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Re: Canadian Securities Administrators ("CSA") Staff Consultation Paper 91-301 Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting (the "Consultation Paper")

INTRODUCTION

The Canadian Market Infrastructure Committee ("CMIC") welcomes the opportunity to comment on the Consultation Paper dated December 6, 2012 published by the Canadian Securities Administrators OTC Derivatives Committee (the "Committee") relating to trade repositories and derivatives data reporting.

CMIC was established in 2010 to represent the consolidated views of certain Canadian market participants on proposed regulatory changes. The membership of CMIC consists of the following: Bank of America Merrill Lynch, Bank of Montreal, Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, Ontario Teachers' Pension Plan Board, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank.

CMIC brings a unique voice to the dialogue regarding the appropriate framework for regulating the Canadian OTC derivatives market. The membership of CMIC has been intentionally designed to present the views of both the 'buy' side and the 'sell' side of the Canadian OTC derivatives market, as well as both domestic and foreign owned banks operating in Canada.

OTC derivatives are an important product class used by both financial intermediaries and commercial end-users to manage risk and exposure. Systemic risk oversight of the OTC derivatives markets is an

essential component of the long term financial stability and growth of Canadian financial markets and their participants.

CMIC appreciates the consultative approach being taken by the CSA in considering the Model Rules relating to reporting of derivatives data. CMIC believes that this approach will lay the foundation for the development of a Canadian regulatory structure[1] that will satisfy Canada's G20 commitments by addressing systemic risk concerns in OTC derivatives markets.

OVERVIEW

One of the primary goals of OTC derivatives regulatory reform and Canada's G20 commitments is increasing transparency in the OTC derivatives market. Thus, CMIC supports reporting OTC derivatives to a trade repository in order to provide regulators with better information relating to position build-up and interconnectedness. We support the regulatory progress that has been made internationally towards meeting G20 commitments. We encourage the CSA to continue to work closely with its global counterparts and other international bodies towards the common goal of meeting the G20 commitments. Having a Canadian regime that is not aligned with global standards would place Canadian participants at a severe competitive disadvantage and risks fragmented, and therefore less useful, data being provided to regulators.

While we have provided commentary on numerous aspects of the Consultation Paper, without detracting from other points discussed in this letter, there are three key issues that CMIC wishes to highlight:

- The definition of "local counterparty" in the Model Provincial Rule – *Trade Repositories and Derivatives Data Reporting* (the "TR Rule") is excessively broad and has extra-territorial implications which will likely result in a dual-reporting regime for certain non-Canadian entities with potentially inconsistent laws applicable to such entities.

- The data field requirements under Appendix A of the TR Rule are inconsistent with the rules of the U.S. Commodity Futures Trading Commission ("CFTC") under Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank"). This will place significant pressure on the existing reporting infrastructure by placing an operational burden on market participants to report data which exceeds what other regulators require and which add minimal value from a regulatory perspective. In addition, the inconsistent requirements will result in information being reported to Canadian regulators that will be difficult to aggregate and compare with information being reported under Dodd-Frank, resulting in less useful data being provided to regulators.

- The TR Rule does not contemplate a phased-in implementation approach on a product basis, which is inconsistent with Dodd-Frank, thus adding stress on the current reporting infrastructure. The most developed reporting regulatory regime is currently in the U.S. but only with respect to OTC derivatives over which the CFTC has exclusive jurisdiction. CMIC recommends that, to the extent reporting rules under Dodd-Frank have not been finalized, the TR Rule should contain a phased-in implementation so that trade reporting for a specific product will be reported only after final rules for that product have been implemented under Dodd-Frank. Since the

[1] References to "regulation" or "regulators" within this document will be considered to include market, prudential and systemic risk regulators.

Canadian OTC derivatives market is quite small relative to the global OTC derivatives market, CMIC submits that Canadian regulators should not be setting the precedent in this area.

Each of these three key issues is discussed in greater detail below.

Harmonization Within Canada and Rule-making Process

In our responses (the "CMIC TR Letter", the "CMIC S&E Letter", the "CMIC S&P Letter", the "CMIC End-User Letter" and the "CMIC CCP Letter", respectively, and collectively, the "CMIC Letters")[2] to the consultation papers issued by the CSA relating to OTC derivatives trade repositories (the "TR Paper"),[3] surveillance and enforcement of the OTC derivatives market (the "S&E Paper"),[4] segregation and portability in OTC derivatives clearing (the "S&P Paper"),[5] the exemption of end-users of OTC derivatives from certain proposed regulatory requirements (the "End-User Paper")[6] and central counterparty clearing (the "CCP Paper"),[7] we emphasized that a Canadian regulatory framework for OTC derivatives must be harmonized and streamlined to the greatest extent possible across the provinces and territories and with federal authority over systemic risk. CMIC is pleased to see that the Model Provincial Rule – *Derivatives: Product Determination* (the "Scope Rule", and with the TR Rule, the "Model Rules") and the TR Rule relating to trade repository reporting have been published by the CSA, representing an agreement among the securities commissions of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario and Quebec (collectively, the "CSA Provinces"). While we understand that the exact regulatory amendments may vary slightly from province to province as a result of variations in provincial and territorial securities regulation, we applaud the goal of the Committee that the substance of the rules will be the same across all Canadian jurisdictions and that market participants and derivative products will receive the same treatment across Canada. Duplicative, contradictory, or unique regulatory obligations within Canada will undermine the ability of a trade repository to amass data that will allow proper regulatory monitoring to take place.

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[2] Response of CMIC dated September 9, 2011 to the TR Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20110909_91-402_cmic.pdf. Response of CMIC dated January 25, 2012 to the S&E Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120125_91-403_cmic.pdf. Response of CMIC dated April 10, 2012 to the S&P Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120410_91-404_cmic.pdf. Response of CMIC dated June 15, 2012 to the End-User Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120615_91-405_cmic.pdf. Response of CMIC dated September 21, 2012 to the CCP Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120921_91-406_cmic.pdf.

[3] CSA Consultation Paper 91-402 – Derivatives: Trade Repositories dated June 23, 2011. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20110623_91-402_trade-repositories.pdf.

[4] CSA Consultation Paper 91-403 – Derivatives: Surveillance and Enforcement dated November 25, 2011. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20111125_91-403_cp-derivatives.pdf.

[5] CSA Consultation Paper 91-404 – Derivatives: Segregation and Portability in OTC Derivatives Clearing dated February 10, 2012. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120210_91-404_segregation-portability.pdf.

[6] CSA Consultation Paper 91-405 – Derivatives: End-User Exemption dated April 13, 2012. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120420_91-405_end-user-exemption.pdf.

[7] CSA Consultation Paper 91-406 - Derivatives: OTC Central Counterparty Clearing dated June 20, 2012. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20120620_91-406_counterparty-clearing.pdf.

We understand, however, that, after considering various comment letters, it is not the intention of the CSA to publish revised Model Rules. Instead, each province and territory will amend its existing legislation to incorporate the Model Rules, taking into account comments received. We submit that taking this approach undermines transparency in the rule-making process. CMIC submits that revised Model Rules should be published for comment in order that market participants can confirm which comments received by the CSA have been adopted and agreed to by the CSA Provinces prior to the amendment of the relevant legislation in each province and territory. We believe that our suggested approach of final Model Rules will enhance consistency across Canada.

Harmonization with International Regulatory Developments

The ability to monitor information on a global basis will undoubtedly depend on the exchange of information with regulators and trade repositories located outside Canada. Canadian adoption, in a harmonized fashion, of standards and protocols developed by international bodies[8] will eliminate the risk of a Canadian framework that is not compatible. In particular, many CMIC members are currently reporting OTC derivatives transactions with U.S. persons under Dodd-Frank. Using significant resources of market participants, operational systems and trade processes have already been developed to comply with the Dodd-Frank requirements. CMIC submits that, unless there are unique features of the Canadian market, adopting the Dodd-Frank reporting requirements will leverage the systems developed already and reduce the risk of gaps in systemic risk regulation. Such an approach will also help ensure that Canadian regulators receive derivatives data in a format that is consistent with global market participants.

With respect to whether there are any features of the Canadian market or a particular Canadian OTC derivatives product that would necessitate any departure from Dodd-Frank and other emerging international standards and protocols, CMIC has identified only one such area: public disclosure of information, including block trade information. For more information, see our discussion below under the heading “Data Available to Public”.

Lastly, the CSA needs to continually monitor developing standards in other major jurisdictions, including Europe, to ensure that Canada is harmonized with international standards as they evolve in coming months.

Detailed Approach vs. Principles-Based Approach

As mentioned above, in order to monitor systemic risk both within Canada and globally, it is crucial that OTC derivatives trade information be reported on a consistent basis. The reporting of such information is a very technical exercise which requires operational and electronic processes and procedures to be established. Accordingly, market participants require that the rules relating to trade reporting be clear and precise. CMIC submits that if a principles-based approach is adopted, there should be clear and precise details provided by the regulators in order to provide useful guidance to market participants. We expand on this point throughout this response letter, for example, under the heading “Exclusion of Physical Commodity Transactions” and “Governance”.

MODEL PROVINCIAL RULE – DERIVATIVES: PRODUCT DETERMINATION

The Committee has indicated in the explanatory guidance that while the Scope Rule applies only to the TR Rule, it expects that elements of the Scope Rule will also be made applicable to additional

[8] Inclusive of CPSS-IOSCO, ISDA, ODRF, ODSG. CMIC considers CPSS-IOSCO standards as the international standards for trade repository framework, ODRF (OTC Derivatives Regulators’ Forum) the international standard for regulatory requirements, ODSG (OTC Derivatives Supervisors Group) standards as the international standard for implementation and IIGC (ISDA Industry Governance Committee) as the international standard for governance structure.

derivatives rules, including but not limited to rules relating to OTC central counterparty clearing, end-user exemptions, trading platforms, capital and collateral and registration. It is CMIC's view that this statement should be removed from subsection 1(3) of the related explanatory guidance. The determination of the scope of each such additional derivatives rule should be considered independently of the Scope Rule. The purpose of trade reporting is to increase transparency with respect to OTC derivative transactions and to provide regulators with access to information. The other rules will have different purposes and accordingly it would be inappropriate to use the Scope Rule as a starting point for such other purposes.

In addition, CMIC submits that it is not clearly stated in the Scope Rule or the related explanatory guidance as to whether exchange traded derivatives are included within the Scope Rule since the definition of "derivative" under the *Ontario Securities Act* is not limited to only OTC derivatives.[9] CMIC's view is that the TR Rule should apply only to OTC derivatives as Canada's G20 commitments relate only to the regulation of OTC derivatives. This should be clearly stated in the Scope Rule or the related explanatory guidance.

Excluded Derivatives – Consistency with Dodd-Frank

As mentioned above, the systems and procedures of market participants have already been built at a significant cost in terms of both systems and human resources in order to comply with Dodd-Frank. To the extent that the transactions under the Scope Rule differ from the transactions required to be reported under Dodd-Frank, it will place an additional burden on market participants. Systems and procedures would need to be further modified to accommodate any differences. We note that the criteria under subsections 2(c) and 2(d) of the Scope Rule for physically-settled trades appear to be more restrictive than under Dodd-Frank. Essentially, Dodd-Frank requires that the parties intend to settle the contract by physical delivery under prong (iii); however, prongs (i) and (ii) appear to be unduly restrictive as well as redundant, which makes those clauses confusing to implement.

Exclusion of Physical Commodity Transactions

Also mentioned above, market participants require that the rules relating to reporting be clear and precise. As currently drafted, the Model Rules use terms that are not defined, thus creating uncertainty. As an example, it is not clear what a "physical commodity" is, and the explanatory guidance is descriptive and not definitive, stating that it "includes" certain types of commodities. CMIC suggests that the Dodd-Frank approach be adopted instead, referring to "financial" versus "non-financial" commodities so as to avoid gaps and uncertainties. Under Dodd-Frank, an intangible commodity (that is not an "excluded commodity") which can be physically delivered qualifies as a "nonfinancial" commodity if ownership of the commodity can be conveyed in some manner and the commodity can be consumed.[10] For example, emissions credits are intangible but can be physically settled, and thus based on our reading of the current wording of the Scope Rule, would not be covered by the exclusion.

"Long Dated" FX Spot Transactions

The Scope Rule excludes foreign exchange ("FX") spot transactions that settle within two business days. CMIC agrees with this approach as the risks relating to these short-dated transactions are

[9] To further demonstrate the lack of clarity, the French version of the explanatory guidance for the Scope Rule provides that "contrats à terme sur change" (which is translated as "FX futures") should be reported to a trade repository.

[10] CFTC and SEC, Final Rules, *Further Definition of "Swap", "Security-Based Swap", and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* 77 F.R. 48,208 (August 13, 2012) (the "Definitions Release") at 48,233. Available at: http://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf.

relatively low and primarily consists of settlement risk. However, there are certain FX transactions that are entered into in order to hedge foreign currency risk in connection with the purchase of an equity security. In order to coincide with the settlement date of the equity purchase, settlement of the FX transaction occurs within a period that is slightly longer than two business days. These types of transactions are considered by the market as "FX spot transactions". Note that the CFTC included within its definition of an FX spot transaction any transaction that is settled by delivery more than two days after the trade date if such settlement coincides with the settlement of a securities transaction denominated in the underlying currency.[11] CMIC accordingly recommends that a similar reference be made to such longer dated FX spot transaction in subsection 2(c) of the Scope Rule.

Intention to Physically Settle; Obligation Netting Agreements

Foreign exchange ("FX") spot transactions are entered into primarily as a source of funding to hedge risk associated with fluctuations in foreign currency values and to manage, on a daily basis, global cash flow needs[12] Prior to the settlement date of one or more FX transactions (for example, FX spot transaction, FX forward transaction and/or an individual leg of an FX swap transaction, the "Original FX Transactions"), each counterparty to such transactions will assess and re-evaluate its currency requirements and, if changed, may enter into one or more FX swap transactions (the "New FX Swap Transactions") to off-set, in whole or in part, the net currency positions in one or more currencies.

On such settlement date and in respect of the Original FX Transactions and the near-leg of the New FX Swap Transactions, pursuant to payment obligations netting arrangements, the parties will calculate the net payment and receipt obligations in each currency and exchange those amounts. Under these types of transactions, the terms of the Original FX Transactions are not amended, including the requirement to physically settle such transaction and in fact, each individual transaction, including the New FX Transactions actually settle.[13] CMIC is concerned that such payment obligations netting arrangements may be viewed as converting a physically-settled transaction into a Cash-Settled Transaction[14] under the Scope Rule or deem such transaction as allowing for the contract to be "rolled over" (thus disqualifying such transaction under paragraph 2(c)(i) of the Scope Rule). CMIC therefore recommends that wording should be added to the Scope Rule to confirm that such payment obligation netting arrangements are permitted in respect of physically-settled transactions. CMIC submits that applying appropriate payment obligation netting mechanisms during the settlement process should not disqualify an FX spot transaction from the exclusion under

[11] See Definitions Release, *ibid,* at 48,257.

[12] See Department of the Treasury, Notice of Final Determination, *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act,* 77 F.R. 69,694, (November 20, 2012) (the "Treasury Determination") at 69,697. Available at: http://www.gpo.gov/fdsys/pkg/FR-2012-11-20/pdf/2012-28319.pdf.

[13] For example, if these transactions are settled using CLS Bank International ("CLS"), each Original FX Transaction and each New FX Swap Transaction is individually settled, while payments to and from CLS are calculated using payment obligation netting mechanics on a multi-lateral basis.

[14] Subsection 2(c) of the Scope Rule provides that foreign exchange spot transactions are excluded only where the parties intend to physically settle the transaction by an exchange of currency by each party on the applicable settlement date. If the parties to such transactions agree to net cash settle in a single currency, for example, based on FX market rates, (such settlement is referred to as "Cash Settlement" and such transaction, a "Cash-Settled Transaction") it would significantly change the risk profile. The payment obligations on the settlement date of each party to a physically-settled foreign exchange spot transaction are known on the trade date. Under a Cash-Settled transaction, however, the single cash payment depends on the exchange rate of the reference currency on the settlement date. As a result, under a Cash-Settled Transaction, the parties are subject to market risk, whereas under a physically-settled transaction, on the settlement date, the parties are primarily subject to settlement risk. Thus, payment obligation netting arrangements do not convert physical settlement to Cash Settlement.

subsection 2(c) of the Scope Rule as it does not change the essential elements of the transaction, namely an exchange of two different currencies at a predefined, fixed rate.

Similarly, parties to contracts entered into for the purchase of a physical commodity for immediate or deferred delivery ("Physical Commodity Forward Transactions") will often enter into a "book out" transaction under which they agree to settle their delivery obligation (but not their other obligations) by exchanging net payments based on price differences.[15] This allows parties to financially settle their delivery obligations, rather than actually making or taking delivery of the physical commodity in order to eliminate the often substantial transaction costs associated with physical settlement.[16] Because the parties to a Physical Commodity Forward Transaction are under no obligation to agree to a book-out transaction, such Physical Commodity Forward Transaction retains all of the risks and obligations associated with making or taking delivery of a physical commodity until either a book-out is agreed or physical settlement occurs.[17] Dodd-Frank expressly provides that parties can enter into book-outs in respect of Physical Commodity Forward Transactions without changing the nature of such transaction from a forward transaction requiring physical delivery to a cash-settled transaction.[18] CMIC submits that it be clarified in the Scope Rule and the related explanatory guidance that where parties to a Physical Commodity Forward Transaction which settles by physical delivery enter into book-out transactions in relation thereto, provided that the parties are not obligated to enter into such book-out transactions, such Physical Commodity Forward Transaction will still be considered a transaction that settles by physical delivery.

Insurance and Gaming Contracts

Under subsections 2(a) and 2(b) of the Scope Rule, a contract or instrument is excluded from being a derivative if it is a gaming contract regulated by federal or provincial gaming control legislation, or an insurance contract or annuity issued by an insurer licensed under federal or provincial insurance legislation. CMIC submits that this exclusion should apply to all gaming contracts and instruments regardless of whether they are regulated in Canada, and to all insurance or annuity contracts, whether or not they are issued by an insurer licensed under federal or provincial insurance legislation. The Committee has indicated that, although these types of products may meet the technical definition of a "derivative" they are not generally recognized as financial derivatives and typically do not pose the same potential risks to the financial system as true derivative products. This reasoning applies equally to all gaming contracts and instruments, and to all insurance or annuity contracts, whether or not they are subject to Canadian regulation.

MODEL PROVINCIAL RULE – TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Obligation to Report

Where a counterparty to a transaction is a "local counterparty", the TR Rule imposes a reporting obligation on such counterparty, thus establishing "who" will have an obligation to report transactions under the TR Rule. The definition of "local counterparty" is broader than any other jurisdiction's reporting regime and has extra-territorial implications. Under paragraphs (c), (d), (e) and (f), a non-Canadian party could have reporting obligations under the Canadian TR Rule even if the other party to the transaction is also a non-Canadian party, and under the transaction there is either no or

[15] See Letter from Edison Electric Institute dated September 20, 2010 on the Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51429 (August 20, 2010) at page 4. Available at: http://www.sec.gov/comments/s7-16-10/s71610-53.pdf.

[16] *Ibid.*

[17] *Ibid.*

[18] See Definitions Release, *supra*, note 10 at 48,228-48,229.

insufficient connection to Canada. In such circumstances, it is not clear how such transactions would impact the Canadian marketplace, and thus, an unreasonable reporting obligation will be placed on the non-Canadian parties. In addition, these paragraphs (particularly paragraphs (e) and (f)) may be unenforceable on the grounds that they are constitutionally inapplicable. The Supreme Court of Canada has held that the applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of "order and fairness",[19] and that the role of "order and fairness" is intended, *inter alia*, to prevent the confusion and potential unfairness of a particular person, or a particular activity, being simultaneously subject to regulation under the laws of multiple jurisdictions.[20]

From a global harmonization perspective, it should be noted that the CFTC had originally proposed a definition of the term "U.S. person"[21] (which then determines the scope of application of Dodd-Frank) that would encompass both persons located within the United States as well as those that may be domiciled outside the United States. This original proposed extra-territoriality reach by the CFTC attracted many submissions from many quarters arguing that the reach was too broad.[22] The European Commission stated that, with respect to the proposed wide definition of a U.S. person, there was significant potential risk with this broad approach because it would have maximized the potential for overlap and duplication of US regulatory requirements with those of other jurisdictions, leading to duplication of laws and potentially irreconcilable conflicts of laws.[23] Based on the recent CFTC No-Action Letter and Final Exemptive Order, [24] it appears that these submissions were successful, and the current definition of the term "U.S. person" is narrower than what was originally proposed. CMIC would also note that the broad extra-territoriality reach of the local counterparty definition would appear to be at odds with the co-operative approach among regulators as seen in last year's joint press statement which appears to emphasize an approach where each regulator limits its scope to entities within its jurisdiction.[25]

Paragraph (c) and Paragraph (d)

Under paragraphs (c) and (d) of the definition, if a party is a reporting issuer or a registrant, in each case, under the securities legislation of a province, such party will be a "local counterparty". These paragraphs will result in all the trades of a non-Canadian party being reported under the TR Rule, including trades with other non-Canadian parties and with no other connection to a specific province, other than the fact that one of the non-Canadian parties is a reporting issuer or a registrant. CMIC submits that the inclusion of these two criteria is arbitrary and unprecedented. CMIC recommends that paragraphs (c) and (d) be removed. An entity becomes a reporting issuer in a particular province because it wishes to sell securities in that province, which is an activity that is unrelated to OTC

[19] See *Unifund Assurance Co. v. I.C.B.C.*, [2003] 2. S.C.R. 63 at para 56.

[20] *Unifund, supra*, at para 80.

[21] See CFTC, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 F.R. 41214 (July 12, 2012). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[22] See comment letters received by the CFTC. Available at: http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1233&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=2

[23] See European Commission letter to CFTC, dated August 24, 2012 at page 2. Available at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58430&SearchText=

[24] See CFTC No-Action Letter 12-22 (October 12, 2012). Available at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-22.pdf and CFTC Final Exemptive Order Regarding Compliance With Certain Swap Regulations Order, 78 F.R. 858 at 862. Available at:

[25] See SEC, *Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market*, (December 4, 2012). Available at: http://www.sec.gov/news/press/2012/2012-251.htm.

derivatives. Similarly, an entity becomes a registrant under provincial securities legislation for purposes unrelated to OTC derivatives. CMIC submits that it is unnecessary for such entity to become a "local counterparty" and report all their trades to a trade repository as required under the TR Rule. Furthermore, the full extra-territorial reach of the proposed TR Rule is seen in paragraph (f) of the definition that requires a non-Canadian subsidiary of a non-Canadian reporting issuer/registrant that enters into a transaction that has no connection to Canada or any of the provinces would also be considered a "local counterparty" for purposes of the TR Rule.

Paragraph (e)

CMIC submits that including paragraph (e) of the definition has extra-territorial effects and may be unenforceable. Under that paragraph, the TR Rule requires that if a party to a transaction negotiates, executes, settles, writes or clears any part of a transaction in Canada, such party is required to report its transactions to a Canadian designated trade repository pursuant to the TR Rule. This is the result under the proposed rule even if such transaction is entered into between two non-Canadian counterparties without a Canadian head office or principal place of business in Canada and where such counterparty is not a reporting issuer or a registrant under any provincial securities laws. Again, paragraph (e) contains wording that is overly broad and unprecedented. [26] CMIC submits that if the only connection to a province under transactions entered into between two non-Canadian entities is the fact that any part of a transaction was negotiated, executed, written or settled in the province, this is insufficient to characterize the parties as "local counterparties" and to thereby impose the provincial trade repository reporting regime upon them without regard to the rules or obligations that may be applicable in their home jurisdictions. In addition, this result would enormously complicate the international dealings by those counterparties who would have to identify themselves as local Canadian provincial counterparties, compounding the "know your counterparty", reporting and disclosure challenges that they would need to face with their global counterparty base.

If the purpose of including paragraph (e) is to ensure that all Canadian dollar denominated transactions, by virtue of the fact that they are all at least partially settled in Canada, are reported to Canadian securities regulators for systemic risk purposes, CMIC submits that this approach is inconsistent with the approach taken globally, and that the purpose of the TR Rule is the regulation of the conduct of OTC derivative market participants, and not the regulation or control of the Canadian currency. No other major jurisdiction has attempted to define the scope of its reporting requirements based on currency alone. CMIC further submits that, consistent with the purpose behind the commitments of the G20 countries relating to OTC derivatives regulation, each G20 country should require the reporting of transactions involving persons located or organized in such country. The regulators in each G20 country should then rely on memoranda of understanding to access information reported in connection with transactions relating to or affecting systemic risk of the financial system of the applicable G20 country.[27] Because of these extra-territorial implications, CMIC submits that non-Canadian parties providing liquidity in Canadian dollar denominated transactions

[26] We would also note that, with respect to transactions entered into by a local counterparty under paragraph (e) of the definition, it is not clear from the wording under subsection 25(1) of the TR rule whether all transactions of the non-Canadian counterparties would be required to be reported, even if such transactions are not executed, negotiated, cleared or settled in the relevant province, or whether the TR Rule requires the reporting of only those transactions which partially or fully is executed, negotiated, cleared or settled in the relevant province. The definition of "local counterparty" in the TR Rule refers to a particular transaction in both the introductory clause and paragraph (e) but subsection 25(1) requires a local counterparty to report derivatives data for "each transaction" (without any restriction on such term) to which it is a counterparty.

[27] See *Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market, note 25.*

may no longer enter into such transactions, thus having a negative effect on liquidity in the marketplace for Canadian dollar transactions.

Paragraph (f)

Under paragraph (f) of the definition of "local counterparty", if a transaction is entered into by a non-Canadian subsidiary[28] of a Canadian party, such non-Canadian subsidiary will be required to report all its transactions under section 25 of the TR Rule, even if there is no connection with Canada (other than the fact that the parent company is Canadian). For example, a subsidiary of a Canadian bank operating in China that enters into an interest rate swap with a Chinese party would be required to report all of its transactions to a designated trade repository pursuant to the TR Rule.

CMIC submits that if paragraph (f) was included as an anti-avoidance measure, a more reasonable approach would be to include an express enforcement provision in securities legislation or to rely on existing, broadly cast, enforcement powers that have already been granted to the securities commissions which should prove to be more than adequate for addressing any non-compliance with transaction reporting requirements.[29] Instead, the approach taken in the TR Rule has extra-territorial effects and may be unenforceable. The test for constitutional applicability requires the plaintiff to demonstrate a connection between breach and harm. [30] CMIC submits that there is an insufficient connection between a non-Canadian local counterparty as defined under paragraph (f) and the harm that would be suffered within Canada if transactions entered into between two such non-Canadian local counterparties were not reported pursuant to the TR Rule.

Substituted Compliance

CMIC submits that the TR Rule should allow for substituted compliance such that the reporting of trades under approved designated non-Canadian regimes with a trade repository approved under such non-Canadian regime should satisfy the reporting requirements under the TR Rule.

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[28] Pursuant to s. 1(4) of the *Ontario Securities Act* ("OSA"), a company shall be deemed to be a subsidiary of another company if, (a) it is controlled by,(i) that other, or (ii) that other and one or more companies each of which is controlled by that other, or (iii) two or more companies each of which is controlled by that other; or (b) it is a subsidiary of a company that is that other's subsidiary. Under s. 1(3) of the OSA, a company shall be deemed to be controlled by another person or company or by two or more companies if, (a) voting securities of the first-mentioned company carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or company or by or for the benefit of the other companies; and (b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the first-mentioned company.

[29] By way of example, section 11 of the *Securities Act* (Ontario) (the "Ontario Act") authorizes the Commission to appoint one or more persons to make such investigation with respect to a matter as it considers expedient for the due administration of Ontario securities law or the regulation of its capital market. Similarly, section 20 of the Ontario Act authorizes the Commission to designate one or more persons to review the books, records and documents that are required to be kept by a market participant under section 19 for the purpose of determining whether the market participant is complying with Ontario securities law. The Commission may also choose to assert its public interest jurisdiction pursuant to section 127 of the Ontario Act. Section 127 authorizes the Commission to make one or more of a number of different orders if in its opinion it is in the public interest to do so. These orders include requiring a market participant to provide a person or company with any document described in the order if the Commission is satisfied that Ontario securities law has not been complied with. Finally, the Commission may apply to the Superior Court of Justice for a declaration of non-compliance with Ontario securities law pursuant to section 128 of the Ontario Act. If such a declaration is made by the Court it may make one or more of a number of different orders including an order requiring a person or company to comply with Ontario securities law.

[30] See test set out in *B.C. v. Imperial Tobacco*, 2006 BCCA 398, esp. at para. 61 and 94, *leave to appeal refused* [2006] S.C.C.A. Nos. 443/444/445/446/447/448/449.

Trade Repository Initial Filing and Designation

When considering the practicalities of designating a trade repository under Canadian regulations, CMIC submits that the process must be as streamlined and efficient as possible at least where the trade repository has been approved as a trade repository by various other regulators. Specifically, with respect to the submission of an application by a non-Canadian trade repository (a "Foreign TR"), the process should not be so onerous as to discourage a Foreign TR from doing business with Canadian market participants. This is particularly important since many Canadian market participants are already reporting to a Foreign TR in respect of their respective obligations under Dodd-Frank. It would be most efficient if such mandatory trade reporting in another jurisdiction would also satisfy reporting obligations of a local counterparty under the TR Rule. CMIC therefore strongly supports the Committee's recommendation under paragraph 6 of the Consultation Paper that exemptions under section 40 of the TR Rule from the requirements of the TR Rule be made available to a Foreign TR if such Foreign TR is subject to an equivalent regulatory and oversight regime in its home jurisdiction.

In order to streamline the process of designating a Foreign TR in Canada, CMIC suggests that such Foreign TR's should only have one point of regulatory contact in Canada. This approach will reduce the administrative burden on both regulators and Foreign TR's by avoiding an unnecessary duplication of effort across the country. To further reduce any duplication of effort, it may also be appropriate to consider a passporting regime with certain international regulators,[31] such as the CFTC and/or European Securities and Markets Authority. If a specified non-Canadian regulator (approved as such by Canadian regulators) has approved such Foreign TR under its regulations, in a passport system, the applicable Canadian regulatory authority would conduct a much more limited review of such Foreign TR than would be required if it had not been previously reviewed by another approved regulator.

Similarly, CMIC suggests that such a passporting regime should be applicable to any trade repository that has been designated (or has applied for designation) as an approved trade repository under one province's regulations where such trade repository would also like to be designated under the rules of other provinces. In such circumstances, consideration should be given to appointing one province as the primary regulator (similar to the existing rules for reporting issuers) and using a passporting regime to streamline the designation process in respect of the other Canadian jurisdictions.

Drafting comments: With respect to the wording used under paragraph 2(3)(b) of the TR Rule, that provision currently requires a legal opinion that the applicant "is able" to provide access and submit to an onsite inspection. CMIC suggests that more precise wording be used given that these are requirements in respect of a legal opinion. Instead of using the words "is able", we suggest using "has the power and authority".

Confirmation of Data and Information

Section 23 of the TR Rule provides that a designated trade repository must establish written policies and procedures to confirm with each counterparty that the reported derivatives data is correct. This

[31] Passporting regimes have long been accepted in the Canadian regulation of public securities offerings. Not only are there aspects of passporting permitted in the domestic distribution of securities publicly within Canada, but the same approach by Canadian securities regulators is seen in certain cross-border offering contexts. For example, the multijurisdictional disclosure system (MJDS) was adopted by the CSA and the U.S. Securities and Exchange Commission in 1991. MJDS provides North American issuers with the ability to access markets in Canada and the U.S. while complying with the prospectus requirements in only their home jurisdiction. It would be reasonable to assume that if Canadian regulators were comfortable with the requirements of the US Securities and Exchange Commission ("SEC") in the area of securities offerings to Canadian investors pursuant to MDJS, it would be comfortable with the requirements of the SEC in the area of regulatory oversight of a trade repository.

requirement presents serious logistical issues in a "real-time" reporting environment. CMIC notes that this requirement is different than the requirements under Dodd-Frank[32] where there is no positive requirement on the trade repository to affirmatively communicate with both counterparties when data is received from a SEF, a designated contract market, a derivatives clearing organization or a third party service provider. Communication need not be direct and affirmative where the trade repository has formed a reasonable belief that the data is accurate, the data or accompanying information reflects that both counterparties agreed to the data and the counterparties were provided with a 48 hour correction period. However, the trade repository must affirmatively communicate with both parties to the transaction when creation data is submitted directly by a swap counterparty. For swap continuation data, a trade repository has confirmed the accuracy of such data if the trade repository has notified both counterparties of the data that was submitted and provided both counterparties with a 48 hour correction period, after which a counterparty is assumed to have acknowledged the accuracy of the data. CMIC supports the approach used under Dodd-Frank and recommends that the TR Rule incorporate the Dodd-Frank approach.

Duty to Report; Reporting Counterparty

CMIC supports having a hierarchy of counterparty types determine default reporting obligations. This is also consistent with existing in force international protocols and standards.[33] The TR Rule does not include such a hierarchy, nor does it address market conventions for trade reporting. Such a hierarchy is critical for buy-side participants as the TR Rule places a burden on them that is not present in other jurisdictions. If both parties are derivatives dealers, or if both parties are not derivatives dealers, paragraph 27(1)(b) provides that both parties will be reporting parties, unless they agree in writing between themselves that one of them is to be the reporting counterparty. This requirement necessitates that each dealer enter into a written agreement with every other dealer setting out who will be the reporting counterparty under certain transactions. If the two parties are unable to agree in writing prior to, or contemporaneously upon entering into a transaction, or if the parties mistakenly assume that market conventions will apply and forget to obtain such a written agreement, there will be dual reporting requirements. This result is inefficient, given that there are market conventions in place that will determine which party will be the reporting party in such circumstances. CMIC submits that the TR Rule should set out a hierarchy as to the determination of the reporting party similar to the hierarchy set out under Dodd-Frank in order to avoid dual reporting or uncertainty as to which party will be obligated to report, and at a minimum, the words "in writing" should be removed from paragraph 27(1)(b) of the TR Rule.

With respect to third party delegation of reporting obligations, subsection 27(4) of the TR Rule allows a reporting counterparty to delegate its reporting obligations but remains responsible for ensuring timely and accurate reporting of derivatives data. The related explanatory guidance indicates that this delegation includes delegation to a CCP in respect of cleared transactions. It is CMIC's view that where parties to a transaction have executed such transaction using a SEF or have agreed to clear such transaction using a CCP, such SEF or CCP should be obligated under the TR rule to report the transaction to a trade repository (regardless of whether one or both counterparties are "local counterparties", thus overriding subsection 27(2) of the TR Rule). In such circumstances, CMIC submits that the counterparties should not be required to monitor whether such reporting has been done by the SEF or CCP. CMIC submits that such counterparties should not be ultimately

[32] CFTC, Final Rule, *Swap Data Repositories: Registration Standards, Duties and Core Principles*, 76 F.R. 54,538 (September 1, 2011) (the "SDR Registration Rule") at 54,579. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-20817a.pdf.

[33] See hierarchy of counterparty reporting as set out under Dodd-Frank: CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 F.R. 2,136 (January 13, 2012) (the "Reporting Requirements") at 2,207. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33199a.pdf.

responsible for reporting in the event that such SEF or CCP fails to report, as long as the SEF and CCP have been approved by the applicable securities regulator. This approach is consistent with Dodd-Frank.[34] Requiring counterparties to assume such a monitoring obligation will add considerably to existing counterparty obligations and systems in such circumstances.

While the motivation for holding a reporting counterparty ultimately responsible in respect of transactions executed using a SEF or cleared through a CCP may be that the applicable Canadian regulator has jurisdiction over such reporting counterparty and thus would be able to enforce this rule, CMIC submits that the applicable Canadian regulator may have a similar ability to enforce this rule against the SEF or CCP as they likely will have been approved by such Canadian regulator under the relevant province's Securities Act and thus, subject to the jurisdiction of such regulator.

Pre-existing Trades

Local counterparties to a transaction that was entered into before the date on which they are required to report the TR Rule (such transactions, "Pre-existing Transactions") are required to report "derivatives data" in respect of such transactions. Under subsection 26(2) of the TR Rule, the derivatives data to be reported for such transactions is the same as the data required to be reported for transactions entered into after the coming into force of the TR Rule. This is different than what is required under Dodd-Frank[35] where only basic economic data is required to be reported for such Pre-existing Transactions. Therefore, Pre-existing Transactions that have already been reported under Dodd-Frank would be required to be amended for the additional information required under the TR Rule, which is operationally challenging and burdensome. CMIC submits that, while some parties might not have records of all terms of each Pre-existing Transaction, the rule should be recast to require that parties report only principal economic terms for each Pre-existing Transaction, which should provide Canadian regulators with sufficient information. Further, CMIC is of the view that it would be inefficient and costly to go back and report additional information for transactions which have already been reported under Dodd-Frank, and therefore, a shorter list of principal economic terms should be set out in the TR Rule which would be applicable to only Pre-existing Transactions.

Real Time Reporting

The TR Rule does not contemplate circumstances where the trade repository ceases its operations or stops accepting data for a certain product. CMIC suggests that in such circumstances the rule should allow a reporting counterparty a reasonable period of time to transition to another trade repository without contravening the timing requirements under section 28 of the TR Rule provided that the reporting counterparty provides a copy of any notice it receives from the trade repository informing parties that it will be ceasing operations or stop accepting data for a certain product.

CMIC submits that the TR Rule should exempt transactions between affiliates from the real time reporting requirements under section 28 of the TR Rule. The real time dissemination of pricing information for transactions between affiliates is unnecessary and, further, might distort price discovery rather than enhancing it.[36]

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[34] See Reporting Requirements, *ibid.,* at 2199.

[35] CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 77 F.R. 35,200 (June 12, 2012) (the "Pre-Enactment Swaps Rule") at 35,208. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-12531a.pdf.

[36] See CFTC, Final Rule, *Real-Time Public Reporting of Swap Transaction Data*, 77 F.R. 1182 (January 9, 2012) at 1187. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33173a.pdf.

Identifiers

Section 30 of the TR Rule requires that a legal entity identifier must be assigned to a counterparty in accordance with the standards set by the Global Legal Entity Identifier System. If the Global Legal Entity Identifier System is unavailable when the TR Rule comes into force, CMIC would suggest that the CSA confirm that CFTC Interim Compliant Identifiers can be used as a substitute pursuant to paragraph 30(3)(a) of the TR Rule.

Section 31 of the TR Rule provides that unique transaction identifiers must be assigned by a designated trade repository. However, CMIC notes that unique transaction identifiers can be created by SEFs and accordingly, paragraph 31(2)(a) should include a reference to such electronic trading venues.

Valuation Data

The TR Rule under subsection 35(2) provides that valuation data is be reported on an ongoing basis, whether daily or quarterly, depending on whether the local counterparty is a dealer. Since the term "local counterparty" is determined at the time a transaction is entered into, this could have the effect of requiring a party to continue reporting valuation date in respect of a transaction when such party is no longer a local counterparty.[37] CMIC submits that if a party is no longer a "local counterparty", the TR Rule should clarify whether valuation data should continue to be reported in respect of such party's trades (which were originally reported to a trade repository).

With respect to the timing requirements by which valuation data is to be reported pursuant to paragraphs 35(2)(a) and (b) of the TR Rule, CMIC submits that the TR Rule should expressly provide that valuation data should be reported using the most current daily mark available. It is market standard that valuations of OTC derivatives are performed overnight and accordingly, the valuation data for a transaction will be first reported on the business day following the trade date. This approach is consistent with Dodd-Frank.[38]

Recordkeeping

The TR Rule provides that local counterparties to a transaction must keep "records" of the derivatives data (which includes continuation data) in relation to the derivative for the life of the derivative plus a period of 7 years after the date on which the derivative terminates. CMIC suggests that clarification is needed with respect to what is required to be retained – whether it is simply whatever records a local counterparty has relating to the transaction, or whether it is all the information that has been reported to the trade repository under the TR Rule.

As this requirement under the TR Rule is two years longer than the requirement under Dodd-Frank, it means that a local counterparty that is not a derivatives dealer (and who could otherwise effectively rely on a derivatives dealer reporting under Dodd-Frank[39]) would be responsible for keeping such records for the additional two years. Buy-side local counterparties do not expect to create such

[37] For example, based on the current definition of "local counterparty" (if in fact the breadth of this definition survives, with which we do not agree and find to be inappropriate – see discussion under the heading "Obligation to Report"), a party may be a registrant under the applicable securities legislation at the time the transaction was entered into but before the termination of that transaction, may no longer be a registrant.

[38] See Reporting Requirements, *supra*., note 33 at 2154.

[39] It should be noted that in the case of a foreign derivatives dealer reporting under Dodd-Frank, it may not know that such reporting will also be used to satisfy a local counterparty's obligation to report under the TR Rule, and thus may not be able to inform the trade repository that it will need to retain such information for an additional two years.

reporting or record-keeping capabilities and requiring them to do so in order to comply with this obligation would be quite burdensome. CMIC recommends that the CSA consider a reduction in the period of record retention to 5 years (at least where the reporting counterparty maintains the information for the period required by the rules of its primary jurisdiction). At a minimum, the rule should be clarified so that a local counterparty will satisfy this requirement as long as it retains its own original records in respect of such transaction, and, if such local counterparty was not responsible for reporting derivatives data to the trade repository, it would not be required to create such derivatives data in order to satisfy this rule.

Data Available to Counterparties

As mentioned in the CMIC TR Letter, there needs to be a legal requirement to disclose to a trade repository (and to a central clearing counterparty) derivatives data relating to what are usually confidential transactions (either by operation of applicable law or by contract). In the absence of such a legal requirement to make such disclosure, there would be no ability for market participants to do so without being in breach of confidentiality obligations. The conventional confidentiality restriction relating to an OTC derivatives transaction (again, whether such confidentiality arises by operation of law or by the terms of the contract between the counterparties) has an exception for disclosure required by applicable law. Subsection 38(3) of the TR Rule is an attempt to override any such confidentiality restriction. Under subsection 38(3), each counterparty to a transaction is deemed to have consented to the release of derivatives data <u>for the purposes of subsection (1)</u> (emphasis added). Further, subsection 38(4) provides that subsection 38(3) applies regardless of any agreement to the contrary between the counterparties to a transaction. Subsection 38(1) provides that a designated trade repository must provide counterparties to a transaction with access to all derivatives data relevant to that transaction which is submitted to the designated trade repository. Therefore, the consent provided under subsection 38(3) is only limited to the release by the trade repository to counterparties to the transaction of the data relevant to that transaction only. This does not cover the initial disclosure by a counterparty to the transaction under its obligation to report derivatives data to a trade repository under section 25 of the TR Rule, nor does it cover the disclosure by the trade repository to regulators under section 37 and disclosure to the public under section 39 (even though subsection 39(4) provides that the identity of the counterparties must not be disclosed, it is arguable that such information could be used to determine the identity of a counterparty – see additional comments below under the heading, “Data Available to Public”). Accordingly, CMIC recommends that subsection 38(3) of the TR Rule be amended to expand its application to all instances under the TR Rule which contemplates disclosure of information to third parties.

In addition, if the agreement governing the transaction is not governed by the local law of the relevant province, or if one of the counterparties is not a local counterparty, the deeming provision under subsection 38(3) may not be sufficient to compel disclosure in contravention of a confidentiality provision in the underlying agreement. For example, privacy laws of some non-Canadian jurisdictions may, in certain circumstances, restrict or prohibit the disclosure of certain “identity information”[40] of a non-reporting party. CMIC recommends that the CSA allow a reporting party or a trade repository to withhold the disclosure of such “identity information” in such limited circumstances.

Data Available to Public

[40] This would be information that would otherwise be required to be reported under the TR Rule and that identifies or would intrinsically reveal the identity of the counterparty or its affiliated group. See the CFTC No Action Letter No. 12-46 dated December 7, 2012 to Robert Pickel, Chief Executive Officer, International Swap and Derivatives Association, Inc., footnote 2. Available at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-46.pdf.

CMIC supports the goal of post-trade transparency. However, in CMIC's view, public disclosure of aggregate data on open positions, transaction volumes, number of transactions and average prices may result in inadvertent disclosure of confidential information. CMIC would be supportive of such disclosure only if rules relating to delayed reporting of large trades meeting a block trade threshold are established in order to preserve the anonymity of market participants and ensure there is no detrimental impact on market liquidity or function. Further, given the volume of the Canadian market and the small number of market participants, CMIC submits that it will be easy to identify the counterparties to certain transactions if aggregate data by (i) geographic location and (ii) type of counterparty is required to be reported, and therefore should be removed from subsection 39(2) of the TR Rule. Disclosure of this type of information is not a requirement under Dodd-Frank.

As noted in the CMIC TR Letter, the SEC proposed a rule that requires full disclosure of transaction level data including notional trade size for block trades, albeit on a delayed basis. In response to the SEC's proposal, however, ISDA stated such disclosure, even if delayed, would "likely impair liquidity for large transactions in the CDS market".[41] In a separate study, the SEC noted many OTC derivative instruments trade sparsely, and the trade sizes tend to be larger for liquid instruments compared to less frequently traded instruments.[42] Such characteristics of the OTC derivatives market are magnified in the Canadian market, which has a considerably smaller number of market participants and smaller transaction volume than the US. Public disclosure of transaction details – even if done on an anonymous basis – could be used to reverse engineer Canadian firms' positions and trading strategies. This information can be used for arbitrage and potential market manipulation, with detrimental impact on market liquidity and function. Compared to the US, the Canadian OTC derivatives market has far fewer participants and liquidity providers. Block trade threshold level setting in the Canadian market must take into account the transaction and liquidity characteristics that are specific to the Canadian market, in addition to asset class and complexity.

The TR Rule does not provide for reporting of block trades on a delayed basis. CMIC believes that there should be two different types of reporting time frames, i.e. standards for reporting of trades to a trade repository within a specified time frame of trade execution and specified delays before public dissemination of block trade information.

As mentioned above, CMIC is very concerned about publication of block trade data because of (i) the risk of inadvertent disclosure of confidential information; (ii) the ability to reverse-engineer trading strategies; (iii) the risk that the small number of relatively large market participants in Canada could lead to the ability to derive individual participant positions; and (iv) the risk that disclosure of transaction level reports to the public before a party is able to hedge its position could have an impact on market function. The current time frame under subsection 39(3) of the TR Rule of one to two days after receiving principal economic terms of each counterparty is not enough time in certain circumstances for a party to hedge its position in the market. Accordingly, CMIC strongly believes that the effective date of subsection 39(3) be delayed for a period of 2 years following the date on which the reporting obligations under Part 3 of the TR Rule comes into force. During this time, CMIC recommends that the CSA conduct a study of the issue using the data reported to trade repositories

[41] *See* ISDA. "Block trade reporting for over-the-counter derivatives markets." January 18, 2011. Available at: http://www.isda.org/speeches/pdf/Block-Trade-Reporting.pdf . Securities and Exchange Commission. File No. S7-34-10; Release No. 34-63346. "Security Based Swap Block Trade Definition Analysis." January 13, 2011. Available at: www.sec.gov/comments/s7-34-10/s73410-12.pdf (at page 2).

[42] Securities and Exchange Commission. File No. S7-34-10; Release No. 34-63346. "Security Based Swap Block Trade Definition Analysis." January 13, 2011. Available at: www.sec.gov/comments/s7-34-10/s73410-12.pdf (at pages 2-3).

in respect of Canadian market participants[43] and engage in a consultation process with Canadian market participants.

Exemptions

In paragraph 8 of the Consultation Paper, the Committee has specifically requested comments on subsection 40(2) of the TR Rule. We submit that the $500,000 exemption with respect to aggregate notional value is too small. Small businesses may be inadvertently caught by these rules and would be adversely affected. Under subsection 27(2), a local counterparty that completes a trade with a dealer that is not a local counterparty will ultimately have responsibility for reporting if the non-local counterparty does not complete the reporting. This could result in an onerous burden on any buy-side participant, but in particular, on smaller market participants. CMIC submits that any final determination of this threshold amount should be determined after the reporting regime has been implemented and the data studied for a period of 3 years. In the absence of an understanding as to why the exemption is cast as applying only to physical commodity transactions, CMIC submits that the threshold, once determined, should apply to all types of OTC derivatives.

Implementation Timelines

As mentioned above, to the extent the TR Rule and the Scope Rule differ from the requirements under Dodd-Frank, market participants will need to amend their operational systems and procedures in order to comply with the Model Rules.[44] In particular, due to the breadth of the local counterparty definition currently in the TR Rule, this will mean capturing entities that are not currently required to report transactions under Dodd-Frank or any other jurisdiction's reporting regime. The implementation time in respect of such entities would be significantly longer than the time required by entities already reporting under Dodd-Frank since such entities would need to create systems to comply with the Model Rules. For some such entities, including large buy-side participants, this will involve developing and creating whole new systems if they otherwise have no reporting obligations. For others who have different reporting systems, this will mean adding a patch to an existing reporting system in order to add or remove data fields to comply with Canadian reporting requirements. Even where a "patch" is all that is required in order to comply with the Model Rules, this is not a simple task as many counterparties have multiple trade capture systems depending on the specific product type, asset class or jurisdiction involved. Once a patch has been created, it needs to be tested, which involves running parallel systems. As well, many such systems are provided by third party vendors with the result that the timing of completion of any changes is not within the control of the local counterparty.

Minimum Data Fields to be Reported

CMIC has identified that Appendix A to the TR Rule includes significant and numerous fields that differ from Dodd-Frank reporting requirements. For example, the custodian, reset dates, settlement agent and branch/desk identifier fields are not included under Dodd-Frank. Such differences would require significant operational efforts to process CSA-compliant reporting through a swap data repository that would not be necessary if the data fields required under the TR Rule were either

[43] It is important to use data relating to only Canadian market participants for purposes of studying the block trade issue, and not data relating to "local counterparties" since the final definition of "local counterparties" may include non-Canadian market participants which would not represent an accurate picture of the Canadian market.

[44] In addition to the differences noted elsewhere in this letter, for certain historical reasons in the U.S., certain products are excluded entirely from Dodd-Frank, such as options on securities, but will be included as a derivative under the Scope Rule. As a result, even though some market participants are already reporting under Dodd-Frank, their systems will need to be amended to cover these additional products.

harmonized, or provided for substituted compliance, with designated international regimes. Further, to the extent the data field requirements under the TR Rule differ from that required under Dodd-Frank, aggregation of such data by regulators will become difficult to reconcile thus reducing the effectiveness of such data.

One of the ways in which Appendix A differs from Dodd-Frank is the requirement to include Reset Dates (being the time and date when the transaction will be reset) as part of "event data". Event data is included in the definition of "creation data", which is included in the definition of "life-cycle data". Under section 34 of the TR Rule, the reporting counterparty must report life-cycle data to a designated trade repository upon the occurrence of a life-cycle event, which is defined to mean any event that results in a change to the derivatives data previously reported. Reset Dates can occur frequently under many swap transactions, as often as monthly. It is not clear under the current draft as to whether including Reset Dates as part of "event data" would have the effect of a monthly reporting requirement under section 34 of the TR Rule resulting in an extremely large volume of data. It is CMIC's understanding that no other jurisdiction has this reporting requirement and submits that this information would not be useful to regulators.

CONCLUSION

CMIC believes that continued engagement with the CSA is fundamental to the development of a regulatory framework that meets the G20 commitments and achieves the intended public policy purposes. Thoughtful inclusion by regulators of the themes set out in the Overview section of this letter will meaningfully contribute to the success of the development of the rules relating to designation of trade repositories and trade reporting.

As we have noted in our prior submissions, each subject relating to OTC derivatives regulation is interrelated with all other aspects. As such, CMIC reserves the right to make supplementary submissions relating to the Model Rules following publication of further consultation papers and model and draft rules.

CMIC hopes that its comments are useful in the development of rules relating to designation of trade repositories and trade reporting and that the CSA takes into account the practical implications for all market participants who will be subject to such rules. CMIC welcomes the opportunity to discuss this response with representatives from the CSA.

The views expressed in this letter are the views of the following members of CMIC:

Bank of America Merrill Lynch
Bank of Montreal
Caisse de dépôt et placement du Québec
Canada Pension Plan Investment Board
Canadian Imperial Bank of Commerce
Healthcare of Ontario Pension Plan
HSBC Bank Canada
JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
National Bank of Canada
Ontario Teachers' Pension Plan Board
Royal Bank of Canada
The Bank of Nova Scotia
The Toronto-Dominion Bank