ISDA® Safe, Efficient Markets

BY E-MAIL February 11, 2013

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Dear Sirs/Mesdames:

Re: Consultation Paper 91-301 - Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting

The International Swaps and Derivatives Association, Inc. (**ISDA**)[1] is grateful for the opportunity to respond to the Canadian Securities Administrators (**CSA**) OTC Derivatives Committee's **Consultation Paper 91-301 – Model Provincial Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting** (the ***Paper***). We note

[1] ISDA's mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. For more information, visit www.isda.org.

that the Paper addresses many of the issues we commented upon in our letter to the Committee dated September 12, 2011 regarding Consultation Paper 91-402 on Derivatives: Trade Repositories (the ***TR Comment Letter***). In this letter, we will refer to the Model Provincial Rule Derivatives Product Determination as ***the Scope Rule*** and the Model Provincial Rule Trade Repositories and Derivatives Data Reporting as the ***TR Rule***.

ISDA is actively engaged with providing input on regulatory proposals in the United States, the United Kingdom, Europe and Asia. ISDA is leading industry efforts to enhance trade reporting of OTC derivatives data. Our comments on the Paper are derived in part from these efforts and this experience and from consultation with ISDA members operating in Canada and globally. They build upon our comments in the TR Comment Letter.

Our comments are organized as follows:

I General Comments

II Derivatives: Product Determination - The Scope Rule

III Trade Repositories and Data Reporting Definitions

IV Trade Repository Rules

V Data Reporting Rules

VI Exemptions

I. General Comments

We commend the Committee for working cooperatively with the CSA's international counterparts and international bodies to facilitate the global sharing of trade reporting data amongst regulators and reducing inconsistencies and conflicts between the different regulatory regimes in Canada and across borders. As we urged in our TR Comment Letter, duplicative reporting, record keeping and other requirements resulting from overlapping regulations that can lead to excessive costs and potential for errors should be avoided. We strongly support the intention of the Committee that the terms, substance and effect of the rules be the same across international jurisdictions and that market participants and derivative products receive the same treatment across Canada. In the course of our comments, we will refer to the final rules and interpretative guidance promulgated by the CFTC and SEC with respect to certain definitions relevant to trade repositories and reporting (the ***US Definition Release***). [2]

[2] See 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)

We note the possibility that there will be variations in final provincial rules. Given the wide definition of "local counterparty" that is proposed in the TR Rule, market participants will inevitably be subject to rules in more than one Canadian jurisdiction. We urge all the CSA to work to minimize any variation between Canadian jurisdictions. Even minor differences in rules could provide a disincentive for dealers to transact with counterparties from Canadian jurisdictions with less significant derivatives activity and thereby decrease liquidity in the Canadian market, which could severely impact the Canadian market, given its size relative to other international markets. Such differences would also render it more difficult for global trade repositories to aggregate the necessary data which would undermine the very purpose of the trade repository reporting rules. We believe that minimizing any and all impediments to access by Canadian market participants to global trade repositories will further the goals of the TR Rule more than adopting any idiosyncratic requirements in a particular Canadian jurisdiction.

We also commend the approach of the TR Rule in creating a consistent trade reporting framework that adopts global reporting standards such as unique legal entity, transaction and product identifiers. But, we urge the Committee to ensure not only that the standards are the same as those in international jurisdictions, but that the data required to be reported is consistent with that required in other foreign jurisdictions. It is important that market participants be able to apply a single set of reporting requirements to fulfill their reporting obligations globally across various jurisdictions without having to consider unique requirements in every jurisdiction that their entities or activities touch. In particular, combining a wide jurisdictional reach with unique requirements will inevitably impose an unnecessary burden on market participants and create disincentives for non-Canadian entities to participate in Canadian derivatives and securities markets.

The proposed definition of "local counterparty" gives the rule a potentially wide reaching extra-territorial scope. It is not clear that the implications of this definition have been fully considered and we believe that it will not be possible operationally or in some cases legally for many entities located outside of Canada to comply. We comment on this feature of the TR Rule in more detail below.

The TR Rule does not propose or seem to allow for any phased approach to implementation of the reporting requirements. We urge the Committee to adopt a phased in approach based on different classes of market participants (dealers first, end-users last), asset classes and availability of licensed trade repositories for the product. The timeline should also take into consideration the industry's capacity to meet the reporting requirements for the specific asset and product class. For each asset and product class, there exists a diversification in data standards and booking systems. Firms also have several booking systems to support different asset classes. Each system may be unique in its information technology protocol and standards. It can be difficult to deploy systems for extracting data from one booking system, to other systems within an organization. Implementing trade reporting systems for each class

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requires significant time and resources. At the very least, the Canadian reporting requirements should not be ahead of those required under Dodd-Frank.

II. Derivatives: Product Determination - The Scope Rule

We note that the Scope Rule is intended to apply for purposes of the TR Rule, but that the Committee expects that it will apply to other rules, with necessary modifications. Our comments are, therefore, not related specifically to a consideration of the Scope Rule in the context of the TR Rule. We believe that it is important, however, that market participants be given an opportunity to review and comment on the model scope rules (and accompanying guidance) that will apply with respect to each of the other rules as the implications of a particular definition may only be fully considered in the context of specific rules.

We believe it would also be helpful if the Guidance for each such model scope rule make it clear that the rule was developed in light of the particular policy of the underlying rule and not with a view to determining an appropriate definition of a derivative for other purposes, including capital treatment or insolvency safe-harbours where very different policy considerations may be involved.

We also believe that it is critical that the definitions not depart in any material way from those in the US Definitions Release. To encourage non-Canadian dealers that are not local counterparties to undertake reporting obligations for Canadian counterparties, it should be possible for such entities to rely on the systems and processes they have put in place at great cost to comply with the Dodd-Frank reporting requirements. Also, given the wide definition of "local counterparty", it is inevitable that many non-Canadian entities subject to Dodd-Frank or EMIR reporting requirements will also be caught by the TR Rule reporting requirements. Canadian institutions are similarly subject to the Dodd-Frank requirements and have made significant investments to develop reporting systems and processes.

We believe that the differences between the categories of exempt transactions in the Scope Rule and those in the CFTC Rule are in some cases quite significant. Avoiding the complexity of the US Definition Release is an understandable goal, but it should be possible to accomplish this objective while still providing for a consistent scope. Below we point out some of the differences we believe are material and problematic.

Section 2(b) – Insurance or Annuity Contracts

We agree that it is appropriate to exclude insurance and annuity contracts. However, we believe that it should not be a requirement for exclusion that the contract is issued by an insurer holding a licence under insurance legislation of Canada or a province. An insurance or annuity contract is in essence not a derivative and it does not become so by being issued by a foreign insurer. Canadian insurance laws apply with respect to the insurance of risks in Canada. While there may be overlap, the jurisdictional tests and the law with respect to what it

means to insure a risk in Canada are not the same as the jurisdictional tests for application of securities or derivatives legislation. For example, if a counterparty is an Ontario incorporated entity but through its U.S. located branch it purchases a reinsurance product or credit insurance with respect to its U.S. business from a U.S. licensed insurer, that U.S. licenced insurer would not necessarily be required to have a Canadian or Ontario insurance license. Similarly, if an entity is a local counterparty because it is a subsidiary of a Canadian bank but it is a licensed insurer in the U.S. where it is located and where it insures risks, it will not necessarily have a Canadian insurance license. Nevertheless, an insurance policy issued by such an entity still is not "recognized as a financial derivative" and does not "pose the same potential risks to the financial system as other derivative products".

The fact that a product is issued by a licensed insurer can be a factor in characterizing the product as an insurance policy or annuity contract where it has characteristics similar to derivatives transactions. It should, however, be sufficient for the purposes of this rule that the policy or contract is issued by an insurer holding a license under insurance legislation in Canada, under the laws of its home jurisdiction or the laws applicable in the place where the risks are insured. A list of acceptable international insurers could be developed to facilitate the application of this rule. This approach would ensure that the product is in fact regulated as insurance in a relevant jurisdiction and appropriately excluded from the application of the derivatives legislation. This approach may also be accomplished in part by defining a list of enumerated policy types that would be deemed to be insurance contracts as long as the insurer was not prohibited by applicable insurance regulation from issuing the policy in the particular circumstances. We believe that a more detailed and sophisticated explanation of the insurance policy exclusion is required in order to ensure that the Scope Rule does not have any inadvertent and inappropriate effects where the insurance does not relate to Canadian risks. The general approach of the US Definitions Release with respect to insurance products is to define a test based on product type (including a list of enumerated products that are defined to be insurance products) and on provider type. We recommend that a similar approach be employed in general for this exclusion and believe appropriate definitions could be formulated without adopting all of the complexity of the US Definitions Release.

The same general comment can be made with respect to the limitation in the gaming contract exception in 2(a) to those regulated in Canada.

Section 2(c) - Spot Market Contracts for Purchase or Sale of Currency

Section 2(c) recognizes that the customary period for settlement of foreign exchange transactions is two days and on that basis appropriately excludes them from the scope of the derivatives definition. However, there are longer customary settlement period in certain cases and ISDA recommends that section 2(c) be extended to recognize the longer timeline in those

circumstances. The US Definitions Release[3] recognizes a further category of Securities Conversion Transactions:

> The CFTC will consider the following to be a bona fide spot foreign exchange transaction: An agreement, contract or transaction for the purchase or sale of an amount of foreign currency equal to the price of a foreign security with respect to which (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline and (ii) actual delivery of the foreign security and foreign currency occurs by such deadline (such transaction, a ''Securities Conversion Transaction'').

A similar approach could be taken under section 2(c).

Section 2(c) and Section 2(d) - Immediate or Deferred Delivery of a Physical Commodity

Physical Commodity Definition. ISDA supports the position that transactions providing for physical delivery of an underlying commodity should be excluded from the definition of derivatives. The Scope Rule does not define "physical commodity" although examples are provided in the Guidance. The Guidance also states that physical commodities do not include "financial commodities" such as currencies, interest rates, securities and indexes. Not all physical goods are "commodities". It is not clear whether the term "commodity" is being used in a more technical sense (e.g. as defined in the *Blue Range* case[4]) or to mean any tangible and fungible item which can be purchased and sold. Given the extremely wide definition of "derivative" in the *Securities Act* (Ontario), the *Derivatives Act* (Quebec) and other securities and derivatives legislation in Canada, it should be made clear in the Guidance that the CSA do not consider contracts for the future delivery of a tangible product that is not a "commodity" to be a derivative. There should also be further clarification that products need not be tangible in order to constitute physical commodities. Certain intangible rights are capable of being delivered and can be used or consumed (e.g., emissions credits which can be used by emitting pollutants within the allowance). The US Definitions Release under Dodd-Frank provides this useful clarity.[5]

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[3] At 48257

[4] The Alberta Court of Appeal in *Re Blue Range Resource Corporation* defined a "commodity" as a product that was interchangeable and readily identifiable as a fungible commodity, capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction. The product must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that the transaction may be marked to market and its value determined.

[5] US Definitions Release, at 48,233.

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Do Not Allow for Cash Settlement. Section 2(c) (ii) and 2(d) (ii) provide that the contract will be within the exclusion only if it "does not allow for cash settlement in place of physical delivery…". The Guidance clarifies that certain provisions in standard contracts providing for cash payments when termination rights are triggered would not themselves be interpreted by the CSA to allow for cash settlement. It states that "to the extent that such standardized provisions relate exclusively to termination rights **resulting from a breach of contract**, we would not interpret them as allowing for cash settlement in place of physical delivery".

First, we believe that the rule itself should recognize that this is not a strict requirement by reframing the provision to say that it does not allow for cash settlement in place of physical delivery "in the ordinary course" or "at the option of one of the parties" or other language to that effect. The Guidance could assist in interpreting what is or is not "ordinary course" or an "option". Our concern is that, as drafted, the rule is narrower than what the CSA actually intend it to be and market participants will be unsure whether they can rely only on the Guidance in the face of what appears to be a more restrictive rule.

Second, we believe that the Guidance describes too narrowly the situations where cash settlement would not affect characterization of the transaction as an excluded derivative. As described, almost no transaction documented under standard industry terms would be an excluded derivative.

Many termination rights are not triggered by a breach of contract *per se*. For example, the commencement of a bankruptcy or reorganization proceeding is an Event of Default under the standard ISDA Master Agreement, but it is not a default in the obligation to deliver the currency or commodity. Nor are such provisions always "standardized" in the sense of being part of the published form or guidance. For example, with various entity types, it may be necessary to add customized provisions on termination to reflect the application of different laws (e.g., the winding-up of a pension fund by a regulator). Including these provisions is critical to the close-out netting process. Parties may define these as Events of Default or, alternatively, as Termination Events. In either case, close-out of the transaction may result. Spot currency and physical commodity contracts are often transactions under master agreements covering many other types of transactions and the default that triggers termination may relate to performance defaults under these other transactions. When close-out is triggered all transactions are terminated, they are valued and those values are included in the calculation of the termination amount. Without clear guidance that the CSA would not interpret this process, regardless of whether it is triggered by a performance default with respect to the delivery of the currency or commodity contract, to allow for cash settlement, it would be difficult to conceive of a physical currency or commodity transaction that ever would be an excluded derivative if documented under standard industry master agreements such as an IFEMA, ISDA Master Agreement, Gas EDI, NAESB or LEAP master.

Intention Requirement.

Settlement Practices. We also believe that further clarification is required to ensure that certain market settlement practices do not result in physically settled transactions being characterized as derivatives.

FX Settlement Netting. A market settlement practice with respect to FX spot transactions is to reduce the delivery obligation by netting the notional delivery obligations under FX swaps settling on the same date. Such netting arrangements applicable during the settlement process should not result in characterization of the FX spot transactions as derivatives. We recommend adding clarifying wording to section 2(c) or the Guidance on this point. The US Definitions Release recognizes that this practice does not affect the characterization of FX transactions as excluded derivatives.

Booking Out. Parties to commodity transactions may individually negotiate cancellation agreements or book-outs with other parties that allow for settlement by exchanging cash payments based on price differences in order to avoid the substantial costs involved in physical settlement. The US Definitions Release recognizes that such agreements do not affect the characterization of the transactions as physically settled.[6]

Vagueness of the Intention Requirement. We are concerned that this criterion is too vague and that its application will create a great deal of uncertainty as to whether the transaction is excluded. Some questions that the test raises are:

1. Is it an objective determined intention or does it depend on the subjective intention of the particular parties?

2. Do both parties have to have the same intention, or either of the parties, or the delivering party?

3. How can an party "actually intend to rely on … frustration provisions" when the occurrence of such event is by definition not within either party's control?

4. How can an party "actually intend to rely on breach… provisions" when the occurrence of such event by the counterparty is not within its control?

The Guidance states that if the intention changes the transaction would become subject to "all derivatives rules". It may not be appropriate to apply derivatives rules to transactions that have already been entered into. This may not make sense for a disclosure obligation, a registration obligation or a collateral obligation, for example. It will also add a significant measure of uncertainty with respect to trade reporting and is inconsistent with CFTC interpretations which consider intent at the time of entering into the forward contract.[7]

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[6] Definitions at 48228-48229.

[7] See US Definitions Release 48227 to 48229 and *Statutory Interpretation Concerning Forward Transactions*, 55 FR 39188

The Guidance states that the Committee does not regard securities as physical commodities. We believe it would make sense to treat contracts for the physical delivery of securities in a similar way, however. A physically settled forward with respect to a security is a derivative, but, in certain Canadian jurisdictions, it is also regulated as a trade in a security (even though the forward contract itself may not be a security) and so, in those jurisdictions, there would not seem to be a reason to also treat the forward contract itself as a derivative. We believe that the effect of the rule as drafted is that the forward contract is a derivative (not a security) and is subject to the TR Model Rule, but also a trade in a security. We understand from the Guidance that the intention of the Scope Rule is to resolve conflicts that arise when a contract meets both the definition of a security and a derivative, but it is unclear how that would apply in this situation.

Section 2(e) and 2(f) – Deposit Transactions

Only derivative linked deposits of Canadian deposit taking institutions are treated as excluded derivatives. This parallels the exclusions from the definition of "security" in the *Securities Act* (Ontario) and from the definition of "forms of investment" regulated under the *Securities Act* (Quebec), and similar exclusions under other local securities and derivatives legislation. We understand that such non-Canadian products could (and likely would) be securities and therefore prescribed not to be derivatives by virtue of Section 4 of the Rule. It would be helpful if the Guidance made that clearer.

III. Trade Repositories and Data Reporting Definitions

"Local Counterparty"

The definition of "local counterparty" establishes the parameters for the trade reporting obligation under the TR Rule. Given the scope of the definition, it will potentially subject Canadian and non-Canadian counterparties to trade reporting obligations in many, and often all, Canadian jurisdictions. While uniformity in the rules will limit the burden of reporting on market participants, it will still be necessary to determine on a trade by trade basis which of the 13 Canadian regulators imposes a reporting obligation with respect to that trade. Compliance with privacy obligations would preclude simply giving access to all Canadian regulators if there is no legal requirement to do so.

The reporting obligation should only be imposed on those entities that each member of the CSA has a legitimate regulatory interest in from the perspective of provincial derivatives regulation. We urge the CSA to cooperate to develop a system to determine one principal Canadian jurisdiction for each local counterparty and the application of the TR Rule of that jurisdiction only. For example, the trade reporting obligation could be imposed on a local counterparty whose "principal Canadian jurisdiction" is the province. This approach would be

(Sep. 25, 1990), known as the Brent Interpretation.

consistent, for example, with the concept of "principal jurisdiction" under National Instrument 33-109 *Registration Information* which applies to Canadian and non-Canadian filers under that rule.

We urge Canadian regulators to limit the extra-territorial reach of the rule outside of Canada and, in particular, the data reporting obligation so as to avoid the imposition of redundant or inconsistent reporting requirements on market participants.

At the least, with respect to entities that do not carry on their business in Canada, the reporting obligation should only be imposed on those entities in which a member of the CSA has a legitimate regulatory interest and which have a real and substantial connection to the CSA member's jurisdiction. For example, the *Securities Act* (Ontario) does give the Ontario Securities Commission jurisdiction to publish rules requiring reporting to a trade repository of derivatives transactions, but we believe that it is implied that the entity and its derivatives activities have a real and substantial connection to Ontario and not simply that the entity has a connection to Ontario through its or its parent company's securities issuance or securities dealer trading activities. We recognize that regulators in this industry as in many others have interests that extend beyond the strict borders of their respective jurisdictions. However, the guiding international law principle in defining fair and orderly limits to such extra-territorial jurisdiction is that there be a real and substantial connection to the jurisdiction.

Particularly concerning is the inclusion of part (f) of the definition of local counterparty. Subsidiaries that are not domiciled or located in Canada will be subject to reporting obligations in other jurisdictions and may be subject to privacy obligations that are inconsistent with compliance with the disclosure obligations under the TR Rule. Nor can the parent company necessarily provide that information on behalf of the subsidiary. Even parent companies that maintain a book of record for subsidiaries do not necessarily have in place systems and processes that allow them to capture all of the types of information that is required to be reported by the TR Rule. Such subsidiaries themselves may not have such capture systems. The problems with this will be exacerbated by any differences in the data elements that must be reported under the TR Rule in relation to those that apply in the subsidiaries' home jurisdictions. Part (f) could impose a significant cost burden on a company with numerous subsidiaries.

We do not believe that any Canadian securities or derivatives regulator should require reporting of transactions between two counterparties who are not located or domiciled in the local Canadian jurisdiction. For example, under the TR Rule, a non-Canadian dealer with an exempt market dealer or restricted dealer registration in Ontario will be required to report all of its derivatives transactions regardless of the location of its counterparties to an Ontario designated TR. Further any subsidiary of such an exempt market dealer regardless of its location will be required to report all of its derivatives transactions with any counterparty. This will be especially problematic if the reporting requirements in Ontario vary in any respect from those to which the entities are subject in their home jurisdictions. Imposing this regulatory

burden on such entities could have negative effects on the access of Canadian entities to relationships with foreign swap providers and hence on liquidity in the Canadian market. Indeed, it could create a disincentive for certain non-Canadian entities to engage in registrable trading (or advisory) activities in the Canadian market. This problem will be exacerbated if the data required to be reported differs from that required to be reported in other jurisdictions.

The same comments are apt with respect to the inclusion of reporting issuers in the list of local counterparties where they are not located or domiciled in Canada.

With respect to a transaction between two non-Canadian entities that is cleared on a clearing organization or trade execution facility with its principal place of business in Canada, the reporting obligation should not apply to such entities or be capable of being fully delegated to such entities. In such a case the clearing organization as a condition of its registration or recognition can be required to provide information for regulatory purposes. The other elements of part (e) of the definition (negotiation, execution, and settlement) are too insubstantial a connection to the province to justify regulatory treatment of the person as a "local counterparty". In no other area of Canadian regulatory jurisdiction that we are aware of does such an insubstantial connection justify regulatory jurisdiction.

If part (f) of the definition is born of a regulatory concern that Canadian entities will move their derivatives transactions into foreign subsidiaries so as to avoid a reporting obligation, then we believe the concern is misplaced. Economically rational market participants will make such decisions based on other more significant regulatory issues, capital considerations and other economic considerations, not on reporting obligation requirements. Moving a swaps business to one or more affiliates requires significant legal, technology and operational investment and makes it difficult for an institution to manage its risk. A desire to avoid a regulatory burden is a minimal motivation in light of the costs and lost efficiencies and controls an institution would face in moving business to affiliates. If this really is a concern, it would be preferable for the Commissions to rely on general powers to deal with fraud and market manipulation. The CFTC Rules do not adopt an entity aggregation concept for trade reporting so the extension of the local counterparty definition to include subsidiaries that are not located in the jurisdiction is materially inconsistent with what is required by Dodd Frank. In terms of employing an anti-avoidance provision as an alternative, some guidance can be found in the CFTC Anti-Evasion Rules which apply in other contexts.[8]

IV. Trade Repository Designation

The Guidance for the TR Rule does not reference any passporting system to be put in place for trade repository recognition. We are assuming in making these comments that Canadian regulators will develop a passport system for trade repository designation that will permit a trade repository to apply for designation or recognition to only one CSA member in

[8] US Definitions Release, at 48297 and following.

Canada and that the application requirements for designation or recognition will be uniform among the Canadian jurisdictions.

We would also encourage the Committee to encapsulate in the rule the principle that it recommended in CSA Consultation Paper 91-402 with respect to the recognition of foreign trade repositories subject to appropriate regulation and oversight in its home jurisdiction; namely that the CSA members defer to the regulatory oversight in the home jurisdiction. Further, foreign trade repositories should be permitted to take advantage of a passporting regime so that they only have to deal with one Canadian regulator. Given that local counterparties must report to a trade repository, but trade repositories are not obligated to accept reporting obligations with respect to any particular province, the process should be as streamlined and uniform as possible to encourage trade repositories to readily accept that data.

Confirmation of Data and Data Reporting – section 23

Section 23 requires a trade repository to confirm with each counterparty or agent for the counterparty that the data that it receives from the reporting counterparty or its delegates is correct. ISDA recommends that this not be a requirement where the data is reported by a SEF, DCO, designated contract market or third party service provider.

V. Data Reporting

Duty to Report – s.25

It is important that there be clear rules with respect to which party in the relationship is required to report and that the possibility of imposing the requirement on both parties be minimized. In order to do that, the rule should establish a more detailed hierarchy than it currently proposes so as to minimize the situations in which both parties would be required to report pursuant to section 27(1) (b). Adopting a hierarchy consistent with the parallel CFTC Reporting requirement rules is a preferable approach.[9]

Derivatives dealers should be permitted to rely on established market conventions to determine which of them has the obligation to report and such reliance may not involve a written agreement between them. ISDA recommends that the reference to an agreement *in writing* be removed.

The retention of responsibility for ensuring timely and accurate reporting under section 27(4) is an impractical and unnecessary rule where the reporting is undertaken by a SEF or DCO. The regulatory oversight of those entities by the appropriate regulator is sufficient to ensure that appropriate responsibility is assumed and monitored. ISDA recommends that this provision recognize an exception where a SEF or DCO is the reporting party at least where the

[9] CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, (January 13, 2012) 77 F.R. 2136 at 2207 and 2167, § 45.8 *Determination of which counterparty must report*.

local counterparty is not a derivatives dealer. This is consistent with the approach under the CFTC Reporting Requirement rules.[10]

Pre-Existing Derivatives – s.26

ISDA is concerned that the counterparties will not be in a position to comply fully with the requirements of this rule or will be unnecessarily burdened in complying to the extent it requires the reporting of the full set of data that is required with respect to transactions entered into after the TR Rule comes into effect. As we stated in our TR Comment Letter, ISDA strongly supports the record keeping and reporting objectives for pre-existing transactions to the extent they apply to principal economic terms. Not all derivatives data that are not principal economic terms may have been collected with respect to such transactions. The rules under Dodd-Frank have not required the reporting of more than the principal economic terms for pre-existing trades. A requirement to report the principal economic terms strikes an appropriate balance between the interests of regulators and reporting counterparties given the costs that would be incurred by them in obtaining this data.

We also encourage the Committee to develop an appropriate definition of what are "principal economic terms". A definition that requires the recreation, reformatting and reorganization of past data imposes an unfair burden on market participants without providing any material information to Canadian regulators.

Reporting Counterparty – s.27

We believe it is unclear under section 27 as to whether a derivatives dealer that is not a local counterparty could be a reporting counterparty. Non-dealer parties should be able to rely on reporting by foreign dealer counterparties. Sections 25 and 26 appear to apply only to a local counterparty. Section 27 does not refer to a local counterparty but since a derivatives dealer that is not a local counterparty has no obligation to report, it is not clear whether a derivatives dealer that agrees to report for the local counterparty could be a reporting counterparty under section 27. Subsection 27(2) suggests that a reporting counterparty might not be a local counterparty, but it is unclear how a reporting obligation could be imposed by Canadian regulators on a party that is not a local counterparty. End-users in particular will be unnecessarily burdened if they cannot confidently rely on dealer counterparties to report on their behalf. This should be clarified.

In addition, a clear definition of a "derivatives dealer" would add some desirable clarity to this provision.

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[10] Ibid. § 45.3 *Swap data reporting: creation data*.

Records of data reported – section 36

In the ISDA TR Comment Letter, we strongly urged the Committee to reconsider the recommendation for a seven year retention period from the date the transaction terminates or expires. This inconsistency with the five year period under Dodd-Frank will involve a heavy cost burden for those entities that are not otherwise subject to a seven year retention period and will provide only a small incremental benefit to Canadian regulators. Local counterparties will not be able to rely on retention by their dealer counterparties if those dealer counterparties are only subject to the five year period under Dodd-Frank. This is an area in which global consistency is important and Canada should not be an outlier, particularly if its definition of "local counterparty" extends to entities not located or domiciled in Canada.

At the very least it should be clarified that a local counterparty that is not the reporting counterparty does not have to retain derivatives data that it would not otherwise be retaining during the term of the transaction.

Data Available to Counterparties – section 38

As you are aware, an important aspect of section 38 is to establish the legal obligation to disclose what would otherwise be confidential information so as to protect the disclosing party from breaching confidentiality obligations and, in many jurisdictions, privacy law obligations. In restricting section 38(3) (the deemed consent provision) to the release of derivatives data for the purpose of section 38(1) (which applies only to disclosure to counterparties), the rule appears to be too narrowly framed to accomplish its purpose. Confidentially obligations are not restricted to situations where the identity of the party is protected[11]. Given that data are also released to the public under section 39 the deemed consent must be more broadly expressed to include any disclosure required or allowed under the TR Rule.

Data available to public – section 39

This rule requires the trade repository to make aggregate data on open positions, volume, number and prices relating to the transactions reported to it available to the public on a periodic basis. In addition, information to be disclosed includes the geographic location of the parties and type of counterparty (s.39 (1) and (2)). This data alone could easily identify the party in some cases. It also requires the trade repository to make transaction level reports of the principal economic terms of each transaction available to the public within one day after receiving those terms from the reporting counterparty if one of the parties is a dealer and otherwise within two days (s.39(3)). We note that there is no contemplated exemption with respect to block trade data. Disclosure of data with respect to block trades could easily result in disclosure of the identity of the parties, especially in the thinner Canadian market.

[11] And there is always the possibility that disclosing the data will indirectly disclose the identity of the parties particularly in the relatively illiquid Canadian market.

Disclosure of block data of this nature even on a delayed basis would likely seriously impair liquidity for large transactions in the market. It could also facilitate market manipulation as it could be possible to identify the parties and determine other confidential and proprietary information and strategies from the disclosed data. As the Committee appreciates, the reporting regime must balance the benefits of post-trade transparency against the harm that may be caused to market participants' ability to hedge risk based on this disclosure. The currently proposed period for disclosure of one or two days is not sufficiently long to allow parties to hedge their positions.

We understand that the development of an appropriate and well calibrated block trade exception framework is difficult and requires research into the Canadian OTC swap market, different assets classes in the Canadian market and different products within those classes. We strongly urge the Committee to conduct such research and work to develop such an exception before implementing this rule. Access to reported trade data will help the Committee to conduct the appropriate research.

In addition, we recommend that inter-affiliate transactions reported to the trade repository not be subject to the real time reporting obligation (as is the case under CFTC Rules[12]) and hence not aggregated with the publicly disclosed data. Aggregating such data could have a distortive effect on the data. A distinction should be drawn between what is required to be reported and what is aggregated for purposes of disclosure.

VI. Exemptions

Small Physical Commodity Transactions. The Committee should consider whether the $500,000 notional value cap is large enough. With a cap this low, the TR Rule is likely to capture many small businesses and commercial users of commodities.

Further, the Committee should consider a similar small transaction cap for reporting obligations for all transactions, at least with respect to parties that are end-users of derivatives.

[12] Rule 43.

ISDA Safe, Efficient Markets

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ISDA appreciates the opportunity to provide its comments on the Paper and, as always, looks forward to providing any assistance to the Committee in its continued efforts to implement an appropriate regulatory regime for derivatives in Canada. Please feel free to contact me or ISDA's staff at your convenience.

Yours truly,

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