

# THE LAST WORD ON REPORTING: FINAL ONTARIO RULES WITH RESPECT TO TRADE REPORTING RELEASED

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On November 14, 2013, the Ontario Securities Commission (the **OSC**) published the final version of the first set of harmonized rules solely aimed at the regulation of over-the-counter (**OTC**) derivatives in Ontario. OSC Rule 91-506 Derivatives: Product Determination (the Scope Rule) and OSC Rule 91-507 Trade Repositories and Derivatives Data Reporting (the **TR Rule**) together with the companion policies for both these rules (collectively the **Rules**), which come into force on December 31, 2013, are aimed at increasing transparency in the OTC derivatives market.

## **Key dates**

The Rules were provided to the Minister of Finance (the **Minister**) for approval on October 17, 2013. Should the Minister approve the Rules, or take no further action by December 16, 2013, the Scope Rule and provisions of the TR Rule related to the designation and ongoing obligations of trade repositories will come into force on December 31, 2013. This staggered approach allows the operation and regulation of trade repositories to be in place before the counterparty data reporting rules come into force.

For derivatives dealers<sup>[1]</sup> and recognized or exempt clearing agencies, the data reporting rules will come into force on July 2, 2014, meaning that derivatives data for transactions occurring from this day forward must be reported. Reporting counterparties that are not derivatives dealers are exempt from the requirement to make reports until September 30, 2014. Transactions occurring prior to July 2, 2014, that have obligations still outstanding after that date, must be reported prior to December 31, 2014, unless the transaction expires or terminates on or before December 31, 2014, in which case no reporting will be required.

Subsection 39(3), which requires a designated trade repository to publicly disclose in transaction level reports certain data outlined in Appendix A to the TR Rule, will come into force on December 31, 2014. The OSC implemented this six month delay to further evaluate the appropriateness of the timing of transaction level public disclosure requirements. This change resulted from comments emphasizing the need to preserve the confidentiality and anonymity of transaction level data because of the potential harm to the Canadian derivatives market and its participants as a result of the less liquid nature of the Canadian market as compared

to other major trading jurisdictions.

## Background

On June 6, 2013, the Canadian Securities Administrators Derivatives Committee (the **CSA Committee**) published Multilateral CSA Staff Notice 91-302 Updated Model Rules – *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (the **Updated Model Rules**)<sup>[2]</sup> as a response to public comment with respect to CSA Staff Consultation Paper 91-301 Model Provincial Rules – *Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting* (the **Draft Model Rules**)<sup>[3]</sup>. Based on these Updated Model Rules, some CSA jurisdictions developed province-specific rules. On the same date, the OSC published Proposed OSC Rule 91-506 *Derivatives: Product Determination; Proposed OSC Companion Policy 91-506CP Derivatives: Product Determination* and Proposed OSC Rule 91-507 *Trade Repositories and Derivatives Data Reporting* together with companion policies for these proposed rules (the **Proposed Ontario Rules**). Similarly, the Quebec Autorité des marchés financiers (the **AMF**) and the Manitoba Securities Commission (the **MSC**) published jurisdiction-specific proposed rules. The Alberta Securities Commission, the British Columbia Securities Commission, the New Brunswick Securities Commission, the Nova Scotia Securities Commission and the Financial and Consumer Affairs Authority of Saskatchewan published a multi-provincial consultation paper containing the Updated Model Rules (the **Paper** and collectively with the Proposed Ontario Rules and the AMF and MSC proposed province specific rules, the **Proposed Provincial Rules**). Based on public comments, the CSA Committee made amendments to the Proposed Provincial Rules. The most significant of these changes, which the OSC incorporated into the Proposed Ontario Rules, are discussed in more detail below.

## Changes to the scope rule

Subsection 2(2) of the Scope Rule was added to clarify that contracts or instruments executed on a derivatives trading facility do not qualify for the paragraph 2(1)(g) prescribed exclusion, which exempts exchange traded derivatives from the reporting requirements under the TR Rule.

Two commenters expressed concerns that the activities of non-bank money services businesses, such as foreign exchange dealers, would not be excluded from the reporting requirements. The comments suggested broadening the foreign exchange spot transaction exemption under paragraph 2(1)(c) of the Scope Rule. Despite these objections, the CSA Committee did not grant any relief. As a result, transactions involving foreign exchange dealers that do not qualify for the paragraph 2(1)(c) exclusion must be reported.

## Changes to the TR rule

(a) *local counterparty definition*

In response to concerns regarding the extra-territorial reach of the definition of local counterparty under the Proposed Provincial Rules, the definition was revised to exclude guaranteed affiliates of registered derivatives dealers not located in Ontario (**Foreign Derivatives Dealers**).

*(b) reporting counterparty*

Subsection 25(1) was revised to clarify that if a transaction which is required to be reported under the TR Rule is between two derivatives dealers, both have reporting obligations; however, by agreement, they may delegate this obligation to one dealer under subsection 26(3) so as to avoid double reporting. Similarly, if the transaction is between two non-derivatives dealer counterparties, each counterparty that is a local counterparty has an obligation to report under the TR Rule. In either case, through the application of subsection 26(3), the reporting counterparty that delegates its reporting obligations remains responsible for ensuring the TR Rule is complied with. Therefore, in such situations, both counterparties are responsible for complying although only one reports.

*(c) foreign reporting counterparty*

Subsection 25(1) outlines the rule used to determine the reporting counterparty in a given transaction. For example, under paragraph 25(1)(c), in a transaction between a derivatives dealer and a counterparty that is not a derivatives dealer, the derivatives dealer is designated as the reporting counterparty even where the derivatives dealer is not a local counterparty. Through the application of subsection 25(2) (subsection 27(2) under the Proposed Provincial Rules), where the reporting counterparty, which is not a local counterparty, does not comply with the reporting requirements under the TR Rule, the local counterparty must act as the reporting counterparty. Subsection 25(2) has been revised to specify how a local counterparty may determine when a foreign reporting counterparty has failed to report. Where there is a transaction between a Foreign Derivatives Dealer and a local non-dealer counterparty, subsection 25(2) states that if the local counterparty has not received confirmation that the derivatives data for the transaction has been reported by the Foreign Derivatives Dealer by the end of the second business day following the day on which reporting is required, the local counterparty must act as the reporting counterparty.

*(d) limited substituted compliance*

To reduce overlapping international and interprovincial trade reporting requirements, subsection 26(5) was added to provide substituted compliance for counterparties that reside primarily outside of Ontario but are otherwise subject to the TR Rule. Substituted compliance would be available to an Ontario registered foreign derivatives dealer for a transaction with a foreign market participant if the transaction is reported pursuant to an equivalent foreign rule and the OSC has access to the reported data. In order to rely on the substituted compliance rule, the transaction must be reported to a designated trade repository pursuant to the securities

legislation of a Canadian province other than Ontario or the laws of a foreign jurisdiction listed in Appendix B to the TR Rule. However, at present, Appendix B is blank. The reporting counterparty must also instruct the designated trade repository to provide the OSC with access to the derivatives data that is required under the TR Rule.

(e) *other changes*

Section 33 of the TR Rule was amended to remove the onerous requirement that both counterparties to a transaction report valuation data. Additionally, in response to concerns that public disclosure of transaction level data would cause harm to the Canadian derivatives market, subsection 43(2) was added to the TR Rule to delay the coming into force of the requirement that a designated trade repository publicize anonymous transaction level data for a period of six months.

## **Conclusion**

Market participants have expressed two primary concerns about reporting: (1) alignment between the Rules and international reporting standards in other jurisdictions, particularly the requirements under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*<sup>[4]</sup> in the United States (U.S.); and (2) duplication of reporting both by a single reporting party in multiple jurisdictions and by multiple counterparties reporting the same transaction in the same jurisdiction. The final version of the TR Rule alleviates concerns about alignment. Further, the TR Rule, as currently written, is consistent with international reporting standards. With respect to the second concern, the changes to the TR Rule have eliminated the need for multiple party reporting in the same jurisdiction, but have failed to completely eradicate the issue of duplicative reporting in multiple jurisdictions. The subsection 26(5) substituted compliance rule does not, in most cases, eliminate the need to report in multiple jurisdictions. However, it is anticipated that most large international trade repositories will apply for designation under the TR Rule in Ontario. If this is the case, reporting to those repositories, as is already required under U.S. and European reporting rules, will also satisfy the reporting obligations under the TR Rule in the vast majority of cases. These concerns will largely be alleviated if U.S.- based trade repository Depository Trust & Clearing Corporation completes its plan to apply for designation and to become operational in Canada prior to the coming into force of the reporting rules on July 2, 2014.

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[1] "derivatives dealer" is defined as a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives in Ontario as principal or agent. See *OSC Rule 91-507 Trade Repositories and Derivatives Data Reporting and Companion Policy 91-507CP*, OSC, 36 OSCB 11015 (2013) at 11038.

[2] See McMillan LLP Derivatives Law Bulletin "[Updating to a Newer Model: CSA Derivatives Committee Revisits Model Rules for OTC Derivatives Determination, Trade Repositories and Reporting](#)" (June 2013).

[3] See McMillan LLP Derivatives Law Bulletin "[Model Behaviour: Canadian Regulators Release Model Rules for Derivatives Product Determination, Trade Repositories and Data Reporting](#)" (May 2013).

[4] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

### **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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