public funds, foundations, endowments, life insurance companies and government agencies. In conjunction with SSgA's other investment centers and sister companies worldwide, State Street Corporation provides clients with integrated solutions that combine investment management, transition management, trust, custody, recordkeeping and administrative services.

In its capacity as an investment advisor or trustee, SSgA is one of the largest end users of foreign exchange products in Canada. In calendar year 2012, SSgA executed over 20,000 separate foreign exchange transactions, with aggregate notional exposure to all currencies equal to CAD 104 billion with 13 broker-dealers acting as market makers in the Canadian markets in various foreign exchange products.

Scope Rule

We limit our comments under the Scope Rule to the proposed treatment of certain Foreign Exchange ("FX") contracts under the Proposed Rules. We agree with the Commission's determination that a short dated FX transaction ("Spot FX") or a deliverable FX transaction entered into for the purpose of settling a securities trade should be treated as 'Excluded Derivative" and therefore exempt from reporting. However, we request the Commission consider further amendments to the final version of the Scope Rule to address further clarifications regarding which FX transactions are intended to settle securities trades.

1. Security Settlements

The Scope Rule includes an exclusion for a "contract or instrument was entered into contemporaneously with a related security trade and the contract or instrument requires settlement on or before the relevant security trade settlement deadline." This exclusion recognizes that FX contracts structured in this way are non-speculative hedges in connection with an underlying securities transaction. We believe this exclusion should be expanded to address (i) repatriation of dividends; and (ii) FX contracts executed in order to hedge exposure in connection with security trades on a "net" basis.

1.1 Repatriation

We believe the same rationale for this exclusion applied to FX contracts for security settlement could be attributed to an FX contract used to effect a repatriation of dividends, distributions or proceeds denominated in a foreign currency into an investment portfolio's base currency. If an investment portfolio is holding securities or instruments that announce an income or distribution date or that have a known maturity date, a party may want to hedge their currency exposure and enter into FX contract that settles on or about the date of the distribution or other payment. We believe that FX contracts used for such repatriation that have a settlement date that corresponds to payment date for the dividend or other

payment and that have a principal amounts that correspond to the dividend or other payment amount should generally be subject to treatment as "Excluded Derivative."

1.2 Net Portfolio Settlement

The Scope provides an exclusion for FX contracts executed contemporaneously with securities transactions. In most instances, the amount of the FX contract and settlement date will coincide with the underlying securities transaction.

However, an investment portfolio will have multiple positions for securities or instruments denominated in the same currency. On any given local business day, a manager of the investment portfolio may execute several buy-sell orders or, may be expected to settle multiple buy-sell orders. It would be expected that the portfolio manager would net the currency obligations for all of the transactions and have one net amount of each currency that it needs to buy or sell[1].

In this case, the amount of deliverable currency under the FX contract may not correspond with any identifiable security transaction. However, the amount of the deliverable currency under the FX contract would correspond to the portfolio's *net* currency obligations resulting from securities trades executed on a particular day or expected to settle on a particular day. SSgA would utilize such a risk-reducing strategy in order to reduce a Canadian client portfolio's exposure to the volatility of the underlying FX market.

The Commission has recognized in the companion policy to 91-506CP that the netting and set-off of FX contracts *at settlement* should not change the characterization of an FX contract that is otherwise "deliverable." The scenario we describe is different, because rather than asking the Commission to recognize netting of FX contracts at settlement, we ask the Commission to recognize that netting of the currency obligations *before the FX contract is executed* should not change the characterization of an FX trade as "executed contemporaneously with a related securities trade."

TR Rule

We request the Commission consider further amendments to the final version of the TR Rule to address whether a non-dealer local counterparty should be obligated to satisfy the reporting obligations under the TR Rule.

The TR Rule states, in section 27(1)(b), that if the transaction is not cleared through a clearing agency and is between a dealer and a counterparty that is not a dealer it is the dealer that is responsible for performing the reporting duties. However, the rule further states "(d)espite any other provision in this Rule, if the reporting counterparty as determined under subsection (1) is not a local counterparty and that counterparty does not comply with the local counterparties reporting obligations under this Rule, *the local counterparty must act as the reporting counterparty.*" (italics added). It is this reversion of the reporting obligations to the local counterparty that is of concern.

[1] For example, on a particular day a portfolio manager may execute 3 buy orders requiring delivery of €100, € 150 and € 175 and execute 3 sell orders requiring receipt of € 100, €75 and € 50. This would result in a net position of € 200 to be delivered (*i.e.* €100 + € 150 + € 175 - € 100 + €75 + € 50 = €200.)

SSgA.

Like most asset managers, all of our FX contracts will be executed with professional FX dealers and therefore we will be operating under the assumption that in all cases, our counterparty, the dealer, will perform the reporting obligations. This approach is consistent with the requirements in the United States under the Dodd-Frank Act, where the dealer is required by regulation to perform the reporting duties. However, under Dodd-Frank, the reporting obligations do not revert back to the non-reporting end-user in the event of a dealer's failure to perform the required reporting obligations. We believe this approach should be adopted by the Commission.

Because an end-user who always trades with a dealer will never have reporting obligations under Dodd-Frank, SSgA, like many asset managers, has not invested in infrastructure necessary to comply with the required reporting obligations. For SSgA to ensure its ability to perform this reporting function would require extensive capital outlays for systems development and enhancements, increased staffing, etc. These expenditures might end up being passed on to the investing public through higher investment management fees or in the form of reduced investment returns. It should be noted that all of these expenditures would be made for a contingency that may never occur, because it is expected the dealers will in fact satisfy the reporting obligations. Given that dealers will also be required to satisfy the reporting obligations under Dodd-Frank and in most instances under EMIR, it seems unlikely they would attempt to evade compliance with reporting obligations under the TR Rule.

Conversely, swap dealers have already begun performing reporting functions in the U.S. and therefore have infrastructure in place that allows them to comply with the TR Rule without any material systems enhancements. Furthermore, even if a U.S. dealer was not subject to jurisdiction of the Commission, trades executed with U.S. dealers are already subject to reporting, with information subject to public dissemination.

For this reason, we continue to recommend against the reversion of reporting obligations to the local non-dealer counterparty. Should the Commission be disinclined to reconsider this point, we suggest that the Commission consider a local non-dealer counterparty's good faith effort to confirm that reporting will be performed by a foreign dealer counterparty a satisfactory approach to complying with section 27(2) of the TR Rule.

* * *

Thank you for the opportunity to provide comments and recommendations regarding the Model Rules.

Respectfully submitted,

Peter Lindley
President and Head of Investments, State Street Global Advisors, Ltd.

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September 6, 2013

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Saskatchewan Financial Services Commission

VIA ELECTRONIC MAIL

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RE: ***Multilateral CSA Staff Notice 91-302: Updated Model Rules - Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting.***

Dear Sirs/Mesdames:

I. INTRODUCTION.

Suncor Energy Inc. and its subsidiaries and affiliates (collectively "**Suncor**") hereby respectfully submit comments on the Canadian Securities Administrators' (the "**Administrators**") Updated Model Rules - Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting ("**Updated Model Rules**"). Suncor appreciates the opportunity to submit these comments on the Updated Model Rules and looks forward to further working with the Committee as it moves forward to implementing Canada's G-20 commitments that relate to the regulation of the trading of derivatives in Canada through its participation in the Alberta Securities Commission Derivatives Advisory Committee.

Suncor is the fifth largest North American energy company and is headquartered in Calgary, Alberta. Suncor's operations include oil sands development and upgrading, conventional and offshore oil and gas production, petroleum refining, and product marketing (under the Petro-Canada brand). Suncor's common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange under the symbol "SU." Suncor's energy trading business is organized around four main commodity groups: – (i) crude oil; (ii) natural gas; (iii) sulphur; and (iv) petroleum coke. Suncor's customers include

mid- to large-sized commercial and industrial consumers, utility companies, and energy producers. The energy trading business is used as a mechanism to support Suncor's oil sands production by optimizing price realizations, managing inventory levels during unplanned outages at Suncor's facilities, and managing the impacts of external market factors, like pipeline disruptions or outages at refining customers. The energy trading business has entered into arrangements in respect of midstream infrastructure, such as pipeline and storage capacity, to optimize delivery of existing and future growth production, while generating trading earnings on select strategies and opportunities.

II. COMMENTS OF SUNCOR.

A. *A Multi-Jurisdictional Approach to Reporting of Derivatives Data is Essential*

Coordination not only between Canadian regulators, but also Canadian regulators and their international counterparts to the reporting and collection of derivatives data is essential for two primary reasons.

First, a multi-jurisdictional approach will significantly reduce the regulatory burden on Canadian market participants while still achieving the objectives of the regulatory framework. The Administrators have already taken steps towards reducing that burden. For example, allowing trade repositories located outside Canada to serve as designated trade repositories is necessary, though not sufficient on its own, to allow companies that trade derivatives in Canada and other international markets to build a single, enterprise-wide infrastructure for reporting. Allowing Canadian market participants to utilize a single reporting system for their global operations will greatly reduce costs associated with building redundant reporting infrastructure. In doing so, however, Canadian regulators must ensure that data fields and data format required under Canadian regulations are functionally comparable to those that have been adopted and implemented in other jurisdictions, notably in the United States by the Commodity Futures Trading Commission ("**CFTC**"), as well as those proposed by the U.S. Securities and Exchange Commission under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**").

Many Canadian companies, including Suncor, have invested time and resources to create the reporting infrastructure necessary to comply with obligations imposed by the CFTC under the Dodd-Frank Act as reporting by end-users begins next week (September 9, 2013). Any significant deviation between Canadian reporting requirements and the comparable reporting requirements in the U.S. would require companies that participate in both markets to construct redundant and costly reporting and recordkeeping systems. Currently, there are approximately twenty-three data fields in the Proposed Model Rules that are not required under the CFTC's swap data reporting requirements. Beyond the obvious discrepancies, there likely are a number of seemingly equivalent or similar data fields that may not be similar enough to be reported using existing reporting systems as the information required or required format may be functionally different.

Second, coordinating reporting regimes across national and international jurisdictions will enhance transparency in global derivatives markets, as well as creating a framework by which regulators from multiple jurisdictions may share, compare and analyse data efficiently. The ability to share actual data seamlessly will also enhance the ability of regulators to: (i) supervise significant international derivatives markets participants; and (ii) identify and eliminate regulatory oversight gaps.

B. Definition of Local Counterparty

The Administrators' initial proposed definition of "local counterparty" would have imposed a significant burden on Canadian companies and served as a competitive disadvantage to those companies' foreign operations.[1] Specifically, the definition of "local counterparty" *(i.e.*, those entities subject to the reporting requirements set forth in the Proposed Model Rules) would have captured the direct and indirect subsidiaries of entities domiciled in Canada. Suncor believes that the revised definition of "local counterparty", which would only capture a foreign subsidiary of Canadian-domiciled entities if the subsidiary is guaranteed by a Canadian Affiliate, is a more reasonable and appropriate approach.

To avoid placing unnecessary burdens on Canadian companies' foreign operations, Suncor respectfully requests that the Administrators permit local counterparties domiciled outside of Canada to satisfy their reporting obligations under the Proposed Model Rules by reporting to any trade repository to which Canadian regulators have access, not just Canadian-registered trade repositories. Such an approach would: (i) help avoid a potential obligation to report the same trade to multiple repositories, as the foreign subsidiary may have a reporting obligation in its home country; (ii) insure that Canadian regulators have access to necessary information; and (iii) limit the adverse competitive consequences to Canadian companies' international operations.

C. The Rules for Reporting of Transaction Data Must Provide for Appropriate Time-Delays and Counterparty Identity Protections

The Administrators' incorporation of some of market participants' comments regarding the potential for real-time dissemination of transaction data to disrupt trading in less-liquid markets is a first step towards avoiding such a disruption. For example, the Proposed Model Rules protections against disclosing information, such as the exact delivery location referenced in a commodity derivative, will limit the potential harmful impacts that real-time disclosure of transaction information can have on market integrity. The Administrators should, however, take additional steps to ensure that real-time disclosure of transaction data does not hinder liquidity in Canadian derivatives and commodities markets.

Specifically, the proposed delay paradigm for the public dissemination of transaction data should be amended. As the Administrators acknowledge, public dissemination delays are necessary so counterparties "have adequate time to enter into any offsetting transaction that are necessary to hedge their positions."[2] The Proposed Model Rules require public dissemination of trade information by designated trade repositories "not later than (a) the end of the day after receiving the data from the reporting counterparty to the transaction, if one of the counterparties to the transaction is a dealer, and (b) the end of the second day after receiving the data from the reporting counterparty to the transaction in all other circumstances."[3]

Suncor highlights two issues with the proposed approach. *First,* the level of protection provided to a transaction (*i.e.*, the length of the time delay) should not be a function of whether a dealer is a counterparty to the trade. Said another way, there is no rational reason that an end-user should receive less protection when they transact with a dealer than when they transact with another end-user. The

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1 *See* Section 1of CSA Consultation Paper 91-301 – Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting.

2 *See* Proposed Model Rules at pg 37.

3 *See* Proposed Model Rules at Section 39(2).

goal of protecting market liquidity and preventing front-running should remain the same regardless of the classification of the counterparty.

Second, the rules provided a maximum time delay, but do not provide a minimum delay. As such, there is nothing to prevent a designated trader repository from publicly reporting information the moment they receive it. Real-time disclosure may not be harmful for certain trades, but it could be very detrimental for counterparties to other trades. For example, disclosing information regarding a relatively small trade in a liquid commodity such as WTI would not harm and may actually improve market integrity. However, real-time or even slightly delayed public dissemination of information on trades in less liquid markets such as WCS could seriously disrupt trading in that market.

As such, Suncor respectfully requests that the Administrators amend the time delay provisions in Proposed Model Rule 39 to require an affirmative time delay such that trade repositories would not publicly disseminate information on derivatives above a certain size threshold until the end of the second day after receiving the data from the reporting counterparty. That size threshold should vary across markets and should be a function of the open interest in a market. For example, a threshold could provide that transactions above the fiftieth percentile in notional size in a given market should receive the affirmative delay. Setting a percentile above which trades receive an affirmative delay would be a good initial safe guard, though individual markets require slightly different levels depending on their unique market characteristics.

Finally, one additional protection is necessary to avoid the disclosure of information that can identify a market participant. In certain commodity markets, the disclosure of the value of trades with large notional values can provide enough information to the market to allow market participants to determine the identity of at least one of the counterparties and potentially front-run trades or engage in other anti-competitive conduct. Suncor suggests that the Administrators amend Proposed Model Rule 39 to provide that publicly disseminated notional value or quantity of any trade with a notional value above the threshold discussed in the previous paragraph should simply be an indication that the trade's size was above the relevant threshold.

Given that the above recommendations will be complex to implement, Suncor requests that the Administrators provide market participants the opportunity to comment on those suggestions if the Administrators decide to include such suggestions.

D. Market Participants Should Only be Obligated to Report Historical Data in Their Possession

The Administrators' desire to collect information on unexpired derivatives entered into prior to the effective date of Part 3 of the Proposed Model Rules is well founded. Reporting of such trades will provide the Administrators with a picture of the current risk in the Canadian derivatives markets. The fact that the Proposed Model Rules were amended to limit the number of data fields required to be reported with respect to pre-existing swaps will lessen the burden and cost to market participants. In addition, the exemption in Proposed Model Rule 41.4 for transactions that expire within 365 days of the effective date of Part 3 of the Model Rules and allowing both counterparties to serve as reporting party for a transaction will further limit the burden with reporting pre-existing derivatives.

However, Proposed Model Rule 26 will still impose an unnecessary burden on market participants as it would likely require market participants to create data not in their possession and to modify the format of existing data in their possession as the derivatives at issue were entered into prior to the model rules being finalized. As such, Suncor suggests that the Administrators revise Proposed

Model Rule 26 to require market participants to report only on creation data currently in their possession in the format in which the reporting counterparty currently keeps such data.

E. Reporting Timeframes Should be Phased-In and Should Reflect Market Participants' Role

Under the Proposed Model Rules, reporting counterparties must report a derivatives transaction "as soon as technologically practicable" and no later than the business day following execution of the derivative.[4] Suncor requests that the Administrators clarify that the phrase "as soon as technologically practicable" reflects the functional role that a reporting counterparty plays in the market. In this respect, the reporting timeframes for derivatives dealers should be shorter than that applicable to end-users, as dealers will likely have more robust systems infrastructure and other back-office resources.

Suncor also requests that the Administrators phase-in reporting timeframes to provide market participants with a reasonable time period that will allow them to adjust to reporting derivatives. In short, market participants' reporting deadlines should not be the end of the next business day as of the date that these requirements become effective. Rather, market participants should have an interim period of time where they are subject to more flexible reporting timeframes before they are required to achieve the final reporting timeframe.

In addition, derivatives dealers should be required to commence reporting before other market participants. Derivatives dealers are likely counterparties to a significant percentage of derivatives transactions in Canadian markets and will continue to play a similar roll in markets going forward. To ensure that derivatives reporting infrastructure is operational and on schedule, designated trade repositories should focusing on interfacing with the small set of derivatives dealers first. This phased-in approach will allow designated trade repositories to focus on beta testing with a small set of market participants before focusing on the remainder of the market, which will likely require more customer service resources to properly "on board." Only once dealers are reporting their derivatives transactions on a full and continuous basis should other market participants begin to test and interface with trade repositories (and then ultimately move to full and continuous reporting). A phased approach to the implementation of derivatives reporting requirements would be consistent with the CFTC's ultimate reporting implementation time line, which was the product of multiple delays due to technical challenges and unrealistic time frames imposed by the regulator.

F. Compliance Dates Should Reflect Degree of Variation From U.S. Reporting Requirements

The suitability of the compliance dates set forth in Part 7 of the Proposed Model Rules is a function of the resources necessary to come into compliance with the Proposed Model Rules. The proposed compliance dates should be sufficient to the extent that the final Canadian reporting requirements are functionally equivalent to those in the U.S. If they are equivalent, and since U.S.-registered trade repositories will be able to register in Canada, much of the infrastructure construction and testing needed for those repositories to be able to interface and test with market participants will already be complete. The majority of the time of the pre-compliance period provided by the Proposed Model Rules remaining can then be used by market participants to: (i) establish reporting relationships; (ii) develop their reporting systems, if not already in place to comply with the CFTC's requirements; and (iii) conduct necessary testing with the repositories.

However, if Canada's reporting requirements are functionally different than those in the U.S., Suncor requests an extension of each of the compliance deadlines in Part 7 of the Proposed Model Rules

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[4] *See* Proposed Model Rules at Section 28.

of six months as trade repositories will need the additional time to develop Canadian-specific reporting systems. Providing that extension would be consistent with the amount of time ultimately provided to end-user reporting counterparties in the U.S., which was just under two years.

III. CONCLUSION.

Suncor thanks the Committee and the Administrators for the opportunity to comment on the Consultation Paper and hopes that the Committee takes these comments into consideration as it finalizes these rules. Suncor respects the efforts of the Administrators to regulate the Canadian OTC derivatives market and will continue to provide support and feedback to the Administrators as it publishes further consultation papers to regulate the Canadian OTC derivatives market.

Should the Committee have any questions, or if Suncor may be of further assistance, please contact the undersigned.

Yours truly,
Suncor Energy Inc.

Curtis Serra
Director, Legal Affairs
Supply, Trading & Corporate Development

cc: Ontario Securities Commission, Attn: John Stevenson, Secretary
(via email: comments@osc.gov.on.ca)

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September 06, 2013

VIA electronic submission

Alberta Securities Commission
British Columbia Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

Dear Sirs/Mesdames:

Re: Comment Letter to CSA Staff Notice 91-302: *Updated Model Rules – Derivatives Product Determination* and *Trade Repositories* and *Derivatives Data Reporting*

TransAlta Corporation (**"TransAlta"**) and its affiliates hereby respectfully submit comments on the Canadian Securities Administrators (**"CSA"**) Staff Notice 91-302 (**"CSA Paper 91-302"**) published by the CSA OTC Derivatives Committee (the **"Committee"**) on June 6, 2013, providing an overview of the Committee's updated model rules (the **"Model Rules"**) that define derivative products, and that impose a trade reporting regime on derivatives market participants. TransAlta appreciates this opportunity to comment on CSA Paper 91-302 and looks forward to further dialog following the submission and consideration of these comments.

TransAlta Background:

TransAlta is a publicly traded generator and marketer of electricity and renewable power. TransAlta owns, operates and manages a highly contracted and geographically diversified portfolio of assets that utilize a broad range of generation fuels including coal, natural gas, hydro, wind and geothermal. TransAlta's major markets are Western Canada, the Western U.S., and Eastern Canada. TransAlta uses OTC derivatives transactions to manage its exposure to price volatility in organized electricity markets and reduce price risks associated with fuel inputs. TransAlta's primary objective as a generation company is to manage revenue risk due to fluctuations in short-term, spot market power prices.

Wholesale marketing is conducted by TransAlta Energy Marketing (U.S.) Inc. (**"TEMUS"**) and TransAlta Energy Marketing Corp. (**"TEMC"**). Market activity is composed of asset hedging and optimization of our power generation portfolio and securing our fuel requirements, electricity retailing to mid to large sized commercial and industrial customers, and proprietary trading of electricity and natural gas. TransAlta utilizes a variety of instruments to manage price exposure,

including physical forward contracts for electricity, natural gas and environmental commodities, and financial derivative transactions based on those same commodities. Most of TransAlta's trading activity takes place on regulated electronic exchanges and clearing platforms, such as Intercontinental Exchange (ICE), Chicago Mercantile Exchange (CME) and Natural Gas Exchange (NGX), with the remainder via brokered transactions or directly with counterparties. Interest rate and foreign exchange derivatives are transacted by our centralized treasury function organized within TransAlta Corporation ("**TAC**"), which is our ultimate parent company. Treasury transactions are entered into for the purpose of risk mitigation and are not used for speculative trading or investment.

For the interest of the Committee, TransAlta's companies with derivative activity are classified under the Dodd-Frank regime implemented by the CFTC as "Non-Swap Dealers / Non-Major Swap Participants / Non-Financial Entities". Under the Dodd-Frank regime, TEMUS is a "US Person" through its incorporation in Delaware but operates from our office in Calgary, Alberta. TEMC and TAC are "Non-US Persons", being incorporated under the Canada Business Corporations Act with a registered office in Calgary, Alberta. In general, TEMUS, TEMC and TAC represent themselves as a "Qualified Party" and/or an "Eligible Contract Participant" ("ECP"), as applicable, in our ISDA master enabling agreements.

General Comments:

First, we would like to state that we support the efforts of the CSA to design and implement a regulatory regime that will "strengthen Canada's financial markets and manage specific risks related to OTC derivatives, implement G-20 commitments in a manner appropriate for our markets, harmonize regulatory oversight to the extent possible with international jurisdictions, all while avoiding causing undue harm to our markets."[1]. We also commend the Committee for amending the Model Rules to address many of the comments already submitted by affected market participants. The specific comments raised below address areas in the Model Rules that TransAlta feels are still of concern.

TransAlta would in general, recommend close alignment with regimes being implemented by Canada's G-20 peers and, in particular, the US. TransAlta currently complies with the US swap data recordkeeping reporting regime, using dedicated technology that was costly and complicated to build and configure. Wherever possible we urge the Committee to propose Model Rules that limit deviations from US standards so we do not have to rebuild our trade reporting technology and/or introduce costly and potentially error-prone manual trade reporting and reconciliation processes.

TransAlta also recommends that the Committee take up these amendments to their trade reporting rules directly within the Model Rules, as opposed to offering after-the-fact exemptive relief. CSA consideration of exemptive relief on a case-by-case basis creates potential uncertainty regarding which transactions to report, while amendments within the Model Rules

[1] CSA Consultation Paper 91-401 on Over-the-Counter Derivatives Regulation in Canada, November 2, 2010

apply to all participants equally and are manageable to implement when clear and broadly known.

Specific Comments:

DERIVATIVES PRODUCT DETERMINATION (the "Scope Rule")

TransAlta respectfully make the following comments regarding the Scope Rule:

- We ask the Committee to consider an exclusion within the Model Rules for electricity products traded directly with an organized independent system operator (ISO)[2], similar to that granted by the CFTC. The CFTC exempts specifically defined "financial transmission rights," "energy transactions," "forward capacity transactions," and "reserve or regulation transactions" that are offered or sold in a market administered by one of the petitioning RTOs or ISOs pursuant to a tariff or protocol that has been approved or permitted to take effect by FERC or PUCT[3]. Some of these same products are currently offered within Canadian wholesale electricity markets (such as IESO Transmission Rights, or TRs), and as electricity markets continue to evolve other similar transactions may be offered in future. The markets managed by the ISOs are subject to regulation, market surveillance and enforcement by provincial energy agencies or boards. The products are transacted on electronic platforms administered by the ISO and the ISO takes the other side (i.e. is the counterparty) on the transaction.

TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING (the "TR Rule")

TransAlta respectfully make the following comments regarding the TR Rule:

- We ask the Committee to consider an exclusion from reporting obligations for companies organized under the laws of a foreign jurisdiction, but that have their principal place of business in a Canadian province. For TransAlta specifically, we are concerned that derivatives transacted by our TEMUS affiliate, which as stated above, is incorporated in Delaware (and so is considered a "U.S. Person" under the CFTC's rules thereby requiring its swaps to be reported), but that operates out of our Calgary head office, would be required to be reported separately under different standards in the US and Canada. This would be duplicative considering that the CSA considers global trade repositories to be sufficiently capable of providing repository services under the local Canadian regime, as well as prone to error, because the trade reporting definitions and minimum data requirements are not aligned between the CFTC and the CSA.

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[2] Such as the Alberta Electric System Operator (AESO) and Ontario's Independent Electric System Operator (IESO).

[3] 78 FR 19879: *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act; Notice*

- We ask the Committee to consider an exclusion from reporting obligations for inter-affiliate transactions where the financial results of the affiliates are reported on a consolidated basis, relief similar to that granted by the CFTC[4]. Such inter-affiliate transactions (or "interbooks") are commonly used by affiliated companies to report the value of transactions within an appropriate accounting profit center. For TransAlta specifically, we are concerned that interbook transactions between our TEMUS and TEMC affiliates (which are incorporated under separate jurisdictions but operate out of the same Calgary head office, are executed by the same trading staff, guaranteed by the same parent and reported on a consolidated basis in internal and external financial reporting) would be subject to unnecessary trade reporting. We consider these transactions as not contributing to systemic risk. Further, many data fields would not be applicable to such entries (for example, master agreement type and version, transaction identifier, collateralization, confirmation timestamp). Finally, misalignment with foreign trade reporting rules creates the potential for errors in trade reporting. However, we do consider inter-affiliate transactions where the affiliates report their financial statements separately to be akin to an external third-party trade and subject to the trade reporting requirements proposed by the Committee.

- Under 35 (1), the Committee proposes that for cleared transactions, valuation data must be reported to the designated trade repository daily by both the clearing agency and the local counterparty. The inclusion of the local counterparty in this reporting obligation must surely be an error, for it is not in alignment with 27 (1) (a) which stipulates the clearing agency as the reporting party, nor is it in alignment with 35 (1) (a) which creates an obligation on dealers to provide daily valuation data. Clearing agencies and dealers are sophisticated entities that can comply with a daily valuation requirement, while local counterparties who are not dealers or who wish to avail themselves of the comprehensive services offered by clearing agencies may not be, and should not be penalized for clearing their transactions.

- Under 35 (2) (b), the intent of the Committee appears to require both local counterparties to a trade to report valuation data for uncleared transactions. Given that the real-time reporting obligation is on the reporting counterparty, it does not appear appropriate or efficient to require the non-reporting counterparty to then provide valuation data to a trade repository. Many end-users do not wish to become participants of trade repositories, for cost reasons or lack of sophistication. It may be suggested that they turn to dealers for their needs instead, but this ignores specific cases in which local end-users transact commercial risk-mitigating arrangements between themselves that are financial or that contain embedded optionality. Ultimately, the imposition of a valuation reporting burden on both parties is unnecessary.

- Under 36 (1), the Committee proposes that transaction records must be kept for seven years after the date on which the transaction expires or terminates. TransAlta is

[4] CFTC Letter No. 13-09: *No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission's Regulations*

concerned that this standard is two years longer than the equivalent CFTC requirement[5]. This not only imposes additional record retention costs on all trading records (which are filed together as a matter of course) but, in light of our comments above about foreign incorporated entities with principal operations in Canada, risks compliance errors if staff believed they were honestly complying with US rules that apply to US affiliates (but that may be reporting/local counterparties under Canadian rules).

- Under 37 (3), we believe that the burden imposed on local counterparties who must "take any action necessary" (to ensure that the appropriate local securities regulator has access to all derivatives data reported to a designated trade repository for transactions involving the local counterparty) is impractical and confusing. It is an unreasonably high burden on a local counterparty, who may not be the reporting counterparty, nor aware of specific arrangements between regulator and depository. Clarification or removal of this new statement is needed.

- Under Appendix A (Minimum Data Fields…), TransAlta remains concerned that the Confirmation timestamp may not be available for some transactions given the differences between proposed real-time reporting timelines and industry-standard confirmation timelines. If the ICE eConfirm /Trade Vault linked solution is used by both reporting counterparties, the confirmation timestamp is available, known, and intrinsic to reporting. However, if the non-reporting counterparty is not enabled with eConfirm (known as "single-sided reporting"), these trades may not have a confirmation timestamp available within the real-time reporting timelines imposed by the Committee. Further, it is unclear if trade reporting occurs as proposed (next business day for end-users), then does the subsequent confirmation count as a life-cycle event?

- Under Appendix A (Minimum Data Fields…), TransAlta is concerned that there are two separate valuation data fields (i.e. "Value of contract calculated by the reporting counterparty" and "Value of contract calculated by the non-reporting counterparty). We believe the imposition of a valuation reporting burden on both parties is unnecessary, and that only the first field is required.

Conclusion:

TransAlta would like to thank the Committee for the opportunity to provide comments on CSA Staff Notice 91-302 and we support the great undertaking of OTC derivatives market reform.

TransAlta looks forward to additional opportunity for comment and consultation on the Committee's efforts to design and implement OTC reform. If you have any questions or concerns regarding our comments, or require further assistance, please contact either of the undersigned.

[5] 77 FR 2136: *Swap Data Recordkeeping and Reporting Requirements, Final Rule*

Sincerely,

/s/ Daryck Riddell

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Re. Proposed Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* (the "Scope Rule") and Proposed Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Trade Data Reporting* (the "TR Rule" and, with the "Scope Rule", the "OSC Proposals")

Draft Regulation 91-506 respecting Derivatives Determination and Draft Regulation 91-507 respecting Trade Repositories and Derivatives Trade Data Reporting of the Autorité des marchés financiers (the "AMF Proposals")

Proposed Manitoba Securities Commission Rule 91-506 *Derivatives: Product Determination* and Proposed Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Trade Data Reporting* (the "MSC Proposals")

Multilateral CSA Staff Notice 91-302 *Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (the "Updated Model Provincial Rules")

Ladies and Gentlemen:

TriOptima AB ("**TriOptima**") is pleased to submit the following comments in connection with the OSC Proposals, the AMF Proposals, the MSC Proposals and the Updated Model Provincial Rules (collectively, the "**Scope and TR Proposals**"). As discussed below in further detail, TriOptima is a provider of post-trade services to major market participants in the OTC derivatives markets.

While TriOptima understands and has assumed that the Scope and TR Proposals are largely harmonized, for convenience of reference, any references to specific sections of the Scope and TR Proposals are to the OSC Proposals but should be interpreted as a reference to the corresponding sections of the AMF Proposals and the Updated Model Provincial Rules. It is TriOptima's intention to comment on the Scope and TR Proposals as they are proposed to be adopted in each of the above jurisdictions. Each of the addressees listed above will be jointly referred to as the "**Commission**".

Any defined terms used have the meaning prescribed to them in the OSC Proposals, unless otherwise specified herein.

TriOptima

TriOptima offers post-trade services in the OTC derivatives markets. TriOptima is headquartered in Stockholm and also conducts its business through its four subsidiaries in New York, London, Singapore and Tokyo. The company's client base is made up of major broker/dealer banks and other financial institutions globally.

TriOptima currently offers three post-trade services for the OTC markets:

- *triReduce*: a service for early termination of OTC derivatives - so called portfolio compression[1],
- *triResolve*: a service for the reconciliation of counterparty positions in OTC derivatives, margin management and operational risk management; and
- *triBalance*: a service for the mitigation of portfolio risk imbalances across bilateral and cleared OTC derivative exposures[2].

TriOptima previously offered a trade reporting repository for interest rate derivatives, which has been wound down.

TriOptima's comments on the Scope and TR Proposals

As a provider of post-trade risk reduction services for the OTC-market and for reasons described below, TriOptima is seeking clarity to ensure that any transactions that come out of post-trade risk reduction services (as further defined below) should be reported to trade repositories within time frames appropriate to the nature of post-trade risk reduction services, should be differentiated from normal trading activities for public dissemination purposes, and third party service providers, such as TriOptima, should be able to obtain access to repository data upon consent by counterparties.

Post-trade risk reduction services

Post-trade risk reduction services, such as multilateral trade compression counterparty credit risk/portfolio rebalancing and basis risk reduction, can be clearly differentiated from trading activities in that they do not involve the interaction of buying and selling interests and are not price-forming. Instead, they are designed to reduce counterparty credit risk, basis risk and/or operational risk. Post-trade risk reduction services operate with some variation but there are common parameters that reflect their risk-reducing function and differentiate them from trading activity:

- They are multilateral and need to be executed in bulk as a single compound transaction to achieve the identified risk-reduction result and cannot be executed in part by any individual participant;
- There is no price negotiation – participants are not able to post bids or offers to enter into specific positions;
- They are designed to provide a result which is overall market risk neutral for each participant;
- They are designed to reduce unwanted secondary risks, such as counterparty credit risk, basis risk and/or operational risk – these risks have arisen as a result of contracts already entered into by the participants (e.g. because of their normal trading activities);

[1] See Annex 1.
[2] See Annex 2.

- They are non-continuous and non-real time – they operate on an overnight or intra-day basis using stale valuations

Providers of post-trade risk reduction services are not party to any transactions and do not provide advice in relation to any transactions. Rather, providers of post-trade risk reduction services perform a calculation exercise based on parameters received from participants participating in the service and report the calculated result back to the participant that verifies the result and decide whether or not to implement the calculated result.

As an example, a multilateral compression exercise results in the complete termination of some transactions and the aggregation or reducing of the notional value of other transactions. As defined in the U.S. Commodity Futures Trading Commission's ("**CFTC**") rule on Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (September 11, 2012), a multilateral portfolio compression exercise is

> *"an exercise in which multiple swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure or risk) of the terminated swaps in the compression exercise."*

In accordance with the above definition, compression can be accomplished through (i) the "amended swap" method where transactions are wholly or partially terminated to represent (as closely as possible) the net notional exposures between a pair of counterparties, or (ii) the "replacement swap" method where transactions are wholly terminated and compression replacement transactions which reflect more closely the net notional exposures between a pair of counterparties (hereinafter called "**replacement swap**") are entered into.

As noted above, there is no change in the counterparties, reference entity, or maximum maturity in either the "amended swap" or "replacement swap" method. These two compression methods are explained graphically in Annex 3.

Reporting and public dissemination of post-trade risk reduction transactions

Under the Scope and TR Proposals, a reporting counterparty shall make a report in real time unless it is not technologically practicable to do so. As transactions resulting from post-trade risk reduction services are executed in bulk and such bulks could consist of many thousands of individual transactions, participants and market infrastructure are likely to face considerable operational and technological

constraints, making it impossible to report such transactions in real-time. In the over-the-counter derivatives market generally, there is comparatively low transaction volumes and as systems are not designed to instantly process thousands of transactions, it is not technologically practicable to report thousands of transactions in real-time or close to real-time.

As described above, transactions resulting from post-trade risk reduction services differ from normal trading activities and are entered into in bulk using stale valuations. If such transactions are to be made available to the public without being differentiated from normal trading activities, the market would be misled and distorted both in respect of prices and market turn-over. It should be noted that, as for inter-affiliate transaction data, the CFTC has exempted multilateral portfolio compression exercises from the definition of "publicly reportable swap transactions" that are subject to public dissemination and notes that it is an example of "swaps that are not arm's length and thus are not publicly reportable swap transactions/.../"[3]. In addition, as stale or even no prices are used for transactions resulting from post-trade risk reduction services, it will be inappropriate or even impossible for the reporting counterparty to include prices when reporting such transactions to a designated trade repository.

Based on the above, we would ask the Commission to (i) clarify that, for purposes of transactions resulting from bulk post-trade risk reduction services, such transactions shall not have to be reported in real-time as it is not technologically practicable for participants to do so; end-of-day reporting is more appropriate for transactions resulting from bulk post-trade risk reduction services, and (ii) clarify that transactions resulting from post-trade risk reduction services should be clearly differentiated from normal trading activities for public dissemination purposes (and no prices should be included). For the reasons mentioned above, we also believe that an indicator of whether a reported transaction came about as a result of a post-trade risk reduction service should be included in the reported data and no prices should have to be reported for such transactions.

Access to trade repository data

In order to promote a level playing field, TriOptima believes it is important that service providers are granted access to data in trade repositories upon consent by relevant counterparties to the trades submitted to the repositories and that trade repositories shall not be able to restrict such access based on reasons other than information security safeguards.[4]

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[3] See CFTC's rule on Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182, at 1244 (January 9, 2012).

[4] See e.g. Article 78 (7) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

We are happy to provide further information on the above, if and as required.

Yours faithfully,

TriOptima AB

Per Sjöberg
Chief Executive Officer

Christoffer Mohammar
General Counsel

Annex 1

Because of the interconnectedness of derivatives trading, active market participants have at any one time large numbers of contracts outstanding with multiple counterparties, each creating counterparty credit risk and an operational burden to manage and oversee. However, when these risks are viewed on a portfolio basis and compared against the portfolios of other participants, there are ready opportunities to reduce certain risks without changing one's market risk. triReduce compression allows participants to terminate contracts early in order to eliminate counterparty credit risk, lower the gross notional value of outstanding contracts, and reduce operational risks by decreasing the number of outstanding contracts. triReduce is operated for rates, credit and commodity derivatives and has helped remove in excess of $300 trillion of gross notional exposure from the financial system since its launch in 2003 including, more recently, cleared transactions. triReduce has approximately 180 subscribing legal entities.

Annex 2

The objective of the G20 commitments adopted in Pittsburgh 2009 is to mitigate systemic risk, and the actions supported by the G20 (including mandatory clearing) are means toward that end. While many OTC derivatives will be suitable for central clearing, some OTC derivatives will remain bilateral and not be cleared, and the combination of cleared and uncleared components in a portfolio may create risk imbalances within such portfolios and increase initial and variation margin requirements. The portfolio imbalances can however be effectively rebalanced by lowering portfolio risk/DV01 characteristics of the portfolio and, thus, systemic risks, by appropriate injections of new bilateral non-cleared trades. Injections of off-setting trades which are not cleared can help to rebalance and stabilize the portfolio by eliminating risk sensitivities in the portfolio. In a multilateral context, these trades can be generated without changing participants market risk and funding risk. TriOptima's triBalance (counterparty risk rebalancing) service was launched to enable rectification of such portfolio imbalances.

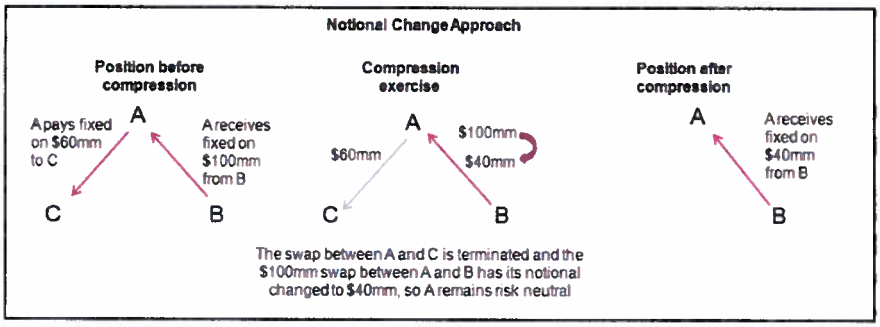
Annex 3

Compression methodology description

The triReduce compression process involves notional adjustment and/or replacement of transactions, depending on the methodology employed. The examples below illustrate how these approaches differ. In both methodologies, the counterparty credit exposure remains between the same counterparties that originally submitted the transaction.[5]

Example using notional change – amended swap (typically used for IRS products)

As a result of a compression exercise, a $100mm swap between parties A and B is required to be notionally changed to $40mm, in order that A remains overall risk neutral. Parties A and B adjust the notional on the swap in their respective systems from $100mm to $40mm. All swaps which are required to be notionally changed are enriched with an event processing ID by TriOptima.



[5] In the diagrams, only party A's risk neutrality is illustrated

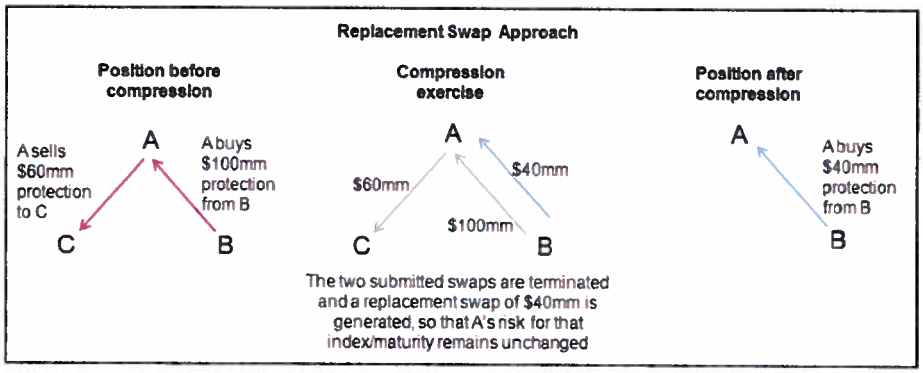
Example using replacement swaps (typically used for CDS products)

For CDS products, although a swap may be notionally changed as in the description above, more commonly, the net position of two or more swaps is represented with a replacement swap.

Party A has two swaps in a CDX index (same maturity date and coupon)

- Swap 1 is $100mm bought protection versus counterparty B
- Swap 2 is $60mm sold protection versus counterparty C

As part of a compression exercise, both swaps are terminated. Party A's net position is represented with a replacement swap of $40mm bought protection versus counterparty B. The replacement swap is enriched with an event processing ID by TriOptima, which provides a common link between compressed and replacement swaps.



INCLUDES COMMENT LETTERS

Comments to other Jurisdictions on Rule 91-506

(For Comments on Multilaeral CSA Staff Notice 91-302 go to page 97)

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September 6, 2013

Ontario Securities Commission

c/o John Stevenson, Secretary
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Dear Mr. Stevenson:

Re: AIMA Canada's Comments on the Proposed Ontario Securities Commission ("OSC") Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Rule") and Companion Policy 91-507CP (the "Proposed CP")[1]

This letter is being written on behalf of the Canadian National Group (**"AIMA Canada"**) of the Alternative Investment Management Association (**"AIMA"**) and its members in relation to the OSC's Proposed Rule and the Proposed CP.

AIMA was established in 1990 as a direct result of the growing importance of alternative investments in global investment management. AIMA is a not-for-profit international educational and research body that represents practitioners in hedge fund, futures fund and currency fund management – whether managing money or providing a service such as prime brokerage, administration, legal or accounting. AIMA's global membership comprises over 1,350 corporate member firms (with over 5,500 individual contacts) in more than 45 countries, including many leading investment managers, professional advisers and institutional investors. AIMA's Canadian national group, established in 2003, now has over 100 corporate members.

The principal aims of AIMA are to provide an interactive and professional forum for our membership and act as a catalyst for the industry's future development; to be the pre-eminent voice of the industry to the wider financial community, institutional investors, the media, regulators, governments and other policy makers; and to offer a centralized source of information on the industry's activities and influence, and to secure its place in the investment management community.

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1 OSC Request for Comments, 36 OSCB 5737 (2013).

For more information about AIMA Canada and AIMA globally, please visit our web sites at www.aima-canada.org and www.aima.org.

This comment letter has been prepared by a working group of the members of AIMA Canada, comprised of managers of hedge funds and fund of funds, and accountancy and law firms with practices focused on the alternative investments sector.

Comments

AIMA Canada supports the purposes of the Proposed Rule, which are to improve transparency in the derivatives market and to ensure that trade repositories operate in a manner promoting the public interest.[2] However, we have significant concerns with the Proposed Rule as currently drafted.

Redundancy in Data Reported for Cross-Jurisdictional Transactions

Under subsection 25(1), a local counterparty must, subject to certain exceptions, "report, or cause to be reported, to a designated trade repository, derivatives data for each transaction to which it is a counterparty."[3]

While we appreciate that the OSC has reduced the scope of the definition of "local counterparty" in the Proposed Rule, many scenarios still exist which would require a report to be filed in multiple jurisdictions. This leads to the anomalous and likely unintended result of some transactions being reported in one jurisdiction while others are reported in multiple jurisdictions. Simply, multiple reporting of the same transaction presents an inaccurate portrayal of market activity, which in turn hinders proper regulatory monitoring.

We propose that this unwieldy reporting patchwork is best avoided by having one centralized trade repository both as a designated trade repository and to collect data on behalf of all of the provinces and territories. Centralized trade repositories would have the additional benefit of standardizing the input and output of the trade repository's reported data.

Alternatively, the OSC and other provincial and territorial regulators could adopt a principal regulator model, similar to the existing principal regulator model for registrants and reporting issuers. Having a principal regulator model would increase market efficiency as well as provide for a more accurate picture of the Canadian derivatives market by reducing redundant reporting.

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[2] *Ibid* at 5738.
[3] *Supra* note 1 at 5768.

While the OSC's response to these comments on the Canadian Securities Administrator's (the "**CSA**") consultation paper 91-301 (the "**Consultation Paper**") is that such a passport system is outside the scope of the Proposed Rule[4], it is within the OSC's jurisdiction to abandon the Proposed Rule to attempt to work with the CSA and all Canadian securities regulators to develop and implement a Canada wide solution to Canada's derivatives trade reporting obligations.

Reporting Counterparty

Section 27 of the Proposed Rule establishes who is responsible for reporting a derivatives transaction to a trade repository or local regulator. We appreciate that as between two end-users, at least one of them will be required to report a transaction. However, we are very concerned that local counterparty end-users, and not foreign dealers and clearing agencies, will be required to comply with the transaction reporting requirements under subsection 27(2) of the Proposed Rule.

Foreign dealers, clearing agencies and other regulated entities, are routinely required to comply with local securities regulation and other Canadian laws when conducting business with Canadians. The risk of non-compliance and the inability to enforce against such entities has not generally been cited as reasons for not imposing rules on foreign entities conducting business with Canadians. As in the case of virtually every other securities law, rule or instrument, foreign dealers, clearing agencies and other regulated entities carrying on business with end-users in Ontario should be required to comply with the transaction reporting provisions of the Proposed Rule.

Differential treatment of local end-users, depending on whether their counterparties are local or not, can also have inadvertent detrimental market consequences. In an effort to avoid reporting requirements, local end-users may disproportionately favour local derivatives dealer counterparties over non-local derivatives dealer counterparties. Consequently, the diversification of derivatives dealer counterparties may be diminished by the decreased participation of non-local derivatives dealer counterparties. In fact, contrary to the OSC's intent, systemic risk may actually be increased as a result of a reduction of the number of active derivatives dealer counterparties.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act and other international derivative regulation initiatives, end-users are not currently required to report transactions when transacting with foreign dealers. The Commodity Futures Trading Commission (the "**CFTC**") has specifically taken this approach because such foreign dealers are "more likely to have automated systems suitable for reporting."[5] Taking the contrary approach in Ontario is inconsistent with the

[4] CSA Staff Consultation Paper 91-301, 35 OSCB 10967 (2012).
[5] CFTC Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 F.R. No. 9 (January 13, 2012) at 2167.

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goal of international harmonization. As a result of attempted harmonization, all Canadian, United States and non-North American derivatives dealers, clearing agencies and other regulated market participants have made significant investments to develop compliant reporting systems. In our view, requiring Ontario end-users to implement reporting systems to facilitate trade reporting is inefficient, impractical and unfair. The time and resources necessary to develop such a system or alternatively, manual compliance, place an undue burden on Ontario end-users. The obligation to report derivatives trade data under the Proposed Rule should be imposed on dealers and clearing agencies party to such transactions, whether foreign or not. Such parties have the technological capability to generate required derivatives data and are in a far better position to efficiently provide reports mandated under the Proposed Rule.

Further, we do not believe the power to delegate the reporting function to third party service providers addresses the concerns stated above and may exacerbate such concerns. While the end-user has acquired and paid for reporting services, it remains ultimately responsible for such reporting and must maintain the relevant data in an accessible format in case the third party service provider fails to comply with its obligations. As such, the ability to delegate under the Proposed Rule, without relief from liability for such reporting, may be more of a burden than a benefit to the end-user.

Finally, we believe that an additional step in the hierarchy of reporting in section 27 should be included in the Proposed Rule that will be of benefit to end-users. Where there is no clearing agency or dealer party to a derivatives transaction, if one of the counterparties is a large derivatives participant, then it, rather than the end-user, should be the reporting counterparty. Presumably large derivatives participants will have the resources and trade frequency necessary to support the development and implementation of a derivatives trade reporting system.

Reporting Valuation Data

We note that the OSC has changed subsection 35(1) to require the local counterparty to report valuation data daily. This is an unexplained change from the Consultation Paper. We believe this should revert to "reporting counterparty", particularly in light of the inconsistency it creates with clause 35(2)(b) which only requires quarterly reporting of valuation data for non-dealers. This approach is also inconsistent with the reporting regime in the United States, where only the reporting counterparty is required to provide valuation data.

Mandatory Disclosure Delay

Subsection 39(3) of the Proposed CP has the stated objective of ensuring "that counterparties have adequate time to enter into any offsetting transaction that may

be necessary to hedge their positions."[6] The objective is to allow counterparties to hedge risk before it becomes unduly difficult or expensive. The potential for market manipulation based on prematurely released data is particularly acute given the relatively limited number of Ontario market participants and corresponding liquidity level.

While we strongly support this objective, we respectfully submit that this objective is not achieved by the current drafting of subsection 39(3). The issue raised by the current drafting is that the delays of one or two days (depending on counterparty identity) are optional, rather than mandatory. The designated trade repository must disclose transaction level reports *not later* than one or two days after receipt from the reporting counterparty. As drafted, there is no requirement that trade repositories wait one or two days.

The stated objective of subsection 39(3) is better achieved by making the delays mandatory. It is our suggestion that subsection 39(3) should be revised to prevent transaction level reports from being publicly disclosed until one day after reporting. This would allow counterparties to protect their risks prior to their trading strategy being prematurely disclosed. We firmly believe that any harm the market would suffer as a result of the one day delay would be minuscule, and in any event would be far outweighed by the benefit of preventing market manipulation.

Dealer or Derivatives Dealer

We believe the addition of a definition of dealer is useful but believe the Proposed Rule should cross reference the definition and guidance provided in respect of the registration rule or instrument. In addition, to distinguish from dealers that are securities dealers, the defined term should be "derivatives dealer".

Conclusion

We appreciate the opportunity to provide the OSC with our views on the Proposed Rule. While supportive of its stated purpose, we have serious concerns above specific aspects of it. Please do not hesitate to contact the members of AIMA set out below with any comments or questions you might have. We would be happy to meet with you in order to discuss our comments further.

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Supra note 1 at 5786.

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Yours truly,

ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION

By:

Tim Baron
On behalf of AIMA Canada and the Legal & Finance Committee

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Jacqueline Shinfield
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September 6, 2013

VIA EMAIL

comments@osc.gov.on.ca

John Stevenson, Secretary
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Dear Mr. Stevenson:

Re: Proposed OSC Rule 91-506 Derivatives: Product Determination and Proposed Companion Policy 91-506CP

We appreciate the opportunity to comment on the proposed Ontario Securities Commission (**OSC**) Rule 91-506 *Derivatives: Product Determination* (the **Scope Rule**) and the proposed Companion Policy 91-506CP on behalf of our clients who are non-bank foreign exchange dealers and are registered with the Financial Transactions and Report Analysis Centre of Canada (**FINTRAC**) as money services businesses (**MSB**).

Our comments relate specifically to paragraph 2(c) of the Scope Rule, which prescribes a contract for the purchase and sale of currency not to be a derivative within the meaning of the Ontario *Securities Act* only if such contract requires physical delivery of the currency within two business days.[1] We understand that any currency exchange contracts that do not fall within the exemption under paragraph 2(c) of the Scope Rule will be subject to reporting requirements under the proposed OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* (the **TR Rule**).

We respectfully submit that the limitation of two business days for the physical delivery in currency exchange transactions will have the effect of extending the application of the reporting requirements under the TR Rule to a large number of MSBs operating in Canada, many of which are small businesses engaged in low-volume non-speculative transactions. The application of the reporting requirements under the TR Rule to MSBs, in our respectful view, is unwarranted given the non-speculative nature of foreign exchange services offered by most MSBs and will result in undue hardship and excessive compliance costs to MSBs operating in Canada. Our reasoning for this submission is as follows:

1. MSBs offer a wide range of foreign exchange services that are aimed at addressing the personal and business needs of their customers for foreign currency in cross-border dealings. The foreign exchange transactions offered by MSBs are rarely speculative in nature. They involve spot or forward arrangements whereby a principal is exchanged at a predetermined settlement exchange rate by physical delivery. After the settlement exchange rate has been predetermined, the Canadian

[1] Subject to the exception in clause 2(c)(i)(B).

dollar amount to be paid or received by the Canadian counterparty is known from the outset and therefore is inherently not speculative. There are no contingent outcomes in these transactions as cash-flows are known at the outset. The risk in the transaction lies with the MSB, not its customer. Although currency transactions that are settled by delivery within two business days would be exempt under paragraph 2(c) of the Scope Rule, those MSBs that offer foreign exchange services with longer delivery dates would fall within the TR Rule requirements. By way of example, an MSB may make a payment in a foreign currency to an overseas contractor or supplier of its business customer in exchange for a payment in Canadian currency to be made by the customer to the MSB in Canada after a specified period of time, such as a week or a month later, at a predetermined rate. An MSB may also make a cross-border foreign currency payment on behalf of a non-business customer, such as an individual who purchases a car or a house in a foreign jurisdiction, who agrees to make a payment to the MSB in Canadian currency at a predetermined rate after a specified period of time that is longer than two business days.

In our view, the size of MSBs and the volume and nature of foreign exchange transactions offered by MSBs are such that they do not pose any significant systemic risk to Canadian financial markets, the regulation of which is one of the objectives of introducing the TR Rule. In addition, given that foreign exchange services offered by most MSBs are not speculative to their customers, the regulation of speculative derivatives contracts and instruments, as a policy underlying the introduction of the TR Rule, does not apply in this context.

2. According to a Typologies and Trends Report[2] published by FINTRAC, as of 2010, 770 businesses have been registered with FINTRAC as money services business that provide foreign exchange services to Canadians. While the MSB sector in Canada includes a number of large companies, many of the registered MSBs are "very small independent businesses with no employees beyond the owner, and which are engaged in very low volumes of transactions."[3] These entities, as we discuss below, are subject to reporting, registration, record-keeping and other obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the **PC Act**) and associated regulations. Subjecting MSBs to reporting obligations under the TR Rule would result in an excessive regulatory burden to these businesses and can interfere with their ability to provide foreign exchange service to a broad sector of Canadians that comprises many small businesses and individuals.

3. MSBs in Canada are subject to a robust regulatory regime under the PC Act and associated regulations, which require MSBs to register with FINTRAC, report transactions, identify customers and determine their beneficial ownership and keep records in respect of these transactions. More particularly:

    a. The PC Act requires that MSBs register with FINTRAC before they can carry on business in Canada. Where an MSB or any of its directors, senior officers or major shareholders is convicted of certain listed offences under the *Criminal Code*, the registration of such MSB is prohibited under the PC Act.

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[2] FINTRAC (July 2010), *Money Laundering and Terrorist Financing (ML/TF) Typologies and Trends for Canadian Money Services Businesses;* available online: http://www.fintrac-canafe.gc.ca/publications/typologies/2010-07-eng.pdf.

[3] *Ibid* at p 3.

b. Registered MSBs are required to report to FINTRAC cross-border electronic fund transfers of CAD$10,000 or more, as well as cash transactions involving a receipt of CAD$10,000 or more.

c. Registered MSBs are required to report to FINTRAC suspicious transactions and transactions involving terrorist-owned or controlled property.

d. MSBs have detailed record-keeping obligations in respect of threshold transactions, including a requirement to keep records for at least 5 years in respect of foreign exchange transactions. The records that an MSB is required to keep in respect of a foreign exchange transaction include (i) the date, amount and currency of the purchase or sale, (ii) the method, amount and currency of the payment made or received and (iii) the individual's name, address and date of birth, where the transaction is made by an individual for $3,000 or more.

e. MSBs are required to confirm the identity and verify the beneficial ownership information of their customers in respect of threshold transactions.

f. MSBs operating in the Province of Quebec are also subject to substantially similar provincial regulation under the Quebec *Money-Services Businesses Act*.

The foregoing requirements under the PC Act introduce a significant level of transparency and accountability to the business of MSBs and regulate in large part the market conduct of MSBs operating in Canada, in addition to addressing the money-laundering and terrorist-financing risks associated money transmittance transactions. The regulatory regime under PC Act, therefore, addresses some of the other stated objectives of the TR Rule and the Scope Rule, namely, the improvement of transparency and the ability to identify and address the risk of market abuse.

Based on the foregoing, we submit that the current wording of paragraph 2(c) of the Scope Rule will bring many MSBs within the scope of the TR Rule and will subject them to substantial compliance costs, which, in our respectful view, are unjustified, given the non-speculative nature of services offered by most MSBs, the insignificant systemic risk that MSBs pose to Canadian and international financial markets and the fact that MSBs are adequately regulated in Canada under the federal PC Act. We therefore request that the Commission reconsider limiting the exemption under paragraph 2(c) to currency contracts with physical delivery within 2 days or address specifically the application of paragraph 2(c) to non-bank MSBs registered with FINTRAC. The Commission may consider extending the exemption under paragraph 2(c) to not only currency transactions that require physical delivery of currency within two business days, but also to those contracts under which the exchange rate has been predetermined at the time of, or within two days of, entering into the currency transaction, notwithstanding the actual settlement date.

Yours very truly,

per J. Shinfield

Jacqueline Shinfield

12662260.2

Canadian Life and Health Insurance Association Inc.

Association canadienne des compagnies d'assurances de personnes inc.

September 5, 2013

John Stevenson, Secretary
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DELIVERED VIA E-MAIL: comments@osc.gov.on.ca

Dear Mr. Stevenson:

Proposed Ontario Securities Commission Rule 91-506 Derivatives: Product Determination and Rule 91-507 Trade Repositories and Derivatives Data Reporting

The Canadian Life and Health Insurance Association is pleased to provide comments on proposed Ontario Securities Commission Rule 91-506 *Derivatives: Product Determination* and 91-507 *Trade Repositories and Derivatives Data Reporting*.

Established in 1894, the Canadian Life and Health Insurance Association (CLHIA) is a voluntary trade association that represents the collective interests of its member life and health insurers. The industry, which provides employment to 65,510 Ontario residents and has investments in Ontario of more than $240 billion, protects some 10.6 million Ontarians through products such as life insurance, annuities, RRSPs, disability insurance and supplementary health plans. It pays benefits of more than $33 billion a year to Ontarians and administers about two-thirds of Canada's pension plans. Canadian life insurance companies participate as end-users in Canadian and foreign derivatives markets.

With respect to Rule 91-506, the CLHIA is pleased that the scope of excluded derivatives in section 2(b) has been expanded to include insurance or annuity contracts issued outside of Canada with an insurer holding a licence under insurance legislation of a foreign jurisdiction, if they would be regulated as insurance under insurance legislation of Canada or Ontario if they had been entered into in Ontario. The CLHIA is also pleased that the Companion Policy to Rule 91-506 has been expanded to clarify that a reinsurance contract would be considered to be an insurance or annuity contract and thus not subject to inclusion.

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However, we believe that a small change to section 2(b)(ii) is warranted to minimize regulatory uncertainty. The requirement that the foreign insurance or annuity contract only qualifies for the exclusion "if it would be regulated as insurance under insurance legislation of Canada or Ontario if it had been entered into in Ontario" creates an unnecessary burden on foreign insurers when doing business with Canadian clients outside of Canada, to examine Canadian and Ontario insurance legislation to ensure compliance with this rule. Further, there could be regulatory uncertainty in the case of a non-standard foreign insurance or annuity contract that may not yet be addressed by Canadian or Ontario insurance legislation. As such, we respectfully request that the above-noted phrase be replaced with "provided that the insurance or annuity contract is permitted under such foreign insurance legislation".

With respect to Rule 91-507, section 27 sets out a protocol for reporting of trades by counterparties and subsection (2) ultimately imposes an obligation on the local counterparty to monitor the reporting of the trade by the clearing agency, the dealer or the other counterparty. This monitoring requirement is unduly onerous for end-users. It's also unclear what is intended by subsection (2) where the trade involves a dealer, as the definition of local counterparty includes both the dealer and the party who is organized under local laws. The ultimate obligation to comply with the reporting requirement should stay with the clearing agency or dealer regardless of their jurisdiction. End-users should not be required to monitor the reporting activities of dealers and clearing houses.

The obligation for the local counterparty to report may result in reporting obligations by multiple parties where counterparties are located in different jurisdictions. We believe it would be reasonable for the rules to be designed such that the Ontario Securities Commission can require a dealer to satisfy the reporting obligation even if the dealer is not based in Ontario. This would greatly limit the potential for duplicate reporting by multiple parties.

Where a U.S. swap dealer with a Canadian counterparty is required to report in the U.S., it would be reasonable to require the U.S. swap dealer to also be responsible for the Canadian reporting requirements, or, require the Canadian trade repositories to coordinate with U.S. swap data repositories (and trade repositories in other jurisdictions) to alleviate the burden of multiple reporting. Obviously, an internationally harmonized approach to reporting obligations is imperative.

As stated in previous submission letters, reporting of intra-group or inter-affiliate transactions should not be required. End-users should be able to organize their affairs by setting up internal back-to-back arrangements without triggering filing requirements. Trade reporting with respect to such transactions will not result in greater transparency; to the contrary, it will result in duplication and distortion of the number of true market transactions.

Canadian Life and Health Insurance Association Inc.

Association canadienne des compagnies d'assurances de personnes inc.

It should be noted that at the current time insurers do not have the systems capability to do real-time reporting, and any required reporting by insurers in the capacity of being end users would be very costly, which costs are likely to be passed on to the insurers' customers.

The issue of maintaining a harmonized approach among all Canadian jurisdictions remains paramount. The rules being developed need to include a process to avoid the requirement to report in more than one Canadian jurisdiction.

The CLHIA appreciates the opportunity to provide its comments on the proposed rules. If you require any additional information at this time, please feel free to contact me by e-mail at JWood@clhia.ca or by telephone at 416-359-2025.

Yours truly,

James Wood

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Counsel

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September 6, 2013

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via email

Re: Proposed OSC Rule 91-506 – Derivatives Product Determination and Companion Policy and Proposed OSC Rule 91-507 Trade Repository and Derivatives Data Reporting and Companion Policy (the "Proposed Rules")

Dear Sir or Madam,

On behalf of The Depository Trust & Clearing Corporation ("DTCC"), we appreciate the opportunity to comment on the Proposed Rules. As an organization that is looking to seek designation of one of its existing Trade Repositories as a foreign Trade Repository in Canada, we would like to share our thoughts on certain aspects of the Proposed Rules.

DTCC's Repository Service

DTCC through its subsidiary DTCC Deriv/SERV LLC operates, and proposes to operate in the near future, companies that provide trade reporting around the world. These companies and the countries in which they are incorporated are listed below:

DTCC Data Repository (U.S.) LLC	("DDR")	United States
DTCC Derivatives Repository Ltd.	("DDRL")	United Kingdom
DTCC Data Repository (Japan) KK	("DDRJ")	Japan
DTCC Data Repository (Singapore) Pte Ltd	("DDRS")	Singapore

It should be noted that DDR and DDRJ are licensed as trade repositories at present in their countries of incorporation and are actively engaged in operating as trade repositories. DDR is provisionally licensed to act as a Swap Data Repository. DDRL is licensed as an FCA service company and offers trade repository services for voluntary reporting. We anticipate DDRL being licensed as a trade repository under EMIR in the near future operating as a European trade repository to meet reporting compliance on January 1, 2014. DDRS is applying to be licensed as a trade repository in Singapore where reporting is expected to commence on October 31, 2013.

We anticipate DDRS handling trade reporting for Australia within a year as a licensed foreign trade repository pursuant to recognition of DDRS by the Australian authorities. On July 2, 2013 the Australian Treasury "prescribed" all of the companies listed above to allow "for interim reporting of derivatives contracts to repositories that are licensed in other jurisdictions prior to the establishment of licensed trade repositories." We expect to be handling trade reporting for Australia through one or more of these companies beginning on October 1, 2013 pursuant to the aforementioned prescription.

Attached are our comments to the Proposed Rules, some of which we have previously made to the Ontario Securities Commission ("Commission" or "OSC"). We look forward to discussing these comments with the Commission if it so desires.

Yours sincerely,

Marisol Collazo
Managing Director
Head of Regulatory Relations
DTCC Deriv/SERV LLC

General Comments

DTCC applauds the Commission for revising a number of the provisions of the previously proposed model rules to take into account the comments of the industry. The current proposed OSC rules are a step in the right direction toward international harmonization. There are however, a few components of the rules that we believe can be amended or revised to further accommodate the registration of foreign trade repositories in Ontario and enhance the quality of trade reporting as well.

Foreign-based trade repositories

In the interest of efficiency in establishing a trade repository in Ontario and international comity, the Commission should provide for flexibility where possible in its trade repository licensing rules to enable registered foreign trade repositories to be designated in Canada. Specifically, we would suggest expanded usage of the Exemption under Section 41 in instances where minor conflicts exist between the laws and regulations governing a foreign trade repository in its home jurisdiction and those proposed by the OSC.

Specific Comments

Companion Policy 91-507CP

Section 1 (2)

DTCC recommends that OSC modify its rules to allow firms to report life-cycle events on either a message by message approach or end of business day "snapshot" reflecting all updates that occurred on the record on the given day. Specifically, the following language "..., the change must be reported under section 34 of the Rule as life-cycle data by the end of the business day..." seems to imply that only life-cycle messages are acceptable for this purpose. DTCC suggests changing the sentence to read "...the life-cycle change must be reported under section 34 of the Rule by the end of the business day..."

Rule 91-507

Life-cycle event definition

DTCC believes that the definition of life cycle event is too broad as it would seem to require the reporting of any change to the contract. DTCC believes the scope of reportable life cycle events should be limited to those events that change the counterparties to, or impact the key economic terms of, a derivatives transaction. Accordingly, DTCC suggests that the definition be revised to include the language in italics below so as to read:

> "life-cycle event means *an* event that *would result in a change in the counterparty or key economic terms of a transaction previously* reported to the designated trade repository. *Key economic terms means any change to the transaction that impacts the price of the trade."*

Section 2(5) – TR initial filing

This section calls for notification to the Commission "in writing immediately" of changes to, or inaccuracy of information in Form 1. We believe this requirement should be for notice in writing as soon as practicable upon the applicant making such changes or becoming aware of such changes, which would be consistent with the requirement to amend a submitted Form 1 within 7 days of such change occurring or the applicant becoming aware of such inaccuracy.

Section 13(2)(d) – No Bundling of Services

DTCC applauds the Commission's adoption of a provision that will prohibit trade repositories from requiring the use or purchase of another service offered by that trade repository in order to utilize the trade reporting service. DTCC would like to point out that by naming a clearinghouse as a reporting party in Section 27 there may be an increased likelihood that in circumstances where a clearinghouse operates a trade repository there will be a loss of choice as the clearinghouse will be incented to report to its own trade repository. DTCC recommends that the clearinghouse should report the transaction to the same trade repository where the original trade was reported.

Section 20(2) – General Business Risk

DTCC would recommend inclusion in the model rules some of the language in the policy statement related to this section of the model rules. DTCC suggests this section be revised to include the language in italics below so as to read:

> "Without limiting the generality of subsection (1), a designated trade repository must hold sufficient insurance coverage and*/or* liquid assets funded by equity to cover potential general business losses so that it can continue operations and services as an ongoing concern *in order to achieve a recovery or orderly wind down* if those losses materialize, *which in no instance may be less than 6 months of current operating expenses*."

Section 21 – Systems and Other Operational Risk Requirements

DTCC believes the current requirements of the board in sections 21(1) and (2) are too broad and inconsistent with the Principles of Financial Market Infrastructures and place on the board responsibilities better seated with the management of the trade repository. We would recommend the section be revised to include the language in italics below so as to read:

> "**21 (1)** A designated trade repository must establish a *risk management framework, which conforms with applicable international standards*, to implement, maintain and enforce appropriate systems, controls and procedures to identify and minimize the impact of all plausible sources of operational risk, both internal and external, including risks to data integrity, data security, business continuity and capacity and performance management.
>
> (2) *The risk management framework* must be approved by the board of directors of the designated trade repository."

Section 21(4) - Business Continuity Plans

DTCC agrees with the requirements of section 21(4)(a) to have a business continuity plan in place to promptly recover operations following any disruptions. However, in the Companion Policy to the Proposed Rules, it states "these plans are intended to provide continuous and undisrupted service, as back-up systems ideally should commence processing immediately. Where a disruption is unavoidable, a designated trade repository is expected to provide prompt recovery of operations, meaning that it resumes operations within 2 hours following the disruptive event." DTCC believes the requirement to recover within 2 hours is unnecessary and unduly burdensome versus the risk a longer recovery time presents. By design, trade repositories do not engage in monetary transactions, which may give rise to financial risks nor serve banking or financial intermediation purposes or deal with depositor, investor or client funds; trade repositories instead function as information gatherers and disseminators. These functions are important parts of the new regulatory regimes that seek to enhance transparency in the derivatives market by providing regulators and the public with information concerning derivative markets, but they do not need to have a 2 hour recovery to perform that function. Presently, the CFTC and EMIR regulations require same day recovery for business continuity plans.

Section 21(6) - Independent Review of Systems

Section 21(6) of the proposed regulation requires that "For each of its systems for collecting and maintaining reports of derivatives data, a designated trade repository must annually engage a qualified party to conduct an independent review and prepare a report in accordance with established audit standards to ensure that it is in compliance with paragraphs (3)(a) and (b) and subsections (4) and (5)." It further defines a qualified party as follows:

> "A qualified party is a person or company or a group of persons or companies with relevant experience in both information technology and in the evaluation of related internal controls in a complex information technology environment, such as external auditors or third party information system consultants."

DTCC believes this requirement would force designated trade repositories to incur excessive cost, would be inconsistent with oversight requirements promulgated in other jurisdictions requiring trade reporting, and be duplicative of independent assessments undertaken by competent Internal Audit functions. As such, we suggest subsection 21(6) be amended to allow the independent assessment requirement to be performed by internal audit departments that are compliant with Institute of Internal Audit's (IIA) 'International Standards for the Professional Practice of Internal Auditing', and align the frequency of reviews to coincide with such standards.

21(8) - Publication of Requirements

DTCC would encourage the Commission to reconsider the requirement that all material changes be announced publicly at least 3 months prior to implementation of such material changes. Even with the exception made in paragraph (11), DTCC believes this requirement is overly prescriptive and not based upon any risk assessment of the proposed changes. DTCC would suggest the 3 month requirement be changed to state "a period of time sufficiently in advance of implementation to allow for sufficient testing and system modification by participants".

21. - Testing Environments

Similar to the comment above, DTCC believes this requirement is overly prescriptive and not based upon any risk assessment of the time needed for testing. DTCC would suggest the 2 month requirement be changed to state "a period of time sufficiently in advance of implementation to allow for sufficient testing and system modification by participants".

Section 23 – Confirmation of Data

DTCC is pleased that the Commission has revised the confirmation requirement to apply only to *participants* of a trade repository and limited the confirmation to the accuracy of data. DTCC suggests requiring notice to the parties of a transaction reported in their name with the ability for them to check the accuracy of the reported data should suffice to meet this requirement. Such treatment would be consistent with the requirements of Section 25(4) for a local counterparty to notify the reporting counterparty of any errors and Section 25(5), which places responsibility for accurate reporting on the reporting party.

Sections 26 and 42(4) - Pre-Existing Derivatives

DTCC believes that for clarity and simplicity, the obligation to report pre-existing transactions should include all those transactions that are open as of the day that mandatory reporting begins as opposed to when the Proposed Rules come into effect regardless of whether any such trade expires or terminates within the 365 day back load period post the mandatory compliance date.

Section 27 – Reporting Counterparty

27(4) – Delegation of Reporting Responsibility

DTCC believes that the responsibility for reporting should rest with the initial counterparties to a trade and not the clearing agency. The counterparty should be allowed to delegate that responsibility to a clearing agency pursuant to the terms of section 27(4).

Section 30(3)(a) - Legal Entity Identifiers

DTCC agrees with the change in section 30(3)(a) to require the counterparties to obtain substitute legal entity identifiers to ensure that records are submitted to the trade repository with an identifier from the outset.

Section 32 - Unique Product Identifiers

DTCC does not agree with new provisions related to UPIs. DTCC believes the counterparties to a transaction are best situated to understand the product and assign a UPI to that product in accordance with either industry or international standards such as the ISDA Taxonomy. DTCC does agree that a trade repository disclose the UPI structure utilized when reporting a transaction, but it is not the province of the trade repository to analyze transactions and determine the type of product being reported.

Section-35 – Valuation Data

DTCC believes this rule needs to be clarified to require that all valuation data must be reported to the same trade repository where the transaction was originally reported. The current language requires reporting to "the designated trade repository" instead of "the Trade Repository to which the transaction has been reported pursuant to Section 33".

Section 37 – Data Available to Regulators

DTCC suggests the language in subsection 2 be revised to include the language in italics to read: "A designated trade repository must conform its access standards to internationally accepted regulatory access standards applicable to trade repositories *to the extent they comport with the standards of any regulatory body with oversight responsibility for the designated trade repository*."

DTCC would like to express its concern with language in the policy statement:

> "Transactions that reference an underlying asset or class of assets with a nexus to Ontario or Canada can impact Ontario's capital markets even if the counterparties to the transaction are not local counterparties. Therefore, the Commission has a regulatory interest in transactions involving such underlying interests even if such data is not submitted pursuant to the reporting obligations in the Rule, but is held by a designated trade repository."

This statement provides too broad a requirement for designated trade repositories to follow without future guidance. At a minimum, a nexus requirement would have to be defined. Furthermore, trade repositories would need to be granted the authority to disclose such data in line with internationally agreements and subject to MOUs between regulators of the parties reporting.

Section 39 – Data Available to Public

DTCC would like to point out concerns that have been previously raised by reporting parties concerned about their identity being discerned from public reporting in certain circumstances. While transaction level reporting may be acceptable in jurisdictions where volume is high like the United States and Europe, firms have expressed the concern that in a less voluminous market, trading firms' identities could be discerned from transaction level detail, which is not in the best interest of the market.

This concern is heightened with respect to the content of the data to be reported, specifically the inclusion of information such as the "geographic location and type of counterparty" mentioned in section 39(2).

39(2) Form 1 – Exhibit I – Trade Repository Participants

DTCC believes it may be problematic to provide the names of participants prior to designation of its applicant company. Prior to designation, participant names may not be available due to constraints imposed by the home regulator. Post designation, and consistent with reporting obligations, participants have the duty to report rather than the TR identifying which of its participants are counterparties to a transaction required to be reported. Post designation and upon the commencement of reporting, a TR will be able to readily determine which participants have reported for purposes of complying with the Ontario rules and thus will be able to provide a list of such participants to the OSC. Even if a trade repository could determine which of its "participants are counterparties to a transaction whose derivative data is required to be reported" prior to actual reporting , there is a serious concern that absent consent to provide such information, the trade repository may be in violation of the privacy rights of such participants.

Data Field Analysis

Clearing Exemption and End-User Exemption fields – Currently DTCC only supports one field for clearing exemptions and exceptions. Generally, users only qualify for one exemption/exception and if they were to qualify for more than one exemption/exception, the counterparty would need to select the one that is being utilized for the particular transaction. DTCC suggests that Clearing Exemption be used and End User Exemption be dropped as a field. The type of Clearing Exemption can be detailed in the Clearing Exemption field itself.

Electronic Trading Venue and Electronic Trading Venue Identifier fields – Currently DTCC only supports one field for execution venue. DTCC suggests that Electronic Trading Venue Identifier be dropped as a field. The identifier of the execution venue can be used as the value under the Electronic Trading Venue field.

Custodian field – Currently DTCC does not support a field that captures custodian information. DTCC suggests removing this field as a requirement.

Unique Product Identifier and Contract Type fields – DTCC uses the industry standard ISDA taxonomy as a UPI. Contract type is a part of the ISDA Taxonomy. DTCC Suggests that Contract Type be dropped as a field since the information will already be included in the ISDA Taxonomy under Unique Product Identifier.

IGM Financial Inc. One Canada Centre, 447 Portage Ave., Winnipeg, Manitoba R3C 3B6

Murray J. Taylor
Co-President and Chief Executive Officer

September 11, 2013

Manitoba Securities Commission
500-400 St. Mary Avenue
Winnipeg MB R3C 4K5

Dear Sir/Madam:

RE: Proposed Manitoba Securities Commission Rule 91-506 and Proposed Companion Policy 91-506CP, *Derivatives: Product Determination*, Proposed Manitoba Securities Commission Rule 91-507 and Proposed Companion Policy 91-507CP, *Trade Repositories and Derivatives Data Reporting*

We are writing in respect of Proposed Manitoba Securities Commission Rule 91-506 and Proposed Companion Policy 91-506CP, *Derivatives: Product Determination* ("Proposed Rule 91-506" and "91-506CP", respectively) and Proposed Manitoba Securities Commission Rule 91-507 and Proposed Companion Policy 91-507CP, *Trade Repositories and Derivatives Data Reporting* ("Proposed Rule 91-507" and "91-507CP", respectively) published by The Manitoba Securities Commission ("MSC") regarding rules for the Over the Counter ("OTC") derivatives market.

IGM Financial Inc. ("IGM") is a diversified financial services provider which operates through its business units Investors Group Inc., Mackenzie Inc. and Investment Planning Counsel Inc. and their respective subsidiaries. Principal subsidiaries include registered portfolio advisers and investment fund managers (I.G. Investment Management, Ltd. and Mackenzie Financial Corporation), investment dealers and mutual fund dealers. As well, IGM, through its subsidiaries, engages in mortgage lending activities in Canada. IGM is interested in the model rules as a number of its subsidiaries use OTC derivatives for the hedging of commercial risks for their own account, or on behalf of investment funds and other client accounts that they manage.

We are supportive of the objectives of the various initiatives that are being proposed with regard to the regulation of OTC derivatives. We have a number of comments regarding Proposed Rule 91-506, 91-506CP, Proposed Rule 91-507 and 91-507CP, as follows:

- **confidentiality** - with regard to the data made available to the public under Part 4 of Proposed Rule 507, we are concerned that this data may allow the market to determine the identity of the counterparties entering certain OTC derivatives trades. In CSA Consultation Paper 91-402, *Derivatives: Trade Repositories*, the Committee agreed that "publicly available information should not disclose the identity of counterparties to any transactions or positions of market participants" and "market participants should be entitled to maintain their anonymity vis-à-vis the public in order to protect their trading strategies and other proprietary information". In fact, the Committee stated that it should be ensured that "public disclosure laws do not force regulators to reveal confidential market participant information". It is important that any aggregated data be designed to ensure that the information will not be attributable to any specific market participant. Also, as noted in comments made by ISDA and Fidelity Investments with regard to CSA Consultation Paper 91-301, there are fewer Canadian OTC market participants, the volume of trading is lower and participants are typically large institutions and, as a result, public disclosure of trade information could harm investors' ability and cost to trade. This becomes even more of an issue when you look at these factors on a province or territory level, particularly in provinces and territories where there are fewer dealers and market participants;

- **definition of dealer** - the term "dealer" in Proposed Rule 507 should only apply to entities which engage in trading OTC derivatives as a significant part of their business (such as making a market in these instruments) and not those who do so for the sole or primary purpose of hedging or transferring commercial risks;

- **definition of derivative** – In our view, it is important that the definition of derivative that is ultimately adopted be absolutely clear as to what is included so that there is certainty from a business perspective. At the same time, it is also crucial that the definition not be overly broad so as to encompass commercial arrangements that should not be intended to be included. The Notice and Request for Comment for Proposed Rule 91-506 indicates that the Scope Rule will "initially" only apply for the purposes of the TR Rule. It seems counterintuitive to have more than one definition of "derivative". We suggest that consistency in the definition of "derivative" for all regulation of derivatives is important, including harmonization across Canada and with foreign regulation of derivatives. We note that the U.S. has exempted FX swaps and FX forwards from clearing, execution on a Designated Contract Market or a Swap Execution Facility and margin requirements;

- **definition of local counterparty and duty to report** – There needs to be clarification as to which factor governs the determination as to "local counterparty" where an entity meets the criteria of a "local counterparty" in more than one jurisdiction or an entity fails to meet the definition of local counterparty in a particular jurisdiction but enters transactions with an entity in such jurisdiction. Without this clarification, the chance of duplicative reporting occurring is increased. Assuming all of the provinces and

territories have the same definition of "local counterparty", a single entity might be a "local counterparty" in Manitoba because their head office is in Manitoba and a "local counterparty" in another jurisdiction because it is organized in that jurisdiction or is registered under the securities laws of either or both Manitoba and the other jurisdiction. As well, it would appear that a federally incorporated entity would be required to report its derivatives transactions in every province and territory as it is organized under the laws of Canada and therefore a "local counterparty" in every province and territory. If a dealer is based outside a particular jurisdiction but enters derivative transactions with counterparties in such jurisdiction, the obligation to report the derivative transaction should be on the dealer, not the local counterparty. The local counterparty's duty in Section 25(1) of Proposed Rule 91-507 to report, or cause to be reported, derivatives data should be subject to the reporting hierarchy in Section 27 of Proposed Rule 91-507. The issues of who has the obligation to report and avoiding duplicative reporting apply both within Canada and internationally; and

- **administrative burden** – we encourage The Manitoba Securities Commission to design the trade repository, compliance and reporting requirements to ensure administrative burdens and the associated costs to registrants are minimized. Initial suggestions include establishing:
    - rules and reporting requirements which are consistent with other Canadian jurisdictions and ensuring that these are integrated with key foreign jurisdictions, most importantly the United States; and
    - designated trade repositories ("DTRs") that are recognized across all of the provinces and territories of Canada to avoid the possibility of duplicative reporting to a DTR in one province and to a Securities Commission in another province (where that province has not designated the trade repository).

We appreciate having this opportunity to share our views regarding Proposed Rules 91-506 and 91-507, and would be pleased to discuss any of these concerns with you at your convenience. If you would like to do so, please either contact myself or David Cheop at (204)956-8444 or david.cheop@investorsgroup.com.

Yours truly,

IGM FINANCIAL INC.

Murray J. Taylor
Co-President and Chief Executive Officer

cc: Jeff Carney, Co-President and Chief Executive Officer

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06 September 2013

John Stevenson, Secretary
Ontario Securities Commission
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Submitted to comments@osc.gov.on.ca

Re: **Proposed OSC Rule Derivatives: Product Determination**
Proposed OSC Rule Trade Repositories and Derivatives Data Reporting

Dear Sir/Madam:

Markit is pleased to submit the following comments to the Ontario Securities Commission (the "***OSC***" or the "***Commission***") in response to its Proposed Rules *Derivatives: Product Determination* and *Trade Repositories and Derivatives Data Reporting* (together the "***Proposed Rules***").[1]

Introduction

Markit[2] is a provider of financial information services to the global financial markets, offering independent data, valuations, risk analytics, as well as processing services across regions, asset classes and financial instruments. Our products and services are used by a large number of market participants to reduce risk, increase transparency, and improve the operational efficiency in their financial markets activities.

Most of Markit's processing services are provided by MarkitSERV,[3] a company that offers confirmation, connectivity, and reporting services to the global derivatives markets, making it easier for participants in these markets to interact with each other. Specifically, MarkitSERV provides trade processing, confirmation, matching, and reconciliation services for derivatives across regions and asset classes, as well as universal middleware connectivity for downstream processing such as clearing and reporting. Such services, which are offered also by various other providers, are widely used by participants in these markets and are recognized as tools to increase efficiency, reduce cost, and secure legal certainty. With over 2,600 firms globally using the MarkitSERV platforms, including agents for over 29,000 buy-side fund entities, our legal, operational, and technological infrastructure plays an important role in supporting the OTC derivatives markets in North America, Europe and the Asia-Pacific region. In 2012, over 20 million OTC derivative transaction processing events were processed using MarkitSERV.

In Canada, the major banks and an increasing number of hedge funds, asset managers, pension funds, fund administrators and other market participants use Markit's products and services. Markit has a local

[1] Ontario Securities Commission Proposed Rules *Derivatives: Product Determination* and *Trade Repositories and Derivatives Data Reporting*. 36 OSC 5737 (June 6, 2013).
[2] Markit is a financial information services company with over 3,000 employees in North America, Europe, and Asia Pacific. The company provides independent data, valuations and processing services for financial products across asset classes in order to reduce risk and improve operational efficiency. Please see www.markit.com for additional information.
[3] MarkitSERV, a wholly owned subsidiary of Markit Group Limited, provides a single gateway for OTC derivatives trade processing. The company offers trade processing, confirmation, matching, and reconciliation services across regions and asset classes, including interest rate, credit, equity, and foreign exchange derivatives. MarkitSERV also connects dealers and buy-side institutions to trade execution venues, CCPs, and trade repositories. Please see www.markitserv.com for additional information.

office based in Toronto to better support our Canadian clients and we have dedicated substantial resources to establishing data and valuations services that will help Canada-based market participants comply with upcoming regulatory requirements. Also, the major banks and an increasing number of asset managers, pension funds, hedge funds, fund administrators and other market participants process their derivatives transactions on the MarkitSERV platforms. In addition to increasing the efficiency with which trades are legally confirmed, MarkitSERV has dedicated substantial resources to establishing the necessary connectivity to help Canada-based market participants comply with upcoming regulatory requirements such as clearing and reporting.

Markit has been actively and constructively engaged in the discussion regarding regulatory reform of financial markets. Over the last several years, Markit has submitted over 80 comment letters to regulatory authorities around the world and we participated in numerous roundtables.[4] We regularly provide regulatory authorities with our insights on current market practice, for example in relation to the confirmation of derivative transactions, efficient means of reporting transactions to Trade Repositories, clearing connectivity, portfolio reconciliation practices, and pre-trade credit checks. We also advise regulatory bodies on approaches to enable timely and cost-effective implementation of newly established requirements, for example through the use of multi-layered phase-in or by providing participants with a choice of means for satisfying regulatory requirements. Additionally, we work closely with the industry and other relevant third-party providers to ensure adequate preparation, testing and data loading.

Last December, Markit submitted a response to the CSA Consultation Paper on *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting.*[5] We appreciate the fact that the CSA/OSC decided to make several changes to the previously proposed rules in response to the feedback they received. We also welcome the publication of the OSC's Proposed Rules on the reporting of derivatives contracts and we appreciate the opportunity to provide the Commission with our comments. Specifically, we believe that (i) a Reporting Counterparty approach to the reporting to Trade Repositories ("***TRs***") is beneficial as it tends to simplify the task of reporting and reduce the burden on end users; (ii) data reporting should be phased in both by asset class and by participant type; (iii) access to TR services should not be unreasonably limited including the use of closed, proprietary interfaces; (iv) a requirement for TRs to accept data for all derivatives of the asset class can prevent harmful data fragmentation; (v) reporting to a TR should occur only as soon as technologically practicable following execution; (vi) backloading requirements should be limited to a certain minimum maturity; (vii) identifiers should be referred to at the high taxonomy level while specific identifiers should be required only when adopted globally; (viii) data accuracy is best ensured by one party reporting data that has been verified by both counterparties; (ix) delegation of the reporting obligation for trade data and valuation data should be explicitly allowed; and (x) the Commission should provide further clarification on the reporting of all of the relevant transactions that exist in the context of central clearing.

General comments

Based on significant development work over the last several years, MarkitSERV today provides market participants with a universal solution for compliance with their regulatory and real-time reporting obligations based on its established connectivity between counterparties, execution venues, CCPs, and Trade Repositories. Many major derivative dealers use MarkitSERV to comply with their Dodd Frank reporting obligations[6] and all of them rely on MarkitSERV to meet their commitments to the OTC Derivatives Regulators Forum ("***ODRF***") in relation to the reporting of interest rates, credit and equity derivatives.

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[4] This number includes responses that have been submitted by MarkitSERV.
[5] Markit response to Canadian Securities Administrators ("CSA"), "CSA Consultation Paper 91-301 – Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting" (December 6, 2012) available here.
[6] Real Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012); Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012); and Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012).

Given our extensive experience in helping market participants comply with requirements to report their OTC derivatives transactions to TRs in multiple jurisdictions,[7] we believe that the OSC should follow several principles when implementing such requirements. Firstly, the reporting rules should provide counterparties with sufficient flexibility to simplify the task of reporting to a TR as much as possible. Secondly, any reporting requirements should take into account the market practices that have been established in the global OTC derivatives markets over the years and permit that, where appropriate, such practices can be used to satisfy the newly created regulatory requirements. We are convinced that, by following these principles, the OSC will not only enable a timely implementation but it will also help avoiding the creation of unnecessary cost.

Data reporting should be phased-in by asset class and participant type

As we stated in our previous letter to the CSAs,[8] we believe that any compliance dates for Data Reporting should be set such that they provide market participants with sufficient time to analyse, build, adjust and test their systems and procedures before they are required to be in compliance with the requirements. This need has been explicitly acknowledged by regulatory authorities in other jurisdictions.[9] We support the OSC's approach of setting compliance dates for reporting to TRs such that market participants are provided with additional time to prepare for compliance. However, based on our experience in other jurisdictions we believe that the provision of an additional 3 months for non-dealers might not be sufficient.[10]

Further, we believe that the OSC should consider making use of a more granular phasing-in for the reporting requirements. Specifically, when designing a compliance phase-in schedule, the Commission should also take into account the characteristics of the different asset classes. This is because derivatives across the various asset classes vary widely in relation to their degree of product standardization and electronification, the number of product variations, the nature and number of counterparties, the size of the asset class as well as the amount of central clearing that occurs already today. All of those factors impact the ability of market participants to report transactions in the respective asset classes to TRs.

Based on these considerations, and consistent with the approach that has been taken in other jurisdictions,[11] we recommend that the OSC require compliance with the Data Reporting requirements first in the asset classes of interest rates and credit as these are at a more advanced stage of development. Compliance with the reporting requirements for other asset classes, i.e., foreign exchange, equities, and commodities, should only be required at a later stage.[12]

Reporting Obligation

The Commission proposed that "all derivative transactions involving a local counterparty are required to be reported to a designated trade repository or to the Commission."[13] It also set out a hierarchy that would be used to determine which counterparty or party to the derivatives transaction will be required to report the transaction to the TR.[14]

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[7] For example, for the reporting of derivatives transactions to TRs, the MarkitSERV platforms are live in the United States and Japan, while they will be going live in Hong Kong and Australia in December and in Europe and Singapore in January.
[8] Markit response to CSA.
[9] See, for example, the SEC's Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act.
[10] OSC Proposed Rule, par. 42(2) and (3).
[11] Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).
[12] The OSC might also want to consider establishing timelines per sub-product category in an asset class as necessary since it is our experience that even within an asset class the levels of automation can vary significantly. For example, a customized product such as a basket transaction done for an end-user client may require further implementation phasing due to its complex structure.
[13] OSC Proposed Rule, par. 6.
[14] Specifically, "The counterparty required to report derivatives data for a transaction to a designated trade repository is, (a) if the transaction is cleared, through a clearing agency, the clearing agency; (b) if the transaction is not cleared through a clearing agency and is between a dealer and a counterparty that is not a dealer, the dealer; (c) if paragraphs (a) and (b) do not apply and both counterparties agree, in writing or otherwise, that one of them is required to report derivatives data for the transaction to the

In our previous response we urged the CSAs to provide both sufficient flexibility and clarity on how to determine the responsibilities for data reporting. On that basis we generally welcome the OSC's approach in the Proposed Rules in this respect.[15] Specifically, we support the OSC's decision to establish a "Reporting Counterparty" (or "***RCP***") approach where, in most cases, only one party would be responsible for the reporting of the transaction to the TR. Our view is based on the experiences that we have gathered supporting reporting firms both in the United States, where an RCP or "one-sided reporting" approach has been established,[16] and in Europe, where both counterparties have an obligation to report to the TR.[17] We believe that the reporting of a *single, verified* record of the transaction data *by one party* provides the advantages of creating clarity, avoiding duplication, reducing the potential for error, and simplifying the workflow. It herewith reduces the cost of reporting while it also minimizes the burden for end users. We also welcome the OSC's proposal, for transactions that are not cleared and where neither counterparty is a derivatives dealer, to allow the counterparties to agree on who will report.

However, in those cases where the reporting obligation remains with both counterparties,[18] we believe it would be useful for the OSC to establish requirements to ensure that this reporting happens without duplication. Such objective could be achieved most effectively if the counterparties were to agree on the use of a common unique transaction identifier for the transaction, which is a requirement in other jurisdictions.[19]

Access to designated trade repository services

The OSC proposed to prohibit a TR from "unreasonably limiting access to its services, permitting unreasonable discrimination among its participants or imposing unreasonable burdens on competition."[20] In this context, the Proposed Rules would also prohibit TRs from "developing closed, proprietary interfaces."

We are supportive of such requirements as we believe that they will be helpful to ensure that reporting parties not only have a choice between the various competing TRs, but they can also chose which of the various competing middleware providers they want to use in order to establish the necessary connectivity with their preferred TRs.

Acceptance of reporting

In our previous letter to the CSAs we supported the CSAs' proposal to require the designated TR to accept derivatives data for reporting purposes from its users for *all* derivatives of the asset class (or classes) set out in its designation order. This is because we believe that it is a crucial measure to prevent harmful fragmentation of the data which would ultimately reduce its usefulness for regulatory purposes. We therefore welcome the OSC's decision to require a designated TR to accept derivatives data from its participants "for all derivatives of the asset class or classes set out in the Commission's designated order."[21]

Based on the same rationale, we also support the OSC's proposal to require that "all derivatives data reported for a given transaction must be reported to the Commission or the same designated trade repository to which the initial report is submitted."[22]

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designated trade repository, the counterparty required to report the derivatives data under that agreement and (d) in any other case, both counterparties." OSC Proposed Rule, par. 27(1)(a)-(d).

[15] OSC Proposed Rule, par. 27(1).

[16] Swap Data Recordkeeping and Reporting, 77 Fed. Reg. 2136 (Jan. 13, 2012).

[17] ESMA Final Report: Draft technical standards under the Regulation (EU) No 648/2012 of the European Parliament and of the council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories. 27 September 2012.

[18] "…in any other case, both counterparties." OSC Proposed Rule, par. 27(1)(d).

[19] The CFTC's Unique Swap Identifier ("USI"), for example, is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its life time. The creation and use of the USI has been mandated by the CFTC and SEC as part of the Dodd-Frank Act. CFTC: Unique Swap Identifier Data Standard. October 2012 .

[20] OSC Proposed Rule, par. 13.

[21] OSC Proposed Rule, par. 14.

[22] OSC Proposed Rule, par. 25(5).

The reporting of cleared transactions

We note that the OSC's proposed hierarchy to determine the responsibility for reporting differentiates between the reporting of a derivatives transaction that "is cleared"[23] and one that "is not cleared".[24] However, we believe that it is not entirely clear from the Proposed Rules how the various transactions that will typically exist as part of the workflow for cleared transactions shall be reported to the TR.

Specifically, the proposed regime does not seem to fully acknowledge the fact that most derivatives transactions that "are cleared" will initially consist of an "uncleared" transaction between the two original counterparties (the so-called alpha trade) which will then be replaced through novation by two "cleared" transactions (beta and gamma trades) between the counterparties and the CCP. We note that the OSC's proposal states, in one instance, that "a transaction that is cleared is required to be reported as a separate, new transaction with reporting links to the original transaction."[25] Also, it states that "a transaction is considered to be cleared if and when it is novated to a clearing agency."[26] However we feel it is somewhat confusing that the OSC also states, in other instances, that the reporting obligations depend on whether the transaction "is cleared" or "is not cleared".[27]

We believe that the potential for confusion could be reduced if the Commission explicitly addressed the reporting of all relevant transactions in the workflow of clearing. The OSC should note that, to ensure that TRs capture an accurate reflection of current risk at all times and store a complete picture of all stages of the life of derivatives transactions, regulatory authorities in other jurisdictions will often require the reporting of both alpha *and* beta/gamma trades.

Timeliness of reporting

The OSC proposed that the reporting of derivatives transactions to the TR shall be performed "on a real-time basis" and "where not technologically possible .... as soon as possible but not later than the end of the next business day following the day that the transaction as entered into."[28]

Based on our experience we believe that it would be overly demanding to require the reporting to TRs on a "real-time basis". We therefore recommend that the Commission instead require reporting to the TR to occur "as soon as technologically practicable, but no later than the business day following execution". While it might make little difference in terms of the actual timeliness of the reporting, such requirement would seem to be more practicable and also consistent with the approach taken in other jurisdictions.[29]

Pre-existing derivatives

The Commission proposed that "a local counterparty to a transaction entered into [*insert date*] that had outstanding contractual obligations on that day must report, or cause to be reported, [...] to a designated trade repository in accordance with this Part not later than 365 days after [*insert date*]."[30] The Commission also stated that pre-existing transactions would be exempted from the reporting obligation if they expired or have been unwound before that date.[31]

Our experience with the reporting of "historical swaps" in other jurisdictions[11] has shown that such "backloading" requirements, if not appropriately designed, can create significant challenges. We therefore

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[23] OSC Proposed Rule, par. 27(1)(a).
[24] OSC Proposed rule, par. 27(1)(b).
[25] OSC Proposed Rule, par. 1(4).
[26] OSC Proposed Rule, par. 35(1).
[27] OSC Proposed Rule, S.27.
[28] OSC Proposed Rule, par. 6.
[29] For example in the United States under CFTC rules.
[30] OSC Proposed Rule, par. 26.
[31] OSC Proposed Rule, par. 26 and 42(4).

commend the OSC for taking a pragmatic approach. We agree with the Commission's view that to not require the reporting of derivatives transactions that have already expired or been unwound at the time of the reporting"[32] will reduce the burden for market participants while the Commission would only forgo a "marginal utility".

We also generally agree with the Commission that limiting the backloading requirements to contracts with a certain minimum maturity can be an equally sensible measure. However, it seems as if the rules are constructed as such that, if a counterparty backloaded its relevant transactions 360 days after [insert date], it would have to report all transactions with a minimum maturity of [insert date] plus 365 days, i.e. including contracts with a very short maturity. We therefore believe the language should be changed to, "report all outstanding contracts that, at the time of the backloading, have a maturity of no less than [x] years". That said, we have found that some firms find it challenging to sub-divide their outstanding derivatives transactions into different maturity categories, where one category has to be backloaded into the TR and the other not. We therefore encourage the OSC to allow firms to report *all* of their relevant derivatives transactions that are outstanding on the reporting start date, i.e. including those that have maturities shorter than [x] years, if they wanted to do so.[33]

Identifiers

The OSC proposed that a TR has to "identify all counterparties to a transaction by a legal entity identifier ("***LEI***") that will uniquely identify parties to a transaction."[34] Additionally, the OSC proposed that a unique transaction identifier ("***UTI***") would be assigned as well as a unique product identifier ("***UPI***").[35]

We agree with the Commission that the use of these specific identifiers that have been (or are expected to be) adopted globally should be encouraged. However, recent experience has shown that, for a variety of reasons, industry participants might agree on using alternative versions of these identifiers. Some of these alternatives might be used just for an interim period while others could be identified as the most appropriate solution for specific jurisdictions or asset classes.

We therefore support the OSC's pragmatic approach to allow also for the use of other identifier standards where this was appropriate. Specifically, we suggest that OSC only refer to a high level taxonomy and require that "relevant identifiers for counterparties, the transaction, or the product that have been agreed upon for reporting purposes (UTI, LEI, and UPI where they have been widely adopted) shall be reported to TRs".[36]

Requirement to confirm the accuracy of the data

The OSC proposed that a designated TR will be required to confirm the accuracy of the reported data generally with both counterparties as long as they are participants of the TR.[37] It also states that such confirmation can be delegated to "a third party representative".[38]

As discussed in more detail above, we believe that in an RCP reporting regime the OSC can best ensure the accuracy of the data that is reported to TRs by requiring, or at least encouraging, the reporting by only

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[32] OSC Proposed Rule, par. 26.
[33] This might result in a certain degree of "over-reporting", or more information being captured in TRs than would have been the case otherwise.
[34] OSC Proposed Rule, par. 30.
[35] OSC Proposed Rule, pars. 30-31.
[36] Specifically, given the current status of the various identifier-related initiatives OSC's regime should result in the following outcome: a) the use of UTIs as transaction identifiers would be required from the start, b) the use of LEIs as entity identifiers would be required when adopted while alternative entity identifiers could be reported in the interim, and c) the use of the industry-agreed high level ISDA product taxonomy as product identifiers would be permitted unless a UPI is subsequently created and adopted on a global basis.
[37] OSC Proposed Rule, par. 23(2).
[38] OSC Proposed Rule, par. 27(4).

one party of transaction records that have been *verified by both counterparties*. The reporting framework should require TRs to use appropriate means to confirm the accuracy of the data they receive, differentiating by the source and nature of the data. Such approach to ensure data accuracy would significantly reduce the burden to counterparties and would be consistent with other jurisdictions. For example, under CFTC rules, a Swap Data Repository ("***SDR***") will not be required to affirmatively communicate with both counterparties when data is received from a third-party service provider, a CCP, or an execution platform if a) the SDR reasonably believes the data is accurate, b) the data reflects that both counterparties agreed to the data and c) the counterparties were provided with a 48-hour correction period.[39] We believe that it would be sensible for the Commission to take a similar approach.

Duty to report

The OSC should note that, with many derivatives transactions being cross-border, their processing is often facilitated by internationally operating providers of middleware services.[40] These entities tend to operate across jurisdictions, so it will often be easier and more efficient to task them with ensuring the compliance of participants across various national requirements than for counterparties to handle such responsibilities themselves. We believe that the use of such entities for reporting to TRs, as well, provide benefits to the international regulatory authorities, as well as to market participants. This has been evidenced by the fact that reporting by Swap Dealers under the CFTC's requirements in the United States has largely been delegated to such third parties.

Recent experience also seems to confirm the Commission's view that the ability for reporting parties to delegate the task of reporting to third parties will help to "mitigate the initial costs associated with implementing necessary systems" and would make the objectives of the Proposed Rule more achievable.[41] We therefore welcome the OSC's proposal to allow reporting parties to delegate some or all of their reporting obligations.[42] In this context, we have the following comments:

- The OSC proposed that, where the reporting is delegated to another entity, the reporting counterparty "remains responsible for ensuring the timely and accurate reporting of derivatives data."[43] We generally agree with this approach, as it is consistent with other jurisdictions.[44]

- The Commission stated that "the reporting counterparty" may delegate its reporting obligation.[45] We encourage the Commission to clarify that, in case that reporting obligation remained with both counterparties,[46] they would *both* have the right to delegate the reporting to a third party, which they could chose individually, or they could agree between themselves to use a single third party to report for them.

Valuation data

The Commission proposed that valuation data for uncleared derivatives transactions shall be reported to the TR "daily using industry accepted valuation standards and relevant closing market data from the previous business day by each local counterparty that is a dealer."[47] The Commission also decided[48] to not

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[39] In contrast, when transaction data is reported by a counterparty, the Swap Data Repository is required to notify both counterparties of the data reported and receive acknowledgement of the accuracy from both counterparties. Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538 (September 1, 2011).

[40] In previous responses we have called such entities Independent Verification Services ("***IVS***") and defined them as "entities that act independently from and on behalf of the counterparties to the transaction to facilitate the agreement of a verified record of the complete transaction details that is used for subsequent processing."

[41] OSC Proposed Rule, par. 10.

[42] OSC Proposed Rule, par. 27(4).

[43] OSC Proposed Rule, par. 27(4).

[44] See CSA Consultation Paper 91-301 Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting (December 6, 2012).

[45] OSC Proposed Rule, par. 27(4).

[46] For example, under "Reporting Obligation" Option (iii).

[47] OSC Proposed Rule, par. 35(2)(a).

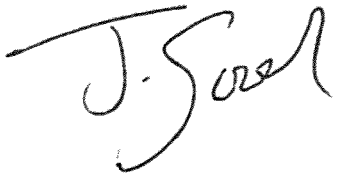
amend the requirement for both derivative dealers to report valuation data as it felt that "having two derivatives dealers report valuation data is useful from a regulatory perspective as it allows for the relevant Commission to have access to two valuation data points for the same transaction."[49]

In this context, we note that the obligation to report valuation data for the derivatives transactions to the TR seems to be detached from the RCP concept that the Commission establishes for the reporting of the initial transaction.[50] We therefore welcome the Commission's clarification[51] that delegation is also permitted for the reporting of valuation data, independent of whether the reporting of the other data elements is also delegated or performed by the RCP itself.

* *** *

Markit appreciates the opportunity to comment on the OSC's Proposed Rules on *Derivatives: Product Determination* and *Trade Repositories and Derivatives Data Reporting.* We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact the undersigned or Marcus Schüler at marcus.schueler@markit.com.

Yours sincerely,



Jeff Gooch
Head of Processing, Markit
Chairman & CEO, MarkitSERV

[48] As one commenter pointed out this would seem to unnecessarily obligate both of them to do the reporting, despite an arrangement between them that one would be the reporting counterparty. OSC Proposed Rule, S35.
[49] OSC Proposed Rule, S.35.
[50] "Valuation data" is presented in OSC Proposed Rule, par. 35, while the RCP concept is presented in OSC Proposed Rule, par. 27.
[51] Par. 35, p. 5785.

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July 10, 2013

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Dear Sir and Madame,

RE: CSA Consultation Paper 91-407 and Proposed Ontario Securities Commission Rule 91-506

We are writing in response to the request for comments to CSA Consultation Paper 91-407 on Derivatives Registration and Proposed Ontario Securities commission Rule 91-506, Derivatives: Product Determination.

Summary of Submission

In this submission, we represent our clients who are foreign exchange dealers and other non-bank entities in the business of providing foreign exchange services to individuals and corporations (**"foreign exchange dealers"**). The overall purpose of regulating OTC derivatives, as stated in Consultation Paper 91-401, is to better control systemic risk in the global financial system. Canada, together with other members of the G20, has committed to take part in efforts to reform the OTC markets by improving transparency, standardizing trading and enhancing reporting to regulatory authorities. Due to the nature of the business of foreign exchange dealers, and the small volume of transactions, we submit that the regulation of foreign exchange dealers as derivatives registrants will have negligible impact on mitigating risk in the Canadian and global financial systems. We believe that because of their relative size and level of complexity, the activities of foreign exchange dealers pose virtually no risk to the OTC derivatives market.

On the other hand, regulations requiring registration as derivatives dealers will result in very real hardship to many foreign exchange dealers, particularly those who operate as small businesses. They will be unable to meet the proposed capital, proficiency and compliance requirements that a securities registration would entail.

We therefore respectfully request that the CSA Derivatives Committee give consideration to ensuring that foreign exchange dealers do not become subject to securities registration. The balance of this letter expands on the foregoing.

Business of Foreign Exchange Dealers

Foreign exchange dealers provide a range of services to their clients. The business of foreign exchange dealers ranges from the operation of currency exchange kiosks located in airports, duty free shops and tourist areas to the provision of foreign exchange services to businesses and other enterprises who do businesses overseas. Foreign exchange dealers are registered with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) as a "money services business" or MSB. MSBs are subject to regulation under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the regulations made thereunder. Unlike deposit-taking financial institutions, foreign exchange dealers are not subject to any minimum capital or other similar prudential regulation. The purchase and sale of currency is not a trade in a security under securities legislation.[1]

In the simplest transactions, foreign exchange dealers exchange currency in the form of bank notes and coins and cash travelers cheques. Foreign exchange dealers may also remit funds on behalf of their clients in foreign currencies; for example, a Canadian with a condominium in Florida may ask a foreign exchange dealer to remit property taxes or utility payments to the local authority on his or her behalf. Foreign exchange dealers located in border areas facilitate businesses and enterprises who accept payments in foreign currency. For example, a restaurant or retailer on the Canadian side of the border may accept payment in U.S. cash, and the foreign exchange dealer may purchase the U.S. cash in exchange for Canadian dollars.

More sophisticated product offerings are available for clients who do business with foreign suppliers or purchasers. An importer for example may need to settle a trade payment in 30 days time. In that case, the importer may agree with the foreign exchange dealer to purchase the required quantity of the foreign currency today for delivery in 30 days time.

Foreign exchange dealers frequently enter into forward currency contracts and foreign currency swaps in the course of their business to hedge risk and for client facilitation. A dealer who has agreed with his client to pay a trade debt in British Pounds Sterling in 30 days time will hedge the exposure by entering into a currency forward or swap with a bank or other counterparty. In these "back to back" transactions, the foreign exchange dealer is effectively hedging the FX risk on behalf of the client. The client typically chooses to work with a foreign exchange dealer because the rates that the client is able to obtain from the foreign exchange dealer are much more advantageous than those available through a commercial bank. Smaller and mid-size businesses are often unable to obtain reasonable foreign exchange rates through banks, and they are also often unable to hedge their currency exposure on commercially reasonable terms. Our clients have observed instances where banks are unable or unwilling to provide these services to small and mid-size enterprises at rates such enterprises can afford. Without foreign exchange dealers, such clients would find it difficult or even impossible to effect payments to foreign suppliers.

Foreign Exchange Dealers do not "Cash Settle"

Virtually every foreign exchange transaction entered into by a foreign exchange dealer is intended to, and does, result in "physical delivery" of the currency. The foreign currency forward contracts and swaps are used to hedge against relatively short-term fluctuations in exchange rates, and are not used for

[1] Ontario Securities Commission Staff Notice 91-702 stated that contracts for difference (CFDs) and "foreign exchange contracts and similar OTC derivative products" raised investor protection concerns. The Staff Notice clarified staff's view that CFDs were "investment contracts" and hence "securities' for purposes of Ontario securities laws and were also "derivatives". The Staff Notice, which is stated to be an interim measure pending the adoption by the CSA of a harmonized approach to the regulation of OTC derivatives, did not specify other "forex contracts and similar OTC derivatives" which would be considered as "securities" or "derivatives" under Ontario securities law.

"investment" or for speculation. As stated, clients of foreign exchange dealers are looking for an efficient and cost effective means to manage their accounts payable, and receivable, in a foreign currency. They do not enter into the contracts for amounts in excess of what is needed to meet payment obligations, with the intent of profiting from exchange rate fluctuations. Hence it is difficult to view the FX contracts as an "investment contract".

Volume of Transactions

The volume of FX transactions undertaken by non-bank foreign exchange dealers is vanishingly small in comparison with the total volume of FX transactions which take place globally through financial institutions. Foreign exchange dealers (MSBs) are not comparable to commodity producers such as oil companies or gold mining companies, who are selling forward their production in contracts in the tens or hundreds of millions of dollars, where contracts which fail to settle could represent significant risk to the counterparties and to the financial system. Foreign exchange dealers are invariably offered forward facilities by banks and financial institutions only on restricted terms, with credit limits conservatively applied and margins and collateral security requirements for the facilities strictly monitored and enforced. It is almost unimaginable that the activities of foreign exchange dealers would pose any measurable threat to the stability of the Canadian or global financial system.

Our concern

CSA Consultation Paper 91-407 on Derivatives Registration, combined with Proposed OSC Rule 91-506 *Derivatives: Product Determination* and Proposed OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* could result in foreign exchange dealers having to become registered as derivatives dealers.

In CSA Consultation Paper 91-407, the CSA Derivatives Committee (the Committee) proposes that a variety of activities be considered to "be a trade in a derivative", including:

- entering into a derivatives contract;
- material amendments to a derivatives contract;
- assignment of any or all rights under a derivatives contract;
- termination of a derivatives contract;
- novation of a derivatives contract, except where the novation is by a clearing agency; and
- other activities in furtherance of a trade.

Would a currency forward of the type routinely entered into by foreign exchange dealers be considered a 'trade in a derivative"?

The commentary to Proposed OSC Rule 91-506 provides the view of regulators with respect to FX spot transactions. Appendix A notes that commentators suggested that deliverable foreign exchange forward contracts be excluded from the definition of "derivative" provided that there is an intention to physically deliver the foreign currency. The Committee has declined to follow that recommendation, stating its belief that all deliverable foreign exchange forward transactions that are not settled within prescribed timelines should be treated as "derivatives".

As currently proposed, a contract or instrument is prescribed <u>not</u> to be a derivative only if it is:

(c) a contract or instrument for the purchase and sale of currency that,

(i) except where all or part of the delivery of the currency referenced in the contract or instrument is rendered impossible or commercially unreasonable by an intervening event or occurrence not reasonably within the control of the parties, their affiliates or their

agents, requires settlement by the delivery of the currency referenced in the contract or instrument,

(A) within two business days, or

(B) after two business days provided that the contract or instrument was entered into contemporaneously with a related security trade and the contract or instrument requires settlement on or before the relevant security trade settlement deadline,

(ii) is intended by the counterparties, at the time of the execution of the transaction, to be settled by the delivery of the currency referenced in the contract within the time periods set out in subparagraph (i), and

(iii) does not allow for the contract or instrument to be rolled over.

So a currency forward contract of the type routinely entered into by foreign exchange dealers, because it does not settle within two business days, or the contract may be "rolled", would be considered to be a "derivatives contract".

And since foreign exchange dealers commonly enter into these types of contracts with their clients, they would likely trip the business trigger for trading. Also, these contracts are entered into by the foreign exchange dealers with the intention of being remunerated or compensated; i.e. with the intention of making a spread or profit, again giving rise to the assumption that the activity is undertaken for a business purpose and thus triggering the registration requirement.

Foreign Exchange Dealers should be exempt from registration as derivatives dealers

It is our view that the activities of foreign exchange dealers should not be considered to be registrable activity under any registration regime such that any derivatives dealer or derivatives adviser registration will be required. If a foreign exchange dealer otherwise meets the definition of "large derivative participant" through aggregate derivative exposure, then the foreign exchange dealer would comply with the registration requirements applicable to LDPs. Please note however that we believe that deliverable foreign currency forward transactions should be excluded from what gets counted as aggregate gross notional exposure in the determination of the threshold for registration and reporting.

Foreign exchange dealers provide a valuable service to an important and underserved economic and demographic segment: individuals and small and mid-sized businesses who are often unable to access foreign currency services at large financial institutions conveniently and at affordable rates. We do not believe that the business carried on by foreign exchange dealers gives rise to investor protection concerns which must be addressed by a registration regime applicable to firms and individuals. We emphasize that clients of foreign exchange dealers are not relying on the dealers for investment advice or financial advice. A currency transaction that does not settle within two days should not automatically turn the transaction into a "derivative contract", and the provider into a securities registrant. Clients of foreign exchange dealers are looking for dependable and cost efficient execution of their foreign currency transactions; they are not placing reliance on the foreign exchange dealer to place them into a suitable investment. We are unaware of instances of clients of foreign exchange dealers who have been harmed by having been sold an "unsuitable" product, and if any such instances have come to the attention of the CSA, we would welcome an opportunity to discuss the situation.

We therefore respectfully request that the Committee give consideration to ensuring that foreign exchange dealers do not become subject to securities registration.

We would be pleased to discuss the foregoing further with you or to respond to any questions you may have.

Yours truly,
MILLER THOMSON LLP

Per: 

Susan Han
sh/ld

9835487.3

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September 6, 2013

VIA E-MAIL

Mr. John Stevenson, Secretary
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Dear Mr. Stevenson,

Re: Proposed Ontario Securities Commission ("OSC") Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Rule") and Companion Policy 91-507CP (the "Proposed CP")[1]

Ontario Teachers' Pension Plan ("**OTPP**") is the largest single-profession pension plan in Canada, with $129.5 billion in net assets.[2] It was created by its two sponsors, the Ontario government and the Ontario Teachers' Federation, and is an independent organization. In carrying out its mandate, OTPP administers the pension benefits of 179,000 current elementary and secondary school teachers in addition to 124,000 members.[3] OTPP operates in a highly regulated environment and is governed by the *Teachers' Pension Act*[4] and complies with the *Pension Benefits Act*[5] and the *Income Tax Act*.[6] More than 920 employees of OTPP help to invest the fund's assets, administer the pension plan, pay out benefits, and report and advise on

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1 OSC Request for Comments, 36 OSCB 5737 (2013). Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20130606_91-506_91-507_rfc-derivatives.pdf.

2 Asset value current as of December 31, 2012. Ontario Teachers' Pension Plan Board, Annual Report, "An Evolving Plan 2012 Annual Report" online: OTPP <http://www.otpp.com/documents/10179/686250/Annual+Report/39482a3d-435c-40d1-96cf-cd6a38d6880a> at 4.

3 *Ibid* at 7.

4 *Teachers' Pension Act*, RSO 1990, c T.1.

5 *Pension Benefits Act*, RSO 1990, c P.8.

6 *Income Tax Act*, RSC 1985, c 1 (5th Supp).

the plan's funding status and regulatory environment.[7] OTPP consistently receives accolades from industry groups for its investment returns and pension strategy.[8]

We are writing to you in response to the request of the OSC for comments in respect of the Proposed Rule and the Proposed CP (together, the "**Proposed Instrument**"). We appreciate the opportunity provided by the OSC to submit comments on initiatives with respect to derivatives regulation in Ontario. We have also been involved in commenting on the Proposed Instrument through the Canadian Market Infrastructure Committee ("CMIC"), and fully support the comments contained within CMIC's response. Our comments in this letter highlight our concerns with respect to the application of the Proposed Instrument to OTPP and other end-users.

As a user of derivatives, OTPP welcomes sensible and properly functioning regulation of the over-the-counter derivatives market and supports efforts to minimize systemic risk, increase transparency and harmonize Ontario derivatives regulation with that in other regions, while avoiding undue harm to end-users and other market participants. However, we have significant concerns with the impact the Proposed Rule will have on OTPP and other end-users.

Reporting Counterparty

Section 27 of the Proposed Rule establishes who is responsible to report a derivatives transaction to a trade repository or local regulator.[9] We appreciate that as between two end-users, at least one of them will be required to report a transaction. However, we are very concerned that local counterparty end-users, and not foreign dealers and clearing agencies, are required to comply with the transaction reporting requirements under subsection 27(2) of the Proposed Rule.

Foreign dealers, clearing agencies and other regulated entities, are routinely required to comply with local securities regulation and other Canadian laws when conducting business with Canadians. The risk of non-compliance and the inability to enforce against such entities has not generally been cited as reasons for not imposing rules on foreign entities conducting business with Canadians. As in the case of virtually every other securities law, rule or instrument, foreign dealers, clearing agencies and other regulated entities carrying on business with end-users in Ontario should be required to comply with the transaction reporting provisions of the Proposed Rule.

Under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("**Dodd-Frank**") and other international derivative regulation initiatives, end-users are not currently required to report transactions when transacting with foreign dealers. The CFTC has specifically taken this approach because such foreign dealers are "more likely to have automated systems suitable for reporting."[10] Taking the contrary approach in Ontario is inconsistent with the goal of

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7 *Supra* note 2 at 57.

8 *Ibid* at 5.

9 *Supra* note 1 at 5768.

10 See CFTC Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 F.R. No. 9 (January 13, 2012) at 2167. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister /documents/file/ 2011-33199a.pdf.

international harmonization. As a result of attempted harmonization, all Canadian, United States and non-North American derivatives dealers, clearing agencies and other regulated market participants have made significant investments to develop compliant reporting systems. In our view, requiring Ontario end-users to implement reporting systems to facilitate trade reporting is inefficient, impractical and unfair. The time and resources necessary to develop such a system or alternatively, manual compliance, place an undue burden on Ontario end-users. The obligation to report derivatives trade data under the Proposed Rule should be imposed on dealers and clearing agencies party to such transactions, whether foreign or not. Such parties have the technological capability to generate required derivatives data and are in a far better position to efficiently provide reports mandated under the Proposed Rule.

Further, we do not believe the power to delegate the reporting function to third party service providers addresses the concerns stated above and may exacerbate such concerns. While the end-user has acquired and paid for reporting services, it remains ultimately responsible for such reporting and must maintain the relevant data in an accessible **form**at in case the third party service provider fails to comply with its obligations. As such, the ability to delegate under the Proposed Rule, without relief from liability for such reporting, may be more of a burden than a benefit to the end-user.

We appreciate that imposing a reporting obligation on foreign dealers and clearing agencies may deter such entities from transacting with Ontario counterparties, which could negatively affect the liquidity of the Ontario market. We believe this issue would be resolved with the implementation of an easily accessible substitute compliance regime, providing foreign dealers and clearing agencies the opportunity to report in their home jurisdiction in full satisfaction of their reporting requirements under the Proposed Rule.

Reporting Valuation Data

We note that the OSC has changed subsection 35(1) to require the local counterparty to report valuation data daily. This is an unexplained change from the Canadian Securities Administrator's (the **"CSA"**) consultation paper published on December 6, 2012.[11] We believe this should revert to "reporting counterparty", particularly in light of the **inconsistency** it creates with clause 35(2)(b) which only requires quarterly reporting of valuation data for non-dealers. This approach is also contradictory to the reporting regime in the United States, where only the reporting counterparty is required to provide valuation data.

Data Available to the Public

While we appreciate the OSC's clarification of the data required for public dissemination under subsection 39(2) of the Proposed Instrument, we are still concerned with the requirement that the geographic location of a counterparty as well as the type of counterparty must be disclosed.[12] This is extremely problematic in the Ontario market due to the limited number of participants in Ontario. The release of the geographic location and type of counterparty to the public, together

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11 See *CSA Consultation Paper 91-301 – Model Provincial Rules*, (2012) 35 OSCB 10967 (the "Consultation Paper"). Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20121206_91-301_model-provincial-rules.pdf.

12 *Supra* note 1 at 5771.

with other publicly available data, would make it relatively easy to identify the Ontario end-user to a transaction, causing disproportionate harm to the Ontario end-user. Transparency in the derivatives market must be balanced with the legitimate business need for preservation of confidentiality of proprietary trades and the ability to hedge trades without market manipulation. The OSC needs to recognize that the inclusion of the aforementioned data fields would have the practical effect of publicly disclosing the identity of certain counterparties and their trades.

We would like to point out that the current CFTC rules do not require that a counterparty's geographic location and type to be disclosed to the public.[13] It is counterintuitive that the OSC mandates less anonymity for end-users while the CFTC allows for more anonymity, especially when considering the number of market participants in the United States versus Ontario. The nominal benefit gained from the public reporting of such data fields is disproportionate to the potential harm to end-users.

In addition, we note the OSC has provided minimal guidance surrounding what is to be disclosed to satisfy the fields for geographic location and type of counterparty, specifically referencing "United States" and "end-user", respectively in the Proposed CP.[14] At this level, we would question the usefulness of the information being released, specifically compared to the potential harm associated with the identification of the specific Ontario end-user. Alternatively, if more specific information is released, for example "province" and "end-user type - pension plan", the identity of the Ontario end-user would become readily apparent, causing undue harm to the Ontario end-user.

Consequently, we believe the requirement that a trade repository release to the public the geographic location and type of counterparty involved in a transaction should be removed from the Proposed Instrument.

Principal Regulator Model

As the CSA expects that each province will enact province specific rules,[15] we are concerned with the duplication in reporting obligations arising from cross-jurisdictional transactions. We recommend that the OSC and other provincial and territorial regulators adopt a principal regulator model, similar to the existing principal regulator model for registrants and reporting issuers. This recommendation will increase market efficiency as well as provide for a more accurate picture of the Canadian derivatives market by reducing redundant reporting. While the OSC's response to the comment on the Consultation Paper is that such a passport system is outside the scope of the Proposed Rule, it is within the OSC's jurisdiction to abandon the Proposed Rule to attempt to work with the CSA and all Canadian securities regulators to develop and implement a Canada wide solution to Canada's derivatives trade reporting obligations.

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13 See CFTC Final Rule, *Real-Time Public Reporting of Swap Transaction Data*, 77 F.R. No. 5 (January 9, 2012) at 1250. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33173a.pdf.

14 *Supra* note 1 at 5786.

15 *Supra* note 11.

Block Trades and Mandatory Delay

While the OSC has taken the position that block trade exemptions will "be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule",[16] we are of the opinion that the OSC should create a mandatory delay under subsection 39(3) for block trades. As currently drafted, subsection 39(3) does not differentiate between types of transaction. This "one size fits all" approach is insufficient to deal with the market reality that hedging a large block trade takes time. The additional systemic risk posed by a slight delay in the timing of disclosure of block trades is miniscule compared to the potential harm that could be caused to market participants. Under section 39 of the Proposed Rule, the OSC should impose a mandatory delay in the public dissemination of block trade data. As many commenters to the Consultation Paper have noted, a time limit would significantly impede hedging strategies with respect block trades. To require public dissemination of block trade data according to the time frames currently in subsection 39(3) will allow arbitrage specialist to manipulate the market at the expense of all participants, thereby creating significant market inefficiencies. We would also like to note that the Dodd-Frank rules create specific reporting and clearing exemptions for block trades of certain sizes.[17] At the very least, we hope that the OSC will delay the implementation of subsection 39(3) and conduct further research on the Ontario block trade market, with a view to crafting a workable public reporting deadline.

Conclusion

We appreciate the opportunity to comment on the Proposed Rule and hope such comments assist the OSC to create a reporting regime within Ontario that fully considers the practical implications of such rules upon the end-user. Please do not hesitate to contact us should you have any questions or wish to discuss in further detail.

Yours very truly,

Gregory O'Donohue
Legal Counsel, Derivatives

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16 *Supra* note 1 at 5749.
17 *Supra* note 13 at 1248.

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September 6, 2013

John Stevenson, Secretary
Ontario Securities Commission
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Dear Mr. Stevenson:

RE: Proposed Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*

I submit the following comments in response to the Notice and Request for Comments (the "**Request for Comments**") published by the Ontario Securities Commission ("**OSC**") on June 6, 2013 ((2013) 26 OSCB 5737) with respect to the Proposed Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting* (the "**TR Rule**") and Proposed Companion Policy 91-507CP *Trade Repositories and Derivatives Data Reporting* (the "**TR CP**").

Thank you for the opportunity to comment on the Request for Comments. I support the OSC's efforts to improve transparency in the derivatives market and to ensure that designated trade repositories operate in a manner that promotes the public interest.

Section 1(1) - Definition of "local counterparty". The definition of "local counterparty", particularly the inclusion in subsection (a) of the definition of "organized under the laws of Ontario", is problematic in that it may capture a wide range of persons or companies that are organized under the corporate, partnership or other laws of Ontario for tax or other purposes, but that have no other connection to Ontario (e.g., limited partnerships formed under the *Limited Partnerships Act* (Ontario) but whose general partners and limited partners are all non-Canadian entities with little or no other connection with Canada).

I respectfully urge the OSC to consider amending subsection (a) of the definition of "local counterparty" to include only persons or companies that have a head office or principal place of business in Ontario.

Section 25 - Duty to report, Section 33 - Creation data and Section 34 - Life-cycle data. With respect to transactions that are cleared through a clearing agency, the TR Rule appears to require the reporting of the following derivatives data:

- The original transaction between the local counterparty and the other counterparty would be reported to a designated trade repository as creation data.

- The novation of a derivative in connection with the original transaction being cleared through a clearing agency would be reported to a designated trade repository as a separate, new transaction with reporting links to the original transaction.

- Any subsequent life-cycle events to the original transaction or the novated transaction would be reported to a designated trade repository as life-cycle data.

Presumably, a novation would be reported as a separate, new transaction as opposed to a life-cycle event because the definition of "transaction" specifically includes "the novation of a derivative" to a clearing agency. I respectfully request that the OSC confirm that the above discussion corresponds to its expectations with respect to the reporting of creation data, life-cycle data and novations by a local counterparty or otherwise clarify the guidance contained in section 1(4) of the TR CP with respect to the reporting requirements applicable to the above derivatives data.

Section 27 - Reporting counterparty. Subsection 27(1)(a) provides that where a transaction is cleared through a clearing agency, the clearing agency will be responsible for reporting derivatives data to a designated trade repository.

In the case of a foreign-based clearing agency, it may be unaware that a counterparty to a derivative transaction qualifies as a "local counterparty" under the TR Rule (e.g., where the counterparty falls within category (c) under the definition of "local counterparty"). Therefore, the foreign-based clearing agency may also be unaware that it is responsible for reporting derivatives data to a designated trade repository under the TR Rule. Although the derivatives data reporting requirement ultimately falls on the local counterparty, any confusion between the counterparty and the foreign-based clearing agency regarding who bears the responsibility to report the derivatives data may result in delays in reporting the data or no reporting of the data at all.

Additionally, subsection 27(1) raises certain extra-jurisdictional issues regarding the imposition of data reporting requirements on foreign-based clearing agencies. However, it should be noted that foreign-based clearing agencies may not

be subject to Ontario securities laws and the OSC may not have jurisdiction over such entities.

Foreign-based clearing agencies that have been recognized pursuant to section 21.2 of the *Securities Act* (Ontario) or obtained an exemption from the clearing agency recognition requirement will be subject to the OSC's regulatory oversight and jurisdiction. As a result, the OSC has recourse against such recognized or exempt foreign-based clearing agencies. However, foreign-based clearing agencies that have not been recognized pursuant to section 21.2 of the *Securities Act* (Ontario) or obtained an exemption from the clearing agency recognition requirement will not be subject to the OSC's regulatory oversight and jurisdiction. As a result, the OSC has limited recourse against such foreign-based clearing agencies.

I respectfully suggest that references to "clearing agency" in subsection 27(1) be replaced by "recognized or exempt clearing agency" and further urge the OSC to consider the extra-jurisdictional implications of subsection 27(1).

Section 41 - Exemptions. The TR Rule does not contain any provision for reciprocity or recognition with respect to foreign-based trade repositories that are subject to the rules of an equivalent jurisdiction. The lack of reciprocity or recognition provisions for foreign-based trade repositories is a significant departure from previous CSA guidance. For example, in Consultation Paper 91-402 *Derivatives: Trade Repositories*, published on June 23, 2011, the CSA Derivatives Committee states the following:

> The Committee recognizes that some foreign-based trade repositories may be subject to a comparable regulatory regime in their home jurisdiction and therefore full provincial regulation may be duplicative. In an effort to achieve international harmonization, the Committee is monitoring international policies for recognition of foreign trade repositories. For example, the European Commission has proposed that foreign trade repositories be recognized provided they are subject to equivalent supervision standards and are accessible to foreign regulators.

In Consultation Paper 91-301 *Model Provincial Rules - Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting*, which sets out model rules and guidance on which the TR Rule is based, the CSA provided the following guidance with respect to foreign-based trade repositories:

> In order for any trade repository, local or foreign, to be an acceptable venue for local market participants to comply with the reporting obligations contained in Part 3 of the TR Rule, the trade repository must be designated or recognized in the applicable provincial jurisdiction. However, the Committee recommends that exemptions under section 40 of the TR Rule to certain requirements of the TR Rule be made available to a foreign-based trade repositories if the trade repository is subject to an equivalent regulatory and oversight regime

in its home jurisdiction. We recognize that some foreign-based trade repositories are already subject to equivalent regulation in their home jurisdiction and believe that the imposition of a duplicate regime is inefficient.

With respect to granting exemptions under the TR Rule generally, the OSC's position is that they "may be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule or any other applicable provision under securities or derivatives legislation." As a result, there is substantial uncertainty for foreign-based trade repositories regarding reciprocity or recognition, even in cases where the foreign-based trade repository is subject to the rules of an equivalent jurisdiction. I respectfully urge the OSC to consider implementing a process for providing reciprocity to, or recognition of, foreign-based trade repositories. If the OSC decides against a reciprocity or recognition process, then I urge the OSC to provide further guidance on how foreign-based trade repositories may seek an exemption under section 41 of the TR Rule and what criteria the OSC will consider in granting the exemption.

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I thank you for the opportunity to express my views on these matters. Please do not hesitate to contact me if you have any questions in this regard.

This letter represents my personal comments (and not those of Stikeman Elliott LLP) with respect to the TR Rule and TR CP.

Yours truly,

(Signed) "Terence W. Doherty"

Terence W. Doherty

TWD/mm