

# MORE AMENDMENTS, LESS HARMONY?: CANADIAN REGULATORS PROPOSE AMENDMENTS TO OTC DERIVATIVES TRADE REPORTING RULES

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On November 14, 2013, the Ontario Securities Commission (the **OSC**) published OSC Rule 91-507 Trade Repositories and Derivative Data Reporting (the **TR Rule**) along with the OSC Companion Policy 91-507CP Trade Repositories and Derivative Data Reporting (the **Companion Policy**), which came into effect on December 31, 2013. Simultaneously, the Manitoba Securities Commission (the **MSC**) and the Autorité des Marchés Financiers (the **AMF**) published local versions of the TR Rule and Companion Policy which were substantially identical to the Ontario version of the TR Rule and Companion Policy.

Subsequently, on April 17, 2014, the OSC and the MSC published amendments to the TR Rule and Companion Policy, to respond to concerns from market participants and delay the effective date for reporting and to remove the local counterparty fallback provisions. The AMF adopted some of these changes by way of blanket exemption decision 2014-PDG-0051 (the **Blanket Exemption**), which delayed the effective date for reporting but did not remove the local counterparty fallback provisions.

On June 26, 2014, the OSC published another set of amendments to the TR Rule to relieve the reporting burden of certain counterparties to transactions and to make a number of other changes to the rule to clarify its application. Simultaneously, the Manitoba Securities Commission published a substantially similar set of amendments to the Manitoba version of the TR Rule.

On July 3, 2014, the AMF published a set of amendments to the Quebec version of the TR Rule. The AMF's proposed amendments create a different process to determine the reporting counterparty than is used in Ontario and Manitoba. The effective dates set out in the Blanket Exemption would also be included in the Quebec version of the TR Rule (these dates are the ones adopted by Ontario and Manitoba in the first set of amendments to the TR Rule). However, the AMF's proposed amendments do not remove the local counterparty fallback rule.

It is expected that prior to the effective date for reporting the AMF will likely adopt a blanket exemption decision which will harmonize the Quebec version of the TR Rule with the Ontario and Manitoba versions of the

TR Rule. However, this is not certain and the difference in proposals across the Canadian jurisdictions may raise issues for market participants trying to comply with the reporting requirements of the TR Rule in more than one Canadian jurisdiction.

## **Ontario and Manitoba Amendment**

### **1. ISDA methodology-based regime for determining reporting counterparty**

Under the existing regime, pursuant to paragraph 25(1)(b) of the TR Rule where both counterparties to a non-cleared transaction are derivatives dealers, each is a reporting counterparty with obligations to report derivatives data to a designated trade repository. A reporting counterparty may delegate this reporting obligation to the other party (or to a third party) under subsection 26(3). However, while a reporting counterparty may delegate its reporting obligation, it remains responsible for ensuring that the transaction data is in fact reported and that it is reported in a timely and accurate manner.

This added responsibility of ensuring that the counterparty to whom the reporting obligation may be delegated fulfills the reporting obligations makes many market participants uncomfortable. Thus, for many transactions where delegation is possible, business judgment would suggest self-reporting rather than delegating the reporting obligations. In these circumstances, the likelihood of double-reporting increases and the amendments provide a way to alleviate these concerns.

With the proposed amendment, section 25 of the Ontario and Manitoba versions of the TR Rule permits parties, subject to certain preconditions, to agree to sign up to the International Swaps and Derivatives Association, Inc. (ISDA) Canadian methodology to determine the reporting counterparty for a transaction. For example, in a transaction between two dealers where both counterparties to the transaction have a reporting obligation, the amended paragraph 25(1)(b) will allow the counterparties to adopt ISDA methodology to determine the reporting counterparty. This results in only one party, determined under ISDA methodology as the reporting counterparty, being responsible for fulfilling the reporting obligations. The other party no longer remains responsible for reporting or for ensuring the timely and accurate manner of reporting.

Similarly, in a transaction between two non-dealers, both counterparties to the transaction have a reporting obligation. Instead of delegating their reporting obligations or double-reporting, the non-dealer parties can sign up to the ISDA methodology to determine the reporting counterparty. Thus, the proposed amendments to determine the reporting counterparty are a welcome change.

There is no requirement for counterparties to a transaction to use the ISDA methodology. However,

there are certain preconditions to using the ISDA methodology. Pursuant to subsection 25(2), a reportable transaction can only use the ISDA methodology if, i) both counterparties to the transaction have agreed in advance to the terms of the multilateral ISDA agreement; and ii) the parties have executed and delivered an ISDA Canada Representation Letter to ISDA in which they agree to adopt the ISDA reporting methodology. It should be noted that the multilateral ISDA agreement is currently in draft and has yet to be finalized.

## **2. Express inclusion of U.S. CFTC Swap Rules under substituted compliance**

Subsection 26(5) allows for limited substituted compliance with the TR Rule provided that the transaction is only reportable because a counterparty qualifies as a local counterparty solely due to the fact that it is a registered derivatives dealer or a guaranteed affiliate of a locally-located local counterparty. Limited substituted compliance is possible for regimes listed in Appendix B if a transaction has been reported to a designated trade repository pursuant to the law of a province of Canada other than Ontario (or Manitoba, as the case may be) or of a foreign jurisdiction.

The proposed amendment has expressly included the U.S. Commodity Futures Trading Commission (the CFTC) swap data reporting rules on Appendix B. This would allow, among other things, registered derivatives dealers (once a derivatives registration regime is in place) located outside Ontario or Manitoba to avoid having to comply with Ontario or Manitoba reporting rules with respect to their transactions with non-Ontario or Manitoba counterparties.

## **3. Simplification and inclusion of optional "Other" field under Appendix A**

Appendix A to the TR Rule contains the minimum data fields required to be reported to a designated trade repository under the TR Rule. The amendment has introduced a number of changes to Appendix A:

- a. An optional "Other" field has been included under Appendix A to capture information required to be reported that does not fit within any of the required fields, such as reporting the terms of an exotic or bespoke OTC derivative transactions. This field also provides a place for parties who are using the same trade report in multiple jurisdictions to report CFTC or EMIR-required information which is not required under Appendix A
- b. The local counterparty identification field has been amended to require market participants to specify the province(s) in which they are a local counterparty, thereby, facilitating the filing of one transaction report for multiple jurisdictions;
- c. A "Valuation Currency" field has been included allowing parties to indicate the currency of the valuation, thereby making it possible to determine the actual value of the transaction;

and

- d. A number of fields have been deleted in order to facilitate international harmonization of derivative trade reporting rules and bring the TR Rule reporting obligations in line with those of other jurisdictions.

## **Quebec Amendments**

In addition to formally adopting the effective dates for reporting previously set out in the Blanket Exemption, the Quebec amendments make the following changes:

### **1. New rules for determining reporting counterparty**

Unlike Ontario and Manitoba, the proposed Quebec amendments would place an obligation on each counterparty to a non-cleared transaction to report derivatives data to a designated trade repository. However, where one party to a transaction is a Canadian financial institution and the other party is not a Canadian financial institution, the Canadian financial institution would have the sole obligation to report. Similarly, where neither party is a Canadian financial institution, but one party is a derivatives dealer registered under the Derivatives Act (Quebec) and the other party is not, the registered derivatives dealer would have the sole obligation to report.

"Canadian financial institution" is defined under National Instrument 14-101 (which applies to the Derivatives Act (Quebec)) as including, among other things, banks, trust companies, loan corporations, insurance companies and credit unions authorized to carry on business in Canada, but it does not include Canadian branches of foreign banks.

Parties would still have the ability to delegate their reporting obligations pursuant to subsection 26(3), but this delegation would not excuse a party with obligations to report from ensuring that the information reported by its delegate was reported in a timely and accurate manner. Similarly, subsection 25(2) of the Quebec version of the TR Rule retains the local counterparty fallback language which was removed from the Ontario and Manitoba versions of the TR Rule in the previous set of amendments.

### **2. Replacement of Appendix B**

Appendix B lists regimes for which limited substituted compliance is permitted. The proposed amendments to the Quebec version of the TR Rule would eliminate Appendix B. Instead, the AMF will maintain a list separate from the TR Rule which will list regimes permissible for substituted compliance. Presumably, this change makes it simpler for the AMF to include or remove qualifying regimes without having to go through the process of formally amending the TR Rule.

### **3. Changes to Appendix A**

The amendments proposed to Appendix A under the Quebec amendments match those proposed in the Ontario and Manitoba versions of the proposed amendments.

#### **In Force Dates**

The Ontario and Manitoba version of the amendments to the TR Rule are not subject to comments and they will come into force on September 9, 2014 subject to Ministerial approval in Ontario. The Quebec version of the amendments to the TR Rule is open for comments until **August 2, 2014**.

#### **Conclusion**

Canadian jurisdictions have so far displayed a strong desire to put in place harmonized derivatives reporting rules to allow market participants to use the same systems and follow the same rules for reporting across all Canadian jurisdictions. It is important for the continued health of the Canadian OTC derivatives market to maintain this harmony. In the interests of harmonization and preventing market fragmentation, we would expect that the AMF will propose amendments at some point in the future to bring its version of the TR Rule into concordance with the Ontario and Manitoba versions of the TR Rule.

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#### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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