ISDA® Safe, Efficient Markets

April 6, 2016

Delivered by e-mail to martin.mcgregor@asc.ca

Alberta Securities Commission
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Re: Request for Comments on Proposed Amendments to Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* and Proposed Changes to Companion Policy 96-101-CP *Trade Repositories and Derivatives Data Reporting*

Dear Sirs/Mesdames,

The International Swaps and Derivatives Association, Inc. ("ISDA")[1] appreciates the opportunity to provide comments regarding the Proposed Amendments (the "Proposed Amendments") to Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* and Proposed Changes to Companion Policy 96-101-CP *Trade Repositories and Derivatives Data Reporting* (together, "MLI") published by British Columbia Securities Commission and the securities regulatory authorities in Alberta, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon (each an "Authority" and collectively, the "Authorities"). We recognize that the Proposed Amendments reflect many of the concerns and suggestions provided in ISDA's letter regarding transaction level public dissemination sent to the Canadian Securities Administrators ("CSA") on January 16, 2015[2].

We greatly appreciate the efforts of the Authorities to propose requirements for the public reporting of transaction level data that align with existing requirements in the U.S., where appropriate, while also providing additional protections that are appropriate to the Canadian derivatives market. We also

---

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of 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, clearing houses 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] http://www2.isda.org/attachment/NzIxNw==/ISDA_Canada_PublicDisseminationLetter_16Jan2015_FINAL.pdf

appreciate the efforts of the Authorities to harmonize their Proposed Amendments with the amendments issued by the Ontario Securities Commission ("OSC"), the Autorité des marchés financiers ("AMF") and the Manitoba Securities Commission ("MSC") to their respective Regulation/Rule 91-507 *Trade Repositories and Derivatives Data Reporting* ("91-507"). Many of the comments contained in this letter are the same, or substantively the same, as the comments ISDA provided to the OSC, AMF and MSC with respect to their corresponding amendments to 91-507[3]; however, in some cases our feedback to the MLI includes suggestions not previously provided with respect to 91-507. This additional commentary to MLI reflects further feedback from some of our members regarding aspects of the MLI that we believe should be harmonized with 91-507. We ask that the Authorities consider these suggestions with an aim for national harmonization.

As a general matter, some of our members question whether transaction level public dissemination is warranted at all in Canada. The goal of such requirements is to increase price transparency. With a limited number of market makers in Canada, it is not clear that the public reporting of data at a transaction level provides useful or necessary additional transparency to market participants in Canada that outweighs the potential impact to liquidity that might result from compromised participant anonymity. We ask the Authorities to consider whether the public dissemination of aggregate derivatives data by trade repositories ("TRs") might sufficiently meet the commitments and goals of Canadian regulators to improve the transparency of derivatives markets. If the Authorities, OSC, AMF and MSC ultimately determine that transactional level public reporting will be required in Canada, then we ask you to consider revising and clarifying those obligations in accordance with the comments below.

I. Bilateral Compression

Section 2(b) of Appendix C of the Proposed Amendments exempts transactions resulting from multilateral portfolio compression exercises from the requirements for the public dissemination of transaction level data. We agree with this exclusion since the act of compression does not result in a new pricing event. For the same reason, we request that the exclusion be expanded to include transactions resulting from bilateral compression exercises. Such an approach would be in accordance with the definition of "publicly reportable swap transaction" in the Part 43 regulations of the Commodity Futures Trading Commission ("CFTC") which exempts portfolio compression exercises from the real time public reporting requirements and would align with current market practice.

II. Prime Brokerage Transactions

Some parties ("PB Clients") enter into derivatives transactions via agreements with a prime broker ("PB") which allow them to seek competitive pricing from a number of executing dealers ("EDs") while legally only entering into transactions with, having credit risk against, and executing transaction documentation (including Master Agreements and confirmations) with their PB. Under a basic prime brokerage arrangement there is a single execution event agreed between the ED and the PB Client which, upon acceptance by the PB under pre-agreed parameters, results in two off-setting trades – one between the PB and the ED and a mirror trade between the PB and the PB Client.

[3] http://www2.isda.org/attachment/ODE2Mg==/ISDA_Canada_TRRuleAmendments_21Jan2016_FINAL.pdf

Since there is a single execution event, there should only be one public report of transaction level data. Public dissemination of both transactions to a PB intermediated execution would negatively impact transparency by duplicating, offsetting and inflating the amount of market activity without providing any additional pricing information. In accordance with current market practice for CFTC reporting, we request that MLI only require the data for the ED-PB trade to be publicly disseminated, even though both the ED-PB and PB-PB Client mirror trades may be reported to the TR. The ED is best positioned to report the execution event timely and according to market practice should be the reporting counterparty for the ED-PB leg, while the PB should report the PB-PB Client leg. The CFTC acknowledged this approach in no-action relief they issued on the matter[4]. Although the relief has expired, there are currently discussions between market participants and CFTC staff to codify this approach to reporting PB intermediated transactions in future amendments to the CFTC's reporting rules (Parts 43 and 45). In the meantime, this approach remains the market practice and should be aligned across jurisdictions to promote efficiency and consistency.

<u>III. Bunched Orders vs. Allocations</u>

It is common market practice for an asset manager or investment advisor (an "advisor") to execute transactions on behalf of, and for the benefit of, funds which are the legal counterparties to derivatives transactions. The advisor traditionally executes an amalgamated notional once on behalf of a number of funds (the "bunched order") and then subsequently allocates that notional at varying levels to the funds (the "allocations"). In this scenario, the execution of the bunched order is the sole execution event and the associated price is based on the consolidated notional. Therefore, we request that for purposes of the transaction level public reporting requirements, only the bunched order should be required to be publicly reported with reporting eligibility based in part on the local counterparty status of the advisor.

If public reporting were done at an allocation level, transparency may be delayed since allocation occurs subsequent to execution of the bunched order and therefore may be sent to the TR only after allocation. Usually a bunched order is fully allocated on the trade date, but in certain cases (e.g. differences in locations of the advisor and the dealer counterparty) allocation may not be fully completed until after the trade date. More importantly, due to the fact that the price was executed at the level of the bunched order, dissemination of the price at an allocation level may appear off-market or be misleading. Additionally, reporting of both the bunched order and the allocations to the public would be duplicative and would inaccurately inflate the level of market activity.

ISDA understands that under 91-507 firms currently report only the allocations that result from a bunched order to a TR, based in part on the local counterparty status of the counterparty to each allocation. We believe the allocations should continue to be reported to the TR, but not publicly disseminated. Based on our suggestion above, reporting counterparties will need to build to report the data in Appendix C for bunched orders to the TR indicating that such data is subject to public reporting and the data for the associated allocations is not. The MLI places the responsibility on the TR to determine which transactions are subject to transaction level reporting, but based on the reporting architecture for the U.S., a reporting counterparty would make such determination itself and the TR would publicly disseminate data in accordance with the relevant specification in the messaging.

Transaction level public reporting of data solely for the bunched order would match current market practice under the CFTC's Part 43 regulations and be in accordance with *Regulation SBSR – Reporting*

[4] http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-53.pdf

and Dissemination of Security-Based Swap Information; Proposed Rule as issued by the Securities and Exchange Commission ("SEC") on March 19, 2015. Based on our experience in other regions, we think there is a strong benefit to the clarity and consistency of compliance to be gained by providing clear requirements and guidance that aligns with current market practice and global requirements.

IV. Clearing Transactions

ISDA understands that as the actual execution event, an alpha transaction would be subject to public dissemination, but that per 2(c) of Appendix C of the Proposed Amendments the related cleared transactions (beta and gamma) would not be subject to public reporting. We concur with that approach, since there is a single pricing event for a set of clearing transactions.

Based on our prior discussion with the OSC with respect to 91-507, we further understand that the T+1 dissemination timeframe in 7(a) of Appendix C for transactions where one of the counterparties is a recognized or exempt clearing agency is not intended to apply to betas and gammas since they result from clearing novation. Rather, the Authorities anticipate this timeframe would apply to transactions entered into directly by a clearing agency on its own behalf (e.g. as a result of a clearing default). We suggest that the Authorities provide additional clarity in the MLI regarding these expectations in order to avoid any inconsistent interpretations.

In addition, we recommend that the Authorities explicitly clarify in the MLI that a cleared transaction that has no alpha trade (e.g. "firm" or "forced" trades which result from the clearing agencies pricing process), is not considered to be "a transaction resulting from novation by a recognized or exempt clearing agency" and therefore is not subject to the exclusion in section 2(c) of Appendix C. We suggest the MLI make it clear that as a result these cleared transactions are subject to the transaction level reporting requirements and that the clearing agency would be responsible to report them in accordance with the reporting counterparty hierarchy. Based on our discussion with some clearing agencies that are currently completing the Part 43 reporting requirements for such transactions, we believe that clearing agencies can accommodate such reporting provided the regulatory obligation is clear.

V. Product Scope for Transaction Level Public Dissemination

ISDA agrees with the proposal to exclude commodity derivatives and foreign exchange transactions from public reporting due to the maturity and size of these markets in Canada.

Although we support the inclusion of equity indices in the product set, we believe that certain sub-indices which are illiquid in the Canadian derivatives market should be excluded from the public dissemination requirements; for example:

- S&P/TSX Capped Energy Index
- S&P/TSX Composite Banks Industry Group Index
- S&P/TSX Capped Utilities Sector Index
- S&P/TSX Composite Energy Sector Index

We appreciate the efforts of the Authorities to avoid the public dissemination of data in Canada for products that may qualify as security-based swaps in advance of corresponding requirements by the SEC.

It is worth noting that some credit and equity indices do not or may not meet the definition of a swap[5] and would not be subject to the CFTC's Part 43 regulations. As a result, it is possible that a trade on an index that qualifies as security-based swap would be subject to public reporting in Canada in advance of a requirement for public dissemination of that same transaction or type of transaction under the reporting requirements of the SEC.

Our members do not believe it is essential to align the product scope in Canada precisely with the distinctions between narrow and broad-based indices as defined by the CFTC and SEC[6]. However, as a more general matter, we would like to acknowledge that some of our members are concerned with the public dissemination of credit indices altogether. As these products are traded more thinly in Canada than they are in the U.S., there is greater likelihood of compromising anonymity. We ask the Authorities to carefully consider these concerns against the perceived benefit of public transparency.

VI. Rounding of notional amounts

ISDA supports the adoption of requirements and conventions for the rounding of notional amounts by a TR for the purposes of transaction level public dissemination as an important safeguard for the preservation of participant anonymity and market liquidity. We do not believe the proposed rounding conventions would adequately protect the relatively small size of the Canadian derivatives market. Instead we propose the following changes to Table 3:

- If the Reported Notional Amount is below $1 million, the rounded notional amount should be "<$1 million";
- If the Reported Notional Amount is equal to or greater than $1 million but less than $10 million, round to the nearest million (instead of $100,000); and
- If the Reported Notional Amount is equal to or greater than $10 million but less than $50 million, round to the nearest $5 million (instead of $1 million).

VII. Capping of notional amounts

ISDA believes the capping of notional amounts by a TR for the purposes of transaction level public dissemination is essential to preserve participant anonymity and market liquidity. We agree with the rounding conventions proposed in Table 3, but recommend the following changes to Table 4 for notional capping:

- Add a cap of CAD 20 million for Interest Rates with a maturity of greater than twenty years
- Change the cap for Credit and Equity from CAD 50 million to CAD 20 million

Employing these suggested thresholds would help preserve market liquidity for these types of transactions which are less liquid in the Canadian derivatives market and may take more time to hedge.

[5] http://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf

[6] Id.

ISDA. Safe, Efficient Markets

VIII. Public dissemination timing

Section 7 of Appendix C provides that a recognized trade repository must disseminate the information contained in Table 1 *no later than* the timeframes in 7(a) and 7(b). We suggest that "no later than" be replaced with "at". Although we understand that TRs intend to send an end-of-day report in accordance with the specified timelines applicable to the relevant counterparties, use of the phrase "no later than" implies that a TR could choose to publicly disseminate the trade data earlier than the deadlines in 7(a) and 7(b). Such outcome would be undesirable to market participants who are relying on equal treatment of transactions among TRs that guarantees that data will not be publicly disseminated in advance of the relevant deadline.

In addition, section 7 of Appendix C provides that a TR must disseminate the information contained in Table 1 based on timeframes initiated by the TR's *receipt* of such data from the reporting counterparty rather than when the transaction or pricing event was executed. This approach has the unintended effect of disadvantaging parties that report earlier and dis-incentivizing prompt reporting. For instance, if a dealer reports on the trade date ("T"), the TR would publicly disseminate the data at the end of the day following the trade date (T+1); whereas the transaction data that is reported by a dealer on T+1 would be publicly reported by the TR at the end of T+2. This creates a commercial disadvantage for the dealer which reports on T since its counterparties will not wish their trades to be publicly disseminated any earlier than mandated.

We believe the most efficient way to resolve this issue is to change the requirement in 7(a) of Appendix C to require the TR to disseminate the information in Table 1 of Appendix C at the end of the *second* day following the day on which the transaction was *executed* (based on the reported execution timestamp) and 7(b) to the end of the *third* day following the day on which the transaction was *executed*. In the event a transaction was reported after the TR's deadline for public dissemination, the transaction data would be subject to public reporting on the same day of receipt. We believe that TRs can more easily support this approach since public dissemination rules for the CFTC are based on the execution timestamp, but they will need notification in advance of the finalization of the Proposed Amendments (and ideally as soon as possible) so they can build their dissemination logic based on execution timestamp rather than time of receipt.

IX. Counterparty identification

We appreciate the inclusion of new section 28(2) which provides clarity regarding the obligation of each local counterparty intending to execute a transaction and which has an ongoing obligations pursuant to a reportable transaction to obtain, renew and maintain a Legal Entity Identifier ("LEI"). Our members recognize the value of LEIs for regulatory reporting and will continue to engage with their counterparties to obtain their LEI for purposes of reporting under the MLI, and could use this provision as evidence of the regulatory mandate.

The Financial Stability Board has stated that "Responsibility for the accuracy of reference data should rest with the LEI registrant"[7]. In accordance with this statement, we feel strongly that a party that has registered for an LEI is solely responsible for maintaining its LEI. A reporting counterparty should not be restricted from using an LEI that has not been renewed. A lapsed LEI still uniquely identifies a

[7] Financial Stability Board, "Recommendation 18 - LEI Data Validation," *A Global Identifier for Financial Markets* (June 12, 2012), page 46: http://www.leiroc.org/publications/gls/roc_20120608.pdf .

counterparty; therefore a prohibition on the use of such an LEI would only serve to undermine the quality of the data available to the Authorities.

X. Pre-existing derivatives

We appreciate and support the proposed amendment made to the MLI, sections 34(1) and 34(2), which permits deferred reporting of legacy transactions entered into before the reporting start dates applicable for dealers and non-dealers, respectively.

We would like to discuss, however, the rules which apply to ensure that legacy transactions that are no longer in force on December 1, 2016 (for trades involving dealers or reporting clearing agencies) and February 1, 2017 (for trades between non-dealers). To simplify this discussion, we will focus on trades involving dealers and section 34(1) and 44(2) which apply to trades involving dealers. (For sake of simplicity, we do not refer to trades for which the reporting counterparty is a reporting clearing agency since this is a direct parallel to the situation for trades for which the reporting counterparty is a dealer. Also, the same analysis which applies to ss. 34(1) and 44(2) for trades involving dealers also applies to the parallel ss. 34(2) and 44(3) for trades between non-dealers and so we have not repeated this discussion in respect of ss. 34(2) and 44(3)).

For transactions entered into before July 29, 2016 (the "Reporting Start Date"), Section 34(1) overrides the Section 31 requirement to report the transaction immediately (or as soon as technologically practicable). Section 34(1) provides that such transactions may be reported on or before December 1, 2016 (the "Legacy Trade Reporting Deadline") provided that the transaction continues to be outstanding on the date it is reported. This achieves the desired objective of permitting delayed reporting of legacy transactions in the same manner as OSC's 91-507 section 34(1).

The question then arises as to which provision of the MLI eliminates reporting obligations for transactions that are entered into before July 29, 2016 (the Reporting Start Date) and which are no longer in force on December 1, 2016 (the Legacy Trade Reporting Deadline) (and are not reported at an earlier date voluntarily).

Section 44(2) as currently drafted only applies to eliminate reporting obligations for transactions entered into before May 1, 2016 which expire or terminate on or before July 28, 2016. This differs from the approach of OSC's 91-507 section 43(5) which eliminated reporting obligations for transactions entered into before October 31, 2014 (the 91-507 Reporting Start Date) and which expired or terminated on or before April 30, 2015 (the 91-507 Legacy Trade Reporting Deadline).

For example, if a new trade is entered into on June 15, 2016 that is scheduled to expire on October 15, 2016, we understand that deferred reporting would be permitted pursuant to MLI section 34(1) but it is not clear whether there is no obligation to report the trade on the basis that it will expire prior to December 1, 2016. Our members understand that this trade does not need to be reported, but reaching that interpretive conclusion leads to the below recommended drafting change to bring the MLI in line with the 91-507 approach described above.

In order to clarify that transactions entered into before the Reporting Start Date are not required to be reported if the transactions are no longer in force on the Legacy Trade Reporting Deadline (and are not reported at an earlier date voluntarily), we would recommend amending Section 44(2) to read as follows:

44(2) Despite Part 3, a reporting counterparty is not required to report derivatives data relating to a derivative if all of the following apply:

> (a) the derivative is entered into before ~~May 1, 2016~~ on or before July 28, 2016 ;
> (b) the derivative expires or terminates on or before ~~July 28, 2016~~ the earlier of the date that the derivative is reported or December 1, 2016;
> (c) the reporting counterparty is a reporting clearing agency or a derivatives dealer.

We note that some market participants have interpreted s. 34(1)(c) as suggesting that if a legacy transaction expires prior to December 1, 2016, then Section 34(1) will not apply and accordingly no reporting of the transaction is required. However, the alternative reading is that if Section 34(1) does not apply then that simply eliminates the ability to rely upon deferred reporting of legacy trades but does not eliminate the trade reporting obligation outright.

If the regulatory intention was that s. 34(1)(c) would eliminate reporting obligations for legacy transactions which expires or terminates on or before December 1, 2016, that could be clarified. However, in this case there would be a question whether s. 44(2) is required at all since 34(1)(c) would on that reading eliminate reporting obligations for all legacy transactions that are also covered under 44(2). Accordingly, we would recommend directly addressing this ambiguity as to whether 34(1) only provides an extended reporting window for legacy trades or also eliminates the reporting obligation.

Given that the MLI ss. 34(1) and 44(2) parallel the OSC's 91-507 ss. 34(1) and 43(5), and 91-507 specifies that no reporting is required for transactions entered into before the Reporting Start Date if the trade is no longer in force on the Legacy Trade Reporting Deadline, we would recommend that MLI s. 44(2) be edited as shown above to follow the same approach.

XI. Local counterparty definition

The "Jurisdiction of reporting counterparty" and "Jurisdiction of non-reporting counterparty" data fields in Appendix A to both MLI and 91-507 require reporting parties to indicate the Canadian jurisdictions in which they and the non-reporting party are a local counterparty under local derivatives data reporting rules, regardless of where the trade is reportable.

In section 1(1) of the MLI, subsection (b) of the local counterparty definition includes a counterparty that is a derivatives dealer (meaning a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in derivatives as principal or agent) in the local jurisdiction. In contrast, 91-507 limits the inclusion of dealers in their local counterparty definition to counterparties which are *registered* by an Authority as a derivatives dealer (currently only applicable in Quebec) or in an alternate category as a consequence of trading in derivatives.

As a result, Appendix A to both the MLI and 91-507 implies a requirement to indicate the MLI provinces and territories where counterparties are dealing in derivatives (in addition to their jurisdictions of incorporation, head office and principal place of business), but only the 91-507 provinces and territories where counterparties are *registered* dealers (in addition to their jurisdictions of incorporation, head office and principal place of business).

This creates the risk that the "Jurisdiction of reporting counterparty" and "Jurisdiction of non-reporting counterparty" would no longer be meaningful or aligned, and could potentially overload the data available to each Authority with transaction data that may not be relevant to its oversight function.

In addition, this would create substantial additional work because market participants currently do not track the jurisdictions where their counterparties are dealing in derivatives.

In order to facilitate the designation of a derivatives dealer as it pertains solely to the reporting counterparty hierarchy in 91-507 and MLI, the ISDA Canadian Representation Letter[8] and the ISDA 2014 Multilateral Canadian Reporting Party Agreement (Deemed Dealer Version)[9] provide an ability for a party to agree to accept the role of a dealer solely for purposes of the reporting counterparty hierarchy.

Part IV of the ISDA Canadian Representation Letter, which is optional when completed through ISDA Amend, provides an ability for a party to agree to accept or share the reporting responsibility in a particular jurisdiction if its counterparty is a local counterparty; however Part IV expressly indicates that by doing so a party is not providing any representation that it is a dealer in a particular jurisdiction. Therefore, a recipient of the ISDA Canadian Representation Letter could not rely on Part IV as a representation that its counterparty is a dealer in a particular jurisdiction, nor would it be able to ascertain that its counterparty is not a derivatives dealer in a particular jurisdiction.

Similarly, the ISDA 2014 Multilateral Canadian Reporting Party Agreement (Deemed Dealer Version) includes an agreement to be deemed to be, or to report as if it were, a derivatives dealer (regardless of the jurisdiction), for purposes of determining the reporting party to a trade. It does not include a representation that a party *is* a derivatives dealer. Rather, such party is agreeing to accept or share the reporting responsibility if the transaction is reportable, regardless of the jurisdiction.

Therefore, for the purposes of indicating the jurisdiction of counterparties in Appendix A, it is not possible, based on either of these documents, to identify a party as being or not being a derivatives dealer, other than a registered dealer, in a particular jurisdiction. Such a new representation would require a more detailed analysis than the current factual representation as to whether a counterparty is or is not registered as a dealer in Quebec. Nor would it be possible for a party to identify jurisdictions in which its counterparties have agreed to report as a dealer because this only applies in respect of jurisdictions in which a trade is reportable.

We do not believe this is the outcome intended by the Authorities with respect to either MLI or 91-507, and we request that prong (b) of the definition of local counterparty be amended to refer only to counterparties which are registered as derivatives dealers (or in an alternate category as a consequence of trading in derivatives). This change would clearly establish in the rule that derivatives dealers which are not registered (as such) in the relevant local jurisdiction do not have an obligation to report all their derivative trades (including those with non-local counterparties) but only those where they face a local counterparty without the need for section 42, while at the same time resolving the inadvertent issue pertaining to the identification of local counterparties. Alternatively, Appendix A to MLI could clarity that the "Jurisdiction of reporting counterparty" or the "Jurisdiction of non-reporting counterparty" is not required to be reported if the relevant party is a local counterparty solely because it falls within (b) of the local counterparty definition. However, this approach does not resolve the impact to 91-507 under which

[8] http://www2.isda.org/attachment/NjQ3Mg==/Cdn%20repletter2final.doc

[9] http://www2.isda.org/attachment/Njk3NA==/2014%20Sept%2022%20ISDA_2014_Multilateral_Canadian_Reporting_Party_Agreement_Dealer_FINAL.pdf

a party identified as a local counterparty under MLI would need to be identified as a local counterparty, therefore a revision to the local counterparty definition would be preferable.

XII. Inter-affiliate exemption

Although we appreciate that the Authorities have included an exemption for the reporting of derivatives between certain affiliated entities as specified in 41.1 of the Proposed Amendments, we believe the exemption is too narrow. Much of the derivatives activity between affiliates is transacted between a local counterparty and an affiliated entity that is not a local counterparty. Section 26(3) of the Proposed Amendments provides for the potential to satisfy the reporting requirements for such inter-affiliate transactions via substituted compliance. But as previously advised by ISDA in comment letters to the Authorities[10], the terms of such provisions are unworkable to the extent that no meaningful efficiency or benefit can be realized by reporting counterparties through the application of substituted compliance.

Specifically, the requirement in 26(3)(c) for a reporting counterparty to instruct a TR to provide the transactional data to the provincial regulator(s) still obligates a party to report the relevant provincial jurisdiction(s) to a recognized TR on a trade-by-trade basis. In addition, because the TR must be recognized or designated by the relevant Authority, reporting counterparties that utilize a TR for reporting in a jurisdiction listed in Appendix B to the MLI that is not recognized would not be eligible for deemed compliance.[11] Some accommodation should be made for TRs that are affiliate 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 Canadian regulators to enter into a Memorandum of Understanding ("MOU") with regulators in other jurisdictions to obtain *direct* access to relevant derivatives data reported subject to another regime's requirements. An MOU between the CSA and a regime specified in MLI should negate the requirement in ss. 26(3)(b) that the relevant TR be recognized by the Authority and eliminate the requirement in ss. 26(3)(c) for a reporting counterparty to instruct a TR to provide access to the data.

Until these hurdles are addressed, it may be easier or necessary for counterparties that are affiliated entities to fully report their transactions to multiple jurisdictions. The operational complexity of meeting the conditions in §26(5) have the practical effect of negating any benefit or efficiency that should result from the application of substituted compliance. Many end users only trade external to their firms with parties that precede them in the reporting party hierarchy and thus will not bear an obligation to report their outward-facing derivatives transactions. Nonetheless, they may need to incur the cost and effort to build and maintain a reporting architecture or to engage a third party provider solely for the purpose of reporting their trades with an affiliate that is not a local counterparty.

The costs can be significant. ISDA, in coordination with certain end-user trade associations, recently conducted a survey on the costs for derivatives end users associated with dual-sided reporting under the European Market Infrastructure Regulation (EMIR). The survey asked end users to provide the initial cost to their firms of implementing reporting technologies, the annual cost of maintaining those technologies,

---

[10] http://www2.isda.org/attachment/NzM0MA==/ISDA_MultilateralTRInstrumentsLetter_24Mar2015_FINAL.pdf at pg. 3

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

and the resources involved in reporting transaction data. The survey found that nearly 45% of respondents incurred annual costs of over €100,000 just to maintain their reporting architectures – a level that exceeds the total yearly compensation of at least one employee per firm. For some institutions, the burden is much greater: 7.3% of end users surveyed spent between €500,000 and €2 million per year, and 4.4% spent more than €2 million per annum. These costs are a significant burden, particularly for smaller end users. In many cases these end users engage dealers to perform delegated reporting on their behalf. But 75% of survey respondents said they still need to report intragroup transactions, so only 25% rely solely on a delegated reporting model. The requirement to report intragroup transactions under EMIR imposes a tremendous burden on end users that may limit their ability to participate in the derivatives markets.

CFTC staff acknowledged this burden when issuing CFTC Letter No. 13-09[12] which provides open-ended exemptive relief to certain affiliated entities with respect to obligations to report their swaps under regulations 45, 46 and 50.50(b). The relief applies to affiliated entities which are neither swap dealers nor major swap participants regardless of whether both entities are U.S. Persons subject to the CFTC's oversight. In issuing the relief, the CFTC acknowledged the rationale of market participants that since inter-affiliate transactions are used for managing risk within a corporate group of entities, they do not contribute to systemic risk and therefore are not meaningful to the analysis of reported trade data. ISDA encourages the Authorities to consider providing broader relief from the obligations under the MLI to all affiliated entities, regardless of whether both are local counterparties in Canada.

XIII. MLI Product Scope

Though outside of the scope of the Proposed Amendments, ISDA is including in this letter relevant comments it provided to the Authorities separately regarding sections 1(4) and 1(5) of Multilateral Instrument 91-101 *Derivatives Product Determination* (the "Product Determination Rule") for further consideration. The guidance says that the intention is that the same products be covered in each jurisdiction, but we believe that this formulation does not accomplish that and may lead to over-reporting.

For British Columbia ("B.C."), Newfoundland and Labrador ("Nfld"), Northwest Territories ("NWT"), Nunavut, Prince Edward Island ("PEI") and Yukon Territory ("Yukon") the coverage applies to "derivatives". A "derivative" requires two tests to be true. First it must meet a basic derivatives definition (swap, forward etc.) and second it must a "security" as defined in the specific securities legislation solely based on being in certain categories of the security definition, namely the option category, a "futures contract", an investment contract, or a document evidencing an option, subscription or other interest in a security.

To take Nfld as an example, the Nfld. Securities Act does not have a definition of a "futures contract" so only investment contracts or options would be covered. That means that only derivatives that are essentially securities are "derivatives" and based on the tests that have been traditionally applied that would exclude bilaterally negotiated OTC derivatives that are not distributed like securities (or essentially not retail). The Nfld Securities Act does not cover OTC derivatives so there does not appear to be sufficient jurisdiction to implement trade reporting in Nfld for OTC derivatives. In B.C, the definition would work differently because it does have a "futures contract" definition that would cover OTC derivatives.

[12] http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-09.pdf

The PEI, NWT and Yukon Securities Acts have a definition of "derivative", and it is unclear why these are not included in the list in section 1(4)(a). ISDA believes that such inclusion would the definition of derivatives more in line with B.C. since the B.C. "futures contract" definition is similar to the "derivatives" definition. Even so, the scope will end up being different than it is in the other provinces with a modernized definition of derivative.

ISDA encourages the Authorities to consider revisions to the Product Determination Rule that may better align the scope of products subject to the MLI in each jurisdiction. Otherwise, it is going to be very difficult for counterparties to determine which sub-set of transactions is reportable. Over-reporting can raise privacy issues if data is provided to an Authority that cannot be tied to an explicit regulatory requirement and may require reporting counterparties to obtain consent from their counterparties for the potential over-reporting of such transactions.

XIV. Timeline to compliance

The Proposed Amendments change the compliance date for transaction level public reporting by TRs from January 1, 2017 to July 29, 2016. July 29, 2016 is not a feasible compliance date, as further discussed below, however our members do support a single compliance date for transaction level public dissemination in Canada across the MLI and 91-507. We further note that establishing a compliance date in the weeks preceding or following the end of the calendar year is extremely challenging for the industry due to year-end code freezes at most institutions. We believe that a uniform date for transaction level of public dissemination on or after October 31, 2016, would solve all of these concerns.

TRs and reporting counterparties are concerned about the anticipated timeline to finalization of the Proposed Amendments. In order to be ready for a July 29, 2016 compliance date, TRs had anticipated needing 6 months from rule finalization for their build, internal testing and user testing. Market participants, including reporting counterparties and market infrastructure providers, also need several months from the availability of final specifications from their TR to develop the new functionality, performing internal testing and participate in TR user and testing. Even though TRs and reporting counterparties expect to leverage existing CFTC reporting architectures to a certain extent, separate messages and associated logic will need to be developed to comply with the transaction level public reporting requirements in Canada, and TRs will need new functionality to process and make such reports available to the public. In addition, the industry will need a substantive testing period to ensure that there are no unforeseen issues with compliance and to ensure transaction data is accurately and appropriately made available to the public.

The specifications for changes on the part of TRs, reporting counterparties and market infrastructure providers that offer reporting services cannot be finalized until rule requirements are final. Building based on the Proposed Amendments risks that changes may need to be made after the final rules are known that could not be accommodated in time for the compliance date.

A representative breakdown of the timeframe for planning, development and testing is as follows:

- TR development: 3 months
- TR internal testing (including regression testing): 2 months
- TR expedited customer testing: 1 month

Since the TRs support trade reporting regulations globally, their development is planned well in advance to accommodate the various and overlapping regulatory deadlines and the necessary development and testing windows. When one of these deadlines changes, TRs need to reassess their book of work and adjust their development and testing schedules in a way that does not disrupt their ability to deliver on other commitments. Rescheduling development of TR functionality is not necessarily based on a linear delay (i.e., a delay in one month of rule finalization translates to a one month delay in the availability of the associated functionality). Rather TRs need to ascertain where in their existing list of global development commitments they can refit the work; thus potentially requiring a later date for delivery of the functionality.

In order to address these concerns, we encourage the Authorities to publish the final version of the Proposed Amendments as soon as feasible. But we believe it is also imperative that the Authorities communicate to the industry, including TRs and reporting counterparties, the specifics of any substantive changes to the Proposed Amendments (e.g. basing the timeframe for reporting on the execution timestamp instead of time to receipt or bunched order reporting) as soon as agreed by the Authorities. Advance notice doesn’t completely mitigate the associated risk of proceeding with planning and implementation in advance of rule finalization, but it would greatly improve the chances that the industry can meet an amended compliance date on or after October 31, 2016.

XV. Conclusion

ISDA and its members thank the Authorities for their consideration of the comments regarding the Proposed Amendments provided herein. We strongly support harmonized trade reporting requirements across Canada, and therefore encourage the Authorities to discuss our comments with the OSC, AMF and MSC in order to adopt amendments to MLI and 91-507 which are aligned. 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 if you have any questions or require further input.

Sincerely,

Tara Kruse
Co-Head of Data, Reporting and FpML
International Swaps and Derivatives Association, Inc.