

February 4, 2013

Ontario Securities Commission
Attention: John Stevenson, Secretary
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8
Email: jstevenson@osc.gov.on.ca

Autorité de marchés financiers
Attention: Anne-Marie Beaudoin
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montreal, Quebec
H4Z 1G3
Email: consultation-en-cours@lautorite.qu.ca

**RE: CANADIAN SECURITIES ADMINISTRATORS OTC DERIVATIVES COMMITTEE MODEL
PROVINCIAL RULES – 60 DAY COMMENT PERIOD**

Please find enclosed a copy of our comments to the following Model Rules:

- Model Provincial Rules – Derivatives: Product Determination (the “Scope Rule”) and the Model Explanatory Guidance to Model Provincial Rule – Derivatives Product Determination; and
- Model Provincial Rule – Trade Repositories and Derivatives Data Reporting (the “TR Rule”) and the Model Explanatory Guidance to Model Provincial Rule – Trade Repositories and Derivatives Data Reporting

The Scope Rule

The following contracts and instruments will not be considered to be “derivatives” and subject to derivative regulation:

- A contract or instrument for immediate or deferred delivery of a physical commodity other than cash or a currency that: (i) requires the counterparties to make or take physical delivery; (ii) that does not allow for cash settlement in place of physical delivery; and (iii) is intended by the counterparties to be physically settled.

It is unclear whether or not such exemption will be similar to the CFTC’s forward contract exclusion. Historically, the CFTC considered non-financial commodity forward contracts “commercial merchandising transactions” which are exempt from the CFTC regulatory scheme because they are

used to transfer ownership of the commodity and not to transfer solely its price risk. While this requires an intent to deliver, such delivery may be deferred for reasons of commercial convenience or necessity and will therefore still be excluded from the CEA's regulatory scheme. In assessing the parties' expectations or intent of delivery, the CFTC applies a "facts and circumstances" test to look for the principles underlying the "Forward Contract Exclusion". This requires book-out transactions are effectuated through a subsequent, separately negotiated agreement to qualify for the safe harbor under the forward exclusions. In describing these transactions, the CFTC stated:

It is noteworthy that while such [book-out] agreements may extinguish a party's delivery obligation, they are separate, individually negotiated, new agreements, there is no obligation or arrangement to enter into such agreements, they are not provided for by the terms of the contracts as initially entered into, and any party that is in a position in a distribution chain that provides for the opportunity to book-out with another party or parties in the chain is nevertheless entitled to require delivery of the commodity to be made through it, as required under the contracts.¹

This exclusion is required for book-out transactions in wholesale electricity markets.

Book-outs

In compliance with prevailing industry practice, if parties enter into one or more transactions at a particular delivery location for a particular delivery period, schedulers, by agreement with the other parties, aggregate the volumes for delivery at a particular location so that the outstanding transactions constitute a single offsetting transaction under which:

1. the parties obligated to deliver the greater amount of energy will deliver the difference between the total amount it is obligated to deliver and the total amount to be delivered to it under the offsetting transaction ; and
2. the party owing the greater aggregate payment will pay the net difference owed between the parties.

Traditionally, schedulers would agree upon the book-out with other parties orally or by IMs but the CFTC now requires that an oral book-out agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form to prevent abuse of the safe harbor. As noted in the Federal Register at p.48230:

With regard to the netting agreements that were expressly permitted by the Energy Exemption the CFTC clarifies that a physical netting agreement (such as, for example,

¹ 39192

the Edison Electric Institute Master Power Purchase and Sale Agreement) that contains a provision contemplating the reduction to a net delivery amount of future, unintentionally offsetting delivery obligations, is consistent with the intent of the book out provision in the Brent Interpretation – provided that the parties had a bona fide intent when entering into the transactions, to make or take delivery (as applicable) of the commodity covered by those transactions.

We would like further clarification on if book-outs will meet the exception to the derivatives definition and will not be subject to derivative regulation.

Trade Repository Rule – Appendix A of Model Provincial Rule – Trade Repositories and Derivatives Data Reporting

Minimum Data Fields Required to be Reported to a Designated Trade Repository

The list of enumerated “MINIMUM DATA FIELDS” is not aligned with CFTC Dodd Frank requirements and some of the fields would be difficult to gather and report. For example:

Initial margin requirement	Yes/No. Indicates the initial margin required by the counterparties.
Initial margin amount	Amount and currency of the initial margin.
Counterparty posting initial margin	Indicates which counterparty or whether both counterparties are posting initial margin.
Variation margin	Whether variation margin is required to be collected under the terms of the transaction.
Counterparty posting initial margin	Indicates whether margin is required to be collected under the terms of the transaction.
Calculating variation margin	Yes/No. Indicates whether the variation

We do not enter into any bilateral OTC agreements that require the use of an Initial Margin or Variation Margin calculation for margining. Currently, this is only performed on exchange cleared trading (for example, the Natural Gas Exchange). For bilateral transactions, the credit terms will be governed by the individual contract language, which normally specifies an unsecured amount granted to each party based on credit ratings. If the termination value for the transaction (on any given day) is outside the unsecured thresholds, collateral can be requested from the appropriate party. Also, we

do not calculate margin on a portfolio basis, as this is limited to each specific contract. Furthermore, any calculations from our Credit Department is not stored in our trade data system (where we will be uploading from into our trade repository for reporting purposes).

Other items that will be difficult to report include:

Mutual confirmation	Yes/No. Indicates whether the details contained here have been confirmed by both counterparties.
Confirmation timestamp	The time and date the transaction was confirmed by both counterparties (mainly for non-electronically traded).

The reason these will be difficult to report to a trade repository is that confirmations occur on a different timeline than what is proposed for derivative reporting to the trading repository. The industry standard is that the confirmation process is completed by 4 days post-date of execution. Furthermore, it is unclear if trade reporting occurs as proposed (next business day for end-users or in real-time for swap dealers) then does the subsequent confirmation count as a life-cycle event?

While the following information is not necessarily difficult to provide to a trade repository, we question the relevance and necessity of such reporting:

Master agreement date	Date of Master Agreement (e.g. 2002, 2006). Why is this important information to disclose?
Registration category and registering authority of reporting party	Authority with which the reporting counterparty is registered and its registration category.
Registration category and registering authority of non-reporting party	Authority with which the non-reporting counterparty is registered and its registration category.
Registration category and registering authority of the reporting agent	Authority with which the reporting agent is registered and its registration category. This seems to be 2 pieces of information (e.g. "MSA-SD")
Underlying Identifier	International Securities Identifying Number (ISIN)/Basket (B)/Index. This was not required by the CFTC. We do not know what this is.

Payment dates

The dates the transaction requires payment to be made. Again, this wasn't required by the CFTC and we question the relevance for reporting purposes.

Submission of transaction entry timestamp

The time and date when the transaction was sent to the trading venue to be executed. Again, we question the relevance of this information for reporting purposes.

If you have any questions or concerns regarding our comments to CSA Staff Consultation Paper 91-301, please feel free to contact me at your earliest convenience.

Thank you.



Carissa Browning
Legal Counsel

Legal, Regulatory and Compliance

Ph: 403-267-3665 Cell: 403-813-6140

Email: Carissa_browning@transalta.com

