

**CSA Multilateral Notice and Request for Comment**  
**Proposed Multilateral Instrument 91-101 *Derivatives Product***  
***Determination and Proposed Multilateral Instrument 96-101 Trade***  
***Repositories and Derivatives Data Reporting***

**January 21, 2015**

## **Introduction**

Staff of the Alberta Securities Commission, the British Columbia Securities Commission, the Financial and Consumer Affairs Authority of Saskatchewan, the New Brunswick Financial and Consumer Services Commission and the Nova Scotia Securities Commission (each an Authority and collectively, “we” or the Authorities) are publishing for a 60 day comment period expiring March 24, 2015:

- proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* (the Scope Rule);
- proposed Companion Policy 91-101 *Derivatives: Product Determination* (the Scope CP);
- proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the TR Rule);
- proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the TR CP).

These documents will be referred to as the Proposed Instruments.

We are issuing this notice to provide interim guidance and solicit comments on the Proposed Instruments.

## **Background**

On December 6, 2012, the Canadian Securities Administrators 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 requested public comment on all aspects of the Draft Model Rules. Thirty-five comment letters were received.

On June 6, 2013, the Authorities published CSA Staff Consultation Paper 91-302 Updated Model Provincial Rules *Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting* (the Updated Model Rules). Also on June 6, 2013, the securities regulatory authorities in Manitoba, Ontario and Québec published corresponding proposed local rules and related companion policies for comment. The Updated Model Rules and the local rules

and related companion policies published in Manitoba, Ontario and Québec were intended to be substantially similar.<sup>1</sup>

In developing the Proposed Instruments, we have reviewed the comment letters received in relation to both the Updated Model Rules and the local rules published in Manitoba, Ontario and Québec, and have considered the final local rules adopted in each of those provinces, including recent amendments. We intend that the Proposed Instruments will be consistent with the local rules in Manitoba, Ontario and Québec, other than minor variations to accommodate differences in provincial securities legislation and those specific proposals discussed in this notice.

Staff of the Authorities intend to work together to review the comment letters and will make any determinations on changes to the Proposed Instruments as a group. Upon reaching agreement on any changes to the Proposed Instruments with the goal of implementing harmonized instruments.

### **Substance and Purpose of the Proposed Instruments**

With respect to Nova Scotia and Saskatchewan, the Proposed Instruments should be read in the context of the amendments to the local securities legislation that have not yet been proclaimed. The securities regulatory authorities in each of these jurisdictions anticipates that the respective amendments will be proclaimed and in force at or before the time that the Proposed Instruments become final.

#### ***(a) The Scope Rule***

The purpose of the Scope Rule is to establish the types of derivatives that will be subject to the requirements of the TR Rule. We anticipate that the Scope Rule will, with appropriate adjustment, also apply to future instruments relating to derivatives. The Scope Rule does not apply to other elements of securities legislation.

The Scope Rule provides that the TR Rule does not apply to certain contracts or instruments that fall within the broad definition of “derivative” in local securities legislation. The excluded contracts are contracts that have not traditionally been considered over-the-counter derivatives. The Scope Rule also addresses the fact that the definitions of “derivative” and “security” in securities legislation are expansive and, in some cases, overlapping. Except in Alberta, the Scope Rule resolves conflicts that arise when a contract or instrument meets both the definition of “derivative” and “security”. In Alberta, because the definition of security and derivative do not overlap, the Scope Rule designates certain types of contracts or instruments to be derivatives to which the requirements in the TR Rule apply.

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<sup>1</sup> In each of Manitoba, Ontario and Québec, the *Derivatives: Product Determination* rule or regulation currently in effect is numbered 91-506 and its related companion policy is numbered 91-506CP; the *Trade Repositories and Derivatives Data Reporting* rule or regulation currently in effect is numbered 91-507 and its related companion policy is numbered 91-507CP.

***(b) The TR Rule***

The purpose of the TR Rule is to improve transparency in the OTC derivatives market and to ensure that recognized trade repositories operate in a manner that promotes the public interest. Derivatives data is essential for effective regulatory oversight of the derivatives market, including the ability to identify and address systemic risk and the risk of market abuse. Derivatives data reported to recognized trade repositories will also support policy-making by providing regulators with information on the nature and characteristics of the Canadian derivatives market.

The TR Rule focuses on two regulatory areas: (i) the regulation and oversight of trade repositories, including the recognition process, data access and dissemination, and operational requirements, and (ii) establishing derivatives data reporting requirements for counterparties to derivatives transactions.

Appendix A to the TR Rule sets out the data fields required to be reported for transactions subject to the reporting requirement in the TR Rule. Guidance for the data fields in Appendix A is included in the Description column in the reporting fields table in Appendix A.

**Summary of the Proposed Instruments**

***(a) The Scope Rule***

The definition of “derivative” in the securities legislation of each of Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan (each a jurisdiction) is intended to include the types of instruments traditionally referred to as derivatives (for example, options, swaps and forwards) as well as other novel instruments. The definition of “derivative” is broad enough to capture many contracts and instruments that have not traditionally necessarily been considered to be derivatives. The Scope Rule tailors the application of the TR Rule to certain existing and emerging products.

Contracts or instruments to which the TR Rule would not apply include:

- gaming and insurance contracts where such contracts are regulated by a domestic or an equivalent foreign legislation;
- contracts for the purchase and sale of currency provided that the contract (i) settles by delivery of the contracted currency within prescribed timelines, (ii) is intended by the parties to be settled by delivery of the currency referenced in the contract, and (iii) does not allow for roll-over;
- contracts for the delivery of a commodity provided that the contract (i) is intended by the parties to be settled by delivery of the commodity, and (ii) does not provide for cash settlement in place of the delivery of the commodity;
- evidences of deposit issued by certain Canadian financial institutions;

- contracts or instruments traded on certain exchanges;
- except in Alberta and British Columbia, contracts that meet the definition of both “derivative” and “security” in the local securities legislation, provided that such contract is not a security solely by virtue of being an “investment contract”;
- in Alberta, a contract or instrument that is not a security solely by virtue being an “investment contract” or an “option”;
- in British Columbia, a contract or instrument that is a derivative but is also a security solely because it is an “investment contract”, a “futures contract” or an “option”; and
- contracts or instruments issued by an issuer, a control person of an issuer or an insider of an issuer where the underlying interest of that contract or instrument is a security of the issuer or an affiliated entity of the issuer and the contract or instrument is used (i) to compensate or incent the performance of a director, employee or service provider of the issuer or an affiliated entity of the issuer or (ii) as a financing instrument in connection with the raising of capital for the issuer or an affiliated entity of the issuer or the acquisition of a business or property by the issuer or an affiliated entity.

***(b) The TR Rule***

The TR Rule focuses on two regulatory areas: (i) requirements relating to the regulation and oversight of trade repositories, including the recognition process, data access and dissemination, and operational requirements, and (ii) establishing derivatives data reporting requirements by counterparties to derivatives transactions.

***(i) Regulation of Trade Repositories***

To be recognized as a trade repository in a jurisdiction under the TR Rule, a person or company will be required to apply to the relevant Authority. An applicant for recognition will be required to file with the relevant Authority a completed Form 96-101F1, financial statements and a letter describing how the entity complies, or will comply, with the TR Rule.

A recognized trade repository will be required to comply with the requirements in the TR Rule in addition to the terms and conditions of its recognition order. It will be required to provide the Authority with interim and year-end financial statements and before implementing any significant changes to the information submitted in its application, to provide notice to the Authority. In addition, recognized trade repositories will be subject to a variety of ongoing requirements including ensuring the adequacy of its governance arrangements, meeting board composition requirements, clearly defining management roles and responsibilities, maintaining policies and procedures for material aspects of its business, retaining records, ensuring data security and confidentiality, establishing a comprehensive risk management and compliance framework and meeting other requirements related to systems and operational risks. A

recognized trade repository will be expected to accept derivatives data for each class of derivatives described in its recognition order.

A recognized trade repository will be required to ensure that its rules, policies and procedures permit fair and open access to its services. Any fees charged by a recognized trade repository will be required to be fairly and equitably allocated amongst its participants and be publicly disclosed. Further, a recognized trade repository will be required to have rules, policies and procedures to confirm the accuracy of reported data with its participants.

Additionally, we propose that a recognized trade repository will be subject to requirements to provide access to trading data to regulators and to the public.

*(ii) Reporting Requirements*

Under the TR Rule, all derivatives transactions involving a local counterparty will be required to be reported to a recognized trade repository or, in limited circumstances, to the relevant Authority. The TR Rule sets out the following hierarchy for determining which counterparty is the reporting counterparty and has the obligation to report a transaction:

- (i) where a transaction is cleared, the clearing agency;
- (ii) where a transaction is not cleared and is between a derivatives dealer and a non-dealer, the derivatives dealer;
- (iii) where a transaction is not cleared and is between a Canadian financial institution and a counterparty that is neither a Canadian financial institution nor a dealer, the Canadian financial institution;
- (iv) where a transaction is not cleared and is between two derivatives dealers, two Canadian financial institutions or two counterparties that are neither derivatives dealers nor Canadian financial institutions, the counterparty that is identified as the reporting counterparty in a written agreement between the counterparties;
- (v) where the counterparties cannot agree, both counterparties will have an obligation to report.

The TR Rule requires that reporting be completed on a real-time basis. However, where it is not technologically possible to do so, the reporting counterparty will be required to report as soon as possible but not later than the end of the next business day following the day that the transaction was entered into. Transactions that were entered into prior to the TR Rule coming into force will be required to be reported provided they have not expired or been terminated within a prescribed period after the TR Rule comes into force. The rule contemplates this date will be the 91<sup>st</sup> day following the implementation of the TR Rule. We encourage comment on the appropriate period.

Three main types of data must be reported under the TR Rule:

- (i) creation data, which includes operational data, product information, principal economic terms, counterparty information, underlier information and relevant identifiers (see Appendix A to TR Rule for more details);
- (ii) lifecycle data which includes any change to derivatives data previously reported; and
- (iii) valuation data, which includes the current value of the transaction.

### **Key Differences between the TR Rule and the trade reporting rules in effect Manitoba, Ontario and Québec**

Subject to exception noted in this part, we intend that the Scope Rule and the TR Rule be consistent with the corresponding local rules in Manitoba, Ontario and Québec. We do not intend that the Scope Rule to have material differences from the corresponding rules in those provinces.

We are seeking comment on the TR Rule and the corresponding local rules in Manitoba, Ontario and Québec. In particular we are seeking comment on:

- (i) whether the proposed differences are appropriate for market participants in our jurisdictions; and
- (ii) whether the proposed differences will result in consequences or issues that are detrimental to market participants, industries or the derivatives market in the jurisdictions and/or in Canada.

We encourage each commenter to provide specific analysis in order to assist the Authorities in understanding the specific issues being raised.

#### ***(a) The definition of “local counterparty” in the TR Rule***

The definition of “local counterparty” in the local trade reporting rules in place in Manitoba, Ontario and Québec includes not just an entity organized or with its head or principal place of business in a jurisdiction (or its guaranteed affiliate), but also a counterparty that is registered under the securities legislation of the local jurisdiction as a derivatives dealer or in another category as a consequence of trading in derivatives (i.e., is a locally-registered entity).

As a result, in each of Manitoba, Ontario and Québec, a counterparty that is a registrant in the jurisdiction, regardless of where its head office or principal place of business is located, would be considered to be a local counterparty in that jurisdiction for all of its derivatives transactions. Consequently, subject to any deemed substitute compliance, all transactions entered into by that registrant are required to be reported even if neither the registrant or its counterparty is situated in the jurisdiction.

In contrast, the definition of “local counterparty” in the TR Rule does not include a registrant unless that registrant is organized or has its head or principal office in the jurisdiction.

As a result of this difference in the “local counterparty” definition in the TR Rule, a transaction involving a registrant in the local jurisdiction will only be required to be reported under the laws of that local jurisdiction if any one of the following applies:

- the derivatives dealer is organized under the laws of the jurisdiction, or has its head office or principal place of business in the jurisdiction,
- the derivatives dealer is an affiliate of a person referenced in the bullet-point above and that party is responsible for the liabilities of the derivatives dealer, or
- the other counterparty to the trade is a local counterparty.

***(b) Reporting counterparty waterfall and record-keeping and additional requirements***

The reporting counterparty waterfall in section 25 of the TR Rule establishes which counterparty to a transaction is the reporting counterparty and is responsible for reporting the transaction to a recognized trade repository. The waterfall in the TR Rule is harmonized with the corresponding provisions, as amended, in the local trade reporting rules in effect in Manitoba and Québec. The reporting waterfall is different from the trade reporting rule in Ontario. These differences are:

- “reporting clearing agency” – the TR Rule, similar to the local rules in Manitoba and Québec, contemplates that a clearing agency which has not yet been recognized or exempted from recognition in the local jurisdiction may undertake to the Authorities to fulfill the TR Rule reporting obligations for a transaction cleared through its facilities;
- “Canadian financial institution” – for a transaction that is not cleared through a reporting clearing agency and is between a Canadian financial institution and a counterparty that is neither a derivatives dealer nor a Canadian financial institution, the TR Rule, similar to the corresponding rules in Manitoba and Québec, the Canadian financial institution will be the reporting counterparty; and
- “written agreement” – for a transaction involving two counterparties that are either both derivatives dealers, both Canadian financial institutions or both local counterparties that are not derivatives dealers or Canadian financial institutions, the TR Rule, similar to the corresponding rules in Manitoba and Québec, permits the counterparties to agree in writing which counterparty will be the reporting counterparty. If the counterparties do not agree, in writing, which counterparty will act as a reporting counterparty, each local counterparty to the transaction is a reporting counterparty.<sup>2</sup> If the counterparties cannot agree, each local counterparty will be required to report transaction identifiers to the relevant Authorities under subsection 25(4).

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<sup>2</sup> Note that the corresponding provision in the Ontario 91-507 rules requires that the reporting counterparty be determined pursuant to the ISDA methodology, as defined in the Ontario 91-507 rule.

Section 25 of the TR Rule also sets out record-keeping requirements for the written agreement referred to above.

These differences are intended to reduce the regulatory burden, particularly for counterparties to derivatives transactions that are not derivatives dealers or Canadian financial institutions. In addition, the changes will reduce the incidents of double reporting of derivatives transactions.

*(c) Exemptions from reporting trades of commodities derivatives*

Section 40 of the TR Rule includes an exemption for a reporting counterparty from the reporting obligations where:

- the transaction is in a derivative based on a commodity, other than cash or currency;
- the counterparty is not a derivatives dealer, a Canadian financial institution or an entity organized in a foreign jurisdiction that is analogous to a Canadian financial institution; and
- at the time of the execution of the transaction, the counterparty's aggregate notional exposure under all contracts based on commodities, other than cash or currency, is less than \$250 million (CAD).

The proposed threshold is very different than the exemptions thresholds in the trade reporting rules in Manitoba, Ontario and Québec. This exemption is intended to reduce the regulatory burden on commodity derivatives market end-users, such as commodity producers, commodity processors and commodity consumers, while still ensuring that the majority of derivatives transaction activity will continue to be reported. Transactions in commodity derivatives where a counterparty is a derivatives dealer or financial institution or has a gross notional exposure exceeding the \$250 million threshold will still be required to be reported in accordance with the regulatory requirements applicable to that counterparty. The exemption is not available for transactions involving derivatives based on assets other than commodities.

The threshold has been established based on analysis conducted by staff of the Authorities. In developing the proposal staff have considered:

- the potential burden on market participants associated with trade reporting,
- benefits that trade reporting provide to regulators and market participants, and
- whether there would be systemic risks associated with derivatives trades that would not be reported.

We encourage comment on whether the proposed threshold is appropriate and the implementations of the threshold. If commenters suggest alternative thresholds, we request that they explain their suggestions and encourage them to provide data or other information to support their suggestions.



## Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex A – Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination*;
- Annex B – Proposed Companion Policy 91-101;
- Annex C - Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*; and
- Annex D – Proposed Companion Policy 96-101.

## Questions

While we encourage comments on all aspects of the Proposed Instrument, we are seeking comments on the following specific aspects of the Scope Rule and Scope CP and the TR Rule and TR CP:

### *(a) The Scope Rule and Scope CP*

1. Does the Scope CP provide sufficient clarity as to the contracts and instruments that are subject to trade reporting? Please provide specific examples where there is not sufficient clarity.
2. The Scope Rule and Scope CP indicate that that options to purchase commodities are derivatives but that certain optionality embedded in an agreement to purchase commodities for future delivery will not, in itself, result in the agreement being a derivative. Do you agree with this approach? Please explain.
3. In New Brunswick, Nova Scotia and Saskatchewan the definition of derivative specifically excludes a contract or instrument if the contract or instrument is an interest in or to a security and a trade in the security under the contract or instrument would constitute a distribution. In these provinces these contracts or instruments are defined as securities. Is the inclusion of subsection 3(6) necessary given that these provinces have such a carve-out?

### *(b) The TR Rule and TR CP*

#### *Local counterparty definition*

4. Is it appropriate to exclude derivatives dealers from the definition of local counterparty appropriate? Please explain. Do you foresee any issues in the jurisdictions adopting a different definition from Manitoba, Ontario and Québec? Please explain.

*Definition of affiliated entity*

5. Subsections 1(4) and (5) of the proposed TR Rule include a harmonized interpretation of the terms “affiliated entity” and “control” that is different from the concept of “affiliate” that applies in the corresponding local rules in Manitoba, Ontario and Québec in that it contemplates that a counterparty may control or be under common control with not just a corporate entity but also a partnership or a trust. Is the TR Rule proposal appropriate? What are the implications of the Authorities adopting an interpretation of “affiliated entity” that is different than the corresponding local rules in Manitoba, Ontario and Québec? Please explain.

*Reporting counterparty waterfall*

6. Section 25 of the proposed TR Rule allows the counterparties to a transaction where either both are derivatives dealers, Canadian financial institutions or not derivatives dealers or Canadian financial institutions to agree on who will be the reporting counterparty. Is this appropriate? Will this be effective in ensuring that the reporting obligation will be applied to the appropriate counterparty? Please provide specific examples or analysis.

7. Do you foresee any difficulties in counterparties agreeing as to who will be the reporting counterparty? If so, explain.

8. Does the inclusion of a Canadian financial institution in the reporting counterparty waterfall create any issues? Please provide specific examples of complications or analysis of potential scenarios.

*End-user Commodity Transactions Exemption*

9. Section 40 of the proposed TR Rule contemplates an exemption from trade reporting for commodity-based derivatives transactions that differs from the section 40 exemption in the existing TR rules in Manitoba, Ontario and Québec. The proposed TR Rule would exempt commodity-based transactions between two end-users provided each counterparty is below a threshold of \$250,000,000 aggregate notional value, without netting, under all of its outstanding commodity-based derivatives transactions.

(a) Does the proposed threshold reflect those entities in the local jurisdiction that you would consider significant participants in the derivatives market? If not, what threshold would more accurately reflect that threshold for the local jurisdiction? The Authorities welcome specific data on the local provincial, national and product-specific derivatives markets.

(b) Are there certain types of counterparties – e.g., those in certain industries – that you anticipate will be most likely to qualify for and rely on the exemption? Please explain.

- (c) What are the implications of the Authorities adopting a different threshold from the section 40 threshold in the existing Manitoba, Ontario and Québec TR rules?
- (d) The proposed TR Rule presently contemplates one threshold applicable across all of the jurisdictions participating in the TR Rule. Please describe in detail, to the extent possible, any implications that would result if different thresholds were applicable in different jurisdictions within the proposed TR rule.
- (e) The proposed TR Rule contemplates that the aggregate outstanding notional value be calculated with reference to outstanding commodity derivatives transactions only. The threshold in section 40 of the corresponding local rules in Manitoba, Ontario and Québec is calculated with respect to all outstanding derivatives transaction, regardless of underlying asset or product. Please describe how the proposed modified calculation basis would affect your organization.
- (f) One of the policy rationales for requiring derivatives trade reporting is to increase transparency. To what extent is lack of transparency in respect of commodity derivatives a concern? Please explain.
- (g) Another policy rationale for requiring derivatives trade reporting is to provide regulators with greater ability to monitor trading for market manipulation, misleading appearance of trading, artificial prices and other practices that might perpetrate a fraud or market abuse. To what extent do concerns exist that these types of practices are occurring in the commodity derivatives market? Please explain.
- (h) Would the adoption of a section 40 exemption threshold at \$250 million, or at a significantly higher level, result in systemic risk in Canada or in any of the participating jurisdictions? Please specify and explain.

### *Implementation and Transition Period*

- 10. We have contemplated that there should be some transitional period between the date on which the proposed TR Rule becomes effective and the date that the first reporting obligations will apply. Is a three month period sufficient for trade repositories to seek and obtain recognition? If not, what period would be sufficient?
- 11. As outlined in the proposed TR CP, we have considered staged implementation of the trade reporting obligations such that the requirement might apply to those lower in the trade reporting waterfall at successively later dates. Given that trade reporting obligations will likely apply to end-users in Manitoba, Ontario and Québec by the time the proposed TR Rule becomes effective, is it necessary for the Authorities to consider staged implementation? Is the staged implementation in the proposed TR CP appropriate?

## Comments

Please submit your comments in writing on or before March 24, 2015. If you are sending your comments by email, please also send an electronic file containing the submissions (in Microsoft Word format).

We do not intend to keep submissions confidential. All comments received will be posted on the websites of each of the Alberta Securities Commission at [www.albertasecurities.com](http://www.albertasecurities.com) and the British Columbia Securities Commission at [www.bcsc.bc.ca](http://www.bcsc.bc.ca). You should not include personal information directly in your comments. It is important that you state on whose behalf you are providing comments.

Thank you in advance for your comments.  
Please address your comments to each of the following:

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

Deliver your comments **only** to the address below. Your comments will be distributed to the other participating jurisdictions.

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