To: The Addressees set out in Appendix A

September 6, 2013

Re: Multilateral CSA Staff Notice 91-302 Updated Model Rules – Derivatives Product Determination (the "Updated Model Scope Rule") and Trade Repositories and Derivatives Data Reporting (the "Updated Model TR Rule", and together with the Updated Model Scope Rule, the "Updated Model Rules")[1]; Proposed Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination (the "Proposed Manitoba Scope Rule") and Proposed Manitoba Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Manitoba TR Rule", and together with the Proposed Manitoba Scope Rule, the "Proposed Manitoba Rules")[2]; Proposed Ontario Securities Commission Rule 91-506 Derivatives: Product Determination (the "Proposed Ontario Scope Rule") and Proposed Ontario Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Ontario TR Rule", and together with the Proposed Ontario Scope Rule, the "Proposed Ontario Rules")[3]; Draft Regulation 91-506 respecting Derivatives Determination (the "Proposed Quebec Scope Regulation") and Draft Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting (the "Proposed Quebec TR Regulation", and together with the Proposed Quebec Scope Regulation, the "Draft Quebec Regulations")[4], in each case, under the Quebec *Derivatives Act* (collectively, the Draft Quebec Regulations, the Proposed Manitoba Rules and the Proposed Ontario Rules, being the "Proposed Provincial Model Rules")

INTRODUCTION

The Canadian Market Infrastructure Committee ("CMIC") welcomes the opportunity to comment on the Canadian Securities Administrators' ("CSA") Updated Model Rules and Proposed Provincial Model Rules, each dated June 6, 2013. While we specifically refer to the provisions of the Updated

[1] Canadian Securities Administrators, Multilateral CSA Staff Notice 91-302 Updated Model Rules – Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting (June 6, 2013). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[2] Manitoba Securities Commission, Proposed Manitoba Securities Commission Rule 91-506 Derivatives: Product Determination and Proposed Manitoba Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting, MSC Notice 2013-21 (June 6, 2013). Available at: http://www.msc.gov.mb.ca/legal_docs/legislation/notices/91_506_91_507_notice_rfq.pdf.

[3] Ontario Securities Commission, Proposed Ontario Securities Commission Rule 91-506 Derivatives: Product Determination and Proposed Ontario Securities Commission Rule 91-507 Trade Repositories and Derivatives Data Reporting, 36 OSCB 5737 (June 6, 2013). Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20130606_91-506_91-507_rfc-derivatives.pdf.

[4] Autorité des marchés financiers, Draft Regulation 91-506 respecting Derivatives Determination and Draft Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting (June 6, 2013). Available at: http://www.lautorite.qc.ca/files/pdf/consultations/derives/septembre-2013/2013juin06-91-506-91-507-derives-cons--en.pdf.

Model Rules along with the related model explanatory guidance in this response letter, unless otherwise indicated, all of our comments apply equally to each of the Proposed Provincial Model Rules and related guidance.

CMIC was established in 2010, in response to a request from public authorities, to represent the consolidated views of certain 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, Deutsche Bank A.G., Canada Branch, Healthcare of Ontario Pension Plan, HSBC Bank Canada, JPMorgan Chase Bank, N.A., Toronto Branch, Manulife Financial Corporation, National Bank of Canada, OMERS Administration Corporation, 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 regarding the appropriate framework for regulating the Canadian OTC derivatives market. 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. As it has in all of its submissions, this letter will reflect the consensus of views within CMIC's membership about the proper Canadian regulatory regime for the OTC derivatives market.

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

CMIC appreciates the consultative approach being taken by the CSA in considering the proposed regime for derivatives product determination and data reporting. CMIC believes that this approach will lay the foundation for the development of a Canadian regulatory structure[5] that will satisfy Canada's G-20 commitments by addressing systemic risk concerns in OTC derivatives markets.

OVERVIEW

CMIC supports the regulatory progress that has been made internationally towards meeting the G-20 commitments and we encourage the CSA to continue to work closely with its global counterparts and other international bodies towards the common goal of meeting the G-20 commitments. In our response letters on prior CSA consultation papers[6], we emphasized the need for rules that are

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

[6] Response of CMIC dated September 9, 2011 to the consultation paper relating to OTC derivatives trade repositories. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20110909_91-402_cmic.pdf; Response of CMIC dated January 25, 2012 to the consultation paper on surveillance and enforcement. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120125_91-403_cmic.pdf; Response of CMIC dated April 10, 2012 to the consultation paper on segregation and portability in OTC derivatives clearing. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120410_91-404_cmic.pdf; Response of CMIC dated June 15, 2012 to the consultation paper on end user exemptions from certain regulatory requirements. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120615_91-405_cmic.pdf; Response of CMIC dated September 21, 2012 to the consultation paper on central clearing counterparties. Available at

aligned with global standards, except where dealing with a unique feature of the Canadian market. Canadian adoption, in a harmonized fashion, of standards and protocols developed by international bodies[7] will eliminate the risk of a Canadian framework that is not compatible with global standards. In particular, many CMIC members are currently reporting OTC derivatives transactions with US persons under the rules of the U.S. Commodity Futures Trading Commission ("CFTC") under Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank"). Using significant resources, Canadian market participants have developed operational systems and trade processes to satisfy the CFTC requirements. Adopting Canadian reporting requirements that are harmonized with the CFTC requirements will enable Canadian market participants to leverage existing systems. Furthermore such an approach will ensure that Canadian regulators receive derivatives data in a format that is consistent with other jurisdictions. The goal of collecting data that can be aggregated has been highlighted by the Financial Stability Board as being hampered by "jurisdictional differences in data elements required to be reported…"[8]

We are concerned with differences that continue to exist between the Updated Model TR Rule and the CFTC rules. Because of Canada's relative position in the global market, unless required because of particular features of the Canadian market, any requirements unique to Canada may impede Canadian market participants' access to global markets. It is for this reason only we feel the Canadian rules should be aligned as closely as possible with the US rules.

As described more fully below, we submit that the CSA's approach to the definition of "local counterparty" will place Canadian participants at a disadvantage. Notwithstanding the changes made to this definition it remains overly broad. It has extra-territorial implications that will likely result in a dual-reporting regime for certain non-Canadian entities with potentially inconsistent laws applicable to such entities.

The data field requirements under Appendix A of the Updated Model TR Rule contain a "Custodian" data field which is not required under the CFTC rules. This will place pressure on the existing reporting infrastructure by creating an operational burden for market participants to report data which exceeds what other regulators require, and what non-domestic dealers are currently set up to report. In CMIC's view, this additional cost far outweighs the minimal benefit received by adding the "Custodian" data field.

However, there are circumstances where the Canadian market requires a different approach. In our view, for public disclosure of trade information, it is more appropriate for Canada to align itself with markets similar in composition and size to Canada, such as Australia and Hong Kong. Accordingly, CMIC submits that it is more appropriate that public disclosure of trade information occur on a weekly

---

http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120921_91-406_cmic.pdf; Response of CMIC dated February 4, 2013 to the model rules (the "Initial Model Rules") on product determination (the "Initial Model Scope Rule") and trade repositories and data reporting (the "Initial Model TR Rule"). Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130204_91-301_cmic.pdf; Response of CMIC dated June 17, 2013 to the consultation paper relating to registration of derivatives market participants. Available at: http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20130617_91-407_cmic_en.pdf.

[7] 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.

[8] FSB OTC Derivatives Market Reforms- Fifth Progress Report on Implementation (April 15, 2013) at page 16.

basis, which is the proposed time frame for such disclosure by market regulators in Australia and Hong Kong.

The most developed OTC derivatives reporting regulatory regime is currently in the U.S., but only with respect to the OTC derivatives over which the CFTC has exclusive jurisdiction. The rules relating to those derivatives under the jurisdiction of the United States Securities and Exchange Commission (the "SEC") are not yet finalized. CMIC recommends that, to the extent the US reporting rules have not been finalized, the Updated Model TR Rule contain a phased-in implementation. Trade reporting for a specific product should only be reported after final rules for that product have been implemented in the US.

Finally, CMIC is pleased that each of the Proposed Provincial Model Rules would appear to be substantively the same as the Updated Model Rules.

UPDATED MODEL RULE – DERIVATIVES: PRODUCT DETERMINATION

Intention to Physically Settle; Obligation Netting Agreements

CMIC appreciates and acknowledges the changes made to the explanatory guidance for the scope rule to confirm that payment obligation netting arrangements are permitted in respect of physically-settled transactions without disqualifying such transactions as excluded derivative transactions under the Updated Model Rules. However, there are still some statements in the explanatory guidance which are of concern, in particular, those relating to the way that the institutional foreign exchange ("FX") market operates. In the institutional FX market, deliverable FX spot transactions are entered into on a daily basis for settlement T+2. Prior to the settlement date of one or more spot FX transactions, each counterparty to such transactions will assess and re-evaluate its currency requirements and, if changed, may enter into one or more deliverable FX spot transactions to off-set, in whole or in part, the net currency positions in one or more currencies. In doing so, counterparties will rely upon payment obligation netting arrangements. This activity occurs daily and has been the basis on which the institutional FX market has operated for many years.

CMIC is very concerned about statements in the explanatory guidance that look to a counterparty's "course of conduct" or "intention" to determine whether a spot FX transaction is being "physically-settled". Specifically, it is CMIC's view that the entering into of such off-setting deliverable spot FX transactions described above (and in reliance upon payment obligation netting arrangements) should not be determinative of whether any prior transactions, or that off-setting transaction, is physically-settled. It should also not be determinative of whether a transaction is physically-settled even if the economic effect of entering into such off-setting transactions is that a counterparty may have, at the end of the day, one payment in a single currency. Such payment netting mechanic is a funding tool in order to settle obligations under transactions, allowing parties to reduce settlement risk. We note that such activity does <u>not</u>, in any way, (i) change the obligations under each individual deliverable spot FX transaction to net cash settle in a single currency, (ii) change the settlement date under each individual deliverable spot FX transaction (i.e. there is no postponement of the settlement date; each transaction settles and there is no unrealized profit/loss, which contrasts with a "rollover" of an FX transaction which is the common practice in the retail FX market where the settlement date remains "open", resulting in unrealized profit/loss), or (iii) cancel and replace original contracts with new contracts reflecting the net currency positions (which are commonly referred to as "book-outs" or "legal novation netting" or "trade compression"). Such obligations, legally speaking, remain gross obligations to deliver currency under each individual spot FX transaction. Payment netting is simply a funding tool which allows each multiple gross obligation to settle upon payment of the reduced amount of currency, thus reducing the value at risk.

CMIC's view is that the purpose or intention behind each deliverable spot FX transaction is irrelevant. If, in legal terms, a deliverable spot FX transaction is entered into for settlement in T+2, it should be excluded from the trade reporting requirements. As long as the parties do not amend the terms of the original transaction, it should continue to be excluded from trade reporting requirements, even if subsequent transactions are entered into which, together with all other outstanding transactions, may have the economic benefit of funding, on a particular day, in currencies and amounts that are different than the gross obligations under each deliverable spot FX transaction.

It is CMIC's view that all such deliverable spot FX transactions should qualify for the exclusion and, thus, would not need to be reported under the Updated Model TR Rule. Our suggested amendments to incorporate these points are set out below.

Drafting Comments:

[2nd paragraph under subheading, "Settlement by delivery except where impossible or commercially unreasonable (subparagraph 2(c)(i))"][9]

"Settlement by delivery of the currency referenced in the contract requires the currency contracted for to be delivered and not an equivalent amount in a different currency. For example, where a contract references Japanese Yen, such currency must be delivered in order for this exclusion to apply. We consider delivery to mean actual delivery of the original currency contracted for either in cash or through electronic funds transfer. In situations where settlement takes place through the delivery of an alternate currency or account notation without actual currency transfer, there is no settlement by delivery and therefore that the exclusion in paragraph 2(c) would not apply. For greater certainty, the netting of delivery obligations pursuant to a netting provision (as discussed below under "Intention requirement (subparagraph 2(c)(ii))"), whether on a bilateral basis or on a multilateral basis (such as settlements conducted using CLS Bank's foreign exchange payment netting platform) is not considered to be "an account notation without actual currency transfer"."

[last paragraph under the subheading "Intention requirement (subparagraph 2(c)(ii))"].[10] CMIC's view is that the following paragraph should be deleted from the explanatory guidance for the reasons stated above. However, if that approach is not accepted, we strongly believe that the explanatory guidance should clarify that the above practice would not constitute conduct which indicates an "intention not to settle by delivery".

"In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. Where a counterparty's conduct indicates an intention not to settle by delivery, the contract will not qualify for the exclusion in paragraph 2(c). For example, where it could be inferred from the conduct that counterparties intend to rely on breach or frustration provisions in the contract in order to achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency, the contract will not qualify for this exclusion. Similarly, a contract would not qualify for this exclusion where it can be inferred from their conduct that the counterparties intend to enter into collateral or amending agreements which, together with the original contract, achieve an economic outcome that is, or is akin to, settlement by means other than delivery of the relevant currency. However, the Committee intends that where a counterparty engages in the market practice of executing two or more separate and succeeding foreign exchange contracts which legally do not amend an existing foreign exchange contract, the net effect of which is to change the funding requirements of a counterparty, all such foreign exchange contracts would qualify for this exclusion."

[9] Updated Model Rules, *supra* note 1 at 7; Proposed Manitoba Rules, *supra* note 2 at 4; Proposed Ontario Rules, *supra* note 3 at 5754; Draft Quebec Regulations, *supra* note 4 at 3.

[10] Updated Model Rules, *supra* note 1 at 8; Proposed Manitoba Rules, *supra* note 2 at 5; Proposed Ontario Rules, *supra* note 3 at 5755; Draft Quebec Regulations, *supra* note 4 at 4.

UPDATED MODEL RULE – TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING

Obligation to Report – definition of "local counterparty"

CMIC acknowledges that the definition of "local counterparty" under the Initial Model TR Rule has been amended to reduce its scope. However, in CMIC's view, the definition of "local counterparty" still has an extra-territorial reach that is inconsistent with the approach taken in global OTC derivatives markets.

Paragraph (c)

Under paragraph (c) of the definition of "local counterparty"[11], if a transaction is entered into by a non-Canadian affiliate of a Canadian party who is "responsible for the liabilities" of that non-Canadian affiliate, such non-Canadian affiliate will be responsible for ensuring all of its transactions are reported under section 25[12] of the Updated Model TR Rule, even if there is no connection with Canada (other than the fact that the parent company is Canadian). For example, an affiliate of a Canadian bank operating in China that is generally supported by its parent, and that enters into an interest rate swap with a Chinese party would be required to report all of its transactions to a designated trade repository pursuant to the Updated Model TR Rule. This approach is inconsistent with the approach adopted by regulators in larger OTC derivatives jurisdictions, such as by the CFTC under Dodd-Frank.

The CFTC definition of "US person" encompasses persons within the United States as well as persons that may be domiciled or operate outside the United States but whose swap activities nonetheless have a "direct and significant connection with activities in, or effect on, commerce of the United States". Under the Proposed Guidance[13], the term "U.S. person" includes an entity in which the direct or indirect owners thereof are "responsible for the liabilities" of such entity and one or more of such owners is a U.S. person. However, in the Final Cross-Border Guidance[14], the CFTC has expressly clarified that its interpretation of the phrase "responsible for the liabilities" would not extend to a non-U.S. affiliate guaranteed by a U.S. person, and is meant to extend to unlimited liability companies and similar types of entities in which a U.S. person has a direct or indirect majority ownership interest.[15] By contrast, the CFTC has also said in the Final Cross-Border Guidance that limited liability corporations or limited liability partnerships would not generally be covered under this particular branch of the definition of "U.S. person".[16] In CMIC's view, this is the approach that should be adopted for purposes of determining the meaning of "responsible for the liabilities of that affiliated party" in the Updated Model TR Rule and the applicable explanatory guidance should be clarified to that effect. Without such clarification, the CSA will be taking a position on extra-territoriality that is

[11] Updated Model TR Rule, *supra* note 1, s 1(1); Proposed Manitoba TR Rule, *supra* note 2, s 1(1); Proposed Ontario TR Rule, *supra* note 3, s 1(1); Draft Quebec TR Regulation, *supra* note 4, s 1(1).

[12] Updated Model TR Rule, *supra* note 1, s 25; Proposed Manitoba TR Rule, *supra* note 2, s 25; Proposed Ontario TR Rule, *supra* note 3, s 25; Draft Quebec TR Regulation, *supra* note 4, s 25.

[13] See CFTC, Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 F.R. 41214 (July 12, 2012) (the "Proposed Guidance"). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf.

[14] See CFTC, Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 F.R. 45292 (July 26, 2013) (the "Final Cross-Border Guidance"). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf.

[15] *Ibid* at 45312.

[16] *Ibid*. The Final Cross-Border Guidance expressly recognizes the principle of international comity, and that the relevant foreign jurisdiction has a strong supervisory interest in regulating the activities of that foreign entity.

more intrusive and far-reaching, and is more likely to cause conflicts, than the approach taken by the CFTC. Given the extent to which the Financial Stability Board has indicated its concern over inconsistencies or duplicative regulatory requirements between national approaches to the implementation of G20 requirements,[17] CMIC submits that the CSA should remove such extra-territorial features in its proposed rule which could lead to inconsistencies and duplicative regulatory requirements.

Paragraph (b)

Under paragraph (b) of the definition of "local counterparty", any counterparty that is "subject to" regulations providing that a person trading in derivatives must be registered is considered a "local counterparty". CMIC submits that this wording is ambiguous and may result in unnecessary dual-reporting. In particular, it would appear that even if a party is exempt from any registration requirements under provincial law, it would still be "subject to" such regulations and thus be included within the definition of "local counterparty". For example, a foreign dealer may be exempt from registration under applicable provincial law because it is subject to comparable regulations in its "home" jurisdiction, but based on the current wording of paragraph (b) of the definition of "local counterparty", such foreign dealer would have a duty to report trades under both the Canadian rules and the rules of its home jurisdiction.

Substituted Compliance

In our response letter on the Initial Model Rules, CMIC suggested that substituted compliance should be expressly addressed with the explicit result that the reporting of trades under approved designated non-Canadian regimes should satisfy the reporting requirements under the Initial Model TR Rule. The CSA has responded[18] that such substitute compliance will be addressed by providing exemptions on a case-by-case basis from the reporting requirements under the Updated Model Rules. In CMIC's view, this approach is not practical and, since substitute compliance is not counterparty specific but would apply to all parties reporting under such non-Canadian regime, no purpose is served by doing this on a case-by-case basis. The case-by-case approach does not take into account the fact that the vast majority of OTC derivatives market participants will need to comply with either Dodd-Frank or the *European Market Infrastructure Regulation* ("EMIR")[19]. CMIC strongly believes that the Updated Model TR Rule should expressly provide that a counterparty is exempt from the requirements under the Updated Model TR Rule if such counterparty complies with "recognized" data reporting requirements of another jurisdiction and if such counterparty submits a letter to the applicable securities regulator stating that it is relying upon such exemption. From time to time, the relevant securities regulator would publish a list of such "recognized" data reporting requirements. For example, this published list could recognize the swap data repository reporting rules of the CFTC as set out under Dodd-Frank. CMIC submits that the explanatory guidance should clarify that the securities regulator will, from time to time, examine the data reporting rules of other jurisdictions, whether at the instigation of the securities regulator or at the request of a market participant, and determine whether or not compliance with such rules will substantially satisfy the requirements under the Updated Model Rules. If the answer is yes, such data reporting requirements rules will be deemed to be "recognized" by the securities regulator and added to the list. Such an approach will

[17] See FSB, OTC Derivatives Market Reforms: Fifth Progress Report on Implementation (April 15, 2013) at 45. Available at: http://www.financialstabilityboard.org/publications/r_130415.pdf.

[18] Updated Model Rules, *supra* note 1 at 56.

[19] See Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (July 4, 2012). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF.

reduce the administrative burden on the part of each securities regulator by not having to process exemptions from each market participant and will ensure a level playing field for all market participants.[20]

Trade Repository Initial Filing and Designation

The CSA has indicated[21] that a system of reciprocity or recognition which allows for a trade repository that is designated in any province to be automatically deemed designated in all provinces is outside the scope of the Updated Model Rules. CMIC continues to support the implementation of such a passport system. As the Canadian OTC derivatives market represents only approximately 3% of the global market,[22] in order to remain competitive, care should be taken to ensure that Canadian regulations do not present unnecessary obstacles for parties (whether trade counterparties or trade repositories) to be able to deal with Canadian market participants. Trade repositories seeking to work with Canadian market participants will need to be designated under the rules or regulations of all Canadian provinces and territories, thus requiring them to deal with potentially 13 different regulators. This requirement alone may constitute enough of an administrative burden for some trade repositories to decide not to do business with Canadian market participants. Adopting a process that is as streamlined and efficient as possible would clearly mitigate this risk.

Confirmation of Data and Information

Section 23[23] of the Updated Model TR Rule requires that a designated trade repository must establish written policies and procedures to confirm with each counterparty that is a participant that reported derivatives data is correct. As indicated in our prior submissions, CMIC continues to support the position that if trade information is received by the trade repository from a clearing agency or a swap execution facility ("SEF"), there should not be a positive requirement on the trade repository to confirm the accuracy of the reported data with both counterparties. Removing this requirement in such circumstances would produce a result that is consistent with Dodd-Frank.[24] Under Dodd-Frank, communication need not be direct and affirmative where the trade repository has formed a reasonable belief that the data is accurate, the data or accompanying information reflects that both counterparties agreed to the data and the counterparties were provided with a 48-hour correction period. However, under Dodd-Frank, the trade repository must affirmatively communicate with both parties to the transaction when creation data is submitted directly by a swap counterparty. For swap continuation data, a trade repository has confirmed the accuracy of such data for Dodd-Frank purposes if the trade repository has notified both counterparties of the data that was submitted and provided both counterparties with a 48-hour correction period, after which a counterparty is assumed to have

[20] If such an exemption is not provided in the Updated Model Rules, the applicable securities regulator may not be able to efficiently grant relief as it may be prohibited from granting an order of general application. See, for example, section 143.11 of the *Ontario Securities Act*.

[21] Updated Model Rules, *supra* note 1 at 56.

[22] Based on published unaudited financial statements for the second quarter of fiscal 2013 for the 6 largest Canadian banks and derivatives market statistics for end-December 2012 published by The Bank for International Settlements. This figure is an approximation only and has not been adjusted to reflect double-counting or timing issues.

[23] Updated Model TR Rule, *supra* note 1, s 23; Proposed Manitoba TR Rule, *supra* note 2, s 23; Proposed Ontario TR Rule, *supra* note 3, s 23; Draft Quebec TR Regulation, *supra* note 4, s 23.

[24] See CFTC, Final Rule, Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 F.R. 54,538 (September 1, 2011) at 54,579. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-20817a.pdf ("SDR Registration Rule").

acknowledged the accuracy of the data. CMIC supports this approach used under Dodd-Frank and recommends that the Updated Model TR Rule incorporate this Dodd-Frank model.

Duty to Report; Reporting Counterparty

Subsection 27(1)

CMIC welcomes the CSA's amendment to subsection 27(1)[25] of the Updated Model TR Rule, which introduces a hierarchy of counterparty types for the purposes of determining reporting obligations. As suggested in our prior submission, CMIC supports the hierarchical approach of determining reporting obligations, which is consistent with Dodd-Frank[26] and other international regimes. While CMIC believes that subsection 27(1) of the Updated Model TR Rule is an improvement over the Initial Model TR Rule, it remains concerned that the CSA's proposed hierarchy does not sufficiently recognize counterparty types. In particular, CMIC has reservations about the omission of SEFs/designated contract markets ("DCMs") from the CSA's proposed hierarchy. SEFs and DCMs figure prominently in the Dodd-Frank reporting regime.

One of the animating principles behind the Dodd-Frank reporting hierarchy is to ensure that reporting is conducted "by the registered entity or counterparty having the easiest, fastest and cheapest access to the data in question, and most likely to have automated systems suitable for reporting."[27] Consistent with this principle, the CFTC has determined that a SEF/DCM should be designated as the reporting counterparty wherever a swap is executed over the facilities of a SEF/DCM.[28] Under Dodd-Frank, SEFs/DCMs are responsible for reporting certain swap creation data immediately after the execution of a transaction, including all of the primary economic terms of that transaction.[29] The CFTC noted that SEFs/DCMs would be well positioned to report such primary economic terms, given that the contract certification process associated with execution over a SEF/DCM would define many of these terms.[30] Separately, the CFTC recognized a number of additional benefits to making a SEF/DCM the reporting counterparty, including utilization of the technology of the execution platform, increased speed of reporting (and by extension, increased transparency), and the ability for "straight-through" processing.[31]

CMIC agrees with these views and submits that the SEF/DCM be the reporting counterparty. Although a reporting counterparty can delegate its reporting obligations under subsection 27(4)[32], including to a SEF/DCM, it is CMIC's view that if a trade is executed pursuant to the facilities of a SEF/DCM, the SEF/DCM should exclusively have the reporting obligations, just as in the U.S. Accordingly, CMIC submits that subsection 27(1)(a) of the Updated Model TR Rule should expressly include a SEF/DCM as the reporting counterparty. Further, it can be anticipated that SEFs will play an important role in the Canadian OTC derivative market and the CSA should give serious

[25] Updated Model TR Rule, *supra* note 1, s 27(1); Proposed Manitoba TR Rule, *supra* note 2, s 27(1); Proposed Ontario TR Rule, *supra* note 3, s 27(1); Draft Quebec TR Regulation, *supra* note 4, s 27(1).

[26] See CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 17 C.F.R. 45 (January 13, 2012). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33199a.pdf.

[27] *Ibid* at 2138.

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid* at 2142.

[31] See CFTC, Final Rlue, Real-Time Public Reporting of Swpa Transaction Data, 17 C.F.R. Part 43 (June 27, 2012) at 1198. Available at: http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/ssLINK/2012-15481a.

[32] Updated Model TR Rule, *supra* note 1, s 27(4); Proposed Manitoba TR Rule, *supra* note 2, s 27(4); Proposed Ontario TR Rule, *supra* note 3, s 27(4); Draft Quebec TR Regulation, *supra* note 4, s 27(4).

consideration to formulating an appropriate regulatory regime relating to SEFs, as has been done under Dodd-Frank.

Subsection 27(2)

CMIC continues to have reservations regarding the responsibilities of local counterparties under subsection 27(2)[33] of the Updated Model TR Rule, particularly as it relates to end-user local counterparties. If a reporting counterparty (as determined under subsection 27(1)(a) (a central clearing agency) or subsection 27(1)(b) (a dealer)) fails to comply with the reporting obligations under the Updated Model TR Rule, end-user local counterparties are required to act as the reporting counterparty. End-user local counterparties do not, and are not expected to, have the infrastructure to perform the reporting counterparty's obligations. In addition, such end-user local counterparties will have serious practical challenges in monitoring a foreign counterparty's compliance with reporting obligations under the Updated Model TR Rule.

CMIC submits that subsection 27(2) should be removed entirely or, in the alternative, amended such that the local counterparty is not responsible in the event that a central clearing agency fails to comply with its reporting obligations. As mentioned above, CMIC is of the view that where parties to a transaction have agreed to clear such transaction using a CCP, the CCP should exclusively have the reporting obligations, and by extension, any liabilities associated with a default in those obligations. If part of the CSA's motivation for making a local counterparty liable in these circumstances is to ensure that local securities regulators are able to assert jurisdiction over the reporting counterparty, such an approach is unnecessary. Where the reporting counterparty is a foreign central clearing agency, that foreign central clearing agency will need to have sought and obtained approval or designation by a local Canadian securities regulator under the relevant province's Securities Act (or Derivatives Act). Thus, such entities will have submitted and become subject to the jurisdiction of such regulator. As a result, local regulators will have a very real basis for asserting jurisdiction over these entities, and for monitoring and sanctioning their conduct.

Drafting comment: CMIC submits that subsection 27(2) should be removed entirely or, in the alternative, amended to read:

> Despite any other provision in this Rule, if the reporting counterparty as determined under subsection (1) (i) is not a clearing agency, (ii) is not a local counterparty and (iii) that counterparty does not comply with the reporting obligations of a local counterparty under this Rule, the local counterparty must act as the reporting counterparty.

Drafting comments: In the explanatory guidance for the Updated Model TR Rule, we suggest revising subsection 27(1), (2) and (4)[34] as follows:

> (1) ~~Under paragraphs 27(1)(d), if~~If the counterparties are unable to ~~identify~~agree who should report the transaction under paragraph 27(1)(c), then under paragraph 27(1)(d), both counterparties must act as reporting counterparty. However, it is the Committee's view that one counterparty to every transaction should accept the reporting obligation to avoid duplicative reporting.
>
> (2) Subsection 27(2) applies to situations where the reporting counterparty, as determined under subsection 27(1), is not a local counterparty. In situations where a non-local reporting counterparty

[33] Updated Model TR Rule, *supra* note 1, s 27(2); Proposed Manitoba TR Rule, *supra* note 2, s 27(2); Proposed Ontario TR Rule, *supra* note 3, s 27(2); Draft Quebec TR Regulation, *supra* note 4, s 27(2).

[34] Updated Model Rules, *supra* note 1 at 49; Proposed Manitoba Rules, *supra* note 2 at 18; Proposed Ontario Rules, *supra* note 3 at 5783-84; Draft Quebec Regulations, *supra* note 4 at 14-15.

does not report a transaction or otherwise fails to fulfil the local ~~counterparties~~counterparty's reporting duties~~,~~ under section 25, the local counterparty must act as the reporting counterparty. The Committee is of the view that non-local counterparties that are dealers or clearing agencies should assume the reporting obligation for non-dealer counterparties. However, to the extent that non-local counterparties ~~are not subject to~~, other than a clearing agency **[designated/registered]** under **[the applicable local securities legislation]**, fail to fulfil the local counterparty's reporting ~~obligation under the Model TR Rule~~duties, it is necessary to impose the ultimate reporting obligation on the local counterparty.

(4) Subsection 27(4) permits the delegation of all reporting obligations of a reporting counterparty. This includes reporting of initial creation data, life-cycle data and valuation data. For example, some or all of the reporting obligations may be delegated to a third-party service provider. However, ~~the local~~subject to subsection 27(2), the reporting counterparty remains responsible for ensuring that the derivatives data is accurate and reported within the timeframes required under the Model TR Rule.

Unique Transaction Identifiers (UTI)

Under subsection 31(2), a trade repository can incorporate a UTI previously assigned to the transaction. It is CMIC's view that where a transaction has been reported with a "unique swap identifier", the rules should provide that the UTI will be that "unique swap identifier".

Reporting of Valuation Data

Subsection 35(1)[35] of the Updated Model TR Rule provides that, if a transaction is cleared, both the clearing agency and the local counterparty must report valuation data. Subsection 35(2)[36] provides that if a transaction is not cleared, valuation data must be provided daily by a dealer and quarterly for all non-dealer counterparties. As mentioned above, end-user local counterparties do not have the infrastructure to report derivatives data and in some cases, may not have the expertise to generate valuation data. In CMIC's view, only the reporting party identified by the hierarchy set out under subsection 27(1) (as augmented by our above comments regarding the hierarchy) should have the obligation to report valuation data. Such reporting party will then have the obligation to report valuation data within the time frame set out in subsections 35(1) and (2).

Drafting comments: To incorporate the above changes, CMIC recommends that subsections 35(1) and (2) be amended as follows:

(1) For a transaction that is cleared, valuation data must be reported to the designated trade repository daily by ~~both~~ the clearing agency ~~and the local counterparty~~ using industry accepted valuation standards and relevant closing market data from the previous business day.

(2) Valuation data for a transaction that is not cleared must be reported to the designated trade repository

(a) daily using industry accepted valuation standards and relevant closing market data from the previous business day by each reporting~~local~~ counterparty that is a dealer, and

[35] Updated Model TR Rule, *supra* note 1, s 35(1); Proposed Manitoba TR Rule, *supra* note 2, s 35(1); Proposed Ontario TR Rule, *supra* note 3, s 35(1); Draft Quebec TR Regulation, *supra* note 4, s 35(1).

[36] Updated Model TR Rule, *supra* note 1, s 35(2); Proposed Manitoba TR Rule, *supra* note 2, s 35(2); Proposed Ontario TR Rule, *supra* note 3, s 35(2); Draft Quebec TR Regulation, *supra* note 4, s 35(2).

(b) at the end of each calendar quarter for all reporting~~local~~ counterparties that are not dealers.

Data Available to Public

Timing of Public Dissemination of Data

Unlike Dodd-Frank, the CSA's Updated Model TR Rule does not explicitly contemplate that transactions be publicly reported on an immediate or real-time basis. However, while the rule does not require real-time public reporting, subsection 39(3)[37] provides that such public dissemination of information must be made available "not later than" one or two days after execution, depending on whether one of the counterparties to the transaction is a dealer. Therefore, a trade repository could cause data to be reported to the public *sooner* than this two-day deadline, for example, on a real-time or near real-time basis pursuant to requirements under Dodd-Frank, and still comply with subsection 39(3) of the Updated Model TR Rule.

As indicated in its response letter on the Initial Model Rules, CMIC strongly believes that there should be a delay in the public dissemination of transaction level information. In CMIC's view, the regulatory objective of enhanced post-trade transparency does not necessarily require that transactions be reported to the public on a real-time basis. While the CFTC and SEC have decided that real-time public reporting is an appropriate regulatory measure for the U.S. marketplace, other regulators have reached different decisions with respect to their local markets. The Australian Securities & Investment Commission ("ASIC"), for example, recently informed market participants that it would not require trade repositories to report to the public on a real-time basis.[38] ASIC stated that in light of the purpose of the reporting obligation, the practicalities of reporting on a shorter timeframe, and the equivalence of the Australian regime with other jurisdictions, it was more appropriate that aggregate statistical data be provided to the public on a weekly basis.[39] Regulators in Hong Kong[40] have formed similar conclusions. In addition, in the European Union, EMIR requires the weekly publication of derivatives data by trade repositories.[41] CMIC submits that the decisions of these foreign regulators may provide a useful template for the CSA's rulemaking, given that the derivatives markets of Australia and Hong Kong are highly comparable to the Canadian market in terms of size, product and participant composition. As such, CMIC submits that subsection 39(3) should be amended to provide that public dissemination by a trade repository of transaction level data occur no sooner than one week after the data is received from the reporting counterparty. Alternatively, CMIC submits that (i) subsection 39(3) should be amended to provide that public dissemination by a trade repository occur only in respect of *aggregated* data no sooner than the one or two day time frame, as applicable, and (ii) there should be a one year delay in the public dissemination of *transaction level* data in order to

[37] Updated Model TR Rule, *supra* note 1, s 39(3); Proposed Manitoba TR Rule, *supra* note 2, s 39(3); Proposed Ontario TR Rule, *supra* note 3, s 39(3); Draft Quebec TR Regulation, *supra* note 4, s 39(3).

[38] See ASIC, Consultation Paper 205, Derivative Transaction Reporting (March, 2013) at 17. Available at: http://www.financialstabilityboard.org/publications/r_130415.pdf.

[39] *Ibid*.

[40] See HKMA-SFC, Joint consultation conclusions on the proposed regulatory regime for the over-the-counter derivatives market in Hong Kong (July, 2012) at 26, 28. Available at: http://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2012/20120711e3a34.pdf.

[41] See Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data (February 23, 2013), Article 1(2). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0033:0036:EN:PDF.

allow the CSA time to consult with market participants and study data so that block trade rules and the risk of reverse engineering of trades can be assessed. See below for further discussion relating to block trade rules and the ability to reverse engineer trades.

Block Trade Rules

If the foregoing recommendation for weekly dissemination to the public of transaction level data is not adopted, CMIC submits that it is necessary that the Updated Model TR Rule provide for delays in disclosure of large notional or "block" transactions. As suggested in CMIC's response letter to the Initial Model Rules, disclosure of block trades on an immediate or real-time basis may negatively impact market function, by impairing the ability of a counterparty to hedge its exposure to a transaction.[42] A number of studies have demonstrated that reduced ability to hedge may have negative effects on the derivatives marketplace, including decreased liquidity, reduced ability to trade, and increased costs for end users.[43] In order to avoid these outcomes, CMIC submits that it is necessary for the CSA to adopt rules providing for delays in disclosure, comparable to those found under the Dodd-Frank reporting regime. Under Dodd-Frank, counterparties to transactions with notional values above the minimum block sizes set by the CFTC will be permitted delays in reporting their transactions to the public. The length of the reporting delays will vary depending on the type of counterparty and whether or not the transaction is subject to clearing requirements. For transactions that are subject to mandatory clearing and involve at least one counterparty that is a dealer, for example, the CFTC rules ultimately contemplate a reporting delay of 15 minutes.[44] Careful study of the Canadian market will be necessary to determine what are appropriate minimum block sizes and delay periods for Canadian market participants, as pointed out in CMIC's earlier submission.

While the CSA has indicated that it anticipates providing relief from the public reporting requirements under the discretionary exemption power in section 41,[45] CMIC submits that this is not a workable solution when considering the number of market participants and transactions that may potentially be subject to relief. Requiring market participants to file requests for relief on a routine basis would not only place a considerable burden on those participants in terms of time and money, it would place great strains on the administrative efficiency of local securities regulators. In addition, it is difficult to conceive how a discretionary exemption could work in the context of reporting obligations that may potentially be real-time, as discussed above. This means that market participants may face operational challenges in complying with the obligation to report while simultaneously seeking an exemption.

Content of Data to be disclosed publicly

CMIC supports the goal of post-trade transparency. However, in CMIC's view, in a relatively small OTC derivatives market such as Canada, with only a small number of sell-side market participants, public disclosure of aggregate data on open positions, transaction volumes, number of transactions and average prices will create an ability to employ reverse-engineering trading strategies and, through a reverse-engineering analysis of such trade data, may cause what is tantamount to inadvertent

[42] See, for example, ISDA, Block trade reporting for over-the-counter markets (January 11, 2011) at 4. Available at: http://www.isda.org/speeches/pdf/block-trade-reporting.pdf.

[43] *Ibid.*

[44] See CFTC, Final Rule, Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 17 C.F.R. Part 43 (May 31, 2013). Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-12133a.pdf.

[45] Updated Model TR Rule, *supra* note 1, s 41; Proposed Manitoba TR Rule, *supra* note 2, s 41; Proposed Ontario TR Rule, *supra* note 3, s 41; *Derivatives Act*, RSQ, c I-14.01, s 86.

disclosure of confidential information. The Canadian market is, in relative terms, quite small. CMIC would be supportive of such public disclosure of information only if the trade reporting rules preserve the anonymity of market participants and ensure there is no detrimental impact on market liquidity or function. Confidential information can be preserved and not disclosed inadvertently by limiting the type of information to be disclosed publicly under subsection 39(2)[46] of the Updated Model TR Rule. According to the CPSS-IOSCO Report on OTC Derivatives Data Reporting and Aggregation Requirements, the nature of data disclosed should "take due regard of concerns about revealing individual firm positions or providing the public with sufficient information to indirectly infer those positions".[47] Given the volume in the Canadian market and the small number of market participants, CMIC submits that it will be easy to identify the counterparties to certain transactions if aggregate data by (i) geographic location and (ii) type of counterparty is required to be reported. CMIC therefore submits that these requirements should be removed from subsection 39(2) of the TR Rule. Disclosure of this type of information is not a requirement under Dodd-Frank.

Data Available to Counterparties

The members of CMIC continue to have concerns over conflicts between the Updated Model TR Rule and foreign laws that prohibit disclosure of certain information. At least two types of foreign laws may potentially conflict with the Updated Model TR Rule: (1) privacy laws, which typically prevent the disclosure of information about a natural person or entity; and (2) blocking statutes (including secrecy laws), which may prevent the disclosure of information regarding entities in the jurisdictions to third parties and or foreign governments.[48] Although privacy laws may often be overridden through contractual mechanisms such as consent, the consent of a counterparty may not be sufficient to override the effect of a blocking statute.[49] In at least some cases, then, derivatives market participants may find themselves in the unfortunate position of being subject to two legal obligations that are incompatible: complying with one will violate the other, and vice versa. CMIC submits that it is neither fair nor reasonable to place market participants in a position of having to choose which set of rules to comply with, thus exposing market participants to potential liabilities that could include both civil and criminal penalties.[50]

While issues around conflicts between reporting laws and foreign privacy or blocking laws are being explored at an international level, there has been relatively little progress to date in reaching a consensus regulatory position globally. As the Financial Stability Board notes in its most recent progress report on derivatives market reforms, responses to the issue are still at "an early stage" with "few…regulatory solutions…in force"[51]. Given the prevailing state of uncertainty and the lack of international consensus on an appropriate regulatory response, CMIC would like to reiterate its earlier recommendation that the CSA provide limited relief from reporting obligations in these types of conflict-of-law situations. Although the CSA has suggested that conflict-of-law issues may be

[46] Updated Model TR Rule, *supra* note 1, s 39(2); Proposed Manitoba TR Rule, *supra* note 2, s 39(2); Proposed Ontario TR Rule, *supra* note 3, s 39(2); Draft Quebec TR Regulation, *supra* note 4, s 39(2).

[47] See CPSS-IOSCO, Report on OTC Derivatives Data Reporting and Aggregation Requirements (January, 2012) at 22. Available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf.

[48] *Supra* note 17 at 48.

[49] *Ibid*.

[50] See ISDA, Comment Letter on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (August 27, 2012) at 3. Available at: http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww2.isda.org%2Fattachment%2FNDc1Mw%3D%3D%2FComment%2520Letter%2520-%2520CFTC%2520Reporting%2520Obligations%2520FINAL%2520082712.pdf&ei=tWsCUsnkA_KgyAH6l4DoAQ&usg=AFQjCNG3ZXVs8Od2rs7sX6QcpexkPJy3Aw&sig2=B86rivMVEacfoYVjcYHbQw&bvm=bv.50310824,d.aWc.

[51] *Supra* note 17 at 49.

adequately addressed through the discretionary exemption under section 41, CMIC submits that this is not a workable solution, given the large number of market participants that may potentially need to avail themselves of such an exemption.

Rather, in cases of conflict between reporting laws and foreign privacy or blocking laws, CMIC submits that the CSA should allow the reporting counterparty to withhold disclosure of certain identity information without having to seek the explicit approval of the regulator. Under this approach, market participants would continue to report all information in relation to a derivatives transaction except for identity information, serving to protect the privacy interests of counterparties, but also to substantially promote the regulatory objective of enhanced transparency. In addition, CMIC requests that the CSA continue to monitor and participate in the implementation of solutions on the international stage, and that it coordinate with international regulators on the development of regulatory, legislative and other changes that will protect market participants from unnecessarily being exposed to liabilities as a result of conflicting laws.

Implementation Timelines

As mentioned above, to the extent the Updated Model Rules differ from the requirements under Dodd-Frank, market participants will need to amend their operational systems and procedures in order to comply with the Updated Model Rules. In particular, due to the breadth of the local counterparty definition currently in the Updated Model TR Rule, this will mean capturing entities that are not currently required to report transactions under Dodd-Frank or any other jurisdiction's reporting regime. In addition to the "Custodian" data field difference between the Updated Model TR Rule and the data fields under Dodd-Frank, the trade reporting rules under Dodd-Frank have been finalized only for asset classes falling under the CFTC's jurisdiction. Trade reporting rules for asset classes falling under the jurisdiction of the SEC under Dodd-Frank have not been finalized; however, such asset classes are included as a "derivative" under the Updated Model Rules. As a result, even though some market participants are already reporting under Dodd-Frank, their systems will need to be amended to cover both the additional "Custodian" data field and these additional asset classes. As mentioned in CMIC's response letter on the Initial Model Rules, this will mean adding a patch to an existing reporting system in order to add or remove data fields to comply with Canadian reporting requirements. Even where a "patch" is sufficient to comply with the Updated Model Rules, this is not a simple task, as many counterparties have multiple trade capture systems depending on the specific product type, asset class or jurisdiction involved. Once a patch has been created, it needs to be tested, which involves running parallel systems. As well, many such systems are provided by third-party vendors with the result that the timing of completion of any changes is not within the control of the local counterparty. CMIC would therefore recommend that the effective date for reporting such additional data field and additional asset classes be deferred for a period of at least one year following the date on which data is otherwise required to be reported under section 42 of the Updated Model TR Rule. As mentioned above, due to the small size of the Canadian OTC derivatives market relative to the global OTC derivatives market, CMIC submits that Canadian regulators should not be setting precedent in this area. Providing such a delay in the implementation date for such additional data field and asset classes allows Canadian regulators to examine the final trade reporting rules of the SEC and assess the extent to which Canadian rules are harmonized with the SEC's rules.

Exemptions

CMIC urges the CSA to reconsider the $500,000 exemption under subsection 40(b)[52] of the Updated Model TR Rule. As mentioned in our previous response letter, we submit that the $500,000

[52] Updated Model TR Rule, *supra* note 1, s 40(b); Proposed Manitoba TR Rule, *supra* note 2, s 40(b); Proposed Ontario TR Rule, *supra* note 3, s 40(b); Draft Quebec TR Regulation, *supra* note 4, s 40(b).

exemption with respect to aggregate notional value is too low. Small businesses may be inadvertently caught by these rules and would be adversely affected. Under subsection 27(2), a local counterparty that completes a trade with a dealer that is not a local counterparty will ultimately have responsibility for reporting if the non-local counterparty does not complete the reporting. This could result in an onerous burden on any buy-side participant, but in particular, on smaller market participants. CMIC submits that any final determination of this threshold amount should be determined after the reporting regime has been implemented and the data studied for a period of 3 years. In the absence of an understanding as to why the exemption is cast as applying only to physical commodity transactions, CMIC submits that the threshold, once determined, should apply to all types of OTC derivatives.

Data Fields

In addition to the comments relating to the harmonization of data fields with Dodd-Frank, CMIC has the following comments with respect to specific data fields set out in Appendix A of the Updated Model TR Rule:

(i) Electronic Trading Venue Identifier. In Appendix A, the "Electronic Trading Venue Identifier" data field is selected as applicable with respect to pre-existing transactions, however the previous data field ("Electronic Trading Venue") is not applicable, which would seem to be inappropriate. The "Electronic Trading Venue Identifier" should therefore be changed to not being applicable for pre-existing transactions.

(ii) Execution Timestamp. As this is defined as being the time executed on a trading venue, this implies that the "Execution Timestamp" is not applicable to transactions not executed on a trading venue. CMIC would like this confirmed by the CSA. Also, it is not always the case that this information is available when a counterparty is backloading pre-existing trades. Accordingly, it is CMIC's view that this should be changed to "No" for pre-existing trades, or indicate that this should be included for pre-existing trades only when available.

(iii) Confirmation Timestamp. This is defined as the time the transaction was confirmed by both parties. However, in reality, it will be the time that the Reporting Party has reported as when confirmed, which could be different from the timestamp of the other party.

CONCLUSION

CMIC 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. Thoughtful inclusion by regulators of the points raised throughout this letter will meaningfully contribute to the success of the development of the final rules relating to designation of trade repositories and trade reporting.

As we have noted in our prior submissions, each subject relating to OTC derivatives regulation is interrelated with all other aspects. As such, CMIC reserves the right to make supplementary submissions relating to the Updated Model Rules following publication of further consultation papers and model and draft rules.

CMIC hopes that its comments are useful in the development of rules relating to designation of trade repositories and trade reporting and that the CSA takes into account the practical implications for all market participants who will be subject to such rules. CMIC welcomes the opportunity to discuss this response with representatives from the CSA. The views expressed in this letter are the views of the following members of CMIC:

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
Deutsche Bank A.G., Canada Branch
Healthcare of Ontario Pension Plan
HSBC Bank Canada
JPMorgan Chase Bank, N.A., Toronto Branch
Manulife Financial Corporation
National Bank of Canada
OMERS Administration Corporation
Ontario Teachers' Pension Plan Board
Royal Bank of Canada
The Bank of Nova Scotia
The Toronto-Dominion Bank

APPENDIX A

ADDRESSEES

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8
e-mail: comments@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

Douglas R. Brown, General Counsel & Director
The Manitoba Securities Commission
500 – 400 St. Mary Avenue
Winnipeg, Manitoba
R3C 4K5
e-mail: Doug.brown@gov.mb.ca

Abel Lazarus, Securities Analyst
Nova Scotia Securities Commission
Ste. 400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia
B3J 1P3
e-mail: lazaruah@gov.ns.ca

Michael Brady, Senior Legal Counsel
British Columbia Securities Commission
701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, British Columbia
V7Y 1L2
e-mail: mbrady@bcsc.bc.ca

Debra MacIntyre, Senior Legal Counsel, Market Regulation
Alberta Securities Commission
Suite 600
250–5th St. SW
Calgary, Alberta
T2P 0R4
e-mail: debra.macintyre@asc.ca

Wendy Morgan, Legal Counsel
New Brunswick Securities Commission
Suite 300
85 Charlotte Street
Saint John, New Brunswick
E2L 2J2
e-mail: wendy.morgan@nbsc-cvmnb.ca