ISDA Safe, Efficient Markets

December 23, 2015

Cooperative Capital Markets
Participating Jurisdictions

Email: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Comments on -

- **Revised Consultation Draft *Capital Markets Act* ("CMA") and Comments on Draft Initial Regulations**

- **CMRA Regulation - *Derivatives and Strip Bonds* – Regulation 91-501 (the "Derivatives Regulation")**

- **CMRA Regulation – *Trade Repositories and Derivatives Data Reporting* – Regulation 91-502 (the "TR Regulation") and Companion Policy 91-502 (the "TR CP")**

- **CMRA Regulation 31-501 *Registration Requirements, Exemptions and Related Matters* ("Regulation 31-501")**

- **National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103")**

- **CMRA Regulation 41-501 *Prospectus Requirements and Exemptions* ("Regulation 41-501")**

- **National Instrument 41-101 – *General Prospectus Requirements*, as it relates to OTC derivatives ("NI 41-101")**

- **CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions* ("Policy 71-601")**

International Swaps and Derivatives Association, Inc.
360 Madison Avenue, 16th Floor
New York, NY 10017
P 212 901 6000 F 212 901 6001
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

The International Swaps and Derivatives Association, Inc.[1] ("**ISDA**") appreciates this opportunity to submit comments on the Revised Consultation Draft CMA and Draft Initial Regulations and National Instruments listed above. ISDA's comments relate to the application of the Draft CMA and Draft Regulations to over-the-counter derivatives transactions ("**OTC derivatives**"). ISDA and its members strongly support the implementation of national standards and uniform derivatives laws and regulations among the Canadian jurisdictions. Our comments are organized as follows:

1. Comments on Revised Consultation Draft CMA
2. General Comments on the Initial Draft Regulations
3. Comments on the Derivatives Regulation, Regulation 41-501 and NI 31-103 and NI 41-101 as they relate to the Derivatives Regulation
4. Comments on the TR Regulation
5. Comments on Policy 71-601

Comments on Revised Consultation Draft CMA

1. Definition of "trade"

The definition of "trade" excludes a transfer, pledge or encumbrance of securities for the purposes of giving collateral for a "debt" made in good faith, except where it is a transfer, pledge or encumbrance of securities from the holdings of a control person if collateral for a "debt" made in good faith. ISDA requests that this exclusion be extended to transactions in securities constituting collateral for a "debt or other obligation". Securities (from a control block or otherwise) may collateralize obligations under OTC derivatives, particularly those where the securities are the underlying reference asset of the derivative. The obligation secured may be a delivery obligation or an obligation to pay a net termination amount on default. We believe that the intention of the exemption is to allow such securities to be used as collateral generally and that making this change to the definition would not result in any policy change and would resolve any uncertainty on the point.

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

2. Section 22 –Registration Requirement for Large Derivatives Participants

ISDA recommends that the concept of registration for large derivatives participants (**LDPs**) be removed from the provincial legislation and any issues that are particular to LDPs be dealt with solely under the *Capital Markets Stability Act* (**CMSA**). Given the relatively small size and nature of the Canadian market, it is almost certainly the case such entities (if there were any) would also be designated as systemically important under the CMSA or that any risk creating conduct could be dealt with under the proposed powers in the CMSA. The rationale for the LDP categorization is the management of systemic risk, a subject more appropriately dealt with under the CMSA. Such entities are also likely to be prudentially regulated by other regulators.

No compelling rationale has been offered for provincial regulation. Because regulatory requirements can have the effect of fragmenting markets across jurisdictional lines[2], it is important that there be an evidence-based policy rationale for any major regulatory requirement, such as this one. Before including this power in the legislation, ISDA encourages the proponents of the legislation to provide such an evidenced-based policy rationale and a set of draft regulations that would allow market participants to assess the impact on the market and provide meaningful feedback. We note that the experience under the CFTC rules with the similar Major Swap Participant (**MSP**) category is that there are only two provisionally registered entities. Consideration should be given to whether this is a concept that is required in the Canadian market.

3. Section 39 – Persons who provide "facilities"

Persons who provide "facilities" for trading in derivatives must in accordance with regulations provide any prescribed information. The term "facilities" or "facility" is not defined in the CMA. Given the breadth of this power we submit it would be appropriate to define this term so as to clarify that it means the facility over which the trading in derivatives takes place.

4. Market Conduct Provisions

ISDA recommends that a careful review of the market conduct rules in the CMA be undertaken with derivatives front of mind. We appreciate that many of the provisions are already found in the Ontario *Securities Act*. However, this opportunity should be taken to consider whether some of these provisions could be framed in a manner that is more appropriate and relevant to the OTC derivatives market. Simply extending securities market conduct provisions to derivatives,

---

[2] See for example ISDA Research Note, "Cross-Border Fragmentation of Global Interest Rate Derivatives: The New Normal?". The report analyses the cross-border fragmentation of the global market for interest rate derivatives, showing that liquidity in the interest rate swaps market has fragmented, particularly between the U.S. and EU, since the implementation of the U.S. SEF regime and the introduction of the first MAT determinations in February 2014.

particularly OTC derivatives, inevitably raises problems in application and interpretation. The review below highlights some of these difficulties.

a. Section 55 – Duty of Fair, Honest and Good Faith Dealing

Section 55 imposes a duty on registrants to deal with "clients" fairly, honestly and in good faith and to meet other requirements.

ISDA submits that the reference to *clients* is unclear in the context of a provision that appears to apply to OTC derivatives transactions. Registered dealers in derivatives will often be dealing with other dealers. The transactions are bi-laterally negotiated and there is not necessarily a party that could be described as the client or each would be a client of the other. ISDA recommends that either:

1. a definition of "client" be provided that excludes counterparties that are financial institutions, registrants, dealers (whether registered or not) and other persons in prescribed classes; or

2. the conduct rules of the CMA apply to OTC derivatives only to the extent provided for in the regulations.

The second approach would allow for a more suitable regulatory scheme for counterparty relationships that could be dealt with as part of the CSA's derivatives dealer and advisor registration rules.

It is also unclear whether a breach of such a duty in the context of an executory contractual relationship such as exists with derivatives would potentially affect the validity or enforceability of the contract. ISDA submits that the provision should clarify that it does not provide a basis for challenging the validity or enforceability of a contract between the registered dealer and its counterparty or client or import fiduciary duties or duties to determine the suitability of a transaction for a counterparty. The development of the common law duty of good faith in Canada can address any contractual effects of the breach of such a duty. It would also be useful to include a provision similar to section 59(2) precluding any statutory right of action for damages and to extend it to include the remedies of rescission or declarations that the contract was void, voidable or otherwise unenforceable.

b. Section 59 – Misleading Statements

Section 59 prohibits a "person" from making a statement it knows or reasonably ought to know is materially false or misleading and would reasonably be expected to have a significant effect on the market price or value of a derivative or "the underlying interest of a derivative".

ISDA submits that this prohibition is overly vague and should not apply to OTC derivatives. There is nothing in the provision that suggests that the person making the statement must be aware of the specific derivative. For example, it would potentially apply to a producer of a relatively rare or illiquid commodity that makes a statement in the press about the market for the commodity even though that producer does not participate in the derivatives markets and is unaware of any specific derivatives transactions but is aware that there is a derivatives market with the commodity as the underlying interest.

Also, for OTC derivatives there is not necessarily a market price or value so it is unclear how the provision could be applied.

Section 59(2) should be extended to actions for rescission or declarations that a contract is void, voidable or otherwise unenforceable given that these are typical common law remedies for misrepresentation.

c. Section 66 -Insider Trading and Tipping

Section 66 of the CMA sets out the restrictions on insider trading and tipping that apply to a "purchase or trade" with "trade" having the expanded meaning discussed below. The prohibition applies to securities and "related financial instruments," a concept that includes not only derivatives but also "agreements, arrangements, commitments or understandings" that affect a person's "economic interest" in a security, namely the right to receive a benefit or exposure to risk.

These prohibitions may operate to unduly restrict entering into, rolling, amending or terminating certain types of derivatives contracts where a party may have undisclosed material information regarding an issuer whose securities form part of or are otherwise connected to the underlying interest. There may be circumstances where a party having undisclosed information can neither roll a transaction over (as this would be entering into the trade) or inform the counterparty that it will not roll the trade (as this may be terminating a trade), yet it must do one or the other. ISDA recommends more tailored defences under section 68 of the CMA, such as an expanded "legal obligation" defence that permits a party to trade, amend, roll, or terminate transactions in accordance with the terms of a contract <u>or</u> commercial understanding with the party entered into or arranged prior to acquiring knowledge of the undisclosed material fact or material change.

d. Section 91 – Freeze Orders

On an application from the Chief Regulator, the Tribunal can on certain specified grounds relating to the regulation of capital markets make certain orders that preclude persons from taking certain actions with respect to derivatives. The order can be made without notice for a 15 day duration and can be extended.

Because of how broadly the power is expressed, ISDA members are concerned that it could extend to preventing counterparties to outstanding derivatives transactions from terminating transactions or dealing with their collateral in the event of a default by their counterparties. The existence of a regulatory power that has the potential to allow for orders that prevent such action from being taken may preclude financial institutions from obtaining the sufficiently robust legal opinions required by capital adequacy rules in order to allow capital with respect to such transactions to be calculated on a net exposure basis. Higher capital costs add significant transaction costs for Canadian market participants and negatively affect the ability or willingness of counterparties to trade with Canadians. Enforceable and effective netting and collateral dealing rights are also the cornerstones in the reduction of systemic risk. By providing for such a power, the CMA may be undermining the reductions in exposure (and hence reductions in systemic risk) achieved through legally effective netting and collateralization arrangements.

ISDA recommends that this power be clarified to the effect that no order or regulation made under the CMA can prevent a party to an eligible financial contract (as defined in the *Payment Clearing and Settlement Act* (Canada)) from exercising its close-out rights, including its right to deal with collateral on a termination event or event of default. The Ontario Commodity Futures Act Advisory Committee Final Report of January 2007 recommended that Ontario support the development of uniform provincial legislation to protect termination, netting and collateral enforcement rights in a manner that would override other statutory provisions or judicial discretions. ISDA encourages the Participating Jurisdictions to take advantage of this rare opportunity presented by the CMA to include these protections in uniform provincial law.

Comments on Draft Initial Regulations

We have provided separate comments below with respect to the TR Regulation and the Derivatives Regulation. In this part, we make some general comments regarding the regulations.

Status Quo Pending Development of Regulations

We note that the stated approach in the Draft Initial Regulations is to maintain the status quo, although it is noted that some changes to the status quo are inevitable given the differences between the current derivatives regimes in Participating Jurisdictions. ISDA agrees that maintaining the status quo to the extent possible is an appropriate approach. With respect to OTC derivatives this should require that there be no material new requirements imposed on a temporary basis that will require changes to documentation or operations, particularly if the requirements are likely to change when final regulations are enacted. Given that the major Canadian market participants in the derivatives area are its five major banks, all of which are based in Ontario, and that most derivatives activity is cross-border activity with these and other Ontario counterparties, the transitional regulations and policies should not impose requirements that do not currently apply under Ontario law. To adopt the rules from other Participating Jurisdictions where they have requirements that do not apply in Ontario is actually to take the opposite approach to maintaining the status quo. The two major areas in the regulations drafted so far where this is most significant are dealer registration and prospectus requirements. These areas will be further addressed in our specific comments on the Derivatives Regulation below.

Product Determination

The basic definition of a "derivative" in the CMA is very broad and, on its face, could apply to many types of contracts that are not considered to be derivatives or capital markets transactions. The Capital Markets Regulatory Authority (the **Authority**) will have the power to make an order or regulation designating a contract or instrument or class of contract or instrument not to be a derivative.[3] One of the purposes of these designation powers is to ensure that transactions which are not truly derivatives or which are regulated as other types of products are not swept into the capital markets law. To ensure that the CMA is limited in scope to capital markets transactions, ISDA believes it is important that the CMA not be brought into force until an order or regulation has been developed that appropriately determines what is not a derivative for purposes of the CMA.

We note that the approach adopted in the Draft Initial Regulations is to make this determination on a regulation-by-regulation basis. Both the Derivatives Regulation and the TR Regulation exclude certain products (the same ones) from the scope of the regulation. We believe that this is not the best approach or the one that the CMA itself impliedly calls for. In order to provide clarity around which types of contracts are not to be regulated as derivatives (or securities), the better approach in our view is to adopt a separate Products Determination Rule that applies to the CMA as a whole.

The contracts that are exempt under the Derivatives Regulation and the TR Regulation are exempt because they are not the type of financial contract that was intended to be covered by the CMA as capital markets legislation. For example, insurance and annuity contracts are excluded because they are not derivatives. They are only technically caught by the wording because they have "payment obligations" based on an "event". They are also adequately regulated by insurance laws. Physically settled forward contracts on non-financial commodities are excluded because the primary purpose of such contracts is to transfer ownership of the commodity and market participants are primarily commercial participants that take delivery of the commodity in the ordinary course of their business. Spot FX contracts are in this same category and are physically settled generally within two business days. Deposit liabilities of financial institutions are excluded because they are regulated by banking laws, and gaming contracts because they are regulated already by strict gaming laws. Because these types of contracts are not the type of contract intended to be covered by the CMA, the more appropriate regulation is one that excludes them from the scope of the CMA. Subject, perhaps, to a few exceptions relating to market conduct, there is no basis for applying any part of the CMA to them.

We understand that the application of the market conduct rules may be justified in those cases where conduct in the market applicable to the exempt derivatives can affect securities markets or non-exempt derivatives markets. For example, physical

---

[3] Under CMA, s.95(1)(g), s.202(1)18, s.205(4)(b)(vii).

commodity markets are connected to futures and OTC derivatives markets. However, because section 62 of the CMA relates to the underlying interest of a derivative, the conduct would be covered even if physical commodity contracts themselves are not derivatives. Further, the same connections do not exist between the exempt spot FX market or the insurance industry, for example.

Further, having a single Product Determination Regulation will facilitate amendments if and when new products are identified for which an exclusion from the CMA would be appropriate. A companion policy to a Product Determination Regulation can also provide the interpretative guidance that has been included in the TR Regulation relating to the exclusion of commercial and consumer contracts from the scope of the CMA. This is guidance relevant to the entire CMA and it is awkward, and not entirely effective to meet its purpose, to repeat it in each regulation that has any provision applying to derivatives. If absolutely required for the purposes of a particular regulation, specific exceptions to the single Product Determination Regulation may be made in that regulation for the limited purposes of that regulation.

Comments on New CMRA Regulations

Comments on CMRA Regulation 91-501 *Derivatives and Strip Bonds*

Deeming OTC Derivatives to be Securities for purposes of Part 5 – Prospectus Requirements

ISDA asks that the Derivatives Regulation be amended so as to remove the designation of all OTC derivatives that are not otherwise securities to be securities for the purposes of Part 5 of the Act. We recognize that the Derivatives Regulation would exempt trades where each party is a "permitted client" or a "qualified party" and would also exempt certain types of contracts and instruments. We also recognize that the wording of section 41 on its face allows for certain derivatives to be designated to be securities. We submit, however, that it is against the clear intention of the CMA to use the section 41 power to designate all derivatives to be securities for purposes of a part of the CMA that is clearly not intended to apply to derivatives. As stated in the "Capital Market Act: A Revised Consultation Draft" document, the section 41 power is to prescribe classes of derivatives to be securities, such as "derivatives sold as retail investment products".[4] We question whether the Authority would have the administrative law power to essentially read the distinction between derivatives and securities out of the CMA for purposes of the prospectus requirements. We understand that the measure is intended to be temporary pending development of the disclosure requirements for designated derivatives. However, it is still necessary that the Authority exercise its regulation making power consistent with the purposes of the CMA. It is for good reason that the prospectus requirements of the CMA do not apply to over-the-counter derivatives transactions.

---

[4] Page 7.

We also note that the requirement to file and provide a prospectus applies when a person distributes a security. The definition of "distribution" in the CMA does not describe any "trade" that could apply to entering into a bi-lateral derivatives transaction. These types of derivatives do not have an "issuer" and are not "issued"; nor are they "purchased" or "sold". In these cases, one could not sensibly define the transaction to be a distribution as there is no clear distinction between the party providing the product (akin to an issuer) and the investor. This again supports that it is not the intention of the CMA that a prospectus requirement apply to over-the-counter derivatives.

The Background provided for the Draft Initial Regulations in relation to CP 41-101 states:

> We added guidance to subsection 1.2(1) [Interrelationship with other securities legislation] to clarify that in CMR Jurisdictions, NI 41-101 applies to OTC derivatives because, in CMR Jurisdictions, OTC derivatives are being treated as securities for the purposes of the prospectus requirements until a comprehensive regulatory regime is implemented for OTC derivatives. The guidance notes that the Authority will consider applications for discretionary exemptions from the prospectus requirement on a case-by-case basis. See "Derivatives", below.

An appropriate *status quo* position for the CMA is not to deem derivatives to be securities, but to provide an appropriate temporary exemption for those securities that are also derivatives.

There are a number of situations where derivatives may be entered into with counterparties that do not meet the "permitted client" or "qualified party" category, but which would also not constitute investment contracts or fit within other categories of securities. A borrower entering into FX contracts or interest rate derivatives as hedging contracts with members of its lending syndicate, for example, would not, and should not, be subject to prospectus requirements. The current draft would render such contracts subject to the prospectus requirement and would appear to impose the requirement on both parties. These are bi-lateral contracts. There is no "issuer" and no "purchaser". There is no meaningful way it could be complied with by either party in such a context. We note also that CMRA Regulation 41-501 *Prospectus Requirements and Exemptions* as a related regulation to Part 5 of the CMA would also be deemed to apply to derivatives. It is clear on reading those requirements that they could not meaningfully apply to a disclosure document with respect to an OTC derivative. The form of prospectus disclosure would not result in meaningful disclosure in the context of an OTC derivative. To impose a requirement that cannot be complied with is not an appropriate exercise of regulatory power, even if exemption applications would be entertained. Derivatives that are exchange contracts will not be subject to the prospectus requirement, so it is anomalous to apply the requirement to a bilaterally-negotiated contract.

Deeming OTC Derivatives to be Securities for purposes of Registration Requirements

The CMA will prohibit a person from acting as a dealer, adviser or large derivatives participant unless registered in accordance with the regulations and in the category prescribed.[5] The requirement applies to entities and to the individuals that act on behalf of the entity.[6] A "dealer" includes a person who engages in the business of trading in derivatives as principal or agent.[7] An "adviser" includes a person who engages in the business of advising others with respect to trading derivatives.[8] The Derivatives Regulation provides that the registration requirement does not apply in respect of a trade in an "OTC derivative" where each party to the trade is a permitted client or a qualified party, each acting as principal.[9] It will further provide that the registration requirement will not apply to contracts or instruments that are of certain types (the same as for prospectus requirement).[10]

In addition, new NI 31-103 provides in section 1.2(2) that in Alberta and a CMR Jurisdiction a reference to "securities" in this Instrument includes "derivatives" unless the context otherwise requires. By deeming derivatives to be securities, new NI 31-103 has the effect of requiring registration in one of the existing categories of registration in order to deal in or advise with respect to OTC derivatives, unless, presumably, the exemption under the Derivatives Regulation disapplies the registration requirement. It also has the effect of rendering the exemptions in Part 8 applicable to OTC derivatives, although many of them would not be relevant in any event.[11]

The result of the proposed changes is that all dealers, including Canadian financial institutions, will be required to either rely on the proposed exemptions and deal only with permitted clients or qualified parties, or will not benefit from a dealer or adviser registration exemption (which they currently have under Ontario law although not in other jurisdictions) or apply for exemptions to enter into financial hedging transactions with their counterparties who are not qualified parties. They will have to amend documentation to obtain representations as to qualified party or permitted client status.

---

[5] CMA, s.22(1).
[6] CMA, s.22(2).
[7] CMA, s.2.
[8] CMA, s.2.
[9] Reg. 91-501, s.10.
[10] Reg. 91-501, s.3.
[11] New subsection 8.25(1.1) deems references to a "financial or other interest" to include a material interest, financial or otherwise, in the underlying interest of the derivative, to make the adviser exemption more suitable for derivatives.

Under Canadian trade reporting requirements, derivatives dealers - as defined under the applicable provincial rules – have experienced significant difficulty in collecting required representations from counterparties. Representations that stem from uniquely Canadian requirements can represent a particularly important hurdle to trading with foreign counterparties, who are seeking to rationalize the number of regulatory regimes to which they are subject. Introducing new frictions to trading relationships by requiring qualified party or permitted client representations should be avoided.

Investment dealer or adviser registration pursuant to the requirements of CMRA Regulation 31-501 *Registration Requirements, Exemptions and Related Matters* is onerous and not adapted to trading in derivatives. Registration as an investment dealer is not a suitable temporary substitute category of registration for dealing in many types of derivatives, including the most common types of derivatives, namely FX and interest rate derivatives. It does not ensure that the dealer has relevant expertise. It would be costly and provide no meaningful protection to persons who do not meet the permitted client or qualified party test to involve such a registrant in a trade or to obtain the qualifications for the registration as an investment dealer. ISDA recommends that the Authority adopt the current Ontario exemption that applies to Canadian financial institutions that deal in derivatives in the context of their core business. ISDA also recommends that the same approach be taken as is now taken in Ontario, namely that the derivatives dealer and adviser registration requirements of the CMA not be proclaimed into force until suitable and harmonized dealer and adviser registration categories are available. Alternatively, ISDA recommends putting in place an additional temporary exemption for dealing with such non-exempt parties for foreign financial institutions that have the equivalent of a derivatives dealer or swap dealer registration in other acceptable jurisdictions.

With respect to the adviser registration requirement, we believe the intention is that dealers (firms or individuals) who are exempt from the registration requirement are also exempt from the adviser registration requirement with respect to advice provided in the course of that dealing relationship and that those entities that act as advisers to permitted clients or qualified parties are exempt from the adviser registration requirement as well. This is not clear, however, as the exemption applies to a "trade" in a derivative. This wording is more applicable to the dealer registration requirement than the requirement to be registered in order to "act" as an adviser. We would request that the Derivatives Regulation clarify that advisers are also exempt.

Comments on New CMRA Regulation – Trade Repositories and Derivatives Data Reporting – Regulation 91-502 and Companion Policy 91-502 (91-502)

ISDA and its members support initiatives to increase transparency, and therefore recognize the importance of the TR Regulation.

We assume that the draft will be amended to be consistent with amendments that are made to the existing trade reporting rules between now and implementation. We refer in particular to the proposed November 5 amendments published by the

OSC, in relation to inter-affiliate transactions, the requirement of local counterparties to obtain an LEI and changes to the data for public dissemination, among other things. ISDA will be providing comments on those proposed changes separately to the CSA.

1. **s.1 – Definition of Local Counterparty**

The definition of "local counterparty" includes registered derivatives dealers and potentially large derivatives participants that are not formed under local law and do not have a head office or principal place of business in the local jurisdiction. As a result, subject to the substituted compliance regime, data with respect to all reportable transactions entered into by such entities will have to be reported under the TR Regulation.

ISDA encourages the Authority to adopt the alternative approach of Multilateral Instrument 96-101 (**MI 96-101**) which does not include registered dealers or large derivatives participants that are not otherwise local counterparties (foreign dealers) as local counterparties. Including foreign dealers that may be required to register as derivatives dealers in Canada in the definition of local counterparty greatly inflates the scope of transactions subject to reporting via inclusion of their transactions with foreign counterparties. This may detract from the ability for regulators to oversee and analyze the activity that is most pertinent to the provincial market. With respect to transparency, including these transactions in publicly available aggregated data and transaction level public reporting may diminish the value of these reports to the public and to regulators since they will offer a more global view of market activity, rather than a purely Canadian one. Given that it is the Authority in its capacity under the federal legislation that is the systemic risk regulator, the main provincial interest under the CMA in trade data is with respect market conduct affecting the Participating Jurisdiction. Data on transactions that dealers undertake with counterparties outside of a Participating Jurisdiction are not sufficiently connected to the market in the Participating Jurisdiction to justify provincial reporting requirements.

A requirement to report all their transactions would disadvantage foreign derivatives dealers subject to registration requirements in Canada since their foreign clients may not wish for their transactions to be reported to additional, non-prudential regulators. As a result, some foreign dealers may limit their activity in Canada, potentially impacting the local markets. Therefore, we encourage the Authority to amend the definition of local counterparty in the TR Regulation to align with MI 96-101 for the sake of harmonization and to avoid disadvantaging derivatives dealers that may be subject to registration requirements in Participating Jurisdictions.

Even though the transactions between foreign derivatives dealers and their foreign counterparties may be subject to substituted compliance under 91-507, this does not alleviate concerns regarding the requirement since the conditions for such substitute compliance are onerous. In practice, the requirement for a reporting counterparty to instruct a DTR to provide the transactional data to the provincial regulator(s) still obligates a party to report with respect to each Participating Jurisdiction to a recognized TR on a trade-by-trade basis, thus limiting the value or efficiency of substituted compliance. In addition, because the TR must be recognized by the Authority, reporting counterparties that utilize a TR for reporting in a jurisdiction listed in Appendix B to 91-507 that is not recognized would not be eligible for deemed compliance.[12] Some accommodation should be made for TRs that are affiliated entities of a recognized TR and a streamlined recognition process should be allowed for TRs that only wish to obtain recognition for purposes of facilitating deemed compliance for their participants.

In order to more efficiently address both of these conditions, we encourage the Authority to enter into a Memorandum of Understanding (**MOU**)[13] with regulators in other jurisdictions to obtain direct access to relevant derivatives data reported subject to another regime's requirements. An MOU between the Authority and a regime specified in the TR Rule should negate the requirement that the relevant TR be recognized by the Authority and eliminate the requirement for a reporting counterparty to instruct a TR to provide the Authority with access to the data. The operational complexity of meeting the conditions in the substituted compliance provision have the practical effect of negating any benefit or efficiency that should result from the application of substituted compliance.

S.26 – Reporting Hierarchy

ISDA fully supports the approach adopted for the reporting hierarchy which allows dealers and non-dealers to determine by written agreement which party will be the reporting counterparty. The wording seems to suggest there will always be such an agreement in place.[14] There may not be however. Consequently, we believe that there is a drafting ambiguity in the event that two dealers or two non-dealers do not have such an agreement in place. Is the intention that if no such agreement is in place, then the local counterparty under part (e) of section 26 will be the reporting counterparty or is the intention that both parties will be required to report if no such agreement is in place or that they have an obligation to enter into a written agreement in such case? While imposing the obligation on the local counterparty would create consistency in the rule in non-CMR jurisdictions, we know that a fall back to dual reporting would incentivize parties to put a written agreement in place. A non-local counterparty may be the party that is better positioned to report, yet have no incentive to agree to do so.

---

[12] Notably, the TRs authorized for reporting in Europe are not currently recognized in Canada.

[13] We note that the European Securities and Markets Authority has concluded MOUs with each of the Reserve Bank of Australia and the Australian Securities and Investments Commission that provide for direct access to data held in European TRs.

[14] The wording is that it applies where there are two dealers, as opposed to applying where there are two dealers with an agreement in place.

s.27 Duty to Report

See our comments above with respect to section 1 as it applies to the substituted compliance regime.

Comments on CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions*

CMRA Policy 71-601 should not be applied to impose prospectus or registration requirements on derivatives transactions with counterparties outside of a CMA Jurisdiction given the difference in the nature of securities distributions as compared to OTC derivatives transactions. ISDA therefore recommends that CMRA Policy 71-601 be carefully reviewed in the context of the expanded definition of "trade" and expanded application of prospectus and registration requirements to derivatives to clearly exempt derivatives transactions, and that the policy guidance and exemptions be carefully tailored to clarify that the policies apply only to the types of transactions that give rise to the underlying policy concerns.

*****

ISDA and its members thank you for your consideration of the comments regarding the CMA and the Draft Regulations that apply to OTC derivatives. We welcome any questions you may have with respect to our recommendations and are happy to provide any additional feedback or information as may be helpful to your consideration.

****

Please contact me or ISDA staff if you have any questions or require further input.

Sincerely,

Katherine Darras
General Counsel, Americas
ISDA