

REPORTING FOR DUTY: CANADIAN REGULATORS PUBLISH FRAMEWORK FOR OTC DERIVATIVES TRADE REPORTING AND REPOSITORIES

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On June 23, 2011, the Canadian Securities Administrators Derivatives Committee (the "**CSA Committee**") published *CSA Consultation Paper 91-402 – Derivatives: Trade Repositories* ("**CSA Paper 91-402**"), setting out proposals for the establishment and operation of over-the-counter (OTC) derivatives trade repositories and the mandatory reporting of OTC derivatives transactions in Canada.

In addition to setting out recommendations relating to the structure and governance of trade repositories, CSA Paper 91-402 includes recommendations regarding trade reporting.

CSA Paper 91-402 builds on the recommendations presented in the CSA Committee's *Consultation Paper 91-401 on Over-the-Counter Derivatives Regulation in Canada* ("**CSA Paper 91-401**"), released on November 2, 2010,^[1] and corresponds to the statement of the G-20 that "OTC derivative contracts should be reported to trade repositories"^[2] in order to enhance the transparency of the OTC derivatives market. This is the first in a series of eight papers, each dealing with a topic covered in CSA Paper 91-401.

mandatory OTC derivatives reporting

The CSA Committee has recommended granting provincial market regulators the ability to make rules mandating that all OTC derivatives trades entered into by a Canadian counterparty be reported to an approved trade repository. All new transactions must be reported, as well as related post-execution events. There would be no exemptions for small transactions between non-financial intermediaries.

OTC derivatives transactions entered into before the reporting rules take effect must be reported as well, though relevant market participants would be given 180 days from the effective date of the rules to comply. Existing transactions scheduled to expire within one year of the reporting rules taking effect would not have to be reported.

designation of reporting party

The CSA Committee has recommended that one counterparty to each OTC derivatives trade be required to report the trade and relevant post-execution activities to an approved trade repository. Where the transaction is between a financial intermediary^[3] and a non-financial intermediary, the former bears the onus of reporting the transaction. Otherwise, the parties must select a reporting party. Reporting may be delegated to a third party, including a central counterparty clearing house. A foreign counterparty may bear the reporting onus, provided that the trade is reported to a Canadian-approved trade repository.

approval of trade repositories

The CSA Committee has recommended requiring that all trade repositories wanting to do business in Canada be approved by the relevant provincial market regulators through a recognition or designation process.

The CSA Committee has noted "serious concerns" with the lack of a central repository for Canadian OTC derivatives trades and will conduct further studies about requiring the use of a Canadian trade repository. This investigation will consider whether such a repository should be designed and operated by industry participants on a for-profit or not-for-profit basis, or whether it should be run by provincial market regulators as a utility.

If no Canadian trade repository is in place at the time new reporting rules are finalized, or if regulators reject requiring the use of such a repository, the CSA Committee has recommended permitting the use of foreign trade repositories. This would be contingent upon those repositories receiving provincial regulatory approval and meeting the requirements imposed on Canadian trade repositories. Canadian market and prudential regulators should enter into arrangements with foreign authorities to allow for access to needed information.

Regulators and the central bank should also arrange with foreign authorities to obtain access to data on "Canadian referenced derivative" transactions^[4] involving only foreign counterparties, as those trades would not face mandatory reporting to a Canadian repository.

unique participant identifiers

In order to participate in a trade repository, each market participant would need to obtain a unique legal entity identifier. The CSA Committee recommends developing the identifier based on internationally accepted standards in order to harmonize OTC derivatives regulation internationally.

The U.S. Commodity Futures Trading Commission has proposed a "corporate affiliations reference database" that would give regulators the ability to view transactions by institutions with multiple affiliates in a consolidated manner. This would involve the development of a system that would identify affiliations between entities, to aid in addressing systemic risk. The CSA Committee recommends requiring Canadian market participants to adopt such a universal system when it is established. These requirements may pose an added burden to Canadian market participants who wish to engage in derivatives market activity.

reporting obligations

Upon the execution of an OTC derivatives transaction, the reporting party would be required to submit the principal economic terms of the transaction, including the identities of the counterparties, the type of transaction, the underlying asset, the notional amounts, price, execution and termination dates. The reporting party would also be required to submit the full form of confirmation setting out all transaction terms.

Data must also be submitted during the life of a derivatives contract. For equity and credit derivatives, changes to trade repository data must be reported on an event-driven basis. For all other derivatives, daily reports on the principal economic terms of the derivative are mandated. The CSA Committee has also recommended daily reporting of valuation data.

real time reporting

The CSA Committee has expressed a desire to implement real-time reporting subject to market participants having access to the requisite technology, and is seeking comments on the ability of Canadian market participants to meet that standard. In the interim, the CSA Committee has recommended requiring reporting by the end of the next business day following the execution of a transaction.^[5]

In order to avoid signaling the market and destroying the anonymity of participants, a reporting delay would be in effect for particularly large OTC derivatives trades, or block trades, where anonymous public disclosure could allow market participants to identify one or more counterparties.^[6] This exception would only apply once real-time reporting is mandated.

public availability of data

The CSA Committee has recommended that trade repositories make aggregate and transaction-level and position-level data available to provincial market regulators, prudential regulators, the central bank and approved foreign regulators to aid them in meeting their regulatory responsibilities. Trade repositories would also be required to make certain data available to the public, including aggregate data on positions and transaction volumes and anonymous, post-trade, transaction-level data. Publicly-released information should not identify transaction counterparties or their positions.

next steps

Canadian market participants have until September 12, 2011 to provide comments on CSA Paper 91-402. Responses will be published on the Ontario Securities Commission and Autorité des marchés financiers websites.

effects of these proposals

The proposals in CSA Paper 91-402 are broadly similar to the Dodd-Frank Act in terms of reporting requirements. This is in large part due to the CSA Committee recognizing the relative size of the Canadian OTC derivatives market and taking the position that it will seek to harmonize its framework with that of other nations. This is crucial to ensuring that Canadian market participants will not be subject to a higher regulatory burden than their foreign counterparts.

In order to give Canadian counterparties exposure to the greatest range of international markets and counterparties, it would be prudent for relatively small markets like Canada to promote interconnectedness among the various national trade repositories. In this way, Canadian counterparties, particularly those that are not financial intermediaries, would not have to face barriers when transacting with international firms who may not be participants in a Canadian trade repository.

By Shahan Mirakian and Ryan Walker, Summer Student

[1] For a review of CSA Paper 91-401, see McMillan LLP Derivatives Law Bulletin "[Change Is Near but Unclear: Canadian Regulators Publish Initial Proposals on OTC Derivatives](#)" (November, 2010)

[2] "Leaders' Statement: The Pittsburgh Summit" (September 24-25, 2009) and "The G-20 Toronto Summit Declaration" (June 26-27, 2010)

[3] The CSA is set to discuss financial intermediary behaviour in a future consultation paper on registration.

[4] The CSA Committee defines "Canadian referenced derivatives" as including derivatives transactions involving a Canadian underlying asset or market variable as well as transactions designated in Canadian dollars.

[5] The CSA Committee notes that Canadian market participants entering into transactions with U.S. counterparties will have to comply with requirements developed under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "**Dodd-Frank Act**"), which mandate real-time reporting for appropriate transactions.

[6] The CSA Committee is seeking the guidance of Canadian market participants on setting block trade thresholds and determining the proper publication delay for block trades.

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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