ISDA Safe, Efficient Markets

BY E-MAIL

March 24, 2015

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

c/o Michael Brady
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British Columbia Securities Commission
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Dear Mr. Brady:

Re: Request for Comment on Proposed Multilateral Instrument 91-101 *Derivatives Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting*

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to provide 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 (the "**Authorities**") with comments regarding 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**") and proposed Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the "**TR CP**") (collectively, the "**Proposed Instruments**").

ISDA and its members support initiatives to increase transparency, and therefore recognize the importance of the Proposed Instruments. On behalf of our members that may be reporting counterparties, local counterparties and recognized trade repositories, as defined in the Proposed Instruments, ISDA would like to submit our comments and suggestions for the Authorities' consideration. We strongly support the importance of harmonizing the Proposed Instruments with the *Derivatives: Product*

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

Determination rule or regulation ("91-506") and the *Trade Repositories and Derivatives Data Reporting* rule or regulation ("91-507") each as issued by the Ontario Securities Commission ("OSC"), the Manitoba Securities Commission ("MSC") and the Autorité des marchés financiers ("AMF"). As such, many of our comments address both substantive and perceived differences between the Proposed Instruments, 91-506 and 91-507. We encourage the Authorities, the OSC, MSC, and AMF to continue to work toward harmonized trade reporting requirements in Canada.

I. Scope Rule and Scope CP

ISDA agrees that optionality embedded in an agreement to purchase commodities for physical settlement, such as variable quantity or the right to elect delivery by a certain date, does not change the intention to physically deliver the commodity. As a result, any such optionality would not negate physically settled commodity transactions from being classified as excluded derivatives under the Scope Rule. We appreciate the guidance provided in the Scope CP that embedded optionality may be consistent with the intention requirement in subparagraph 1(1)(d)(i), however we are concerned about the last sentence of that paragraph which says "A contract will not qualify for this exclusion where it can be inferred that the counterparties intend to enter into the contract to achieve an economic outcome that is, or is akin to, an option."

It is not clear to us under what circumstances the Authorities would infer that the parties intend to achieve an "economic outcome", and so we are concerned that a physical commodity that otherwise meets the two-pronged test of 2(1)(d) of the Scope Rule may not be considered an excluded derivative for purposes of the rule. We ask that the Authorities provide clarity as to the purpose of this sentence, since as currently drafted we believe it has the potential to create confusion.

II. TR Rule and TR CP

A. Local counterparty definition

Registrants and deemed compliance

ISDA fully supports the exclusion of derivatives dealers from the definition of local counterparty in the TR Rule. Including foreign dealers that may be required to register as derivatives dealers in Canada in the definition of local counterparty greatly inflates the scope of transactions subject to reporting via inclusion of their transactions with foreign counterparties. This may detract from the ability for regulators to oversee and analyze the activity that is most pertinent to the provincial market. With respect to transparency, including these transactions in publicly available aggregated data and transaction level public reporting may diminish the value of these reports to the public and to regulators since they will offer a more global view of market activity, rather than a purely Canadian one.

A requirement to report all their transactions would disadvantage foreign derivatives dealers subject to registration requirements in Canada since their foreign clients may not wish for their transactions to be reported to additional, non-prudential regulators. As a result, some foreign dealers may limit their activity in Canada, potentially impacting the local markets. Therefore, we encourage the OSC, MSC and AMF to amend the definition of local counterparty in 91-507 to align with the TR Rule for the sake of harmonization and to avoid disadvantaging derivatives dealers that may be subject to registration requirements in Ontario, Manitoba or Québec.

Even though the transactions between foreign derivatives dealers and their foreign counterparties may be subject to substituted compliance under 91-507, this does not alleviate concerns regarding the requirement since the conditions for such alternative compliance are onerous. In practice, the requirement for a reporting counterparty to instruct a Trade Repository ("TR") to provide the transactional data to the provincial regulator(s) still obligates a party to report the relevant provincial jurisdictions to a recognized TR on a trade-by-trade basis, thus limiting the value or efficiency of substituted compliance. In addition, because the TR must be recognized by the provincial regulator, reporting counterparties that utilize a TR for reporting in a jurisdiction listed in Appendix B to 91-507 that is not recognized would not be eligible for deemed compliance.[2] Some accommodation should be made for TRs that are subsidiary entities of a recognized TR and a streamlined recognition process should be allowed for TRs that only wish to obtain recognition for purposes of facilitating deemed compliance for their participants.

In order to more efficiently address both of these conditions, we encourage Canadian regulators to enter into a Memorandum of Understanding ("MOU")[3] with regulators in other jurisdictions to obtain direct access to relevant derivatives data reported subject to another regime's requirements. An MOU between the CSA and a regime specified in Appendix B of 91-507 or the TR Rule should negate the requirement in §26(5)(b) that the relevant TR be recognized by the provincial Authority and eliminate the requirement in §26(5)(c) for a reporting counterparty to instruct a TR to provide access to the data.

Until these hurdles are addressed, it may be easier or necessary for foreign dealers and local counterparties that are affiliated entities to fully report their transactions with foreign counterparties in Canada rather than bifurcate their reporting streams to either report different data fields for transactions with local counterparties vs. non-local counterparties or divide reportable transactions based on whether the foreign TR is recognized in Canada. The operational complexity of meeting the conditions in §26(5) have the practical effect of negating any benefit or efficiency that should result from the application of substituted compliance.

Individuals

As currently drafted, 91-507 does not capture individuals within the definition of "local counterparty"; however, the TR Rule includes a new requirement that individuals should also be included in that definition[4]. This is a significant divergence from 91-507 and will cause significant new compliance costs for market participants.

We question the value of derivatives data for transactions involving individuals to the analysis of systemic risk or the oversight of market conduct, especially considering the inconsistent requirement of such information between the provinces and the operational challenge of identifying individuals that are local counterparties. Since individuals are not eligible for Legal Entity Identifiers ("LEI") and are instead reported via use of a client code, it would be difficult to track any activity by a particular person across reported data. With respect to requiring transactions with individuals in order to understand the full scope

[2] Notably, the TRs authorized for reporting in Europe are not currently recognized in Canada.

[3] We note that the European Securities and Markets Authority has concluded MOUs with each of the Reserve Bank of Australia and the Australian Securities and Investments Commission that provide for direct access to data held in European TRs.

[4] Neither the TR Rule nor the TR CP provide clear direction as to how a "person" should be determined to qualify as a local counterparty since such person would not be "organized under the laws of the local jurisdiction", nor presumably have a head office or principal place of business in accordance with the same conventions that would apply to a "company". We strongly prefer that individuals be removed from the definition of local counterparty, however, if the Authorities determine that individuals will remain then we suggest that subsection (a) of the local counterparty definition be supplemented with text similar to the following: "(iv) in the case of an individual, he or she has his or her principal residence in the local jurisdiction;". We are happy to discuss a proposed definition with the Authorities.

of the activity in the province, we believe that from a supervisory perspective, this negligible population is not important. Further, it seems inconsistent to exempt certain commodity transactions from reporting while at the same time requiring individuals to be local counterparties and require reporting in these individuals' jurisdictions given that trades concluded with individuals are far less important in volume and size. Individuals transact sporadic, customized and very small notional trades that are not likely to amount to more than a fraction of a percentage of Canadian market total volume.

Although individuals themselves are exempted from reporting, the addition of individuals to the scope of local counterparties would add cost and complexity to reporting conducted by derivatives dealers and local counterparties (which are not individuals). Reporting counterparties subject to 91-507 will not have obtained representations from individuals to confirm their local counterparty status since these transactions are currently only reportable in the jurisdiction(s) relevant to the reporting counterparty. Additional client outreach, which is only applicable to the Proposed Instruments, may be required to confirm the local counterparty status of individuals and maintain static data. We believe that it is not necessary to capture individuals and that the costs of including individuals as local counterparties would outweigh any benefit due to the following:

- The costs related to the additional outreach that will have to be performed by reporting counterparties already covered by 91-507;

- The costs of maintenance of such location records that system-wise are typically captured in different areas of the organization than static information on corporate clients;

- The costs related to the extra care reporting entities will have to ensure around the confidentiality of such information (PIPEDA[5] requirements: even if an address is not considered personal, these issues will necessarily surface in organizations and with individual clients);

- And finally and importantly, because the benefits are tiny. Related transactions that are carried with individuals AND that would not be reported in a specific jurisdiction constitute a negligible fraction of the OTC derivatives Canadian market and by no means constitute any form of systemic risk that regulators should be concerned about.

Therefore, we ask that the Authorities eliminate individuals from the definition of local counterparty.

B. Definition of affiliated entity

Parties cannot be certain they are fully compliant with both the TR Rule and 91-507 when key definitions are disharmonized and subject to potentially different interpretations. We feel strongly that whether a party qualifies as an affiliate that is a local counterparty or whether such party may be subject to an inter-affiliate exemption should be consistent across any trade reporting requirements in Canada. A conservative comparison of the TR Rule and 91-507 yields the conclusion that they are not harmonized and that, as a result, some parties may qualify as an "affiliate" in some provinces and not others. For instance, is it correct to assume that under the TR Rule a trust or partnership could qualify as an affiliate which is a local counterparty, but under 91-507 the same party may not be considered an affiliate or a local counterparty even though the entity that controls it is a local counterparty under both sets of rules?

If the exact delineation is not clear it will create a challenge for parties to accurately and consistently determine their own status as a local counterparty or their qualification for an inter-affiliate exemption

[5] *Personal Information Protection and Electronic Documents Act*

from public reporting with respect to each rule. A reporting counterparty will have no choice but to obtain and rely on a representation from its counterparties with respect to their status as an affiliate under the relevant local counterparty definition without certainty as to whether provincial distinctions have been appropriately considered. The quality and completeness of the data may be impacted as a result.

Under both the TR Rule and 91-507, a transaction between affiliated entities is not subject to either aggregate or transaction level public reporting. Due to the differences in the way affiliates are defined, it is possible that the transactions of a pair of counterparties may be subject to public reporting under one rule and not the other. Since in order to help protect party anonymity, each TR is anticipated to produce a single, separate report in Canada to meet each of the aggregated public reporting and transaction level public reporting requirements, then the transactions to a pair of counterparties can only either be included or excluded. Unless the definition of affiliates is harmonized, the Authorities, OSC, MSC and AMF will need to agree and publish the public reporting requirement for transactions between counterparties that do not qualify for the inter-affiliate exemption under both rules.

With respect to agreeing to a harmonized definition of affiliate, we believe that a wider definition of affiliate is preferable. Corporate structures involve a variety of entities for tax purposes so it is unclear why only corporations would be included in an affiliated entity definition. The definition of affiliated entity in the TR Rule seems to be sufficiently broad as it includes both partnerships and trusts. Additionally, we appreciate that the definition in the TR Rule does not include the term "deemed". Its use in 91-507 implies that other relationships may also be affiliates; a definitive definition of what an affiliated entity means is preferable. Finally, we believe that transactions between affiliated entities should equally qualify for an exemption from public dissemination of transaction reporting, an intragroup exemption from mandatory clearing and an exemption from execution on a Derivatives Trading Facility. We recommend that the CSA consider adopting a singular, broad definition of affiliated entity across these rules.

C. Definition of derivatives dealer

The definition of a derivatives dealer under the OSC and MSC versions of 91-507 includes "in Ontario" or "in Manitoba", respectively. However, the definition of a dealer in the Québec Derivatives Act and the definition of a derivatives dealer in the TR Rule do not have a provincial specific reference. This led us to question whether a party that meets the definition of a derivatives dealer due to its activity in one province would be considered a derivatives dealer in all provinces. Or, for instance, could a party that conducts its primary business as a derivatives dealer in Alberta hedge that activity with a derivatives dealer in British Columbia and deem themselves a non-dealer with respect the latter?

We understand from speaking with the Authorities that the Proposed Instruments should be considered a separate instrument in each participating province, and therefore parties should provide a provincial-specific representation with respect to their status as a derivatives dealer. If we questioned the appropriate interpretation then we expect that others may as well, and so suggest that the Authorities include guidance in the TR CP that clarifies that since the Proposed Instruments are considered a separate instrument in each province, a party should consider its status as derivatives dealer in each jurisdiction.

D. Reporting counterparty

Reporting clearing agency

ISDA acknowledges that the inclusion of clearing agencies that are willing to provide an undertaking to assume the reporting obligation in the reporting counterparty hierarchy is intended to address gaps in reporting which may occur in the event a transaction is cleared via a clearing agency that is neither recognized nor exempted in a particular province in which the counterparty is a local counterparty. However, there are two primary issues with this approach that we would like to highlight - transparency and completeness.

First, although the definition of a reporting clearing agency refers to a written undertaking provided by the clearing agency, neither a prescribed form nor any specifications for such documentation are included in TR Rule or the TR CP. Despite a similar requirement in the MSC and AMF versions of 91-507, clearing agencies are voluntarily fulfilling the role of the reporting clearing agency without having delivered such an agreement. As a result, there is a lack of transparency with respect to which clearing agencies have officially assumed the role of a *reporting clearing agency*. Members of particular clearing agencies will have been notified of such services, and ISDA has created an unofficial list. But ideally, the Authorities, OSC, MSC and AMF would publish and maintain a table of reporting clearing agencies, including those which are recognized, exempted or have provided a written undertaking in order to facilitate public transparency. Such a list would be useful for local counterparties looking to transact with a new clearing agency, as they would have upfront affirmation that the reporting obligations for their cleared transactions would be met.

Secondly, since a clearing agency is not obligated to accept the role of a reporting clearing agency in a province for which it clears a transaction for a local counterparty but is itself not recognized or exempted, there may be gaps in the reporting of cleared transactions. Clearing agencies need certainty that when they assume the role of a reporting clearing agency in a province that they will not be subject to any obligations beyond those prescribed in the TR Rules. In provinces for which a clearing agency has limited or no current clients that are local counterparties, there may be no commercial incentive to put themselves forward as reporting clearing agency. Since under most global reporting requirements the clearing agency is the designated reporting counterparty, parties have built their reporting architectures to suppress the reporting of cleared transactions. Altering reporting logic to compensate for exceptional cases where a clearing agency has not offered to report may be complex and costly. In instances where the transaction is reported by a clearing agency in another jurisdiction or even another province, a separate report by the party facing the clearing agency in the transaction may result in duplicate and/or inconsistent reporting that could impact the quality of Canadian and global aggregate data.

The scope of potential gaps is likely very limited, but transparency with respect to reporting clearing agencies would provide clarity and certainty. Perhaps these potential gaps will be addressed, at least in part, once the clearing mandate has been established in Canada. In the meantime, any efforts on the part of the Authorities to facilitate transparency and completeness with respect to the reporting responsibility for cleared transactions would be appreciated.

Reporting counterparty waterfall

ISDA does not foresee an issue with respect to parties to a transaction that are at the same level in the reporting counterparty waterfall in §25 of the TR Rule agreeing on whom will be the reporting counterparty. As acknowledged in the TR CP, ISDA has leveraged the reporting counterparty hierarchy it established with the industry for reporting under the Part 43, Part 45 and Part 46 regulations of the Commodity Futures Trading Commission ("CFTC") to develop the Canadian Transaction Reporting Party Requirements[6] (the "RCP Standard"). The RCP Standard has proven to work well to determine a single reporting counterparty in conjunction with both the CFTC's regulations and 91-507. For transactions which are subject to reporting in both the U.S. and Canada, it facilitates a single reporting counterparty across jurisdictions, thus promoting efficiency and global transaction data quality.

In order to help firms comply with the requirements in §25 of each 91-507 to enter into a corresponding written agreement, ISDA published the ISDA 2014 Multilateral Canadian Reporting Party Agreement (Deemed Dealer Version)[7]. To date, 116 parties have adhered, thereby agreeing to apply the RCP Standard published by ISDA to determine the reporting counterparty to their mutual transactions. As additional parties adhere, the schedule to the agreement is provided by ISDA to the OSC, MSC and AMF on behalf of the adhering parties. ISDA is currently seeking feedback on a draft of a non-dealer version of the agreement, the 2015 Multilateral Canadian Reporting Party Agreement (Non-Dealer Version), which can be used for transactions between local counterparties that will become subject to reporting on or after June 30, 2015 under 91-507. In anticipation of additional trade reporting requirements, the RCP Standard and both versions of the Multilateral Canadian Reporting Party Agreement were designed to be extensible to other provinces and territories in Canada. As administrator of the Multilateral Canadian Reporting Party Agreements, ISDA can help parties to comply with the recordkeeping requirement in §25(2) of the TR Rule and provide transparency to the Authorities with respect to those using the agreements to comply with the requirement in §25(1)(d).

Dual UTI submission

We understand that the requirement in §25(4) of the TR Rule is intended to incentivize parties to enter into agreements which facilitate a single transactional report. ISDA has demonstrated a strong preference for the efficiency of single-sided reporting and the value it adds to the quality of aggregated data. We encourage parties to use the RCP Standard, delegated reporting or another agreed method to determine a single reporting counterparty for each transaction.

However, we are concerned about the use of the Unique Transaction Identifier ("UTI") reporting requirement in §25(4) of the TR Rule to achieve this goal. As conveyed to the MSC with respect to Rule No. 2014-19[8], this provision puts an undue burden on non-dealer local counterparties that are not Canadian financial institutions and further disharmonizes the trade reporting requirements in Canada. Although we can understand the regulatory need to identify duplicates when both parties report, ISDA feels strongly that by definition a UTI is a value that is known and used by both parties to the transaction in the event each reports in Canada and in the event either one or both parties reports in other global jurisdiction(s). Absent use of an agreed UTI, parties could simply report using their internal reference numbers; an approach that does not support the ability of individual regulators or the global regulatory

[6] http://www2.isda.org/attachment/NzMzNA==/Reporting%20Party%20Requirements_Canada_20Mar2015_clean.pdf

[7] http://www2.isda.org/attachment/Njk3NA==/2014%20Sept%2022%20ISDA_2014_Multilateral_Canadian_Reporting_Party_Agreement_Dealer_FINAL.pdf

[8] http://www2.isda.org/attachment/NzI3MQ==/ISDA%20Response%20MSC%2091-507%20Amendments_16Dec14_FINAL.pdf

community to meaningfully and accurately aggregate data. Use of a single, agreed UTI negates the need for parties to separately obtain, retain and report the UTI used by their counterparty. Rather than adding exceptional processing that is a burden for both local counterparties and the Authorities as the recipient(s), the Authorities should follow the drafting used in Ontario and Québec which places an onus on the parties to ensure that a single UTI is used in accordance with the recommendations of the Financial Stability Board[9].

If both local counterparties report and use the same UTI, the transaction would not be duplicated if the same TR is used. In the event different TRs are used, any duplicate reporting could be easily identified without the need for a separate notification to the Authorities. At a minimum, we ask that the requirement in §25(4) should not apply (i) to parties that utilize the same UTI as their counterparty when reporting a transaction, or (ii) where there is only one local counterparty in the applicable province given that the local regulator will not gain any additional information from the stand-alone report on the UTI used. In either case the requisite notification to the Authority is not necessary to identify duplicate reporting. Providing this exception would encourage local counterparties to establish the technological mechanisms to create and/or consume UTI and the communication lines to transmit them.

E. Identifiers

Legal Entity Identifiers

ISDA recognizes that using LEIs to identify the parties to a reported transaction is a powerful tool that improves the accuracy and usefulness of reported data both within and across global reporting regimes. Reporting counterparties have built the necessary infrastructure to hold LEIs as party of their static data, and as reporting requirements continue to expand across the G20 jurisdictions, the number of parties obtaining LEIs continues to grow.

Despite the advancement of the LEI initiative, reporting counterparties still have counterparties which are not subject to a requirement by their local authority to obtain one. Regardless of the ease and low cost to apply for and maintain an LEI and the outreach efforts undertaken by reporting counterparties, a percentage of parties may not be persuaded to obtain one ahead of their own regulatory requirement. In these limited cases, the reporting counterparty could not comply with 27(a) of the TR Rule and instead would need to provide an alternative party identifier. The TR CP acknowledges the case where a party identifier is not available from the Global LEI System ("GLEI"), but does not address cases where a substitute identifier that is in accordance with GLEI is not available. While not undermining the requirement to identify counterparties with an LEIs, we request that the TR CP recognize the use of alternative party identifiers in limited cases while the requirement to obtain an LEI expands to additional global jurisdictions.

Unique Product Identifiers

ISDA appreciates footnote 7 in the TR CP which acknowledges the ISDA OTC Taxonomy as an acceptable system of product taxonomy for reporting a Unique Product Identifiers ("UPI"). The ISDA OTC Taxonomy is in broad use globally for product identification in reporting, and ISDA is actively engaged with regulators and IOSCO as the global effort to adopt a consistent approach to UPI commences. As part of any participation in the global dialogue, we encourage the Authorities to support

[9] September 19, 2014, *Feasibility study on approaches to aggregate OTC derivatives data*: http://www.financialstabilityboard.org/wp-content/uploads/r_140919.pdf

the leveraging of existing industry standards, such as the ISDA OTC Taxonomy, as the UPI or a basis for the UPI for global transaction reporting in order to ease the cost and difficulty for reporting counterparties to comply.

F. Data available to public

Harmonization

With respect to both the aggregate and transaction level reporting requirements in §39, we believe it is crucial that the requirements in Canada be harmonized in order to provide consistent and fair access to data while providing equal protections to preserve anonymity and the Canadian market. We ask that the Authorities consider the recommendations recently made by ISDA[10] to the Canadian Securities Administrators ("CSA") with respect to the transaction level public reporting requirements. We appreciate the recent amendments issued by the OSC[11] and MSC[12], and the exemptive order issued by the AMF[13] that extend the date for transaction level public reporting to July 29, 2016. This timeframe should allow for the analysis of data reported in Ontario, Manitoba and Québec in order to determine whether the current requirements are both beneficial and appropriate. Since limited data may be reported under the TR Rule and available for analysis prior to the deadline under 91-507, the Authorities should ensure that any final requirements under 91-507 with respect to the transaction level public reporting requirements are suitable to and adopted under the TR Rule as well.

Dissemination timing

Under §39(3) of the TR Rule, TRs are required to make available data for transactions involving a clearing agency, derivatives dealer or CFI on T+1; therefore only transactions between two non-dealers would be held until T+2. However, under §39(3) of 91-507, only transactions involving a dealer or derivatives dealer are subject to reporting by T+1. This means that the cleared transactions of a non-dealer and both cleared and uncleared transactions of a non-dealer CFI would be subject to dissemination by the TR by T+1 under the TR Rule but by T+2 under 91-507. We acknowledge that the CSA plans to undertake a review of reported derivatives data in order to reassess the requirements for transaction level public reporting, and that as a result the TR Rule and 91-507 may ultimately be aligned around that informed view.

We encourage an alignment of the timing for transaction level public dissemination as we believe a different requirement adds operational complexity for TRs and could provide unequal treatment to parties based on their local counterparty jurisdiction. Similar to the concern raised above regarding transactions subject to an inter-affiliate exemption, since we assume there will be (and believe there ought to be) a single public transaction report per TR, if the dissemination timings are different the Authorities, OSC, MSC and AMF would need to agree and publish the requirement that applies when a transaction is subject to different dissemination timeframes in different provinces to which the parties are local counterparties. Assuming the lowest threshold would apply, this may be viewed as a disadvantage for counterparties that report under the TR Rule.

[10] http://www2.isda.org/attachment/NzIxNg==/ISDA_Canada_PublicDisseminationLetter_16Jan2015_FINAL.pdf
[11] http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20150212_91-507_derivatives-data-reporting.htm
[12] http://www.msc.gov.mb.ca/legal_docs/legislation/notices/91_507_notice_am_2_package.pdf
[13] http://www.lautorite.qc.ca/files/pdf/bulletin/2015/vol12no6/vol12no6_6-10.pdf

With respect to which timeframes would be preferable for a uniform approach, we support the T+1 timeframe for transactions involving a clearing agency since cleared products tend to be more liquid and standardized, and therefore a consistent, earlier timeframe for all market participants should not compromise the anonymity of any party. However, requiring an earlier timeframe for reporting of uncleared transactions involving a CFI would be problematic since the CFI status of a party to a transaction is not known to a TR. Even if TRs requested this information as part of their onboarding processes, a particular TR would not be able to collect CFI status for parties which are not on-boarded to its platform, and thus could not consistently apply logic to include uncleared transactions involving CFIs in a T+1 dissemination file. Requiring reporting counterparties to obtain and report CFI status on a transactional basis would add significant cost and effort for both reporting counterparties and TRs for little benefit since most transactions with CFIs would already be subject to dissemination on a T+1 timeframe if the transaction is cleared, the CFI is a derivatives dealer or the CFI faces a counterparty which is a derivatives dealer.

G. End-user Commodity Transactions Exclusion

We support an exclusion for the reporting of commodity transactions for end-users, but believe that for the sake of fairness and operational complexity it is important that the TR Rule and 91-507 align. If based on the Authorities' analysis and the feedback of end-users most likely to be impacted by §40, it is determined that the threshold should be raised and/or the aggregate notional calculation should be based solely on commodity derivatives, then corresponding amendments should be adopted under 91-507. We note that it may be easier for some parties to calculate their aggregate notional based on a single asset class.

We are concerned about the use of the term "each counterparty" in 40(c) of Option #1 in the TR Rule as it implies that the parties must know each others' status under the provision in order to determine whether the transaction may be exempted from reporting. Representations would need to be gathered and maintained for all parties that may qualify for an exemption and corresponding static data implemented as part of reporting architectures. Since a party's aggregate notional as compared to the threshold could change over time, additional representation and systematic changes could be required. This seems to replace a reporting burden with an administrative burden and a different technological burden. Whereas, the use of "each local counterparty" in 40(c) Option #2 of the TR Rule and under 91-507, seems to allow for each local counterparty to independently determine whether it is subject to a reporting exemption for the transaction based on its current aggregate notional. This approach puts less burden on a party that is consistently eligible for the exemption.

It would also be extremely challenging if a party or a pair of counterparties qualified differently for the commodities exclusion either between provinces under the TR Rule or between the TR Rule and 91-507. Parties would have to obtain and maintain provincial specific representations and built separate logic to determine whether the exemption applies in each province relevant to a local counterparty. Such complexity and burden undermines the value of the exclusion, and could drive parties to trade with counterparties in a province for which the transaction would not be subject to reporting.

Regardless of which approach is taken to the commodity exclusion, we do not believe it will have a materially negative impact on market transparency or surveillance. Nor do we believe that a higher threshold would create systemic risk. Most commodity derivatives are physical, rather than synthetic, so fall outside the scope of the TR Rule. The nature of this market does not lend itself to speculation; rather commodity derivatives tend to serve an end-user community with direct exposures.

H. Exemptions

Although we appreciate the opportunity for a participant to request, and potentially obtain, an exemption from one or more Authorities under §42 of the TR Rule, such process can be extremely onerous when the participant has obligations under the TR Rule in multiple provinces. Though we acknowledge the autonomy of each Authority, we strongly encourage the Authorities to offer a mechanism for a participant to request and obtain an exemption under the TR Rules from all or more than one of the Authorities. Ideally, such mechanism would also allow a party to seek an exemption under both the TR Rule and 91-507, easing the burden for both participants and regulators.

I. Implementation and transition period

Transitional period

We agree that there should be a transitional period between the date on which the proposed TR Rule becomes effective and the date that the first reporting obligations will apply. A three month period may be sufficient for reporting parties to prepare, however such period could overlap but should not run concurrently with the time period for TRs to seek and obtain recognition. Parties that are onboarding to a TR need certainty that their chosen TR will apply for and be granted recognition in all the provinces for which they may have reporting obligations. In order to allow adequate time for both TR recognition and reporting counterparties to onboard to and implement and test in accordance with the requirements of a recognized TR, six months would be a more reliable period.

With the Proposed Instruments, there are multiple Authorities for which each TR has to simultaneously seek recognition. Securing recognition from each of the Authorities may take the majority of or even more than three months, even though some of the TRs have already obtained recognition from OSC, MSC and AMF. Ideally, TRs would be allowed to submit a single application to obtain recognition from the Authorities, regardless of the independent review and authorization that may be required by each Authority. A collaborative process would encourage TRs to seek recognition from all Authorities. If a TR chooses not to seek recognition from all Authorities due to the cost or complexity of the process, then it would adversely affect reporting counterparties that are counting on use of a single TR to meet their reporting obligations in Canada. If reporting counterparties are driven out of those markets due to cost or complexity, it could negatively affect liquidity.

Staged Implementation

Although end-users in Manitoba, Ontario and Québec may be already reporting to a TR, end-users in other provinces will not have built reporting architecture, on-boarded to a TR or gathered the requisite representations they need in order to assume reporting obligations. End-users are less likely to have multi-provincial or multi-jurisdictional reporting obligations, and so many will need to prepare for derivatives data reporting for the first time. Such effort cannot commence in earnest until there is certainty with respect to the reporting obligations that a party will hold and the timing of such obligations. Therefore, a staged implementation for non-dealers subject to the Proposed Instruments is both necessary and appropriate.

Pre-existing transactions

We support the proposed 90 day additional phasing for reporting pre-existing trades subsequent to the relevant implementation date for reporting commencement. In accordance with our support for staged

implementation for reporting of new transactions, many market participants will be reporting pre-existing transactions for the first time and will benefit from additional time to prepare for and comply with these requirements. A separate, subsequent phase for reporting pre-existing transactions will benefit data quality as reporting counterparties will not be working to prepare for and comply with both sets of requirements simultaneously.

In §43(2) and (3), the TR Rule provides that the scope of reportable pre-existing transactions excludes those which are no longer live as of deadline for reporting pre-existing deadline (the "pre-existing deadline"). Aside from transactions for which the maturity or termination date precedes the pre-existing deadline, a reporting counterparty cannot predict which transactions may be subject to a negotiated unwind, novation, credit event or other termination event that will render the trade no longer subject to reporting. Therefore, a reporting counterparty which exercises its option to report its pre-existing transactions prior to the relevant pre-existing deadline may actually over-report. Since in retrospect some transactions weren't required to be reported, the consent a reporting counterparty has obtained from its counterparties may be insufficient and the reporting counterparty may be considered to be in breach of data privacy restrictions.

Although this may not have been an intended consequence of the text in §34 of 91-507, the concerns explained above have deterred some reporting counterparties from reporting their pre-existing transactions in advance of the April 30, 2015 deadline under 91-507, which means the TRs will be inundated with parties seeking to fulfill their obligations on or as close to that deadline as possible. This situation can be easily remedied by clarifying in TR CP that the scope of pre-existing transactions excludes those which are no longer live as of the date on which the reporting counterparty fulfills its obligation, either on or before the pre-existing deadline.

III. Conclusion

ISDA and its members thank the Authorities for their consideration of the comments regarding the Proposed Instruments provided herein. We welcome any questions you may have with respect to our recommendations and are happy to provide any additional feedback or information as may be helpful to your consideration.

Please contact me or ISDA staff if you have any questions or require further input.

Sincerely,

Katherine Darras

Katherine Darras
General Counsel, Americas
International Swaps and Derivatives Association, Inc.