



Canadian Securities
Administrators

Autorités canadiennes
en valeurs mobilières

CSA Multilateral Notice of Approval
Multilateral Instrument 91-101 *Derivatives: Product Determination*
and
Companion Policy 91-101CP *Derivatives: Product Determination*
– and –
Multilateral Instrument 96-101 *Trade Repositories and Derivatives*
Data Reporting
and
Companion Policy 96-101CP *Trade Repositories and Derivatives Data*
Reporting

January 22, 2016

Introduction

The securities regulatory authorities (each an **Authority** and collectively the **Authorities** or **we**) in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon (the **Participating Jurisdictions**) are adopting Multilateral Instrument 91-101 *Derivatives: Product Determination* (the **Product Determination Rule**) and Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the **TR Rule**) (together the **Instruments**).

In addition, we are implementing Companion Policy 91-101CP *Derivatives: Product Determination* (the **Product Determination CP**) and Companion Policy 96-101CP *Trade Repositories and Derivatives Data Reporting* (the **TR CP**) (together the **Companion Policies**).

In some jurisdictions, government Ministerial approvals are required for the adoption of the Instruments. Subject to obtaining all necessary Ministerial approvals, and in some Participating Jurisdictions, proclamation of certain amendments to applicable securities legislation, the Instruments are targeted to come into force in each of the Participating Jurisdictions on May 1, 2016.

Background

On December 6, 2012, the Canadian Securities Administrators (**CSA**) 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**). Thirty-five comment letters were received.

On June 6, 2013 the Authorities in Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan published for comment Staff Consultation Paper 91-302 *Updated Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting* (the **Updated Draft Models Rules**). On the same date the securities regulatory authorities in Manitoba, Ontario and Quebec published for comment corresponding proposed local rules and companion policies, based on the Updated Draft Model Rules. Twenty-seven comments letters were received on the Updated Draft Model Rules.

After reviewing the comments received and making determinations on revisions to the Updated Draft Models Rules, the Authorities in Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan published Proposed Multilateral Instrument 91-101 *Derivatives: Product Determination* and Proposed Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* and the related companion policies (the **Proposed Instruments**) on January 21, 2015. We received eighteen comment letters. A list of those who submitted comments and a chart summarizing the comments received and responses to those comments are attached at Annex A to this Notice.

We anticipate that we will publish proposed amendments to the TR Rule in the near future (the **Proposed Amendments**). We anticipate that the Proposed Amendments will be generally consistent with the proposed amendments to the corresponding local rules published for comment by the Manitoba Securities Commission, the Ontario Securities Commission and the Autorité des marchés financiers on November 5, 2015.

Substance and purpose of the Product Determination Rule

The purpose of the Product Determination Rule is to define the types of over-the-counter (**OTC**) derivatives that will be subject to reporting requirements under the TR Rule. These OTC derivatives are defined as “specified derivatives”. The Product Determination Rule will initially only apply to identify the types of OTC derivatives subject to the TR Rule; however, we expect that it will be used to also define the types of OTC derivatives subject to future rules relating to OTC derivatives. The Product Determination Rule does not apply to other elements of securities legislation. Any other legislation, rules, notice or other policies applicable to derivatives will continue to apply to all products meeting that definition.

The Product Determination Rule provides that certain types of contracts or instruments that fall within the broad definition of “derivative” in the securities legislation of the applicable Participating Jurisdiction are excluded from the definition of “specified derivative”; as a result, these contracts or instrument are excluded from the requirements in the TR Rule. The excluded contracts are contracts that have not traditionally been considered to be OTC derivatives.

Substance and purpose of the TR Rule

The TR Rule has three main objectives. First, it will improve transparency in the OTC derivatives market for regulators. Derivatives data is essential for effective regulatory oversight of the OTC derivatives market, including the ability to identify and address systemic risk and 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 OTC derivatives market.

Second, the TR Rule contemplates public dissemination of certain transaction-level data to improve transparency in the OTC derivatives market for participants. Derivatives data will provide participants with information relating to the OTC derivatives market to allow them to assess their own derivatives and to value their positions. Detailed requirements for public dissemination of transaction-level data are anticipated to set out in the Proposed Amendments.

Finally, the rule imposes requirements relating to the governance and operation of trade repositories. These requirements are designed to ensure that trade repositories act in a way that is consistent with the public interest.

The requirements in the TR Rule:

- facilitate the regulation and oversight of trade repositories, including requirements for the recognition process, operations and data access and dissemination; and
- mandate that counterparties to derivatives report specific data about those derivatives.

Summary of the Product Determination Rule

The definition of “derivative”¹ in applicable securities legislation includes the types of instruments traditionally referred to as “derivatives” (for example, swaps and forwards) as well as other novel instruments. However, the definition of “derivative” is broad enough to capture many contracts and instruments that have not traditionally been considered to be “derivatives”. The Product Determination Rule tailors the application of the regulatory requirements in the TR Rule to certain existing and emerging products referred to as “specified derivatives”. Contracts or instruments that are not “specified derivatives” will not be subject to trade reporting requirements under the TR Rule.

In Alberta, the Alberta Securities Commission has issued an order designating certain types of investment contracts and options to be “derivatives” and not to be “securities” for the purpose of the Product Determination Rule. As a result, these designated contracts and instruments are “specified derivatives”. The designation order is available on the website of the Alberta Securities Commission and is included as Annex F to this Notice.

In British Columbia, Newfoundland and Labrador, Northwest Territories, Nunavut, Prince Edward Island and Yukon, a contract or instrument is a “derivative” if it meets the criteria in paragraph 1(4)(a) or if it is a security solely because it is an investment contract, option, futures contract or document evidencing an option, subscription or other interest in a security.

¹ Subsection 1(4) of the Product Determination Rule defines “derivative” for the Participating Jurisdictions that do not have a definition of derivatives in their local securities legislation that is consistent with the definitions in the securities legislation in Alberta, New Brunswick, Nova Scotia and Saskatchewan.

The following contracts are not “specified derivatives” under the Product Determination Rule:

- gaming and insurance contracts that are regulated by a domestic or a foreign regulatory regime;
- contracts for the purchase and sale of currency provided that the contract (i) settles within prescribed timelines, (ii) is intended by the counterparties to be settled by delivery of the currency referenced in the contract, and (iii) is not rolled-over;
- commodity forward and option contracts provided that physical delivery of the commodity is intended and the contract does not permit cash settlement unless an intervening cause makes physical delivery impossible or commercially unreasonable;
- evidence of a deposit with a bank, credit union or certain other federally or provincially regulated entities;
- contracts or instruments traded on certain exchanges;
- certain instruments such as warrants, where an issuer of a security is a counterparty and the underlying interest of the derivative is a “security” of the issuer.

In New Brunswick, Nova Scotia or Saskatchewan, a contract or instrument that would be a security but is not as a result of the exclusion of “derivatives” from the statutory definition of “security” is excluded from the definition of “specified derivative” unless that contract or instrument is a security solely by reason of being an investment contract.

As noted above, any contract or instrument excluded from the definition of “specified derivative” under the Product Determination Rule will not be subject to trade reporting requirements under the TR Rule.

Summary of the TR Rule

As noted above, the requirements in the TR Rule generally fall into two categories: (i) requirements that facilitate the regulation and oversight of trade repositories, and (ii) requirements that counterparties to derivatives report specific data about those derivatives.

(i) Regulation and oversight of trade repositories

To obtain recognition as a trade repository in a Participating Jurisdiction, a person or company must apply to the relevant Authority for recognition. The TR Rule establishes the process for making this application.

A person or company that applies to be a recognized trade repository in a Participating Jurisdiction will need to file a completed Form 96-101F1 and financial statements. Factors that may be considered by the applicable Authority in assessing an application for recognition are described in the TR CP.

The TR Rule also establishes on-going requirements that will apply to recognized trade repositories in each Participating Jurisdiction. A recognized trade repository must comply with the trade repository requirements set out in the TR Rule, as well as all terms and conditions imposed by each applicable recognition order.

A recognized trade repository will be required to provide each applicable Authority with interim and year-end financial statements and to provide notice of any significant changes to the information submitted in its Form 96-101F1 before implementing the changes.

Once operational, a recognized trade repository will be required to accept derivatives data for each asset class set out in an Authority's 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 are expected to be fairly and equitably allocated amongst its participants and must be publicly disclosed. Further, a recognized trade repository will be required to have rules, policies and procedures to allow its participants to confirm the accuracy of reported data.

A recognized trade repository will be required to provide the following access to derivatives data:

- each Authority will have access to all relevant derivatives data reported to the recognized trade repository in accordance with the Authority's mandate;
- counterparties to a derivative will have access to derivatives data relevant to their derivatives; and
- the public will have access to aggregate data on open derivatives including volume, number and prices related to derivatives.

(ii) Derivatives data reporting requirements

Under the TR Rule all derivatives involving a local counterparty are required to be reported to a recognized trade repository or, in limited circumstances, to the applicable Authority. The TR Rule establishes a hierarchy for determining which counterparty will be required to report a derivative. This hierarchy is intended to place the reporting burden on the counterparty most capable of fulfilling the reporting obligations. For example, in the case of a derivative (assuming that it is not cleared through a clearing agency) that involves one counterparty that is a derivatives dealer and another that is not, the derivatives dealer will be required to fulfill the reporting obligations.

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

- creation data, which includes specific terms relating to the derivative;
- life-cycle event data, which includes any change to derivatives data previously reported; and

- valuation data, which includes the current value of the derivative.

Appendix A to the TR Rule provides specific details on each type of data that the reporting counterparty to a derivative must report. Guidance for the data fields in Appendix A is included in the Description column in the reporting fields table.

The TR Rule requires that reporting be completed immediately following a transaction. However, where it is not technologically practicable 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.

Derivatives 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 TR Rule provides specific deadlines for the reporting of these pre-existing derivatives.

The TR Rule provides certain exclusions from the requirement to report derivatives data. These are:

- an exclusion for a local counterparty that has not had, in the preceding twelve months, an aggregate month-end gross notional amount under commodity-based derivatives exceeding \$250 000 000;
- an exclusion from the requirement to report a derivative between a non-resident derivatives dealer and another non-resident counterparty where the derivative is reported in a jurisdiction solely because one or both counterparties is a non-resident derivatives dealer in that jurisdiction; and
- an exclusion from the requirement to report a derivative between a government of a local jurisdiction and a crown corporation or agency that is consolidated with the government for accounting purposes.

In addition, the TR Rule provides for a temporary exclusion from the reporting obligations for derivatives between counterparties that are affiliated entities and are neither derivatives dealers (or affiliated with a derivatives dealer) nor clearing agencies (or affiliated with a clearing agency). We expect this exclusion to apply until we have implemented final requirements relating to reporting derivatives between two affiliated entities. We expect that a proposed exclusion from the obligation to report certain derivatives between affiliated entities will be published for comment as part of the Proposed Amendments.

Summary of changes

After considering the comments received on the Proposed Instruments, we have made certain revisions. These revisions are reflected in the Instruments and Companion Policies that we are publishing concurrently with this CSA Multilateral Notice. As these revisions are not material, we are not republishing the Instruments or Companion Policies for a further comment period.

(i) Changes to the Product Determination Rule

We have deleted certain provisions relating to investment contracts and options as these provisions are not necessary, because of (i) the designation order issued by the Alberta Securities Commission, discussed below; and (ii) the operation of the securities legislation in New Brunswick, Nova Scotia and Saskatchewan. In addition, we have deleted a provision relating to contracts or instruments that would meet the definition of both “derivative” and “security” in British Columbia as this provision is not necessary, because of the operation of the securities legislation in British Columbia.

(ii) Changes to the TR Rule

The definition of “local counterparty” has been harmonized with the corresponding definition in the Local TR Rules, by capturing a derivatives dealer as a local counterparty. A corresponding new exclusion has been added, excluding derivatives between a non-resident derivatives dealer and another non-resident counterparty from the reporting requirements. This will help to ensure that the Authorities only receive reports of derivatives involving a counterparty that is resident in the jurisdiction.

The exclusion relating to commodity derivatives has been clarified, including with respect to when and how a counterparty’s notional amount outstanding should be calculated for the purpose of the threshold.

Other changes in the TR Rule include changes to the requirements for assigning a unique product identifier. The changes increase flexibility in how that identifier is assigned, and reflect current market practices.

Additionally, we have clarified the requirements relating to reporting pre-existing derivatives, including with respect to reporting pre-existing derivatives before the relevant deadline.

Summary of written comments

We received submissions relating to the Proposed Instruments from 18 commenters. We have considered all of the comments received and thank all of the commenters for their input. The names of commenters, a summary of their comments, and our responses to the comments are contained in Annex A of this notice.

Local Matters

Alberta – Ministerial approval of provisions relating to corporate governance

In Alberta, sections 8, 9 and 10 of the TR Rule relate to corporate governance of a recognized trade repository. Because these provisions relate to corporate governance, they require Ministerial approval. These provisions will become effective on May 1, 2016 with the TR Rule if Ministerial approval has been granted on or prior to May 1, 2016. Otherwise, these provisions will become effective on the date that Ministerial approval is granted.

Alberta – Designation order of the Alberta Securities Commission

Attached as Annex F is an order of the Alberta Securities Commission designating certain contracts and instruments to be derivatives for the purposes of the Product Determination Rule. This order applies only in Alberta, and has the effect of harmonizing the outcome of the Product Determination Rule in Alberta with the outcome in the other Participating Jurisdictions.

Contents of Annexes

The following annexes form part of this CSA Multilateral Notice:

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| Annex A | Summary of Comments and Responses |
| Annex B | Multilateral Instrument 91-101 <i>Derivatives: Product Determination</i> |
| Annex C | Companion Policy 91-101CP <i>Derivatives: Product Determination</i> |
| Annex D | Multilateral Instrument 96-101 <i>Trade Repositories and Derivatives Data Reporting</i> |
| Annex E | Companion Policy 96-101CP <i>Trade Repositories and Derivatives Data Reporting</i> |
| Annex F | Local Matters – None |

Questions

Questions with respect to this Notice, the final approved Instruments or Companion Policies may be referred to:

Martin McGregor
Legal Counsel, Corporate Finance
Alberta Securities Commission
Tel: 403-355-2804
Email: martin.mcgregor@asc.ca

Michael Brady
Manager, Derivatives
British Columbia Securities Commission
Tel: 604-899-6561
Email: mbrady@bcsc.bc.ca

Wendy Morgan
Senior Legal Counsel, Securities
Financial and Consumer Services
Commission (New Brunswick)
Tel: 506-643-7202
Email: wendy.morgan@fcnb.ca

Abel Lazarus
Senior Securities Analyst
Nova Scotia Securities Commission
Tel: (902) 424-6859
Email: abel.lazarus@novascotia.ca

Liz Kutarna
Deputy Director, Capital Markets, Securities Division
Financial and Consumer Affairs Authority of Saskatchewan
Tel: 306-787-5871
Email: liz.kutarna@gov.sk.ca