

June 17, 2013

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Re: Canadian Securities Administrators (CSA) Consultation Paper 91-407 on Derivatives: Registration (the Registration Consultation Paper)

The International Swaps and Derivatives Association, Inc. (ISDA)¹ welcomes the opportunity to respond to the Consultation Paper published by the CSA on April 18, 2013 setting

¹ Since 1985, ISDA has worked to make the global over-the-counter ("OTC") derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 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.

forth the CSA Derivatives Committee's (**Committee**) proposal for the regulation of key derivatives market participants through the implementation of a registration regime in the Canadian over-the-counter (**OTC**) derivatives markets. We are pleased to share these comments with the CSA, in addition to our comment letters submitted to the CSA in connection with Consultation Paper 91-401 setting forth the CSA Derivatives Committee proposals regarding the regulation of OTC derivatives (the **OTC Derivatives Consultation Paper**)², Consultation Paper 91-402 setting forth proposals for the reporting of OTC derivatives transactions and the operation of trade repositories³, and Consultation Paper 91-406 on Derivatives: OTC Central Counterparty Clearing⁴.

ISDA is actively engaged with providing input on regulatory proposals in Asia, Europe, the United Kingdom and the United States. ISDA commends the Committee for its careful consideration of the issues raised by its registration proposal and welcomes further dialogue with the Committee on this Registration Consultation Paper.

I. Registration Requirement

ISDA and its members are strong supporters of regulatory reform in a manner that promotes safety and market integrity. Regulators should, nevertheless, be cautious not to introduce conflicting, unduly incremental or uncertain requirements and to avoid creating opportunities for regulatory arbitrage. Thus, it is highly important that comprehensive analysis and consultation occurs on the soundness of a registration regime in the Canadian OTC market and the implications for financial stability and competitiveness. ISDA urges the Committee to consider that derivative specific registration requirements exist in only a handful of jurisdictions globally, and the related volume and thresholds in such jurisdictions as compared to the size of the Canadian-booked share of the global market, to ensure that imposing a registration regime would not negatively impact the trading of OTC derivatives in Canada.

Information about ISDA and its activities is available on the Association's web site: www.isda.org.

² Letter from ISDA to the CSA dated January 14, 2011 may be found at <http://www2.isda.org/regions/canada/> (**January 2011 Comment Letter**).

³ Letter from ISDA to the CSA dated September 12, 2011 may be found at <http://www2.isda.org/regions/canada/> (**September 2011 Comment Letter**).

⁴ Letter from ISDA to the CSA dated September 21, 2012 may be found at <http://www2.isda.org/regions/canada/> (**September 2012 Comment Letter**).

A. *Scope of Registration Requirement*

The Committee's proposal imposes standard registration requirements based on the activity conducted by market participants, the so-called "business trigger". Among other categories of market participants, such as Large Derivative Participants ("LDPs"), the registration requirement would apply to persons (i) carrying on, or holding themselves out to be carrying on, the business of trading in derivatives ("Derivatives Dealer") and (ii) that carry on the business of advising others in relation to derivatives, or who hold themselves out to be in that business ("Derivatives Adviser"). The Committee, nonetheless, acknowledges that the definition of derivative is not consistent across Canada, and the only guidance as to what types of instruments the Committee may recommend to be considered derivatives relates to the recently published CSA Staff Consultation Paper 91-301, which only relates to trade reporting.

As indicated in our previous comment letters, the Committee needs to clearly define the scope of the transactions, entities, trades and markets that are intended to be covered by the regulations in order for the industry to give meaningful comments on proposed rules. The Committee will also have to outline which of its member agencies have jurisdiction and rule-making authority over the various issues outlined in the Registration Consultation Paper. It remains unclear what would be an "OTC derivative" and a "Canadian" derivative or market, which leaves unanswered the question of which products and parties will be covered by the regulations. For example, we need to understand whether a derivative trade by non-Canadian entities that references a Canadian asset will be subject to the registration requirement, as well as the implications for non-Canadian entities (including non-Canadian affiliates or branches of a Canadian bank).

The Committee indicates that additional protection is intended for certain market participants that are not large, sophisticated participants with adequate resources to absorb losses from derivatives trades ("qualified parties"). It is not clear from the Registration Consultation Paper which entities would not qualify and would, therefore, need additional protection, which may or may not be registration based. As the Committee concedes, there are several options available to determine whether a person will be a qualified party. ISDA members are concerned about potential overlap and, to some extent, inconsistencies among the various standards available to determine whether a person will be a qualified party. For example, the application of the definition of "Accredited Investor" for prospectus disclosures under National Instrument 45-106 and the definition of "Permitted Client" under National Instrument 31-103 may result in a client trading prospectus exempt securities and derivatives having to meet three separate definitions. Therefore, ISDA urges the Committee to carefully consider how it defines "qualified party" to ensure it is harmonized where possible.

B. Cross-Border Considerations

The Committee acknowledges that in developing the proposal it considered rules and proposals specific to the regulation of key derivatives market participants in a number of foreign jurisdictions, particularly Europe and the United States, as well as the existing CSA registration regime for securities and existing regulatory requirements applicable to derivatives market participants in each CSA jurisdiction.

As noted in our January 2011 Comment Letter, we urge the Committee to consider the global nature of the markets when creating regulations for OTC derivatives to ensure that such regulations do not restrict the ability of Canada market participants to continue participating in, and remaining competitive in, the global OTC derivatives market. To this end, ISDA cautions regulators against adopting duplicative, overlapping or incremental requirements and/or infrastructure where sufficient alternatives exist. For example, regulators should consider whether it is appropriate to establish a Canadian registration requirement when there is no requirement to register under the European Market Infrastructure Regulation (“EMIR”) and registration is not a G20 obligation. Moreover, regulators should bear in mind the more limited number and types of counterparties participating in the Canadian market, as well as products traded, when compared to other foreign markets. The only other country with an OTC registration requirement comparable to Committee’s proposal is the United States, which is a market of a size, diversity and liquidity that does not compare to that of the Canadian market. Furthermore, the United States’ OTC derivatives registration regime includes a number of exemptions and thresholds that have not been incorporated, in whole or in part, in the Committee’s proposal. We further note that other jurisdictions of comparable size and participating counterparty types, such as Australia, have not imposed local registration requirements for the OTC derivatives market. In addition, none of the Asian jurisdictions have adopted derivatives registration regimes similar to, or as fulsome as, the Committee’s proposal.

Many Canadian counterparties have, therefore, expressed concerns that a registration regime may make participation in the Canadian market too burdensome or expensive in particular for foreign derivatives dealers, with the result that Canadian market participants may face a dwindling number of counterparties willing to transact in Canada. We, therefore, recommend that regulators allow for a consultation and data collection period to consider these market concerns and conduct jurisdictional comparisons that evaluate the competitive impact to the domestic market, as well as accept further public comment as to whether a derivatives registration requirement is appropriate for the Canadian market.

C. Thresholds

The Committee notes that its proposal, although in many ways comparable to the registration requirements applicable to derivatives dealers in the U.S. under both the CFTC and SEC regimes, does not include a *de minimis* exemption comparable to that adopted by U.S. regulators. ISDA agrees with the Committee’s assessment that all participants in the derivatives



market should be subject to sound protections. Nonetheless, ISDA believes that, in establishing a registration requirement, a form of threshold is important to recognize that not all derivative market participants represent systemic risk.

Moreover, we believe that if foreign firms deemed to be in the business of dealing or advising in the trading of derivatives are required to register in Canada, a threshold should be established. Since the United States, which is currently the only jurisdiction to require statutorily defined entity-level registration, has set a threshold for registration, requiring foreign firms to register without establishing a comparable threshold will impose a burden on these firms that is excessive when compared to the scale of the Canadian market. As a result, market participants may avoid transacting in Canada, triggering contraction and decreased liquidity in the Canadian market. There are also concerns about disparate results from a lack of a *de minimis* threshold in Canada that can be a further disincentive for participation in the Canadian OTC derivatives market. For example, a firm doing business in both the United States and Canada with higher trading volume in the United States may not be required to register in United States due to a *de minimis* requirement, but be subject to registration requirements in Canada where its trading volume is lower.

Given the Canadian market's particular traits, in terms of volume and nature of market participants, it would be difficult to propose an appropriate threshold for a *de minimis* requirement without further evaluation of trading patterns and competitive risks. We, thus, recommend a test period once reporting requirements are in effect in Canada allowing to better assess and monitor OTC trading volume and compare with other jurisdictions prior to the adoption of a registration requirement devoid of a *de minimis* threshold.

II. Exemptions from Registration

The Committee's proposal includes exemption from certain registration requirements for Canadian counterparties where there are equivalent regulation requirements applicable to that party in Canada, and for foreign market participants when they are subject to equivalent regulation requirements in their home jurisdictions. Foreign market participants would, nonetheless, be required to register in each Canadian jurisdiction where they carry on business.

ISDA believes that the burden resulting from required registration in multiple provinces with possible divergent or inconsistent requirements, even where the differences between provinces are minor, may result in further disincentive to transact in OTC derivatives in the Canadian market.

ISDA welcomes the Committee's proposal to exempt from specific regulatory requirements foreign-based derivatives advisers and derivatives dealers, where they are subject to equivalent regulatory requirements, as part of Canada's commitments to developing cooperative regulation regimes with regulators outside of Canada. Given the global nature of the

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OTC derivatives market, such coordination is essential to effectively establish international minimum risk management standards, avoid regulatory arbitrage, and mitigate systemic risk and adverse spill-over across countries. Diverse and inconsistent requirements between different supervisors will increase costs and make it less likely that robust international standards can be developed. As stated above, however, these market participants would still be subject to the requirement to register, and comply with potentially conflicting, duplicative or incremental requirements, in each Canadian jurisdiction where they carry business under the Committee's proposal.

ISDA submits that in making a global assessment of regulatory reform, the Committee should consider whether to impose any requirement to register in Canada for a foreign market participant if and where the regulations in the participant's home jurisdiction are deemed to achieve equivalent outcomes as the Canadian regulations⁵. Our members are concerned about the potential negative impact of imposing duplicate regulations for foreign institutions conducting derivatives business in Canada, where compliance with multiple regulatory frameworks would make such cross-border business unduly burdensome and costly. ISDA, therefore, urges the Committee to consider further harmonization with foreign regimes, including the establishment of "substitute compliance" exemptions where appropriate⁶, to avoid a potentially counterproductive impact on the Canadian derivatives market. To that end, we believe that the Committee should establish a consultation working group with market participants subject to the Dodd-Frank Act to evaluate and develop "substitute compliance" provisions that eliminate burdensome overlap with registration requirements in Canada.

⁵ In Japan, for example, under the Financial Instruments and Exchange Act (FIEA), if a firm will be conducting "financial instruments trading business", it will need to apply for registration for the type of business it will conduct. If a firm enters into OTC derivatives as "business", they are required to register as a Type 1 Financial Instruments Business Operator (FIBO). The FIEA sets out exemptions for foreign financial institutions to allow, with no registration in Japan, to offer or trade OTC derivatives with certain professional investors such as Qualified Institutional Investors if the foreign financial institution is licensed or registered in the foreign country and is supervised by that country's authority (Item (ii) of paragraph 1 of Article 1-8-6, and Article 17-3 of the Order for Enforcement of the Financial Instruments and Exchange Act).

⁶ For example, swap dealers and major swap participants registered under the Dodd-Frank Act should be exempted from registration in Canada.



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ISDA appreciates the opportunity to provide its comments on the Registration Consultation Paper and looks forward to working with the Committee as it continues to consider the issues outlined in the Registration Consultation Paper. Please feel free to contact me or ISDA's staff at your convenience.

Sincerely,

Katherine Darras
General Counsel, Americas