

# REPORTING REFRESHED: AMENDMENTS PROPOSED TO HARMONIZE CANADIAN DERIVATIVES REPORTING RULES

Posted on July 12, 2022

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Despite a strong desire to harmonize the reporting of over the counter (“**OTC**”) derivatives transactions in every Canadian jurisdiction, the requirements for transaction reporting are not nationally harmonized. This lack of consistency presents challenges for market participants and makes harmonization with non-Canadian jurisdictions impossible.

There are currently four separate rules across Canada which govern the reporting of OTC derivatives transactions.<sup>[1]</sup> These rules differ not only with respect to what transactions must be reported and by whom but also with respect to the information that is required to be reported. Additionally, the Canadian rules for OTC derivatives transaction reporting differ from their international counterparts regarding the information to be reported, which means that reporting counterparties often need to acquire and report separate data for the same transaction in Canada and internationally.

Some of these differences in rules (both within Canada and globally) reflect different policy objectives across jurisdictions, but many of the differences are simply the result of the drafting process in each jurisdiction and the absence of internationally-accepted standards for the information to be provided.

On June 9, 2022, members of the Canadian Securities Administrators (“**CSA**”) published for comment proposed amendments to the rules in each Canadian jurisdiction aimed at harmonizing OTC derivatives reporting requirements across Canada and globally. The main sets of proposed amendments are **those** published by the Ontario Securities Commission (“**OSC**”) amending OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* (“**91-507**”) and **those** published by the CSA members other than Ontario, Quebec and Manitoba amending Multilateral Instrument 96-101 *Trade Repositories and Derivatives Date Reporting* (“**96-101**”) (the proposed amendments collectively are referred to as, the “**Proposed Amendments**”).

Some of the Proposed Amendments deal with the obligations of trade repositories and are of limited interest to other market participants, therefore only the Proposed Amendments dealing with reporting obligations are further described below. The Proposed Amendments are described in two separate groups, those that are consistent across all Canadian jurisdictions and those that differ among the various Canadian jurisdictions.

Finally, there is a discussion of the determination of a reporting counterparty for transactions involving only derivatives dealers. This remains an area where the Canadian jurisdictions have not yet settled on a harmonized approach.

## **Pan-Canadian Proposed Amendments**

### ***Amendments in respect of the Unique Transaction Identifier (“UTI”)***

Currently, all of the Canadian rules<sup>[2]</sup> specify that a designated<sup>[3]</sup> trade repository must assign a UTI to each reported derivative transaction using either its own methodology, or a UTI previously assigned to the transaction. Under the Proposed Amendments, the UTI Technical guidance published by CPMI-IOSCO would create universal identifiers and a hierarchy to determine which entity is responsible for generating the UTI for a transaction. The proposed hierarchy is intended to align globally; reducing operational costs and complexities because trade repositories would no longer be responsible for providing their own UTIs.

### ***Amendments in respect of the Unique Product Identifier (“UPI”)***

A UPI is a description of a derivatives transaction (e.g. cross currency swap). Previously, the International Swaps and Derivatives Association, Inc. (“**ISDA**”) composed a list of types of derivatives that was relied on for reporting purposes. Now, the Derivatives Service Bureau<sup>[4]</sup> (“**DSB**”) has composed a list of types of derivatives to be used globally. The Proposed Amendments require a reporting counterparty to identify a transaction by means of a UPI assigned by the DSB to ensure that the product type is reported consistently globally.

### ***Position Level Reporting***

Reporting counterparties who report many transactions which are fungible and have no set expiration date (generally this is meant to capture contracts for differences and rolling spot foreign exchange transactions) may report lifecycle data in aggregate form rather than individually for each transaction. Additionally, daily valuations and collateral positions for such transactions may be reported in aggregate form on a position basis.

### ***Updates to Appendix A of the Rules***

In Appendix A of each of the Canadian rules, some of the data fields are specific to Canada which presents challenges (especially for non-Canadian dealers) to comply with reporting requirements.<sup>[5]</sup> Under the Proposed Amendments, the data fields in Appendix A would be harmonized internationally to reflect global standards set out in guidance prepared by CPMI-IOSCO regarding critical elements of derivatives data reporting other than UTI and UPI (“**CDE Technical Guidance**”). In addition to creating a single global set of reported information, this will reduce the reporting burden of market participants. For example, removing the “Other details” data element in the existing Canadian rules will eliminate thousands of details – known as a

data dump – that market participants are reporting under this specific field given the uncertainty of what is meant by “Other details.”

### ***New Derivatives Data Technical Manual***

A manual has been drafted to inform market participants on how to comply with the requirements in the Canadian rules, including Appendix A. This manual is included as an appendix to the Companion Policy for each of the Canadian rules. The manual will ensure that the data are reported in a more consistent format, which will make it easier for regulators to compare transactions.

### ***“Derivatives Dealer” Definition***

The definition of “derivatives dealer” is revised in the Canadian rules and the associated Companion Policies to reflect the definition in proposed National Instrument 93-101 Derivatives: Business Conduct (the “**Proposed Business Conduct Rule**”). This will allow market participants to make a single determination about their dealer status which will apply to all derivatives rules (not just transaction reporting rules) in all Canadian jurisdictions.

### ***Data Verification Requirements***

There are new requirements in the Proposed Amendments to ensure that the data reported by reporting counterparties accurately reflect the information required to be provided relating to a transaction. All reporting counterparties (including those reporting counterparties which are neither derivatives dealers nor clearing agencies (“**end users**”) and, where there is more than one reporting counterparty, both reporting counterparties even if only one counterparty actually assumes the operational act of providing the transaction report) will have an obligation to ensure that all reported data are accurate and contains no misrepresentations. In order to meet this obligation, reporting counterparties will have to review the data submitted to the designated trade repository for accuracy. Additionally, there is a requirement for reporting counterparties other than end users to verify the accuracy of the reported data at least every 30 days. Reporting counterparties must also report any significant errors or omissions as soon as practicable. These requirements are consistent with global verification requirements (in particular, US reporting requirements).

### ***Reporting of Collateral and Margin Data***

Although, all the Canadian rules currently require reporting counterparties to indicate whether a transaction is collateralized, they do not require any reporting about the nature or amount of the collateral. The Proposed Amendments require reporting counterparties other than end users to report creation data regarding collateral and to provide data regarding collateral on a daily basis in the same manner as other valuation data. This new requirement does not apply to reporting counterparties which are end users. This requirement is consistent with the CDE Technical Guidance and reflects global requirements.

### ***End User Valuation Data Reporting***

The Proposed Amendments eliminate the requirement for the reporting counterparty for transactions that only involve end users to report quarterly valuation data. Combined with there being no requirement to periodically report collateral data or to perform data verification, the only periodic reporting requirement for transactions only involving end users is to report lifecycle data, which generally occurs much less frequently than each quarter.

### ***Derivatives Trading Facilities***

In respect of anonymized derivatives trades which take place over derivatives trading facilities (the Canadian equivalent of swap execution facilities), the standard hierarchy for determining the reporting counterparty does not apply and instead, the derivatives trading facility is required to report the transaction. This amendment recognizes that it is not possible for the counterparty to an anonymous transaction to actually report the transaction (not only does it lack all the necessary data, but it also does not know if it has a reporting obligation in a particular jurisdiction).

### ***Jurisdiction Specific Proposed Amendments***

#### ***“Affiliated Entity” Definition***

In Ontario, the definition of “affiliate” used in 91-507 is from the *Securities Act* (Ontario) (“**OSA**”) which refers primarily to corporations. Most Canadian jurisdictions use the more expansive term “affiliated entity” that includes, among other things, relationships between entities including partnerships and trusts. It is proposed that Ontario use the term “affiliated entity” rather than “affiliate” and adopt the broad definition (which is the same one used in the Proposed Business Conduct Rule).

This change is a double-edged sword for partnerships and trusts. Although they may now be able to use the inter-affiliate reporting exemption because they qualify as affiliated entities, they may still be denied use of the exemption because they could be considered “affiliated entities” of a derivatives dealer if they in any way have common ownership with a derivatives dealer.

#### ***Commodity Derivatives Reporting Exemption***

An Ontario end user whose sole transactions are commodity derivatives which have an outstanding gross notional amount (including all transactions by the end user’s affiliates) of less than \$250,000,000 does not have any reporting obligations in Ontario. Previously the reporting exemption was limited to end users with less than \$500,000 in outstanding notional amount. This increase in the amount brings Ontario in line with the Canadian jurisdictions which have adopted 96-101 and is also intended to reduce the regulatory burden on end

users.

### ***Individuals as Local Counterparties***

Ontario now considers an individual resident in Ontario to be a local counterparty. An exemption for individuals from the requirement to report has also been introduced, so that the effect of this amendment is to require foreign derivatives dealers to report transactions with individuals resident in Ontario. This amendment is not included in the Proposed Amendments for the Canadian jurisdictions which have adopted 96-101, where individuals remain excluded from the definition of local counterparty, and actually reduces the harmonization of the reporting regimes across Canada.

### ***End User Designation of Reporting Counterparty***

Rather than have to rely on the ISDA methodology to determine who is the reporting counterparty for a transaction solely involving end users, Ontario now allows end users to determine which will be the reporting counterparty by entering into a written agreement. This is consistent with the method used in Canadian jurisdictions other than Ontario for determining the reporting counterparty for transactions solely involving end users.

### ***Reporting counterparty for transactions between derivatives dealers***

In Ontario there is a reporting hierarchy for derivatives dealers based on the ISDA methodology. The rules governing reporting derivatives transactions in all other Canadian jurisdictions enable the dealers to decide among themselves (typically by written agreement) who would report.<sup>[6]</sup>

Ontario faces a dilemma because the ISDA methodology has worked well, but Ontario is the only Canadian jurisdiction using this methodology. Under the Proposed Amendments, Ontario will continue to rely on the ISDA methodology for reporting transactions between derivatives dealers. Recognizing that Ontario is different than other jurisdictions and in an effort to achieve national harmonization, Ontario has proposed an Alternative Reporting Hierarchy (which doesn't rely on ISDA's methodology).

The Alternative Reporting Hierarchy is meant to be a compromise between retaining the ISDA methodology and harmonizing with the other Canadian jurisdictions. Although the other Canadian jurisdictions have not proposed adoption of the Alternative Reporting Hierarchy, they have included a description of the Alternative Reporting Hierarchy in their requests for comment and asked commenters to comment on whether or not it should be adopted.

### ***Alternative Reporting Hierarchy***

The Alternative Reporting Hierarchy recognizes that financial entities may be better positioned to report

transactions than derivatives dealers that are not financial entities. For example, a commodity dealer transacting with a bank may currently delegate its reporting obligation to the bank. Under the Alternative Reporting Hierarchy, the bank would be the reporting counterparty in this situation, thus avoiding the need for delegation.

The Alternative Reporting Hierarchy maintains a static approach in transactions involving dealers that are financial entities (i.e. the ISDA methodology). However, greater flexibility is attained in transactions between two derivatives dealers that are non-financial entities because the Alternative Reporting Hierarchy enables the non-financial entities to agree through any written agreement which counterparty must report the transaction.

### **Transition Period**

As stated above, the amendments to Appendix A in the Proposed Amendments (changes to the data fields to be reported) are intended to bring Canadian reporting requirements in line with global standards. However, it is almost certain that the Proposed Amendments will not be implemented in time for Canada to be consistent with global standards as they come into force internationally. For instance, the US reporting regime will become consistent with global standards in two phases, the first of which will be in force in December 2022 and the second in December 2023. The earliest date for implementing the Proposed Amendments will be early 2024. Therefore, it is likely that CSA members will have to provide transitional guidance for which data fields are to be reported to prevent Canada from falling behind other jurisdictions in the implementation of the global standards.

### **Conclusion**

The CSA intends that the Proposed Amendments will contribute to the global harmonization of data reporting standards, which will significantly reduce regulatory burden by enabling market participants who are active across multiple jurisdictions to take a more consistent approach to compliance.

Additionally, the Proposed Amendments are intended to simplify market participants' reporting systems and decrease ongoing operational and compliance costs (particularly for end users), while improving the consistency and quality of the data available to regulators and the public.

While it is encouraging to see a move towards greater harmony, particularly among the Canadian jurisdictions, the failure to adopt a consistent reporting hierarchy for derivatives dealers remains an issue that hopefully can be addressed (whether through universal adoption of the Alternative Reporting Hierarchy or otherwise).

Comments on the Proposed Amendments must be submitted to each relevant jurisdiction by **October 7, 2022**.

We invite market participants to discuss any comments and questions with us. We are available to assist those wishing to submit comments regarding the Proposed Amendments.

[1] In 2013, securities regulators in Manitoba, Ontario and Quebec, in consultation with each other, enacted rules (the “**MOQ Rules**”) governing the reporting of derivatives transactions. These three rules (one in each jurisdiction) have minor differences from each other. In 2015, the remaining provinces and territories enacted a harmonized rule (among themselves) governing the reporting of derivatives transactions

[2] The term “rule” is used to refer to all of the Canadian various instruments that require trade reporting. In Quebec, the instrument is a regulation pursuant to the *Derivatives Act* (Quebec) and in jurisdictions other than Ontario, Quebec and Manitoba, the instrument is a multilateral instrument.

[3] In certain jurisdictions, the term used for a trade repository which is permitted to accept transaction reports in that jurisdiction is “recognized” rather than “designated”. For consistence, the term “designated” is used in this bulletin.

[4] The DSB is a subsidiary of the body which provides securities identifiers (such as ISINs) internationally. In addition to providing UPIs, the DSB provides ISINs for European Union trade reporting.

[5] Examples of Canadian specific fields to be reported are inter-affiliate transaction, master agreement type, master agreement version.

[6] The Proposed Amendments to 96-101 remove the requirement for the derivatives dealer to enter into the written agreement at the time of a transaction. This would allow derivatives dealer to assign responsibility for all reporting through an omnibus agreement or, more likely, in the master agreement governing their OTC derivatives transactions.

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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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