

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission



Canadian Market
Infrastructure Committee

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

Me Anne-Marie Beaudoin
Secrétaire de l'Autorité
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montréal, Québec
H4Z 1G3
e-mail: consultation-en-cours@lautorite.qc.ca

September 9, 2011

**Re: Canadian Securities Administrators (“CSA”) Consultation Paper 91-402 on Derivatives:
Trade Repositories (the “Consultation Paper”)**

INTRODUCTION

The Canadian Market Infrastructure Committee (“CMIC”) welcomes the opportunity to comment on the Consultation Paper published by the CSA on June 23rd, 2011 relating to Derivative Trade Repositories.

CMIC was established in 2010 to represent the consolidated views of Canadian market participants on proposed regulatory changes. The membership of CMIC consists of the following: Bank of America Merrill Lynch, Bank of Montreal, Caisse de dépôt et placement du Québec, Canada Pension Plan Investment Board, Canadian Imperial Bank of Commerce, Healthcare of Ontario Pension Plan, National Bank of Canada, Ontario Teachers' Pension Plan Board, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank.

CMIC brings a unique voice to the dialogue over the appropriate Canadian regulatory framework. The membership of CMIC has been intentionally designed to present the views of both the ‘buy’ side and the ‘sell’ side of the Canadian OTC derivatives market, as well as both domestic and foreign owned banks operating in Canada.

CMIC appreciates the consultative approach being taken by the CSA in considering an appropriate framework for the reporting of over-the-counter (“OTC”) derivatives transactions and the operation of a trade repository (“TR”). CMIC believes that this approach will lay the foundation for the

development of a Canadian regulatory structure¹ that will satisfy Canada's G20 commitments by addressing systemic risk concerns and achieving appropriate market conduct oversight of the Canadian OTC derivatives market and its participants.

OTC derivatives are an important product class used by both financial intermediaries and non-financial market participants to manage risk and exposure. Access to OTC derivative markets is an essential component of the long term financial stability and growth of Canadian financial markets and its participants.

OVERVIEW

CMIC submits that formulating the most appropriate trade repository regulatory regime for Canada must begin with recognition of the fundamental policy purpose behind establishing trade repositories for OTC derivatives. While Canadian financial institutions and Canadian OTC market participants fared well, on a relative basis, in the 2007/2008 global financial crisis, in a number of other advanced economies the absence of regulatory transparency with respect to certain OTC derivatives has been identified as a flaw in effective market oversight. The primary goal of reform, therefore, is to provide systemic risk regulators with better information on the degree to which risks relating to OTC derivatives are concentrated in individual market participants or products so as to be able to address systemic risk concerns relating to position build-up and interconnectedness.

While the concerns with certain aspects of OTC derivatives activity have had dimensions of inappropriate market conduct outside Canada, such concerns have been seen as secondary to systemic risk. The fact that systemic oversight is the primary goal, requiring the broadest capture of information, with market conduct being a secondary component, suggests in our view that systemic regulators should play the central role in any new regulatory structure. In Canada, this means the Bank of Canada should play the pivotal role in the TR regulatory framework. Placing federal authority at the centre of TR regulation is also consistent with the fact that the 'sell' side of the OTC derivatives market in Canada is largely conducted by Canadian and foreign banks which are subject to banking law under exclusive federal jurisdiction.

Our view does not ignore the role of market conduct oversight in a TR framework. CMIC believes that market conduct should also be appropriately addressed, but as a secondary goal. As will be discussed more fully below, CMIC believes that, within their respective jurisdictions and legislative mandates, each of the provincial and territorial securities regulators should participate in the trade repository framework in a manner that allows each to discharge its market conduct oversight responsibilities in its respective jurisdiction. This is a classic Canadian example of a mixed jurisdictional challenge in which the necessary solution can only be found in a co-operative harmonized intergovernmental solution that allows each level of government to discharge its respective jurisdictional responsibilities.

Our views expressed herein reflect the fact that the OTC derivatives market is a global market, with Canadian market participants representing a relatively small share (approximately 1.9% of the gross notional amount traded). A large proportion of trades entered into by Canadian market participants are transacted with non-Canadian financial institutions and, accordingly, we believe that Canadian TR rules need to be aligned with global standards having due regard for the unique Canadian legal and market characteristics.

Duplicative, contradictory, or unique regulatory obligations within Canada will undermine the ability of the TR to amass data that will allow proper regulatory monitoring to take place. The ability to monitor

¹ References to "regulation" or "regulators" within this document will be considered to include market, prudential and systemic risk regulators.

information on a global basis will undoubtedly depend on the exchange of information with regulators and TRs located outside Canada. Canadian adoption, in a harmonized fashion, of standards and protocols developed by international bodies² will eliminate the risk of an incompatible Canadian framework. There is no benefit (and indeed significant disadvantage) in producing inconsistent Canadian solutions to what will be global, industry-wide requirements such as operating standards or unique identifiers.

OTC derivative transactions frequently involve a multitude of parties in multiple jurisdictions, underscoring the complexity and need for harmonized solutions. In fact, it would not be uncommon for one OTC trade to legally touch six different jurisdictions. An example would be a total return equity swap in which the underlying shares are issued by an Alberta corporation, entered into between a pension fund established under British Columbia law, but acting through an office in Ontario, with a German bank acting through its London branch whose collateral functions are centralized in New York, with eligible collateral being debt obligations of a Canadian government and US treasury securities. If each province had rules relating to monitoring of systemic risk, including rules relating to trade repositories and central clearing counterparties, there is a serious potential for overlapping or conflicting requirements among the provinces which could ultimately place Canadian market participants at a competitive disadvantage.

In summary, there are five specific reasons supporting a harmonized approach:

1. Market participants conducting business in more than one province should not be subject to the risk of incompatible and / or conflicting domestic regulatory TR obligations.
2. A trade repository that wishes to be responsible for trades that touch more than one Canadian jurisdiction should not have to meet different and possibly conflicting criteria.
3. Market participants should not become excessively burdened by duplicative and / or inconsistent regulations.
4. In order to achieve effective reporting to, and useful data aggregation within a TR, consistency of transaction data submission across Canada (and globally) is essential.
5. Arguably most importantly in policy terms, conflicting requirements within the Canadian trade repository framework would not achieve the primary policy purpose in developing a trade repository regime, namely, to allow systemic risk regulators to identify the presence of systemic risk in the Canadian OTC derivative market as a result of position build-up, concentration and interconnectedness.

The legislative approach that we suggest the CSA consider would involve the development by federal authorities of federal legislation that would focus on the Bank of Canada's TR requirements for systemic risk monitoring purposes. Such federal legislation should be developed on a co-operative basis by federal authorities in consultation both with provincial securities regulators and industry so as to ensure that the scheme of federal legislation is consistent with the market conduct responsibilities of provincial securities regulators. In turn, provincial securities regulators could adopt rules that

² Inclusive of CPSS-IOSCO, ISDA, ODRF, ODSG. CMIC considers CPSS-IOSCO standards as the international standards for trade repository framework, ODRF (OTC Derivatives Regulators' Forum) the international standard for regulatory requirements, ODSG (OTC Derivatives Supervisors Group) standards as the international standard for implementation and IIGC (ISDA Industry Governance Committee) as the international standard for governance structure.

recognize a TR that met the requirements of the inter-governmentally agreed upon scheme set out in the federal legislation and address other matters within provincial jurisdiction.

The need for extensive Memoranda of Understanding (“MOU”) among international regulators to create frameworks that will provide regulators in Canada and globally with the transparency that they require reinforces the importance of international cooperation. Given the recommendations contained in the Consultation Paper, CMIC views the execution of these MOU by Canadian regulators as one of the most significant pre-requisites to the successful implementation of a TR regime. This will be the case regardless of whether the Canadian structure relies on global TRs or Canadian regulators choose, at some later point, after careful study, and continued monitoring of international developments, to develop a Canadian TR.

Taken as a whole, and individually in many cases, the CSA recommendations will require significant changes to business models and infrastructure that are both costly and complex to implement. CMIC suggests that the timeframes for implementation be phased appropriately and consistently with international regulatory developments. The phasing approach should be carefully studied by the CSA ahead of committing to an implementation roadmap. CMIC will remain available for consultation throughout this ongoing period of study. The industry believes that, as a small market, global reform should be studied and adapted to our home market, but Canada should not be trying to set standards in this area other than through its membership in various international regulatory bodies.

At various points in this letter, CMIC identifies the need for greater consideration of the practical implications of developing a TR regulatory regime. In order for Canada and Canadian based market participants to continue to be competitive in the global markets, and at the same time maintain high regulatory standards, it is imperative that time be spent by regulators and industry studying the issues in order to achieve effective monitoring of risk.

SUMMARY OF RESPONSE

The following is a summary of CMIC’s response to the Consultation Paper, organized under the three major sections of the Consultation Paper and includes CMIC’s direct response to CSA’s six questions. Then, after this summary, CMIC’s specific response to each of the CSA’s recommendations is set out.

Consultation Paper Recommendation 1. Trade Repository Requirements

CMIC’s views are generally consistent with the CSA’s recommendation that trade repositories operating in Canada should comply with CPSS-IOSCO’s recommended standards for financial market infrastructure (“FMI”) and for trade repositories. CMIC believes the benefits of adhering to such international standards include facilitating the sharing of information among international regulators and reducing the potential for data fragmentation. We agree with the CSA’s view that Canadian laws should, where necessary, be amended to incorporate the necessary terms and conditions to recognize a TR. However, there are certain points where our views diverge from, or require further clarification regarding, the CSA’s recommendations. These points are summarized below.

- Recommendation 1.c): Consistent with customary practices, the TR’s board of directors should be responsible for resolving conflicts of interest, and the Chief Compliance Officer (CCO) should work with the board to effect such resolution, consistent with rules proposed by the CFTC and the SEC.
- Recommendation 1.d): It may not be feasible to resume operation within two hours of disruption in all circumstances, given the diversity of events that can disrupt the operation of a TR. CMIC believes that, under certain circumstances, resumption by end of day should be permitted.

- Recommendation 1.f): CMIC believes there are situations where a TR cannot prevent “any data use”. An example would be where data is released to a third party regulator and the TR can no longer detect or prevent a further prohibited use of data. CMIC recommends an international data sharing framework such as CPSS - IOSCO’s Multilateral Memorandum of Understanding (“MMOU”) for effective prevention of misuse of data.

Consultation Paper Recommendation 2. Reporting Requirements

CMIC’s views are largely consistent with the CSA’s recommendation that the reporting requirements for Canadian market participants be consistent with international standards. Canadian rules should benefit from progress made in other jurisdictions to achieve an effective reporting process in an efficient manner. There would be significant disadvantages in unilaterally developing a local Canadian solution to global, industry-wide requirements (or, even worse, having a range of different regimes within Canada). One particular example would be any inconsistent Canadian approaches to TR operating standards and unique identifiers.

CMIC’s view diverges from the CSA approach in relation to certain points. These are summarized below.

- Recommendation 2. a)ii) CMIC does not believe mandating the reporting of pre-existing trades within 180 days from the effective date of the new reporting rules is operationally practical. CMIC proposes to work with the regulators to develop a roadmap to achieve reporting of pre-existing transactions from the time a TR is approved by the regulators. We also recommend a phased-in approach based on the complexity of the products and data reported.
- Recommendation 2.e)iii): Clarification is needed from the CSA that the “full executed legal agreement” refers only to economic terms of the trade.
- Recommendation 2.e)iv): CMIC recommends the CSA undertake further study regarding the reporting requirement for continuation and valuation data for bilateral structured trades, the complexity of which is significantly higher than conventional derivatives.
- Recommendation 2.g): CMIC agrees that market transparency is an important goal of OTC derivatives regulatory reform. CMIC is, however, concerned that public disclosure of transaction and positions data in the context of the Canadian OTC derivatives market, which has a relatively small number of participants, could be used to reverse engineer firm-specific positions and allow for market manipulation. CMIC proposes to work with the regulators on how the requirements for market transparency can be achieved without undermining market integrity and function.

Consultation Paper Recommendation 3. Access to Confidential Trade Repository Information

CMIC concurs with the three features of this recommendation and emphasizes the critical importance of ensuring that confidential trade repository data not be made available publicly for the reasons outlined elsewhere in this letter.

CONSULTATION PAPER QUESTIONS

Consultation Paper Question 1: *If the use of a Canadian trade repository were to be mandated, should it be privately developed and operated for profit, privately developed and operated on a not-for-profit basis or should provincial market regulators perform this function directly?*

CMIC acknowledges that there is a range of ownership possibilities. CMIC proposes that the governance and ownership structure of a Canadian TR be included within the proposed study (Recommendation 2.d)i).

There will need to be careful study of the strengths and weaknesses of the various ownership options. These will need to be studied in the context of utilizing infrastructure of an existing non-Canadian domiciled TR, or creating a Canadian domiciled TR. The study of the ownership options should recognize that the technology, governance and access characteristics are more important than the actual ownership issue and each option should be assessed in light of such considerations. A TR will require a globally compatible technical solution. Further, each TR must have an appropriate governance structure that ensures fair and open access to all market participants providing a 'level playing field' for Canadian and international market participants across product categories. Usage fees, privacy protocols and functionalities should not be prohibitive or inconsistent with international standards such that Canadian market participants are disadvantaged vis-à-vis international competitors. The TR regime needs to recognize the uniqueness of the Canadian market.

Consultation Paper Question 2: *What is required to enable Canadian derivative market participants to be able to report derivatives transaction information in real time and how long will it take to achieve this functionality?*

It is important to develop implementation time frames that are customized to each asset-class and the market practices in relation to the underlying products. For those transactions that are either executed on an electronic trading venue or cleared, the ability to report in real time may be achievable in a reasonable period of time as international protocols and technology develops. However, for transactions that are confirmed bilaterally on paper, significant changes to operational processes and technology would be required to achieve real time reporting. Any move toward a market practice that includes real time reporting should be phased-in based on transaction type, asset class, current technology, cost and materiality.

CMIC would like to better understand and explore with the CSA why the regulators are seeking real time reporting. A TR is not a market, but simply a data base. While timely information is necessary, the incremental benefit of having the derivatives transactions information in real time should be carefully considered, weighing the perceived benefits against the challenges. Additionally, the time frame within which real time reporting can be achieved is heavily dependent on (i) the level of data required to be reported, (ii) the complexity of the underlying transaction, and (iii) the availability of the necessary technology. Canada is not alone in facing the challenge of real time reporting of non-electronically transacted trades. CMIC recommends that the real time reporting time frame should depend on the evolution of global requirements and related technologies. However, if real time reporting is required, the timetable for implementing real time reporting should be consistent with the phased approach of TR reporting endorsed in recommendation 2.a)ii) of this response.

NB: response to the following two questions (Question 3 and Question 5) are consolidated below

Consultation Paper Question 3: *What is the appropriate block trade threshold for the Canadian market?*

Consultation Paper Question 5: *Would a uniform block trade threshold across asset classes be acceptable or should thresholds be determined based on asset class? If block trade thresholds should be determined based on asset class, what thresholds would be suitable for specific asset classes?*

CMIC agrees with the CSA that "further study will be required to determine what constitutes a block trade for various categories of derivatives in the Canadian market". Compared to the US, the Canadian OTC derivatives market has far fewer participants and liquidity providers. Block trade threshold level setting in the Canadian market must take into account the transaction and liquidity characteristics that are specific to the Canadian market, in addition to asset class and complexity. It

is important to note that in the US dialogue continues between the regulators and the industry on appropriate block trade thresholds.³

CMIC recommends that block trade threshold rules be customized by asset class and by product complexity and maturities within asset class. This is consistent with related views expressed by ISDA.⁴ The SEC stated it is required to include in its rule making “[the specification of] the criteria for determining what constitutes a large notional Security Based Swaps (“SBS”) transaction (block trade) *for particular markets and contracts*”⁵ (emphasis added), acknowledging “[the SEC] is mindful that there may be differences between the SBS market and the other securities markets that the [SEC] regulates”.⁶ For swaps, the CFTC proposed that “minimum block trade size [be] based on the *type of swap instrument*”⁷ (emphasis added). CMIC also submits that block trade threshold rules must be implemented in a manner that does not impair market liquidity. This submission is consistent with concepts expressed by ISDA⁸ and the SEC.⁹

Consultation Paper Question 4: *What is the appropriate publication delay for block trades?*

CMIC concurs with the CSA’s differentiation between two types of reporting time frames, i.e. 1) standards for reporting of trades to a TR within a specified time frame of trade execution (“execution reporting”) and 2) specified delays before public dissemination of block trade information (“block trade delay”). Consistent with the concerns highlighted in the response to recommendation 2.g), CMIC is very concerned about publication of block trade data because of (i) the risk of inadvertent disclosure of confidential information; (ii) the ability to reverse-engineer trading strategies; and (iii) the risk that the small number of relatively large market participants in Canada could lead to the ability to derive individual participant positions. Accordingly, CMIC strongly believes that the

³ For Credit Default Swaps (CDS), SEC identified general criteria for defining block trade size (See Securities and Exchange Commission, File No. S7-34-10; Release No. 34-63346. “Security-Based Swap Block Trade Definition Analysis.” January 13, 2011. Available at: <http://www.sec.gov/comments/s7-34-10/s73410-12.pdf>) but did not propose specific thresholds, citing the need to collect additional comments from the public and “collect and analyze additional data from the SBS market” (See Securities and Exchange Commission. Release No. 34-63446 ; File No. S7-34-10, RIN 3235-AK80. “Regulating SBSR – Reporting and Dissemination of Security-Based Swap Information.” November 19, 2010. Available at: <http://www.sec.gov/rules/proposed/2010/34-63446.pdf> (at page 80)). For interest rates swaps (IRS), CFTC has proposed swap contracts be grouped into “broad categories of swap instruments in determining the appropriate minimum block size” (See “Real Time Public Reporting of Swap Transaction Data, Proposed Rule.” 75 Fed. Reg. 76140-76183. December 7, 2010. Available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2010-29994a.pdf> (at page 76154)), but ISDA has described CFTC’s proposed categorization “excessively broad” and called for “narrower definition of swap instruments with appropriately tailored rules” for block trade threshold (See ISDA. “Block trade reporting for over-the-counter derivatives markets.” January 18, 2011. Available at: <http://www.isda.org/speeches/pdf/Block-Trade-Reporting.pdf> (at page 24))

⁴ “[Block trade threshold] rules should be tailored to products and markets. Rules for less liquid products should be set different from rules for more liquid products. One size does not fit all”. (See ISDA. “Block trade reporting for over-the-counter derivatives markets.” January 18, 2011. Available at: <http://www.isda.org/speeches/pdf/Block-Trade-Reporting.pdf> (at page 28))

⁵ Securities and Exchange Commission. Release No. 34-63446 ; File No. S7-34-10, RIN 3235-AK80. “Regulating SBSR – Reporting and Dissemination of Security-Based Swap Information.” November 19, 2010. Available at: <http://www.sec.gov/rules/proposed/2010/34-63446.pdf> (at page 11)

⁶ *Ibid.* (at page 6)

⁷ “Real Time Public Reporting of Swap Transaction Data, Proposed Rule.” 75 Fed. Reg. 76140-76183. December 7, 2010. Available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2010-29994a.pdf> (at page 76145)

⁸ Block trade thresholds be “set so that liquidity is not impaired... [and] rules for less liquid products should be different from rules for more liquid products.” See, *supra*, note 4 (at page 28)

⁹ Block trade size definition “must be specified in a way that takes into account whether public disclosure of [large SBS] transactions would materially reduce market liquidity”. See, *supra*, note 5 (at page 80)

reporting of block trades to the public should only be done at the end of the quarter next following the execution date of the trade (i.e. the report of a trade executed on March 28 would be made public at the end of June). Such an approach would achieve a balance between the goal of transparency and the need to preserve market liquidity.

Consultation Paper Question 6: *If block trade thresholds are determined by asset class and given the changes inherent in liquidity conditions, how often should these be assessed? (As per the CFTC's two tests proposal for example?)*

CMIC believes block trade thresholds should be assessed at a minimum quarterly to ensure such thresholds correctly reflect then current market conditions, including liquidity. However, as one respondent to the SEC's proposed rule pointed out, liquidity "can fluctuate markedly among traded instruments, [especially for credit derivatives] which can migrate between being liquid and illiquid in a matter of weeks and months".¹⁰ CMIC believes any rules governing the frequency of assessment should be customized by asset class and complexity, and must reflect the unique characteristics of the Canadian derivatives market. We believe that there must be a mechanism in place for immediate threshold assessments during periods of market stress. A mechanism should be established and maintained in Canada between regulators and market participants whereby any party can request an immediate assessment of block thresholds based on significant market events or trends. CMIC also recommends the establishment of a formal process to appeal changes to block trading thresholds and delays.

¹⁰ Response of Barclays Capital Inc. to SEC. February 11, 2010. Available at: <http://www.sec.gov/comments/s7-34-10/s73410-56.pdf> (at page 2)

SPECIFIC RESPONSES TO CSA PAPER RECOMMENDATIONS

For purposes of completeness, CMIC has provided responses to each of the recommendations contained in the executive summary of the Consultation Paper. The annotation below follows that of the Consultation Paper.

1. Trade Repository Requirements

CSA Statement a) *In order to operate in Canada, trade repositories should be required to meet the internationally accepted governance and operational standards recommended by the Committee on Payment and Settlement Systems (“CPSS”) and the Technical Committee of the International Organization of Securities Commissions (“IOSCO”) including standards relating to legal framework, governance, market transparency and data availability, operational reliability, access and participation, safeguarding of data, timely recordkeeping, and communication procedures and standards.*

CMIC supports the proposal that TRs, in order to operate in Canada, should be required to meet the internationally accepted governance and operational standards as defined in the CPSS-IOSCO consultation papers on trade repositories¹¹ and financial market infrastructure.¹² ISDA, in awarding its RFP for Trade Repository, announced its TR “will meet all current and future regulations governing repositories”,¹³ which is assumed to be consistent with CPSS-IOSCO standards. Canada’s interest is well represented in CPSS by Bank of Canada¹⁴ and in IOSCO by Autorité des marchés financiers (“AMF”), Ontario Securities Commission (“OSC”), Alberta Securities Commission (“ASC”), and British Columbia Securities Commission (“BCSC”).¹⁵

CSA Statement b) *The boards of directors of trade repositories should be composed of individuals with an appropriate diversity of relevant skills and experience and include appropriate independent representation.*

CMIC supports strong and robust corporate governance for any TR. The board of directors of TRs should be composed of individuals with an appropriate diversity of relevant skills to satisfy their responsibility for the management and governance of a TR, in accordance with CPSS-IOSCO standards.¹⁶ The roles and responsibilities of the board of directors, as well as the processes to “prevent, identify, address and manage member conflict of interest” should be clearly documented, in accordance with CPSS-IOSCO recommendations.¹⁷ There should be independent representation on the board of directors, which is also in accordance with CPSS-IOSCO recommendations¹⁸, in addition

¹¹ Bank for International Settlements. Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners. “Consultative Report - Considerations for trade repositories in OTC derivatives markets.” May 2010. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD321.pdf>

¹² Bank for International Settlements. Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners. “Consultative Report - Principles for financial market infrastructure.” March 2011. Available at: <http://www.bis.org/publ/cpss94.pdf>

¹³ ISDA News Release : “ISDA Announces Commodity Derivatives Trade Repository Selection.” June 14, 2011. Available at: <http://www2.isda.org/attachment/MzlwNw=/CommodityRepositorySelection.pdf>

¹⁴ Bank for International Settlements. “Fact Sheet: Committee on Payment and Settlement Systems.” Available at: <http://www.bis.org/about/factcpss.htm>

¹⁵ OLCU-IOSCO. Members of the Inter-American Regional Committee.” Available at: http://www.iosco.org/lists/display_committees.cfm?cmtid=9

¹⁶ See *supra*, note 11 (at sections 3.4)

¹⁷ See *supra*, note 12 (Principle 2, Key Consideration 3)

¹⁸ See *supra*, note 12 (Principle 2, Key Consideration 4)

to appropriate representation from the financial industry. These requirements should apply to a TR regardless of the ownership and legal structure.

CSA Statement c) *All trade repositories should appoint a chief compliance officer responsible for reviewing compliance with applicable legislation, identifying and resolving conflicts of interest and completing and certifying an annual compliance report.*

CMIC supports a strong culture of compliance for the TR. All TRs should appoint a chief compliance officer (“CCO”) with responsibilities that are consistent with those currently described for the CCO of SDRs in the Dodd-Frank Act¹⁹ and related proposed rules by the CFTC²⁰ and the SEC²¹.

CMIC understands that the purpose of this proposal (and the corresponding US rules) is to ensure TRs have a dedicated individual or department charged with maintaining compliance. CMIC submits, however, that in accordance with customary practice the primary responsibility for resolving conflicts of interest should rest with the board of directors, clearly working in conjunction with the CCO.

CSA Statement d) *Trade repositories should have robust operational risk management capabilities including back-up systems that can resume operations within two hours of any disruption.*

CMIC agrees TRs should have robust operational risk management and mitigation capabilities including back-up systems in accordance with CPSS-IOSCO recommendation that “Business continuity plans and backup facilities should be established to allow for timely recovery of operations.”²² However, CMIC is concerned about a proposal that mandates “resumption of operation within two hours of any disruption” (emphasis added). While we recognize that the CSA position is consistent with current CPSS-IOSCO proposals, CMIC believes that disruptions can be caused by many factors outside the TR’s control, and effects can range from temporary to protracted. CMIC therefore recommends making provision for extreme circumstances that require more than two hours for resumption of operations.

CSA Statement e) *Trade repositories should provide fair and open access to market participants and be required to accept all trades for each asset class for which the trade repository accepts data.*

CMIC supports the CSA’s proposition that TRs have publicly disclosed requirements for access and participation and that these requirements should not influence or restrict the ability of market participants to participate in the OTC derivative markets. CMIC agrees with the CSA proposal that the TR should provide access to all market participants.

CMIC also supports the recommendation that a TR should accept all trades for a particular asset class from any market participant. CMIC considers that this recommendation will limit the number of TRs necessary to support the Canadian market and avoid a number of undesirable outcomes, including data fragmentation, gap of product coverage and duplication of reporting requirements. Additionally, limiting the number of TRs enhances global post trade transparency. Consolidation should also reduce the risk of misreporting and failed reporting as well as facilitate the implementation of links between market participants and TRs.

¹⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Congress (2010). Available at: http://docs.house.gov/rules/finserv/111_hr4173_finsrvcr.pdf (at Section 728: “Designation of Chief Compliance Officer”)

²⁰ “ Swap Data Repositories, Proposed Rule.” 75 Fed. Reg. 80898-80945. December 23, 2010. Available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2010-31133a.pdf> (at page 80934)

²¹ “Security-Based Swap Data Repository Registration, Duties, and Core Principles.” 75 Fed. Reg. 77306-77377. December 10, 2010. Available at: <http://www.sec.gov/rules/proposed/2010/34-63347r.pdf> (at 77341)

²² See *supra*, note 12 (at page 75)

Without limiting the foregoing principles, CMIC cautions that the specific asset classes for which a TR accepts data will likely need to be phased in over time as the technological infrastructure required to support reporting is developed.

CSA Statement f) *Trade repositories should safeguard confidential data and prevent any data use that could represent a conflict of interest.*

CMIC supports the proposal that TRs should manage confidential information in accordance with CPSS-IOSCO standards for safeguarding of data.²³ CMIC also supports the proposal for TRs to have appropriate governance to avoid conflicts of interest²⁴ in accordance with CPSS-IOSCO standards.²⁵ The TR should have a rigorous know your customer (“KYC”) and entitlement process to ensure only authorized and authenticated users have access to the TR’s aggregated data. Each such authorized and authenticated user should only be able to view the specific data to which such user is entitled. Each TR should have robust risk identification and mitigation policies regarding links to third parties to ensure no leaks occur during data transfer.

CMIC is, however, concerned about a potential consequence of the CSA proposal that TRs should “prevent any data use that could represent a conflict of interest” (emphasis added). The result could be that the TR is liable for a misuse of data by an authorized user of TR data. For example, an appropriately authorized foreign regulator could retrieve data to which it is entitled from the TR and then forward it to a third party, whose use of that data would create a conflict of interest. In this example, the TR would not even be aware of such misuse and would not be in a position to prevent it. CMIC recommends that a framework of global coordination among regulators is critical in order to assure safeguarding of confidential data including leakage and misuse. One such framework already in use is the MMOU developed by IOSCO²⁶ and signed by various international bodies as well as by the ASC, BCSC, and OSC.

CSA Statement g) *Canadian provincial securities and derivatives laws should, where necessary, be amended to include approved trade repositories in the definition of market participant.*

CMIC agrees that a TR should be considered a market participant in order for it to be subject to the same standards as other market infrastructure entities such as clearing agencies, quotation and trade reporting systems and exchanges and to facilitate regulators’ oversight into their operations whether for market conduct purposes at the provincial level or for systemic risk purposes at the federal level. As indicated elsewhere in this letter, CMIC believes that it is critically important that TR regulation be harmonized within Canada and be consistent with international standards.

2. Reporting Requirements

a) Transactions Required to be Reported

CSA Statement i) *Canadian provincial securities and derivatives laws should, where necessary, be amended to permit mandating the reporting of all OTC derivatives transactions to an approved trade repository and provincial market regulators should mandate such reporting.*

²³ See *supra*, note 11 (at page 10 – Factor 6: “Safeguarding of Data”)

²⁴ While the CSA Consultation Paper only addresses conflicts of interest, CFTC amendment of Part 49 says the use of reported data for commercial use is prohibited unless the submitter has consented. It may be useful for submitters to have an option to allow commercial use of data.

²⁵ See *supra*, note 11 (at page 9 - Factor 4: “Governance”)

²⁶ OICU-IOSCO. “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.” May 2002. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf>

CMIC recognizes that mandating the reporting of cleared and electronically executed OTC derivatives transactions to an approved trade repository is required to fulfill Canada's G20 commitments. Clearly, however, the value of Canadian mandating would be seriously undermined if other jurisdictions do not do so as well.

In order to implement mandatory reporting, domestically and internationally consistent definitions of "OTC derivative" and "counterparty" (domestic and foreign) are required. The definitions for domestic and foreign counterparty should be consistent with global standards so that no counterparty is considered to be domestic by more than one country's regulators. This approach avoids a situation where the same entity is subject to more than one country's regulations. Regulators should be especially careful in defining these terms to keep in mind the extraterritorial impacts of these important definitions and should avoid unintended consequences such as conflicting international jurisdictional reach. A harmonized Canadian approach will be critical here.

CSA Statement ii) *Pre-existing OTC derivative transactions should be reported to an approved trade repository within 180 days from the effective date of the new reporting rules.*

- o Pre-existing transactions terminating or expiring within one year of the effective date of the new reporting rules should be exempted from reporting requirements.*

CMIC understands the need to report pre-existing transactions to allow the regulators to have a complete view of OTC derivative markets. CMIC acknowledges that the recommendation that a period of 180 days from the effective date of the reporting rules is consistent with the proposed rules in other international jurisdictions.²⁷ However, CMIC submits that this recommendation is not a practical approach. A hard deadline starting from the effective date of the reporting rules, instead of the date upon which a particular TR is established, would mean that market participants could be bound to report data before an acceptable trade repository is available. Consistent with our view, the European Commission proposed an alternative rule²⁸ that would allow market participants to report 120 days after the registration of a trade repository.

Further, a hard deadline would not take into consideration the unique nature of each derivatives asset class and the product types within that asset class. CMIC considers that a 180 days recommendation would not "provide sufficient time when introducing these rules for market participants to prepare system changes to meet reporting requirements".²⁹ There is no precedent that would indicate that the 180 day timeline is appropriate or achievable.

CMIC recommends that regulators take a measured approach to implementing the requirement to report pre-existing trades. In particular, the initial requirement for reporting pre-existing trades should be limited to data then in the possession of a market participant, with no obligation to supplement data or change its format. CMIC also recommends that once regulators determine the specific data fields to be reported, regulators, in consultation with market participants, should establish a future date at which such data would be required to be reported. The OTC Derivatives Supervisors Group ("ODSG") has taken a similar approach to the implementation of trade repositories.³⁰

²⁷ See, for example, Dodd Frank, SEC and CEA standards

²⁸ European Commission. "Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties and Trade Repositories." {SEC (2010) 1058, SEC (2010) 1059}. September 15, 2010. Available at : http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposal_en.pdf (at Article 71)

²⁹ CSA Consultative Paper 91-402 (at page 15)

³⁰ Letter to the OTC Derivatives Supervisors Group. March 31, 2011. Available at: <http://www.newyorkfed.org/newsevents/news/markets/2011/SCL0331.pdf>

CMIC welcomes the CSA's proposed exemption from reporting for pre-existing transactions that are expected to expire within one year of the implementation of the new reporting rule. However, for the same reasons as set out above, the relief for each asset should start from the effective date of reporting for that asset class. Market participants should be permitted to choose to report transactions subject to exemption.

CMIC is also concerned about the need to gain prior consent from trading counterparties for legacy trade data. Considering the number of transactions and counterparties, we recommend that regulators adopt a legislative solution to address this legal impediment to conforming to TR requirements.

CSA Statement iii) *Records for all OTC derivative transactions should be retained by each counterparty and the relevant trade repository for a period of seven years from the date the transaction terminates or expires.*

CMIC supports the proposal for record retention by TRs and by counterparties for seven years from the transaction termination or expiration, subject to this proposal not conflicting with international standards on data retention.³¹ Once the seven years has elapsed, those data records should be eligible to be expunged, subject to international requirements.

CMIC further agrees with the CSA recommendation that retained data should be provided in a "reasonable period of time". We are, however, concerned that the reasonable period of time could be defined as any time period required by any regulatory authority if existing provincial securities commission approaches are ultimately taken in relation to retained data. In contrast, the CFTC requires retained data be retrievable after 3 business days, and we recommend this standard be adopted.

b) Reporting Obligations

CSA Statement i) *One counterparty to each OTC derivative transaction should be required to report the transaction and any related post execution events to an approved trade repository.*

CMIC recognizes that in order for OTC derivative transactions to be reported to an approved trade repository there must be a legal requirement that at least one party to the trade report the details of the trade. This has the benefit that end-users who do not have a reporting infrastructure will not have the burden of reporting trades entered into with financial intermediaries. CMIC supports single-party reporting provided that (i) such approach remains consistent with global standards, and (ii) the development of international protocols and technology make the approach practical and effective in ensuring data integrity. We expect this will be the case where trades are executed on an exchange and/or cleared through a central counterparty (which would involve independent trade verification) and market participants delegate their reporting obligations to the respective exchange or central counterparty. Further development of international standards should be monitored in connection with the reporting of bilateral trades.

CSA Statement ii) *Transaction reporting obligations should be determined based on counterparty type, and delegation of reporting to a third-party service provider including a central counterparty clearing house should be permitted.*

- o Financial intermediaries should bear the reporting onus in transactions with end users.*

³¹ SEC and CFTC require 5 years of data retention, and EMIR 10 years of data retention, after the termination of contract. ODRF requires data to be retained indefinitely. Sarbanes Oxley requires certain data to be retained for no less than 7 years.

- o *Transaction counterparties should be permitted to elect the reporting party for transactions between two financial intermediaries or two end users.*
- o *A foreign counterparty may assume reporting obligations provided that the transaction is reported to a trade repository approved in Canada.*

CMIC supports having a hierarchy of counterparty types determine default reporting obligations. This is also consistent with international protocols and standards. Discussions around global standards relating to reporting obligation rules are ongoing (predominantly within ISDA and SIFMA forums), and CMIC recommends that the CSA be mindful of these standards as they are developed.

CMIC also agrees that participants should have the option to delegate the task of transaction reporting to a third party. In addition to the CCP (as identified in the Consultation Paper), participants should also be able to outsource reporting to execution platforms and affirmation engines (such as MarkitWire) where appropriately robust solutions exist. CMIC submits that each market participant should have the option to decide whether or not to outsource reporting to a third party.

Consistent with the response to recommendation 2.b)i), CMIC agrees that, due to the expertise and experience that financial intermediaries possess, they should be the reporting party in trades with end-users. However, more clarity around reporting responsibility and liability is required where the two counterparties are both non-financial intermediaries.

c) Reporting to Approved Trade Repository

CSA Statement i) *All OTC derivative transactions entered into by a Canadian counterparty should be reported to an approved trade repository.*

CMIC recognizes that reporting of OTC derivatives transactions by a Canadian counterparty to an approved trade repository is required to fulfill Canada's G20 commitments.

NB: response to the following two recommendations (2cii and 2ciii) are consolidated below

CSA Statement ii) *Any trade repository that intends to carry on business in one or more Canadian province should be approved by the applicable provincial market regulator through a recognition or designation process.*

CSA Statement iii) *Canadian provincial securities and derivative laws should be amended, where necessary, to create an approval process for the recognition or designation of trade repositories and to facilitate the development of rules for their operation.*

CMIC understands that a TR may need to provide information to all 13 provincial and territorial securities regulators, as well as federal systemic risk regulators, in order to achieve the dual public policy goals of market conduct oversight and systemic risk monitoring. CMIC also submits, as set forth elsewhere in this response, that federal authority over systemic risk and banking means that the Bank of Canada should be at the centre of TR regulation within harmonized federal and provincial approval processes. Federal and provincial regulators should leverage existing CPSS-IOSCO standards and processes to ensure that Canadian TR regulation is consistent with these internationally accepted standards. Potentially conflicting provincial rules among the provinces or between the provincial regulators and federal authorities could lead to an outcome where one trade repository could not operate across Canada.

A requirement that any TR be required to register thirteen times in thirteen different ways under thirteen different regimes in order to conduct business in Canada would be exceedingly counterproductive. It could produce data fragmentation and possibly regulatory arbitrage by way of forum shopping. Most importantly, it would not achieve the public policy goal that, in the first instance,

created the desire to report OTC derivative transactions to trade repositories – namely, monitoring systemic risk relating to position build-up, concentration and interconnectedness. The recommended approach is a framework that is designed to provide federal authorities with the appropriate data for their systemic risk purposes and provincial securities regulators with the appropriate data for their market conduct purposes.

CMIC strongly reiterates the CSA's recommendation that all Canadian trade repository regulation be compliant and consistent with international standards.

d) Mandating a Canadian Trade Repository

CSA Statement i) *Mandating the use of a Canadian-based (or domiciled) trade repository by Canadian OTC derivative transaction counterparties should be studied. The Committee will investigate the feasibility of adopting a mandate and options for developing a Canadian trade repository.*

CMIC endorses the CSA's proposal to study the mandated use of a Canadian TR, including the feasibility of various options for a single Canadian based solution.

CMIC notes ISDA's response to the CSA consultation paper 91-401.³²

"ISDA firmly believes that the location of a repository should not be an over-riding consideration. The CSA should seek to avoid the regulatory uncertainty and ambiguity (and potential room for regulatory arbitrage) and additional expense that will ensue if market participants are required to comply with inconsistent or redundant regulations."

Whether or not reporting of trades to a Canadian TR is ultimately mandated, Canadian regulatory authorities will require access to global TRs in order to obtain a complete picture of factors affecting systemic risk in Canada. We understand that there are concerns that a global TR may impede regulators' access to necessary data. One example is the indemnification clause in the Dodd-Frank Act that generally requires domestic and foreign authorities, in certain circumstances, to indemnify SEC or CFTC-registered trade repositories (or Swap Data Repositories "SDR" as per Dodd-Frank terminology) as a condition to obtaining data directly from that trade repository. In view of recent changes the CFTC has made in the U.S.³³, it appears that Canadian regulators may have access to the relevant SDRs without the execution of an indemnification agreement. Nevertheless, the regulatory community and service providers should ensure that appropriate information-sharing and technical access solutions are established to avoid restrictive consequences for the Canadian market. There are precedents for such solutions. Various tax treaties produce similar information sharing results. In the securities context, the Canada-United States multi-jurisdictional disclosure system has been effective.

CSA Statement ii) *Reporting to a foreign-based trade repository that has been approved by provincial market regulators and meets all the requirements applicable to a Canadian trade repository should be acceptable until a Canadian trade repository is operational or if the mandating of such a repository is rejected by market regulators.*

CMIC strongly supports the CSA's effort to achieve a Canadian framework that is consistent with international standards. The pursuit of global standards should be promoted by regulators in order to

³² ISDA Response to CSA Consultative Paper 91-401. January 14, 2011. Available at: www2.isda.org/attachment/MjI2NA==/ISDA_CSA.pdf (at page 14)

³³ These views were supported by CFTC Chairman Gensler in recent roundtable discussions and the revisions to the proposed rules. See, for example, CFTC. "Final Rules Regarding Registration and Regulation of Swap Data Repositories." Available at: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/sdr_factsheet_final.pdf

create a robust and consistent market infrastructure, not only in Canada but also in the international markets where Canadian market participants are active. Reporting to a global TR would meet the regulators' goals as it facilitates cross-jurisdictional cooperation and data sharing, and prevents data fragmentation. This also represents a cost-effective solution that would allow Canadian market participants to remain competitive.

e) Information Required to be Reported

CSA Statement i) *OTC derivative transaction data should be reported in accordance with international standards for data reporting.*

CMIC strongly supports the CSA's effort to achieve Canadian standards that are compatible with international standards and agrees that OTC derivatives should be reported in accordance with international standards to avoid duplicate and/or contradictory reporting requirements.

CSA Statement ii) *Unique identifiers for legal entities, transactions, product types as well as country specific identifiers should be developed in accordance with international standards and reported for each OTC derivative transaction.*

CMIC strongly believes in the value of aligning with international standards, especially those related to the unique identification of OTC derivative transactions, products, and counterparties. The unambiguous and accurate identification both of the entities involved and the derivative trade itself for every financial transaction is essential to allow regulators to successfully monitor systemic risk. CMIC believes that a globally standardized unique derivative identifier system (for products and legal entities/counterparties) equivalent to similar rules proposed by the U.S. Treasury Department, CFTC and SEC is a pre-requisite for the immediate functioning of a TR that promotes market transparency.

The implementation of a Canadian TR regime should take into account the timing of global initiatives underway to establish these unique identifiers.

CSA Statement iii) *Initial transaction data including the principle economic terms and the full executed legal agreement entered into between the counterparties should be reported for all OTC derivative transactions.*

CMIC recognizes that a TR must capture sufficient details of OTC transactions in a timely fashion in order to provide meaningful systemic information to the regulators. Regulators should be provided with the principal economic terms of all OTC trades. However, there is a concern regarding the technical feasibility and value of submitting the full executed legal confirmation or agreement to the TR. The recent CPSS-IOSCO paper³⁴ released on August 24, 2011 has a very good discussion of the challenges here. We would encourage the CSA to take these considerations into account in formulating their approach.

Bilateral and structured transactions are supported by a complex suite of documentation, with many asset class and product specific nuances. Certain of these documents are finalized days or weeks after the trade is executed. As a result, providing legal documentation for non-cleared trades on a real time basis may not further the goal of monitoring systemic risk and is significantly administratively complex for participants.

³⁴ Bank for International Settlements. Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners. "Consultative Report – Report on OTC Derivatives Data Reporting and Aggregation Requirements." August 2011. Available at : <http://www.bis.org/publ/cpss96.pdf>

CSA Statement iv) *Continuation data should be reported throughout life of an OTC derivative transaction including valuation data and snapshot or lifecycle data depending on the class of OTC derivative.*

CMIC understands why the CSA is seeking data that might permit monitoring of positions and corresponding risk exposures throughout the life of a trade. CMIC agrees with the approach taken by the CFTC in separating the types of continuation reporting required based on whether trades are executed on an electronic platform, and whether they are cleared through a CCP. However, reporting updates on valuation for trades not electronically executed or centrally cleared presents significant challenges.

For trades that are executed electronically and cleared through a CCP, the CCP's pricing and margining capability can be leveraged to provide the TR with daily updates on mark-to-market ("MTM") values as reflected in variation margin ("VM"), as well as relevant margin/collateral data already available to the CCP. Therefore, CMIC recommends that the CCP should bear the responsibility for reporting continuation data for transactions cleared through the CCP. This is consistent with the CFTC's proposed rules.³⁵

The reporting of continuation and valuation data for bilateral structured trades is significantly more complex. CMIC strongly recommends that the CSA undertake further study of this matter, including assessing the materiality of such continuation and valuation data.

Some of the key issues surrounding structured products and the data reporting requirements relating to valuation data proposed by the CSA are noted below. Due to the complexity of MTM value derivation, it is CMIC's position that neither the counterparties nor the TR should be held legally accountable for continuation data submitted by market participants.

- Complexity of MTM value derivation:
 - Due to the complex manner in which pricing of illiquid, structured instruments is determined, the reported MTM value may not be an executable price, nor reflect actual market conditions and risk exposure associated with the trade.
 - In order to replicate MTM value of a structured product and the embedded exposure, one would need the underlying valuation models and pricing curves for all underlying products/indices embedded in a given contract. However, one or more of the underlying components may not have a mark because they are not regularly traded.
 - Since the MTM value of an overall structured product may be theoretical (that is, marked to model instead of marked to market), it will in all probability vary between counterparties. As such, the MTM value submitted for a particular trade may not necessarily be reconcilable as between counterparties.

- Commingling of collateral:
 - There may be "one-off" bilateral trades where a financial intermediary has collateral allocated to a specific trade. However, the majority of bilateral trades will be part of a larger portfolio and collateral will be posted across the entire portfolio rather than having collateral segregated and linked to each transaction.

³⁵ CFTC, 17 CRF Part 45, RIN 3038-AD19, "Swap Data Recordkeeping and Reporting Requirements; Proposed Rule", 75 Fed. Reg. 76574-76609, December 8, 2010. Available at: <http://www.cftc.gov/ucm/groups/public/@Irfederalregister/documents/file/2010-30476a.pdf> (at page 76580)

- The appropriate extent of collateral information reporting required of participants for non-cleared transactions should be limited to flagging whether or not collateral has been posted for a particular transaction.
- CMIC recommends, upon request from a regulator, the financial intermediary make information available about collateral supporting a particular position.
- Reporting timelines:
 - Currently, Canadian market participants do not have the operational capacity to report valuation data on a real time basis. Due to the manner in which valuation data such as MTM is calculated by different market participants, the mark calculation may not be available until after end-of-day processes are complete.

f) Availability of Information to Regulators

CSA Statement *i) Trade repositories should provide transaction level, position level and aggregated data to Canadian and acceptable foreign regulators and central banks in accordance with their regulatory duties.*

CMIC agrees that a TR should provide transaction, position and aggregated data to Canadian and acceptable foreign regulators sufficient to enable them to discharge their respective regulatory responsibilities. As suggested above in the Overview section, CMIC believes the adoption of an MOU protocol is required to permit this level of information sharing. This should be a high priority for all regulators globally.

As detailed in the response to recommendation 1.f), the importance of data security and confidentiality relating to information sharing cannot be overstated. Domestic and foreign regulators should only be entitled to receive data that is relevant to their respective regulatory mandates. For example, CMIC submits that the OSC should not have access to trades that do not involve an Ontario based market participant or relate to an Ontario market.

CSA Statement *ii) A data aggregator should be developed to assist Canadian regulators and the central bank in the collection and aggregation of trade data from multiple trade repositories (located domestically or internationally) if a Canadian trade repository with aggregation functionality is not developed.*

CMIC recognizes the need for regulators to have access to “up to date transaction and position level data” in order to “monitor the state of OTC derivative market on the micro and macro level” within their respective jurisdictional responsibilities. CMIC is concerned that the term “aggregation” is used in different contexts:

- 1) aggregation of transaction details into positions;
- 2) retrieval of information across multiple TRs and consolidation of retrieved data; and
- 3) presentation of aggregation reports per specific requirements of a regulator.

Aggregation functionalities in the context of (1) above would be within the expected normal capability of a TR. The functions defined in (2) and (3) would more appropriately reside within the domain of regulators.

g) Availability of Information to Public

CSA Statement *CSA Trade repositories should make available to the public aggregate data, including information on positions, transaction volumes and average prices. Anonymous post-trade*

transaction level data should also be made public provided that it would not be detrimental to market liquidity or function.

CMIC supports the goal of post-trade transparency in the CSA's proposal that a TR make public certain information including aggregate data on positions, transaction volumes and average prices. However, CMIC's support is conditional on the successful execution of recommendation 3.b), which states:

“Amendments to legislation should be enacted to ensure that confidential trade repository data is not made publicly available pursuant to public disclosure laws. “

CMIC strongly agrees that “the data made available to the public does not disclose the transactions or positions of any market participants nor any information that would compromise trade secrets”. We do have a number of concerns here. Public disclosure of such data may result in inadvertent disclosure of confidential information. We are also concerned about requiring that “anonymous post-trade transaction level data should also be made public provided that it would not be detrimental to market liquidity or function” to enhance price transparency. This proposal depends on the successful execution of recommendation 3.b) stated above as well as recommendation 2.h), which states:

“Large trades meeting a to-be-determined block trade threshold should be subject to delayed reporting in order to preserve the anonymity of market participants and ensure there is no detrimental impact on market liquidity or function.”

The SEC has proposed a rule that requires full disclosure of transaction level data including notional trade size for block trades, albeit on a delayed basis. In response to the SEC's proposal, however, ISDA stated such disclosure, even if delayed, would “likely impair liquidity for large transactions in the CDS market”³⁶. In a separate study, the SEC has noted many OTC derivative instruments trade sparsely, and the trade sizes tend to be larger for liquid instruments compared to less frequently traded instruments³⁷. Such characteristics of the OTC derivatives market are magnified in the Canadian market, which has a considerably smaller number of market participants and smaller transaction volume than the US. Public disclosure of transaction details – even if done on an anonymous basis – could be used to reverse engineer Canadian firms' positions and trading strategies. This information can be used for arbitrage and potential market manipulation, with detrimental impact to market liquidity and function.

CMIC recommends that regulators undertake further study of this subject in order to achieve an appropriate level of public disclosure to meet regulatory goals of transparency without having a detrimental impact on the market. Having said that, CMIC believes there is no value in public disclosure of back loaded data – that is purely of value for systemic risk management purposes.

h) Timing of Reporting

CSA Statement *i) Transaction reporting to trade repositories should be done in real time once feasible for Canadian market participants and within one business day until real time reporting is implemented.*

CMIC understands the need to report transactions to a trade repository promptly. Additionally, CMIC supports the CSA's recommendation for next working day reporting as an interim solution until a

³⁶ See *supra*, note 4 (at page 2)

³⁷ Securities and Exchange Commission. File No. S7-34-10; Release No. 34-63346. “Security Based Swap Block Trade Definition Analysis.” January 13, 2011. Available at: www.sec.gov/comments/s7-34-10/s73410-12.pdf (at pages 2-3)

decision on real time reporting can be reached, if deemed appropriate. CMIC submits that real time reporting should be subject to further study, including a cost benefit analysis in order to determine if such reporting is feasible and to ensure such reporting does not disrupt or otherwise negatively impact effective reporting to a TR. The implementation of next day reporting or real time reporting should follow the phased approach.

CSA Statement ii) *Once real time reporting is implemented, large trades meeting a to-be-determined block trade threshold should be subject to a delayed reporting requirement in order to preserve the anonymity of market participants and ensure that there is no detrimental impact on market liquidity or function.*

CMIC supports delayed reporting requirements for block trades. For the details of CMIC's views on block trade thresholds and reporting delay, please refer to our responses above to CSA questions 3, 4, 5 and 6.

3. Access to Confidential Trade Repository Information

CSA Statement a) *Provincial market regulators from each jurisdiction should consider whether it is necessary to enact legislation that expressly permits the disclosure of confidential information to and by trade repositories.*

CMIC has concluded that it will be necessary to enact legislation explicitly permitting the disclosure of confidential information to and by a TR in order to prevent an unintentional breach of confidentiality obligations as highlighted in recommendation 2.a)ii). CMIC views such legislation as a necessary pre-condition to the reporting of trades to any TR as the absence of such legislation will expose the counterparties of OTC derivative transactions to serious economic, reputational and legal risks. Provincial and federal authorities will need to work together on such legislative changes.

CSA Statement b) *Amendments to legislation should be enacted to ensure that confidential trade repository data is not made publicly available pursuant to public disclosure laws.*

CMIC agrees with this recommendation as it aligns with the data security and entitlements considerations outlined in our response to recommendation 1.f). The absence of such legislation will expose the counterparties of OTC derivative transactions to serious economic, reputational and legal risks.

CSA Statement c) *Canadian regulators and the central bank should establish cooperation agreements with foreign jurisdictions that have equivalent legal and supervisory frameworks to facilitate cross border access to trade repository data. Canadian regulators and the central bank should have access to all trade repository data regarding Canadian counterparties or Canadian referenced derivatives.*

CMIC agrees that Canadian regulators should establish cooperation agreements with foreign jurisdictions that have equivalent legal and supervisory frameworks. This should facilitate cross border access to trade repository data in order to enable the regulators to have a complete and comprehensive view of the OTC derivatives market within their purview. CMIC believes that the adoption of such MOU as cited in recommendation 1.f) should be a high priority for regulators globally. However, in our view, each regulator should only be entitled to data that is relevant to its particular regulatory mandate.

CONCLUSION

CMIC believes that continued engagement with the CSA is fundamental to the development of a trade repository regulatory framework that meets the G20 commitments and achieves the intended public

policy purposes. We support the majority of the proposals and concepts set out in the Consultation Paper. Where we suggest alternatives, we believe that such alternatives are closely aligned with the CSA's objectives. Thoughtful inclusion by regulators in the development of the TR regime of the themes set out in the overview section at the beginning of this letter (recognition of federal systemic risk authority, Canadian harmonization and inter-governmental co-operation, consistency with international standards and a phased, careful, studied rule making process) will meaningfully contribute to the success of the resulting framework. The adoption of appropriate global standards reflecting Canadian market characteristics will achieve this goal.

The Consultation Paper is the first of a series of eight consultation papers that will be issued. To the extent necessary to do so, CMIC reserves the right to make supplementary submissions relating to trade repositories following the publication of the remaining consultation papers.

CMIC hopes that our comments are useful in the development of a regulatory framework for trade repositories and that the CSA takes into account the practical implications for market participants who will be subject to the regime. CMIC welcomes the opportunity to discuss this response with representatives from the CSA.

The views expressed in this letter are the views of all of the members of CMIC listed below:

Bank of America Merrill Lynch
Bank of Montreal
Caisse de dépôt et placement du Québec
Canadian Imperial Bank of Commerce
Canada Pension Plan Investment Board
Healthcare of Ontario Pension Plan
National Bank of Canada
Ontario Teachers' Pension Plan Board
Royal Bank of Canada
The Bank of Nova Scotia
The Toronto-Dominion Bank