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Re: Canadian Securities Administrators (“CSA”) Consultation Paper 91-403 on Derivatives: Surveillance and Enforcement (the “Consultation Paper”)

INTRODUCTION

Caisse de dépôt et placement du Québec (“Caisse”) welcomes the opportunity to comment on the Consultation Paper published by the CSA on November 25, 2011 relating to Surveillance and Enforcement of the over-the-counter (“OTC”) derivatives market.

The comments formulated by Caisse herein are common to some of the comments expressed by the Canadian Market Infrastructure Committee (“CMIC”) in its letter of January 25, 2012 which Caisse has reviewed.

Caisse appreciates the consultative approach being taken by the CSA in considering an appropriate framework for the surveillance and monitoring, market conduct and enforcement of OTC derivatives markets. Caisse 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.

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

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

First, while preparing our response to the Consultation Paper, we found it exceedingly difficult to formulate specific suggestions respecting market conduct surveillance and enforcement in the absence of a defined framework for OTC derivative transactions that recognizes, among other things, the distinct characteristics of the products that comprise the OTC derivatives market and regulates them accordingly. By way of example, there would appear to be very little risk of market manipulation or insider trading associated with the conduct of interest rate and currency swaps, which collectively comprise a significant component of the OTC derivatives market. It is therefore anticipated that market conduct requirements will vary on a product-by-product basis and it will be important to ensure that the imposition of such requirements does not serve to alter existing counterparty relationships or undermine participation in the OTC derivatives market. Until such market conduct and product relationships have been established any attempt to design an appropriate surveillance and enforcement regime would be premature.

Secondly, the OTC derivatives market is primarily an institutional market that encompasses sophisticated commercial end-users and, with limited exceptions, is not a market that engages the retail investor. Quite the contrary, it is currently a market based on bilateral contracts in which virtually all trades involve at least one regulated counterparty that is subject to rigorous oversight and supervision by a prudential regulator and that has highly developed risk management systems, in which such regulated counterparties transact with each other and with sophisticated commercial end users. As alluded to above, any framework for the regulation of OTC derivative transactions must recognize the distinct characteristics of the categories of products that comprise the OTC derivatives market and, by doing so, the distinctions that exist between the OTC derivatives market and the retail securities market. Simply adopting the surveillance and enforcement regime that currently exists for the trading of public equities is unnecessary and could have unintended consequences for the OTC derivatives market.

Finally, it is apparent to Caisse that the G20 commitments will require significant operational, technological and resource issues to be addressed within a tightly compressed time frame. It may therefore be very challenging for regulators to meet such commitments during the next eleven months if they are also engaged in resolving non-core issues that do not involve systemic risk, including the further study and research that is contemplated by the Consultation Paper. While Caisse fully appreciates the necessity for such further study and research for the reasons described above, it will also require a significant commitment of time and resources that would otherwise detract attention from the primary G20 commitment objective of identifying and addressing systemic risk.

SUMMARY OF RESPONSE

The following is a summary of Caisse' response to the Consultation Paper, organized under the three major sections of the Consultation Paper. Then, after this summary, Caisse's specific response to each of the CSA's recommendations is set out.

Consultation Paper Recommendation

1. Surveillance and Monitoring

Caisse urges the CSA to adopt its recommendation that further study and research is required prior to the development of a comprehensive surveillance and monitoring regime. Caisse agrees that there

are a number of regulatory and operational challenges that will need to be considered and overcome by the CSA as study and research in this area progresses, including identifying those products and services that are to be the subject of surveillance activities, the timing of surveillance activities and the process for coordinating and sharing information. We suggest that the CSA, in conjunction with federal regulators, depending of their jurisdictions, be guided by the principles of harmonization, cooperation and efficiency in the development of any rules and reporting obligations related to the OTC derivatives market.

Consultation Paper Recommendation

2. Market Conduct

While Caisse fully supports preserving the integrity of the OTC derivatives market, it is submitted that any related market conduct rules must recognize, and take into account, the following:

- the sophistication of OTC derivative market participants;
- the stringent regulatory environment in which most participants operate;
- the contractual framework within which OTC derivative transactions are currently conducted;
- the distinctions that exist between various categories of OTC derivative products; and
- the distinctions that exist between institutional markets, such as the OTC derivatives market, and the market for retail securities.

As noted above, there is little or no historic evidence of any OTC derivatives market misconduct that requires any immediate attention. Market conduct, surveillance and enforcement should therefore be given a lower priority than systemic risk related issues to ensure that sufficient time and resources can be devoted to a consideration of the factors noted above and that such time and resources will not detract from the primary objective of meeting the G20 commitments. Market conduct rules must be warranted and should not give rise to any unintended consequences that could have an adverse impact on the OTC derivatives market.

Consultation Paper Recommendation

3. Enforcement

Caisse generally agrees with the need at a later stage to establish an enforcement regime in connection with the OTC derivatives market once the regulatory requirements applicable to the different categories of OTC derivative products have been clarified. Caisse submits that such a regime must recognize, among other things, the existing contractual remedies available to market participants, the distinct characteristics of each category of OTC derivative product and the appropriate jurisdiction governing any such enforcement activities.

SPECIFIC RESPONSES TO CSA PAPER RECOMMENDATIONS

For purposes of completeness, Caisse has provided a response following each of the recommendations contained in the executive summary of the Consultation Paper that have been reproduced below.

1. Surveillance and Monitoring

a) *Supplementing Current Market Surveillance with Surveillance of OTC Derivatives Markets*

CSA Statement *Provincial market regulators must conduct further study and research on the development of a comprehensive surveillance system which supplements current market surveillance with surveillance of OTC derivatives markets, and includes cross-product and cross-market analysis.*

Caisse agrees that further study and research is required in connection with the proposed development and administration of a comprehensive surveillance system for the OTC derivatives market. Suggested areas for detailed study include products and participants to be captured by surveillance activities, timing of surveillance, and coordination and information-sharing with domestic and foreign regulatory authorities.

Caisse suggests that cross-product and cross-market analysis should focus on those products and markets that can most directly have an impact on the markets that are currently regulated by Canadian authorities. Consideration should also be given to the compatibility of domestic and foreign regulatory requirements governing OTC derivative transactions given the global nature of the OTC derivatives market and the large number of international participants completing transactions with Canadian counterparties.

Further extensive study is required with respect to the timing of proposed surveillance activities. Unusual trading patterns, insider trading, and price manipulation are examples of activities more likely to be discovered through post-trade monitoring and investigation rather than real-time surveillance. Additional thought should be given to the activities and behaviours that OTC derivatives market surveillance is meant to identify and prevent so that the most appropriate means and timing of surveillance can be determined.

Caisse agrees that it will be necessary for both federal and provincial regulators to consider the significant costs and operational issues that they will have to confront when implementing a comprehensive surveillance system. In addition to the issues raised in the Consultation Paper, Caisse is also concerned about the increased confidentiality and security risks created by introducing a system of data storage and archiving outside of any trade repository ("TR") established or mandated as a result of the consultation process commenced by the TR Paper.

Caisse supports a harmonized approach to data collection and surveillance across markets and jurisdictions, both within Canada and internationally. In order to minimize the reporting burden on market participants and to eliminate any duplication or inconsistencies in reporting obligations, consideration should be given to consolidating all OTC derivatives reporting requirements at the level of a TR.

As discussed in the CMIC TR Letter,² there is a need for extensive memoranda of understanding ("MOU") among Canadian and international regulators in order to establish a framework for collecting and sharing information. Among other things, it will be necessary for such MOU to address the location of data storage, the scope and purpose of data collection and sharing, data security, confidentiality and associated liability, and the extent to, and manner in, which enforcement will occur

² Response of CMIC dated September 9, 2011 to the TR Paper. Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20110909_91-402_cmic.pdf

across jurisdictions. MOU will also be relevant in connection with any cross-market surveillance and analysis to ensure that regulators have access only to the data relating to those participants and transactions that fall within the mandate of any given regulator.

b) *Monitoring Participant Positions*

CSA Statement *Provincial market regulators, in coordination with other key Canadian financial market regulators, should obtain data relating to positions held by registrants and other key participants in our OTC derivatives markets to understand the risks to those participants, the market and the Canadian economy.*

Caisse is open to discussing the objectives of position monitoring in order to better understand the participants and transactions proposed to be monitored and to assist the provincial securities regulators in determining if any monitoring regime is necessary.

To the extent that position monitoring is implemented, Caisse submits that, consistent with the response to recommendation 1.a), any such monitoring should occur only with respect to information available to regulators through a TR rather than subjecting participants to additional, and possibly redundant or conflicting, reporting requirements. Given the multijurisdictional nature of OTC derivatives trading, unless information is consolidated in one place, there is a very meaningful risk that information available to regulators may be fragmented or incomplete, which would not allow the regulator to accurately assess a given participant's position and could very well lead to inaccurate and misleading conclusions being drawn by regulators. In order for any such regime to be effective, it will be necessary for regulators to have access, through a TR, to complete information regarding those participants and transactions that fall within the regulator's mandate.

c) *Management of Data*

CSA Statement i) *Provincial market regulators require the authority to access, receive and analyze data about OTC derivatives and participants in the OTC derivatives market.*

Caisse supports the ability of provincial market regulators to access, receive and analyze data about OTC derivatives and participants in the OTC derivatives market that relate to those participants and transactions that fall within the mandate of a particular regulator. As noted in the responses to recommendations 1.a) and 1.b), any data regarding participants and trades to be collected and analyzed should be collected through a TR rather than subjecting participants to additional, and possibly conflicting, reporting requirements. Caisse agrees with the CSA proposal that standardized data may be obtained by the regulators from other regulators to the extent that such information is available.

CSA Statement ii) *Provincial market regulators should collaborate with domestic and international regulators, as well as regulated entities that hold OTC derivatives data, to establish cooperative arrangements for surveillance, monitoring and enforcement purposes. Provincial market regulators should ensure they have the authority in their legislation to share information with these entities.*

As discussed in the response to recommendation 1.a) and in the CMIC TR Letter,³ a harmonized approach, both domestically and internationally, is necessary to ensure consistent surveillance, monitoring and enforcement across Canada and in the international OTC derivatives market. Caisse submits that aggregate data in a TR should be made available to international and Canadian federal

³ *Supra* note 2 (at page 4).

and provincial regulators to carry out analysis relevant to each regulator's mandate in a harmonized fashion. MOU will need to be put in place in order to govern the collection and sharing of data among regulators that hold information related to OTC derivatives markets. To ensure that such sharing of data is permitted, various legislative amendments will need to be made prior to the implementation of a comprehensive surveillance and enforcement regime.

Consideration should be given to conflict resolution in the event of inconsistencies between jurisdictional frameworks when establishing cooperative arrangements with other non-Canadian jurisdictions for surveillance, monitoring and enforcement activities. Caisse suggests deference to a participant's home jurisdiction as a possible solution to any such conflict.

CSA Statement *iii) Provincial market regulators should compare their provinces' public access to information legislation with securities legislation to ensure that the information received for surveillance and monitoring purposes is kept confidential. Where appropriate, provincial market regulators may have to work with their provincial governments to implement carve-outs from the provincial access to information legislation.*

Caisse agrees with this recommendation. A comprehensive review of access to information and securities legislation is required to ensure the confidentiality and security of information received by the regulators for the purposes of surveillance and monitoring. If provincial access to information legislation is invoked and OTC derivatives market data is publicly disclosed, it could have adverse consequences for participants, prices, volumes and new issues in the OTC derivatives and other markets.

d) Operational Issues

CSA Statement *Provincial market regulators must conduct further study and research on various operational issues required to develop and implement comprehensive surveillance and monitoring systems for financial markets, which include the monitoring of OTC derivative markets. Key operational issues include:*

- *Consideration of which entity or entities will be responsible for surveillance of OTC derivatives markets and reviews of market participants;*
- *Analysis of the resources, expertise and analytical capabilities, both human and technological, necessary to conduct the surveillance and monitoring; and*
- *Determination of how to consolidate, reconcile and aggregate various data sets which provincial market regulators receive from various sources.*

Caisse supports the recommendation that further study and research is required on the operational issues facing the CSA in connection with the development and implementation of the systems necessary for a comprehensive surveillance and monitoring regime. Consistent with this recommendation, Caisse submits that, as a first step, the regulatory landscape will need to be established and surveillance mandates assigned. If more than one entity will be responsible for surveillance of OTC derivatives markets and reviews of market participants, Caisse reiterates the need for a harmonized approach with an appropriate division of responsibility. Consideration should also be given by the CSA to the breadth and scope of the potential information technology required to be developed and costs associated with implementing a comprehensive surveillance and monitoring regime, as the systems architecture will be critical to effective and efficient oversight.

2. Market Conduct

CSA Statement *It is recommended that provincial market regulators obtain the legislative authority to implement specific rules to address the following market conduct issues related to OTC derivatives if such rules are determined to be appropriate:*

- *Market Manipulation and Fraud*
- *Misrepresentations/Misleading or Untrue Statements*
- *Prohibited Representations*
- *Abusive Trading Practices*
- *Record Keeping and Audit Trail Requirements*
- *Insider Trading*
- *Evasion or Avoidance*
- *Abuse of Exemptions*
- *Business Conduct Standards for Registrants*

As noted above, while Caisse fully supports preserving the integrity of the OTC derivatives market, it is submitted that any related market conduct rules must recognize the sophistication of OTC derivative market participants; the stringent regulatory environment in which most participants operate; the contractual framework within which OTC derivative transactions are currently conducted; the distinctions that exist between various categories of OTC derivative products; and the distinctions that exist between institutional markets, such as the OTC derivatives market, and the retail market for securities.

Unlike the retail market for securities, most participants in the OTC derivatives market are large, highly-regulated institutions or sophisticated commercial end-users. Virtually all trades in the OTC derivatives market involve at least one counterparty that has a sophisticated and highly developed risk management system and is subject to rigorous oversight and supervision by a prudential regulator. This feature of the market addresses the vast majority of the market conduct concerns that are identified in the Consultation Paper. In the event that OTC derivative market conduct rules are implemented, it is essential that the scope of such regulation and scrutiny is commensurate with the sophistication of OTC derivative market participants and the regulatory framework within which they currently operate.

Any OTC derivative market conduct rules would also have to recognize that the OTC derivatives market is currently a bilateral contract market where conduct is generally governed by the terms and conditions of an ISDA master agreement (the "ISDA Agreement") or another master agreement containing similar provisions as the ISDA Agreement. The ISDA Agreement contains standardized representations, covenants, termination events, events of default, remedies and provisions setting out standardized practices. For example, the ISDA Agreement contains (i) a representation from the parties that the execution of the ISDA Agreement and the performance of all obligations thereunder do not violate or conflict with any applicable law or any order or judgement of any applicable government agency and (ii) a covenant from the parties that they will comply in all material respects with all applicable laws and orders to which they may be subject. Accordingly, any OTC derivative

market conduct rules should be formulated in recognition of the contractual nature of the OTC derivatives market.

Finally, in addition to the distinctions that exist between institutional markets, such as the OTC derivatives market, and the retail market for securities, it is equally important that any OTC derivative market conduct rules recognize the distinctions that exist between various categories of OTC derivative products. As a result of these distinctions, the potential for market misconduct will vary on a product-by-product basis and will, in some cases, be non-existent in respect of both the OTC derivative contract and the underlying interest. OTC derivative market conduct requirements should therefore be tailored to the product or products that they are intended to regulate. By way of an example, there would appear to be very little potential for market manipulation or insider trading associated with the conduct of interest rate and currency swaps, which collectively comprise a significant component of the OTC derivatives market. OTC derivative market conduct requirements must therefore be sensitive to the products that they are intended to regulate to ensure that the imposition of such requirements does not serve to alter existing counterparty relationships, create confusion regarding their respective responsibilities, undermine current levels of participation in the OTC derivatives market or cast too broad a net and thereby subject routine transactions to relatively prohibitive compliance costs which could leave OTC derivative market participants without an effective means of risk mitigation.

3. Enforcement

CSA Statement *For the same reason, provincial market regulators should obtain the authority to extend existing compliance, investigation and enforcement powers found in securities legislation to trading in OTC derivatives.*

As discussed in the response to recommendation 1.d), Caisse submits that, as a first step, the regulatory framework for OTC derivative transactions will need to further evolve before an enforcement regime can be formulated. Caisse reiterates the need for a harmonized approach with an appropriate division of responsibility between federal and provincial regulators.

Any enforcement activities should also be tailored to the products and the market. As noted in the response to recommendations 1.a) and 2), certain OTC derivatives products are not likely to be susceptible to market misconduct and market misconduct requirements should therefore be customized to the market misconduct risk potential of a particular OTC derivative product. Consideration should also be given to the existing contractual framework, which addresses the remedies available to parties in the rare occasion of a breach of the terms of derivatives transactions.

CONCLUSION

Caisse believes that continued engagement with the CSA is fundamental to the development of a regulatory framework that meets the G20 commitments and achieves the intended public policy purposes. As noted above, we believe that the regulators' priority at this time should be systemic risk and that surveillance and enforcement should follow once a broader OTC derivatives regulatory framework is developed. Subject to the foregoing, 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.

The Consultation Paper is the second in a series of eight consultation papers that will be issued. To the extent necessary to do so, Caisse, alone or jointly with CMIC, reserves the right to make supplementary submissions relating to surveillance and enforcement following the publication of the remaining consultation papers.

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

A handwritten signature in black ink, appearing to read 'S. Lussier', with a long horizontal flourish extending to the right.

Sophie Lussier

Senior director, Legal Affairs, Financial markets and derivative products