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September 6, 2013

VIA E-MAIL

Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario
M5H 3S8
Email: comments@osc.gov.on.ca

Dear Mr. Stevenson,

Re: Proposed Ontario Securities Commission ("OSC") Rule 91-507 Trade Repositories and Derivatives Data Reporting (the "Proposed Rule") and Companion Policy 91-507CP (the "Proposed CP")[1]

Ontario Teachers' Pension Plan ("**OTPP**") is the largest single-profession pension plan in Canada, with $129.5 billion in net assets.[2] It was created by its two sponsors, the Ontario government and the Ontario Teachers' Federation, and is an independent organization. In carrying out its mandate, OTPP administers the pension benefits of 179,000 current elementary and secondary school teachers in addition to 124,000 members.[3] OTPP operates in a highly regulated environment and is governed by the *Teachers' Pension Act*[4] and complies with the *Pension Benefits Act*[5] and the *Income Tax Act.*[6] More than 920 employees of OTPP help to invest the fund's assets, administer the pension plan, pay out benefits, and report and advise on

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1 OSC Request for Comments, 36 OSCB 5737 (2013). Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20130606_91-506_91-507_rfc-derivatives.pdf.

2 Asset value current as of December 31, 2012. Ontario Teachers' Pension Plan Board, Annual Report, "An Evolving Plan 2012 Annual Report" online: OTPP <http://www.otpp.com/documents/10179/686250/Annual+Report/39482a3d-435c-40d1-96cf-cd6a38d6880a> at 4.

3 *Ibid* at 7.

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

5 *Pension Benefits Act*, RSO 1990, c P.8.

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

the plan's funding status and regulatory environment.[7] OTPP consistently receives accolades from industry groups for its investment returns and pension strategy.[8]

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

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

Reporting Counterparty

Section 27 of the Proposed Rule establishes who is responsible to report a derivatives transaction to a trade repository or local regulator.[9] We appreciate that as between two end-users, at least one of them will be required to report a transaction. However, we are very concerned that local counterparty end-users, and not foreign dealers and clearing agencies, are required to comply with the transaction reporting requirements under subsection 27(2) of the Proposed Rule.

Foreign dealers, clearing agencies and other regulated entities, are routinely required to comply with local securities regulation and other Canadian laws when conducting business with Canadians. The risk of non-compliance and the inability to enforce against such entities has not generally been cited as reasons for not imposing rules on foreign entities conducting business with Canadians. As in the case of virtually every other securities law, rule or instrument, foreign dealers, clearing agencies and other regulated entities carrying on business with end-users in Ontario should be required to comply with the transaction reporting provisions of the Proposed Rule.

Under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("**Dodd-Frank**") and other international derivative regulation initiatives, end-users are not currently required to report transactions when transacting with foreign dealers. The CFTC has specifically taken this approach because such foreign dealers are "more likely to have automated systems suitable for reporting."[10] Taking the contrary approach in Ontario is inconsistent with the goal of

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[7] *Supra* note 2 at 57.

[8] *Ibid* at 5.

[9] *Supra* note 1 at 5768.

[10] See CFTC Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 F.R. No. 9 (January 13, 2012) at 2167. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister /documents/file/ 2011-33199a.pdf.

international harmonization. As a result of attempted harmonization, all Canadian, United States and non-North American derivatives dealers, clearing agencies and other regulated market participants have made significant investments to develop compliant reporting systems. In our view, requiring Ontario end-users to implement reporting systems to facilitate trade reporting is inefficient, impractical and unfair. The time and resources necessary to develop such a system or alternatively, manual compliance, place an undue burden on Ontario end-users. The obligation to report derivatives trade data under the Proposed Rule should be imposed on dealers and clearing agencies party to such transactions, whether foreign or not. Such parties have the technological capability to generate required derivatives data and are in a far better position to efficiently provide reports mandated under the Proposed Rule.

Further, we do not believe the power to delegate the reporting function to third party service providers addresses the concerns stated above and may exacerbate such concerns. While the end-user has acquired and paid for reporting services, it remains ultimately responsible for such reporting and must maintain the relevant data in an accessible format in case the third party service provider fails to comply with its obligations. As such, the ability to delegate under the Proposed Rule, without relief from liability for such reporting, may be more of a burden than a benefit to the end-user.

We appreciate that imposing a reporting obligation on foreign dealers and clearing agencies may deter such entities from transacting with Ontario counterparties, which could negatively affect the liquidity of the Ontario market. We believe this issue would be resolved with the implementation of an easily accessible substitute compliance regime, providing foreign dealers and clearing agencies the opportunity to report in their home jurisdiction in full satisfaction of their reporting requirements under the Proposed Rule.

Reporting Valuation Data

We note that the OSC has changed subsection 35(1) to require the local counterparty to report valuation data daily. This is an unexplained change from the Canadian Securities Administrator's (the **"CSA"**) consultation paper published on December 6, 2012.[11] We believe this should revert to "reporting counterparty", particularly in light of the **inconsistency** it creates with clause 35(2)(b) which only requires quarterly reporting of valuation data for non-dealers. This approach is also contradictory to the reporting regime in the United States, where only the reporting counterparty is required to provide valuation data.

Data Available to the Public

While we appreciate the OSC's clarification of the data required for public dissemination under subsection 39(2) of the Proposed Instrument, we are still concerned with the requirement that the geographic location of a counterparty as well as the type of counterparty must be disclosed.[12] This is extremely problematic in the Ontario market due to the limited number of participants in Ontario. The release of the geographic location and type of counterparty to the public, together

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11 See *CSA Consultation Paper 91-301 – Model Provincial Rules*, (2012) 35 OSCB 10967 (the "Consultation Paper"). Available at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20121206_91-301_model-provincial-rules.pdf.

12 *Supra* note 1 at 5771.

with other publicly available data, would make it relatively easy to identify the Ontario end-user to a transaction, causing disproportionate harm to the Ontario end-user. Transparency in the derivatives market must be balanced with the legitimate business need for preservation of confidentiality of proprietary trades and the ability to hedge trades without market manipulation. The OSC needs to recognize that the inclusion of the aforementioned data fields would have the practical effect of publicly disclosing the identity of certain counterparties and their trades.

We would like to point out that the current CFTC rules do not require that a counterparty's geographic location and type to be disclosed to the public.[13] It is counterintuitive that the OSC mandates less anonymity for end-users while the CFTC allows for more anonymity, especially when considering the number of market participants in the United States versus Ontario. The nominal benefit gained from the public reporting of such data fields is disproportionate to the potential harm to end-users.

In addition, we note the OSC has provided minimal guidance surrounding what is to be disclosed to satisfy the fields for geographic location and type of counterparty, specifically referencing "United States" and "end-user", respectively in the Proposed CP.[14] At this level, we would question the usefulness of the information being released, specifically compared to the potential harm associated with the identification of the specific Ontario end-user. Alternatively, if more specific information is released, for example "province" and "end-user type - pension plan", the identity of the Ontario end-user would become readily apparent, causing undue harm to the Ontario end-user.

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

Principal Regulator Model

As the CSA expects that each province will enact province specific rules,[15] we are concerned with the duplication in reporting obligations arising from cross-jurisdictional transactions. We recommend that the OSC and other provincial and territorial regulators adopt a principal regulator model, similar to the existing principal regulator model for registrants and reporting issuers. This recommendation will increase market efficiency as well as provide for a more accurate picture of the Canadian derivatives market by reducing redundant reporting. While the OSC's response to the comment on the Consultation Paper is that such a passport system is outside the scope of the Proposed Rule, it is within the OSC's jurisdiction to abandon the Proposed Rule to attempt to work with the CSA and all Canadian securities regulators to develop and implement a Canada wide solution to Canada's derivatives trade reporting obligations.

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[13] See CFTC Final Rule, *Real-Time Public Reporting of Swap Transaction Data*, 77 F.R. No. 5 (January 9, 2012) at 1250. Available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33173a.pdf.

[14] *Supra* note 1 at 5786.

[15] *Supra* note 11.

Block Trades and Mandatory Delay

While the OSC has taken the position that block trade exemptions will "be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule",[16] we are of the opinion that the OSC should create a mandatory delay under subsection 39(3) for block trades. As currently drafted, subsection 39(3) does not differentiate between types of transaction. This "one size fits all" approach is insufficient to deal with the market reality that hedging a large block trade takes time. The additional systemic risk posed by a slight delay in the timing of disclosure of block trades is miniscule compared to the potential harm that could be caused to market participants.
Under section 39 of the Proposed Rule, the OSC should impose a mandatory delay in the public dissemination of block trade data. As many commenters to the Consultation Paper have noted, a time limit would significantly impede hedging strategies with respect block trades. To require public dissemination of block trade data according to the time frames currently in subsection 39(3) will allow arbitrage specialist to manipulate the market at the expense of all participants, thereby creating significant market inefficiencies. We would also like to note that the Dodd-Frank rules create specific reporting and clearing exemptions for block trades of certain sizes.[17] At the very least, we hope that the OSC will delay the implementation of subsection 39(3) and conduct further research on the Ontario block trade market, with a view to crafting a workable public reporting deadline.

Conclusion

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

Yours very truly,

Gregory O'Donohue
Legal Counsel, Derivatives

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[16] *Supra* note 1 at 5749.
[17] *Supra* note 13 at 1248.