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BY EMAIL

September 6, 2013

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario
M5H 3S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

Dear Mr. Stevenson:

**RE: Proposed Ontario Securities Commission Rule 91-507 Trade
Repositories and Derivatives Data Reporting**

I submit the following comments in response to the Notice and Request for Comments (the “**Request for Comments**”) published by the Ontario Securities Commission (“**OSC**”) on June 6, 2013 ((2013) 26 OSCB 5737) with respect to the Proposed Ontario Securities Commission Rule 91-507 *Trade Repositories and Derivatives Data Reporting* (the “**TR Rule**”) and Proposed Companion Policy 91-507CP *Trade Repositories and Derivatives Data Reporting* (the “**TR CP**”).

Thank you for the opportunity to comment on the Request for Comments. I support the OSC’s efforts to improve transparency in the derivatives market and to ensure that designated trade repositories operate in a manner that promotes the public interest.

Section 1(1) - Definition of “local counterparty”. The definition of “local counterparty”, particularly the inclusion in subsection (a) of the definition of “organized under the laws of Ontario”, is problematic in that it may capture a wide range of persons or companies that are organized under the corporate, partnership or other laws of Ontario for tax or other purposes, but that have no other connection to Ontario (e.g., limited partnerships formed under the *Limited Partnerships Act* (Ontario) but whose general partners and limited partners are all non-Canadian entities with little or no other connection with Canada).

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I respectfully urge the OSC to consider amending subsection (a) of the definition of “local counterparty” to include only persons or companies that have a head office or principal place of business in Ontario.

Section 25 – Duty to report, Section 33 – Creation data and Section 34 – Life-cycle data. With respect to transactions that are cleared through a clearing agency, the TR Rule appears to require the reporting of the following derivatives data:

- The original transaction between the local counterparty and the other counterparty would be reported to a designated trade repository as creation data.
- The novation of a derivative in connection with the original transaction being cleared through a clearing agency would be reported to a designated trade repository as a separate, new transaction with reporting links to the original transaction.
- Any subsequent life-cycle events to the original transaction or the novated transaction would be reported to a designated trade repository as life-cycle data.

Presumably, a novation would be reported as a separate, new transaction as opposed to a life-cycle event because the definition of “transaction” specifically includes “the novation of a derivative” to a clearing agency. I respectfully request that the OSC confirm that the above discussion corresponds to its expectations with respect to the reporting of creation data, life-cycle data and novations by a local counterparty or otherwise clarify the guidance contained in section 1(4) of the TR CP with respect to the reporting requirements applicable to the above derivatives data.

Section 27 – Reporting counterparty. Subsection 27(1)(a) provides that where a transaction is cleared through a clearing agency, the clearing agency will be responsible for reporting derivatives data to a designated trade repository.

In the case of a foreign-based clearing agency, it may be unaware that a counterparty to a derivative transaction qualifies as a “local counterparty” under the TR Rule (e.g., where the counterparty falls within category (c) under the definition of “local counterparty”). Therefore, the foreign-based clearing agency may also be unaware that it is responsible for reporting derivatives data to a designated trade repository under the TR Rule. Although the derivatives data reporting requirement ultimately falls on the local counterparty, any confusion between the counterparty and the foreign-based clearing agency regarding who bears the responsibility to report the derivatives data may result in delays in reporting the data or no reporting of the data at all.

Additionally, subsection 27(1) raises certain extra-jurisdictional issues regarding the imposition of data reporting requirements on foreign-based clearing agencies. However, it should be noted that foreign-based clearing agencies may not

be subject to Ontario securities laws and the OSC may not have jurisdiction over such entities.

Foreign-based clearing agencies that have been recognized pursuant to section 21.2 of the *Securities Act* (Ontario) or obtained an exemption from the clearing agency recognition requirement will be subject to the OSC's regulatory oversight and jurisdiction. As a result, the OSC has recourse against such recognized or exempt foreign-based clearing agencies. However, foreign-based clearing agencies that have not been recognized pursuant to section 21.2 of the *Securities Act* (Ontario) or obtained an exemption from the clearing agency recognition requirement will not be subject to the OSC's regulatory oversight and jurisdiction. As a result, the OSC has limited recourse against such foreign-based clearing agencies.

I respectfully suggest that references to "clearing agency" in subsection 27(1) be replaced by "recognized or exempt clearing agency" and further urge the OSC to consider the extra-jurisdictional implications of subsection 27(1).

Section 41 - Exemptions. The TR Rule does not contain any provision for reciprocity or recognition with respect to foreign-based trade repositories that are subject to the rules of an equivalent jurisdiction. The lack of reciprocity or recognition provisions for foreign-based trade repositories is a significant departure from previous CSA guidance. For example, in Consultation Paper 91-402 *Derivatives: Trade Repositories*, published on June 23, 2011, the CSA Derivatives Committee states the following:

The Committee recognizes that some foreign-based trade repositories may be subject to a comparable regulatory regime in their home jurisdiction and therefore full provincial regulation may be duplicative. In an effort to achieve international harmonization, the Committee is monitoring international policies for recognition of foreign trade repositories. For example, the European Commission has proposed that foreign trade repositories be recognized provided they are subject to equivalent supervision standards and are accessible to foreign regulators.

In Consultation Paper 91-301 *Model Provincial Rules - Derivatives Product Determination and Trade Repositories and Derivatives Data Reporting*, which sets out model rules and guidance on which the TR Rule is based, the CSA provided the following guidance with respect to foreign-based trade repositories:

In order for any trade repository, local or foreign, to be an acceptable venue for local market participants to comply with the reporting obligations contained in Part 3 of the TR Rule, the trade repository must be designated or recognized in the applicable provincial jurisdiction. However, the Committee recommends that exemptions under section 40 of the TR Rule to certain requirements of the TR Rule be made available to a foreign-based trade repositories if the trade repository is subject to an equivalent regulatory and oversight regime

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in its home jurisdiction. We recognize that some foreign-based trade repositories are already subject to equivalent regulation in their home jurisdiction and believe that the imposition of a duplicate regime is inefficient.

With respect to granting exemptions under the TR Rule generally, the OSC's position is that they "may be considered on a case-by-case basis under the exemption power in s. 41 of the TR Rule or any other applicable provision under securities or derivatives legislation." As a result, there is substantial uncertainty for foreign-based trade repositories regarding reciprocity or recognition, even in cases where the foreign-based trade repository is subject to the rules of an equivalent jurisdiction. I respectfully urge the OSC to consider implementing a process for providing reciprocity to, or recognition of, foreign-based trade repositories. If the OSC decides against a reciprocity or recognition process, then I urge the OSC to provide further guidance on how foreign-based trade repositories may seek an exemption under section 41 of the TR Rule and what criteria the OSC will consider in granting the exemption.

I thank you for the opportunity to express my views on these matters. Please do not hesitate to contact me if you have any questions in this regard.

This letter represents my personal comments (and not those of Stikeman Elliott LLP) with respect to the TR Rule and TR CP.

Yours truly,

(Signed) "Terence W. Doherty"

Terence W. Doherty

TWD/mm