

**CSA Multilateral Notice of Amendments to  
Multilateral Instrument 91-101 *Derivatives: Product Determination*  
and  
Multilateral Instrument 96-101 *Trade Repositories and Derivatives  
Data Reporting*  
and Changes to Related Companion Policies**

**June 30, 2016**

**Introduction**

The securities regulatory authorities (each an **Authority** and collectively the **Authorities** or **we**) in Alberta, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan<sup>1</sup> and Yukon are making:

- amendments (the **Product Determination Rule Amendments**) to Multilateral Instrument 91-101 *Derivatives: Product Determination* (the **Product Determination Rule**),
- amendments (the **TR Rule Amendments**) to Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the **TR Rule**),
- changes to Companion Policy 91-101 *Derivatives: Product Determination* (the **Product Determination CP**), and
- changes to Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the **TR CP**)

collectively, the **Amendments**.

While the British Columbia Securities Commission (**BCSC**) is not participating in this notice, staff of the BCSC has worked with staff of the Authorities in developing the Amendments. Subject to receipt of ministerial approval, BCSC staff anticipate publishing notice of implementation of versions of the Product Determination Rule and the TR Rule that incorporate the Amendments.

**Background**

We announced the implementation of the Product Determination Rule and the TR Rule on January 22, 2016, with an effective date of May 1, 2016, subject in certain participating jurisdictions to Ministerial approval and legislative amendments. In February 2016 we published for comment proposed amendments to the TR Rule (the **Proposed TR Amendments**) which

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<sup>1</sup> In Saskatchewan, the amendments to the Product Determination Rule are not being implemented but will be published for comment under a separate notice.

were intended to be substantively harmonized with proposed amendments to corresponding local rules<sup>2</sup> (collectively, the **Local TR Rules**), published in November 2015 by the securities regulatory authorities in Manitoba, Ontario and Québec.

### *Harmonization*

We have developed the Amendments in cooperation with staff from the securities regulatory authorities in British Columbia, Manitoba, Ontario and Québec with the goal of substantive harmonization among the jurisdictions.

### **Substance and Purpose**

#### *Product Determination Rule Amendments*

The Product Determination Rule Amendments clarify the definition of “derivative” for the purpose of the Product Determination Rule in Newfoundland and Labrador, Northwest Territories, Nunavut, Prince Edward Island and Yukon, in order to better harmonize the definition of “specified derivative” among the MI Jurisdictions.

The Product Determination Rule Amendments also reflect recent amendments to the *Securities Act* (Alberta) (the **Alberta Act**), which received royal assent on May 27, 2016. Among other things, the amendments to the Alberta Act revised the definition of “derivative”, such that a contract or instrument may now be both a “derivative” and a “security” at the same time, without the need for a designation order.

Prior to the statutory amendments, the definition of “derivative” in the Alberta Act excluded a security. In order to have the Product Determination Rule have the same effect in Alberta as in other MI Jurisdictions, the Alberta Securities Commission previously issued an order (the **Designation Order**) designating certain contracts and instruments to be derivatives for the purpose of the Product Determination Rule.<sup>3</sup> With the statutory amendments, the Designation Order is no longer necessary and accordingly, the Alberta Securities Commission has issued an order revoking the Designation Order, effective September 30, 2016 which is the date on which the Amendments will become effective.

#### *Product Determination CP Changes*

The changes to the Product Determination CP reflect the Product Determination Rule Amendments, and clarify certain guidance relating to: (i) physically-settled commodity derivatives, settlement by delivery except where impossible or commercially unreasonable; and (ii) investment contracts in New Brunswick, Nova Scotia and Saskatchewan.

#### *TR Rule Amendments*

The key objectives of the TR Rule Amendments are to:

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<sup>2</sup> Manitoba Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting*, Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting* and Québec Regulation 91-507 respecting trade repositories and derivatives data reporting, CQLR, c. I-14.01, r. 1.1

<sup>3</sup> Alberta Securities Commission, *Re Designation of certain investment contracts and options to be derivatives*, 2016 ABASC 15, January 22, 2016.

- make explicit the requirement that a local counterparty have a legal entity identifier (**LEI**), and revise the provisions relating to LEIs to reflect international developments;
- provide relief from the reporting obligations under the TR Rule for derivatives between affiliated entities where each counterparty is not a derivatives dealer, clearing agency or an affiliate of a derivatives dealer or clearing agency;
- provide a transition period before the reporting obligations under the TR Rule become effective for a counterparty that is not a derivatives dealer or a clearing agency, or an affiliate of a derivatives dealer or clearing agency, that previously qualified for an exclusion from reporting derivatives under the TR Rule or a Local TR Rule and becomes the reporting counterparty for the first time;
- set out the requirements for public dissemination of transaction-level data, balancing the objective of providing price information on the Canadian over-the-counter (**OTC**) derivatives market and the need to preserve the anonymity of counterparties to limit the negative impact of transparency on market participants; and
- specify certain laws, regulations or instruments of foreign jurisdictions in Appendix B, for the purpose of providing that, for certain derivatives, reporting in compliance with these specified laws, regulations or instruments satisfies the reporting obligations under the TR Rule.

#### *TR CP Changes*

The changes to the TR CP reflect the changes to the TR Rule Amendments.

#### **Implementation**

The Amendments will become effective September 30, 2016, subject in certain jurisdictions to Ministerial approval. The January 16, 2017 start date for transaction-level public dissemination is harmonized across with the corresponding start date in the Local TR Rules.

#### **Summary of the TR Rule Amendments**

##### *(a) Subsection 26(3): Substituted Compliance and Appendix B: Trade Reporting Laws of Foreign Jurisdictions*

Amended subsection 26(3) provides that, in certain circumstances, a reporting counterparty may satisfy the reporting requirements under the TR Rule if it reports the derivative to a recognized trade repository pursuant to the trade reporting laws of a jurisdiction of Canada or a foreign jurisdiction specified in Appendix B (**substituted compliance**).

New Appendix B specifies the European Union (**EU**) trade reporting rules and the U.S. Commodity Futures Trading Commission (**CFTC**) swap data reporting rules. This amendment harmonizes the substituted compliance provision in the TR Rule with the corresponding provision in the Local TR Rules and permits certain OTC derivatives market participants that are subject to the reporting obligation under the TR Rule to benefit from substituted compliance when they report pursuant to the EU trade reporting rules or the CFTC swap data reporting rules.

*(b) Subsection 26(4): Duty to report – locations to report data*

We have amended subsection 26(4) of the TR Rule to provide that all derivatives data in respect of a derivative must be reported to the same recognized trade repository, but not necessarily to the recognized trade repository to which the initial report relating to the derivative was made. This amendment is intended to facilitate the porting of derivatives data from one recognized trade repository to another while ensuring that all data relating to a derivative is available in a single facility.

*(c) Section 28: Legal entity identifiers*

The identification of counterparties by an LEI is an initiative endorsed by G20 nations and provides a globally recognized and standardised identification system of legal entities engaged in financial transactions. LEIs support authorities and market participants in identifying and managing financial risks, simplifying reporting and simplifying authorities access to reported data across jurisdictions.

We have amended section 28 of the TR Rule to require each local counterparty (other than an individual) that is party to a derivative which is required to be reported under the TR Rule, if eligible, to obtain an LEI issued in accordance with the standards set by the Global LEI System. Reporting counterparties have indicated that they have encountered challenges in reporting derivatives as some of their counterparties do not have LEIs. This amendment ensures that all eligible local counterparties to reportable derivatives are under a direct obligation to have an LEI. Amended subsections 28(3) and (4) set out the requirements that apply where the non-reporting counterparty is not eligible to receive an LEI.

*(d) Section 34: Pre-existing derivatives and Section 44: Transition period*

We have amended sections 34 and 44 to correct errors in the dates that were included in the January 22, 2016 publication of the TR Rule, with respect to derivatives entered into before the reporting requirements under the TR Rule become effective.

*(e) Subsection 39(3) and Appendix C: Requirements for the Public Dissemination of Transaction-level Data*

Amended subsection 39(3) of the TR Rule requires a recognized trade repository to publicly disseminate transaction-level data for certain derivatives reported to it, in accordance with the detailed requirements in new Appendix C. Appendix C sets out the asset classes and underlying identifiers subject to transaction-level public dissemination, as well as the subset of reported derivatives data that will be publicly disseminated. The requirement to publicly disseminate transaction-level data becomes effective January 16, 2017, consistent with the effective date in the Local TR Rules.

Public dissemination of derivatives data provides important information to the OTC derivatives market to facilitate price discovery. This will allow market participants to more accurately value existing derivatives and to assess the pricing they receive when entering into new derivatives.

While transparency can be beneficial, we also appreciate the importance of maintaining the anonymity of OTC derivative counterparties in the context of publicly disseminating transaction-level data. The publication of transaction-level data, even anonymised data, could potentially

allow market participants to determine the identity and exposure of one or both of the counterparties to a specific derivative through, for example, the size and/or underlying interest of the derivative. The indirect identification of counterparties to a derivative could make future transactions in derivatives, including derivatives hedging the risks of a particular published derivative, more difficult and expensive as market participants adjust pricing in anticipation of the counterparties' immediate hedging needs. This is a particularly relevant risk for counterparties engaged in derivatives related to asset classes that are relatively illiquid in the Canadian market.

Therefore, to protect the anonymity of counterparties while providing appropriate transparency, we have limited the application of the transaction-level public dissemination requirement at this time to OTC derivatives of asset classes and underlying benchmarks that exhibit sufficient market activity to make it difficult to identify a specific counterparty. Appendix C also provides for anonymising measures, such as the rounding and capping of notional amounts, to further protect counterparty identity without eliminating the value of the published information to the market. Capping levels for each asset class and category were determined by assessing the unique characteristics of each group, including the relative size and frequency of trades.

Appendix C provides for a uniform publication delay for all transaction-level reports. In response to public comments, we amended the time delay for public dissemination so that it is linked to the execution timestamp of the transaction.

The details for transaction-level public dissemination in Appendix C have been harmonized as between the TR Rule and Local TR Rules in Manitoba, Ontario and Québec. Those jurisdictions have had several months experience of derivatives data being reported under their respective Local TR Rules. We anticipate pursuing further harmonized amendments to Appendix C over a series of future phases following additional study of trade repository data and public consultation. The purpose of this study and consultation will be to determine whether additional data and product types are appropriate for public dissemination and to consider shortening the timing delay for the release of such data to the public.

*(f) Section 41.1: Derivatives between affiliated entities*

We have amended the TR Rule to provide an exemption from the reporting requirement for derivatives between affiliated entities where each counterparty is not a derivatives dealer or a clearing agency, or an affiliated entity of a derivatives dealer or a clearing agency. The amendment is broader than proposed in the February 2016 publication for comment.

The exemption proposed in the February 2016 publication was limited to derivatives between end-user affiliates that are both local counterparties in Canada. Commenters unanimously remarked that the proposed exclusion for derivatives between local counterparty end-user affiliates was too restrictive. In light of the public comments, the exemption has been broadened to apply to all derivatives between affiliated parties provided neither counterparty is a derivatives dealer or a clearing agency, or an affiliate of a derivatives dealer or clearing agency. As a result of the broader exemption, it is not necessary to implement the substituted compliance for derivatives between affiliated entities as was contemplated in the February 2016 proposed amendments.

We recognize that derivatives between affiliated entities are typically used for managing risk within a corporate group and that the primary source of market risk to a corporate group related to its derivatives transactions arises from its market-facing transactions. However, reporting of derivatives between affiliated entities can provide the securities regulatory authorities with information regarding the redistribution of risk between legal entities, highlighting market activity and trends. We intend to study the use of inter-affiliate derivatives transactions as a strategy of corporate group risk distribution and to monitor international regulators' approaches to inter-affiliate trade reporting. We may consider amending the TR Rule to require reporting of derivatives data for inter-affiliate derivatives involving an affiliated entity that is not a local counterparty pursuant to the laws of a jurisdiction of Canada that introduce risk to the local or national market.

*(g) Section 42.1: Reporting by a local counterparty that ceases to benefit from an exclusion*

New section 42.1 provides a transition period for a counterparty that is not a derivatives dealer or a clearing agency, or an affiliated entity of a derivatives dealer or a clearing agency, that has not previously acted as the reporting counterparty under the TR Rule or a Local TR Rule because it qualified at the relevant time for an exemption under section 40 from the reporting requirements under the TR Rule. We are aware that some local counterparties may not be required to act as the reporting counterparty for a derivative because they are able to rely on the commodity derivative exemption in section 40 of the TR Rule.

For such a local counterparty, the reporting obligations under the TR Rule become effective 180 days after the date on which the local counterparty no longer qualifies for the exemption in section 40. Immediately following the expiry of the 180-day transition period, the local counterparty is required to report all of its outstanding derivatives that have not already been reported pursuant to the TR Rule – for example, by its counterparty.

*(h) Appendix A: Minimum Data Fields Required to be Reported to a Recognized Trade Repository*

In response to public comments, we have amended the descriptions of the “Jurisdiction of reporting counterparty” and “Jurisdiction of non-reporting counterparty” data fields in Appendix A. This amendment reflects the intention of section 42 of the TR Rule, that a reporting counterparty is not required to report a derivative in the local jurisdiction if neither counterparty is a local counterparty under paragraph (a) or (c) of the definition of local counterparty. The amended data field descriptions are harmonized with the Local TR Rules.

**Local Matters**

In Alberta, the order revoking the Designation Order is included as Annex J.

**Summary of written comments**

We received comments on the proposed amendments from 7 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.

## Contents of Annexes

The following annexes form part of this CSA Notice.

Annex A	Summary of Comments
Annex B	Amendments to Multilateral Instrument 91-101 <i>Derivatives: Product Determination</i>
Annex C	Changes to Companion Policy 91-101 <i>Derivatives: Product Determination</i>
Annex D	Amendments to Multilateral Instrument 96-101 <i>Trade Repositories and Derivatives Data Reporting</i>
Annex E	Changes to Companion Policy 96-101 <i>Trade Repositories and Derivatives Data Reporting</i>
Annex F	Blackline of Multilateral Instrument 91-101 <i>Derivatives: Product Determination</i> showing amendments
Annex G	Blackline of Companion Policy 91-101 <i>Derivatives: Product Determination</i> showing changes
Annex H	Blackline of Multilateral Instrument 96-101 <i>Trade Repositories and Derivatives Data Reporting</i> showing amendments
Annex I	Blackline of Companion Policy 96-101 <i>Trade Repositories and Derivatives Data Reporting</i> showing changes
Annex J	Local Matters

## Questions

Questions with respect to this Notice or the Amendments may be referred to:

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

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

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