

NOTICE OF THE AUTORITÉ DES MARCHÉS FINANCIERS : COMING INTO FORCE OF DERIVATIVES ACT; DERIVATIVES REGULATION; COMING INTO FORCE OF REGULATION RESPECTING TARIFFS AND FEES PAYABLE; DECISION AND POLICY STATEMENT

Référence : Bulletin de l'Autorité : 2009-01-23, Vol. 6 n° 3

Introduction

The *Autorité des marchés financiers* (the "Authority" or "we") is publishing the *Derivatives Regulation* (the "Regulation"), a decision, and policy statements related to the *Derivatives Act* (the "Act"). This notice is intended to inform the markets of the implementation of these texts to help harmonize the coming into force of the Act.

Under Order-in-Council 19-2009 dated January 14, 2009 issued by the Government of Québec, most of the provisions of the Act will come into force on February 1, 2009.

For purposes of the application of the Act, the Authority will issue policy statements from time to time to inform interested parties of the manner in which it intends to exercise its discretion and interpret the principles set out under the various titles of the Act. Policy statements intended in particular for regulated entities and accredited counterparties are part of this publication.

In addition, we are publishing, in section 6.10 of this bulletin, a blanket decision for harmonizing implementation of the derivatives framework across Canada by preserving the status quo with respect to over-the-counter derivatives offerings to accredited investors pursuant to *Regulation 45-106 respecting Registration and Prospectus Exemptions* ("Regulation 45-106"), which was made under the *Securities Act* (the "SA"). Under the leadership of the Authority, the Canadian Securities Administrators (the "CSA") has launched initiatives in this regard.

Coming into force of the Act

The order-in-council providing for the coming into force of the Act sets an effective date of February 1, 2009 for Titles I to III, except in respect of sections 55, 58 and 59, Title IV, except in respect of the second paragraph of section 82 and sections 83 to 85, and Titles V to XI, except in respect of subparagraphs 21 and 22 of section 175.

We are mindful that the coming into force of the Act will require many financial sector participants to implement new derivatives-related compliance measures, for example, for the purpose of establishing in a conclusive and verifiable manner that a person meets the conditions under paragraph 7 of the definition of "accredited counterparty" of section 3 of the Act. In order to ensure a smooth transition during the first six months following the coming into force of the Act, the Authority therefore expects market participants to phase in compliance obligations arising from the new requirements set out in the Act.

The effective date of sections 55, 58 and 59 of Title III of the Act, which concerns dealers and advisers, is deferred to take into account the major reform of registration requirements still under way. Indeed, virtually all of *Regulation 31-103 respecting Registration Requirements* is expected to be implemented. In the meantime, as provided for under section 57 of the Act, only dealers registered in accordance with the SA may carry on business in derivatives, and they are required to comply with the registrant obligations set out in sections 61 to 79 of the Act.

The coming into force of the provisions of Title IV respecting qualified persons is also partly deferred. Only the provisions of the first and third paragraphs of section 82 of the Act will be effective immediately. The second paragraph of this section, as well as sections 83 to 85 of the Act, pertain, in particular, to the authorization of derivatives offered to the public by a person other than a regulated entity. This deferral is intended to enable the CSA to complete its harmonization initiatives with respect to derivatives offered to the public.

In the meantime, to temporarily preserve the status quo, the Authority issued, pursuant to section 86 of the Act, a blanket decision with respect to exemptions from the application of sections 54, 56 and 82 of the Act. This enables

derivatives currently governed by the SA to be offered to accredited investors, as defined under Regulation 45-106. Such accredited investors will therefore be able to continue to carry out over-the-counter trades, pursuant to Regulation 45-106 (including the filing of the report, in accordance with Part 6 of this Regulation), in respect of the following instruments previously referred to in section 1 of the SA and section 1.1 of the *Securities Regulation*:

- an option or a negotiable futures contract pertaining to securities, or a Treasury bond futures contract;
- an option on a commodity futures contract or financial instrument futures contract;
- commodities futures contracts, financial futures contracts, currencies futures contracts and stock indices futures contracts.

The new framework governs derivatives not listed above. In the absence of a regulation specifying conditions for qualification, the Authority will not be able to grant qualified person status. In addition, since the second paragraph of section 82 of the Act is not in force, authorization will not be given for the creation or marketing of a derivative to be offered to the public by a person subject to qualification. However, to compensate for this restriction, the Authority may draw on the discretion provided under section 86 of the Act with respect to a specific application that would not be prejudicial to the public interest.

Derivatives Regulation

The *Derivatives Regulation* was made by the Authority on December 12, 2008. It received ministerial approval as required and will come into force on February 1, 2009.

The Ministerial Order approving the Regulation was published in the *Gazette officielle du Québec* dated January 21, 2009 and is reproduced below.

This Regulation:

- determines the minimum assets of a person for purposes of the definition of accredited counterparty;
- establishes the self-certification process for operating rules of regulated entities;
- provides for the risk information document.

The divisions of the Regulation concerning qualified persons as well as dealers and advisers will be covered by a subsequent publication, given the deferral of the coming into force of these aspects of the Act.

Policy Statements

Three Policy Statements are also included in this publication:

- *Policy Statement respecting Accredited Counterparties;*
- *Policy Statement respecting Hybrid Products;*
- *Policy Statement respecting Self-Certification.*

The first Policy Statement concerns accredited counterparties. It clarifies the application of the definition of accredited counterparties to financial institutions and the accreditation of certain counterparties.

The second Policy Statement explains the application of section 4 of the Act in respect of hybrid products and refers to hybrid products presumed to be securities based on certain conditions under the Act.

The third Policy Statement covers self-certification of the operating rules of recognized regulated entities. It provides examples of rules of minor impact, and specifies the Authority's expectations under various circumstances

with respect to the process stipulated in the Regulation.

Regulation respecting Tariffs and Fees Payable

The *Regulation respecting Tariffs and Fees Payable* was published in the *Gazette officielle du Québec* as a draft Regulation on October 22, 2008, and has been submitted for government approval. Developments may take place shortly.

The Regulation sets the fees payable by a regulated entity, dealer, adviser, representative or qualified person at the time of an application for recognition, registration or qualification respectively, for purposes of the Act.

Applicable securities regulation

Interested persons are reminded that securities regulation continues to apply, pursuant to section 232 of the Act, to the extent that it pertains to a matter for which the Act provides for the relevant regulation-making powers. Accordingly, *Regulation 21-101 respecting Marketplace Operation* and *Regulation 23-101 respecting Trading Rules*, in particular, continue to apply to persons subject thereto. Moreover, as dealers and advisers are registered under the SA, all current regulation continues to be applicable.

Policy Statement Q-22

Finally, *Policy Statement Q-22, Disclosure Document for Commodity Futures Contracts, for Options Traded on a Recognized Market and for Exchange-Traded Commodities Futures Options*, in respect of which the Authority previously granted an exemption (Decision No. 2004-PDG-0143 dated October 27, 2004) to enable use of the disclosure document appended thereto, will be repealed over the coming months. The Authority considers that registrants should use the document provided for by the Regulation, which is, for the most part, identical to the document appended to the decision, and currently used by member dealers of the Investment Industry Regulatory Organization of Canada.

January 23, 2009
