TEACHERS'
PENSION PLAN • RÉGIME DE RETRAITE
ONTARIO DES ENSEIGNANTES ET DES ENSEIGNANTS

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BY E-MAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

c/o

John Stevenson, Secretary
Ontario Securities Commission
Email: jstevenson@osc.gov.on.ca

Anne-Marie Beaudoin, Secrétaire
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: Canadian Securities Administrators ("CSA") Staff Consultation Paper 91-301 Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting (the "Consultation Paper")

Ontario Teachers' Pension Plan ("OTPP") is the largest single-profession pension plan in Canada, with $117.1 billion in net assets.[1] It was created by its two sponsors, the Ontario government and the Ontario Teachers' Federation, and is an independent organization. In carrying out its mandate, OTPP administers the pension benefits of 180,000 current elementary and secondary school teachers in addition to 120,000 members.[2] OTPP operates in a highly regulated environment and is governed by the *Teachers' Pension Act*[3] and complies with the *Pension Benefits Act* ("PBA")[4] and the *Income Tax Act*.[5] More than 800 employees of OTPP help to invest the fund's assets, administer the pension plan, pay out benefits, and report and advise on the plan's funding status and regulatory

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1 Asset value current as of December 31, 2011. "Fast Facts", online: Ontario Teachers' Pension Plan Board <http://www.otpp.com/wps/wcm/connect/otpp_en/home/investments/fast+facts>.

2 Ontario Teachers' Pension Plan Board, Annual Report, "Leading the Way: 2011 Annual Report" online: OTPP <http://docs.otpp.com/annual_report/PDF2012/AnnRepCommentary2011.pdf> at 12.

3 *Teachers' Pension Act*, RSO 1990, c T.1.

4 *Pension Benefits Act*, RSO 1990, c P.8 ("*PBA*").

5 *Income Tax Act*, RSC 1985, c 1 (5th Supp).

environment.[6] OTPP consistently receives accolades from industry groups for its investment returns and pension strategy.[7]

We are writing to you in response to the request of the CSA for comments in respect of the Consultation Paper. We appreciate the opportunity provided by the CSA to submit comments on initiatives with respect to derivatives regulation in Canada. We have also been involved in commenting on the Consultation Paper through the Canadian Market Infrastructure Committee ("CMIC"), and fully support the comments contained within CMIC's response. Our comments in this letter highlight our concerns with respect to the application of the Consultation Paper to OTPP and other end-users.

As a user of derivatives, OTPP welcomes sensible and properly functioning regulation of the over-the-counter derivatives market and supports efforts to minimize systemic risk, increase transparency and harmonize Canadian derivatives regulation with that in other regions, while avoiding undue harm to an end-user. However, we have significant concerns with the potential impact the Consultation Paper will have on OTPP and other end-users.

Reporting Counterparty

Subsection 27(1) of the Consultation Paper establishes who is responsible to report a transaction to a trade repository. If a transaction arises between a derivatives dealer and a non-derivatives dealer, the derivatives dealer has the obligation to report. In all other circumstances, both parties must report unless they have agreed who will be responsible for reporting.

Within the guidance provided by the CSA, the definition of "derivatives dealer" must be established by combining the definition of derivatives and dealer from the *Securities Act* (Ontario).[8] As the definition of derivatives dealer determines whether an end-user will be responsible for reporting transactions, we would propose the term "derivative dealer" must be specifically defined within the Consultation Paper. We specifically note it is unclear how the definition of "derivatives dealer" would apply to an entity that is not a "local counterparty".

End-Users are not currently required to report their transactions, and any obligation imposed on an end-user to report transactions is inconsistent with current international initiatives. Many of the reporting obligations mandated by the Consultation Paper will create a significant burden on an end-user. Canadian market participants that qualify as a

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6 *Supra* note 2.
7 *Ibid*, at 3.
8 *Securities Act*, RSO 1990, c. S.5.

"Swap Dealer" pursuant to the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank") have made significant investments to develop reporting systems. To require an end-user, regardless of size, to implement a similar reporting system places an undue burden upon such end-user and will take a considerable amount of time to develop.

We would suggest the CSA create an exemption to the reporting regime for end-users, regardless of the size of the end-user or the specific product being transacted.

We are extremely concerned that a reporting requirement is placed upon end-users, under the assumption that third party service providers may begin to offer such reporting services to end-users, removing the requirement that end-users build reporting systems. We would suggest that an end-user relying upon the reporting services of a third party is highly inappropriate, and may be in violation of fiduciary duties owed to beneficiaries of pension plans, as the end-user is ultimately responsible to the relevant regulator for such reporting, specifically if the third party service provider fails to report.

Records of Data Reported

Subsection 36(1) of the Consultation Paper requires a local counterparty to keep records of the "derivatives data" throughout the life of a transaction and for a further 7 years from the termination of such transaction. We are specifically concerned with two aspects of this provision: (i) the information that is required to be retained; and (ii) the length of time required to retain such information.

(i) Information to be Retained

As the Consultation Paper specifically references the term "derivatives data", an end-user local counterparty will be required to retain "creation data", "life-cycle data" and "valuation data" for each transaction. As this record retention rule is different from other international reporting requirements, we are greatly concerned that this will lead to unintended burdens being placed upon end-users.

Presently, an end-user will typically only retain the confirmation related to a transaction, such confirmation containing the primary economic terms of a transaction. End-users typically do not collect, nor have they implemented systems to collect, retain or submit to a trade repository, event data, life-cycle data or valuation data. To the extent these data fields are currently being reporting to a trade repository, the end-user will rely upon their counterparty to the transaction, typically a dealer, to report such data fields.

Pursuant to Dodd-Frank, with respect to pre-enactment and transitional swaps, a counterparty subject to the jurisdiction of the Commodity Futures Trading Commission

("CFTC") must retain minimum primary economic terms data,[9] which will generally be satisfied by retention of a confirmation. To the extent a counterparty is in possession of the following information, such counterparty must also retain the confirmation, relevant master agreement, as well as the credit support agreement[10]. With respect to all other swaps, recordkeeping requirements are imposed on specifically enumerated entities, which include swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers and major swap participants.[11] Consequently, end-users would only need to retain information to the extent they fall into one of the enumerated categories of entities listed above.

We would request the CSA adopt a recordkeeping regime within Canada similar to the Dodd-Frank recordkeeping regime outlined above, and in any event an end-user should only be required to retain a confirmation related to a transaction. Establishing a requirement that a Canadian end-user implement systems to retain event data, life-cycle data and valuation data would be very onerous on the Canadian end-user.

(ii) Length of Retention

As mentioned above, the Consultation Paper requires that data be held throughout the life of a transaction and for a further seven years from the termination of such transaction. Pursuant to CFTC rules, records must be kept by specified entities "throughout the life of the swap and for a period of at least five years following the final termination of the swap".[12]

We are concerned that, as currently drafted, the burden to ensure data is held for the entire seven years from the termination of a transaction (and specifically the final two years of the retention period) is placed upon the end-user. Such additional retention requirements may force a Canadian end-user to recreate such information, extract the information from a trade repository prior to the trade repository's destruction of such information, or to enter into relationships with the trade repository and require the trade repository retain the relevant information for the duration of the Canadian requirements.

To ensure the Canadian end-user is not unduly harmed by the issues outlined herein with respect to the record retention policy, we would propose that either: (a) the data retention timeline needs to be consistent with international requirements; (b) an end-user reporting

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[9] See CFTC Final Rule, *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 77 F.R. No. 113 (January 13, 2012) ("Pre-Enactment and Transitional Recordkeeping and Reporting") s. 46.2(a)(1) at 35227. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-12531a.pdf.

[10] See Pre-Enactment and Transitional Recordkeeping and Reporting, *ibid,* s. 46.2(a)(2) at 53227.

[11] See CFTC Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 F.R. No. 9 (June 12, 2012) ("Recordkeeping and Reporting") s. 45.2(a) at 2198. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33199a.pdf.

[12] See Recordkeeping and Reporting, *ibid*, s. 45.2(c) at 2198.

exemption be created, but in any event, the end-user shall only be required to retain the confirmation related to a specific transaction for the CSA's required retention period; or (c) a trade repository, as a requirement to being registered within Canada, needs to retain derivatives data pursuant to the CSA's required retention period.

With respect to option (c) outlined above, we would refer the CSA to the CFTC recordkeeping regime, which specifically requires "swap data repositories" retain "full, complete, and systematic records, together with all pertinent data and memoranda, of all ... swap data reported to the swap data repository"[13] ... "throughout the existence of the swap and for five years following final termination of the swap",[14] and "thereafter, for a period of at least ten years in archival storage from which they are retrievable by the swap data repository within three business days".[15] If a similar system were adopted in Canada, requiring the trade repository to retain such information for at least seven years after the termination of the transaction, the Canadian end-user would not be required to implement a reporting system as a result of differences between the Canadian and other recordkeeping regimes.

Data Available to the Public

Subsection 39(2) of the Consultation Paper outlines the specific information a trade repository is required to make available to the public, which includes the geographic location of a party as well as the type of counterparty. This is extremely problematic in the Canadian market due to the limited number of participants within the Canadian market. The release of the geographic location and type of counterparty to the public would make it relatively easy to identify the Canadian end-user to a transaction, causing undue harm to the Canadian end-user. In addition, geographic location and type of counterparty is not being made available to the public pursuant to Dodd-Frank.

We note the CSA has provided minimal guidance surrounding the geographic location and type of counterparty, specifically referencing "Canada" and "end-user", respectively. At this level, we would question the usefulness of the information being released, specifically compared to the potential harm associated with the identification of the specific Canadian end-user. Alternatively, if more specific information is released, for example "province" and "end-user type – pension plan", the identity of the Canadian end-user would become readily apparent, causing undue harm to the Canadian end-user.

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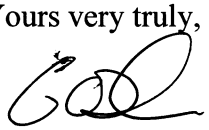
[13] See Recordkeeping and Reporting, *ibid*, s. 45.2(f) at 2199.
[14] See Recordkeeping and Reporting, *ibid*, s. 45.2(g)(1) at 2199.
[15] See Recordkeeping and Reporting, *ibid*, s. 45.2(g)(2) at 2199.

Consequently, we believe the requirement that a trade repository release to the public the geographic location of a party and type of counterparty involved in a transaction should be removed from the Consultation Paper.

Conclusion

We appreciate the opportunity to comment on the Consultation Paper and hope such comments assist the CSA to create a reporting regime within Canada that fully considers the practical implications of such rules upon the end-user. Please do not hesitate to contact us should you have any questions or wish to discuss in further detail.

Yours very truly,



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