



DLA Piper LLP (US)
500 Eighth Street, NW
Washington, DC 20004
www.dlapiper.com
Nicolette.KostDeSevres@dlapiper.com
T 202.716.7135
F 202.799.5190

January 29, 2016

SENT BY ELECTRONIC MAIL

Mrs. Josée Turcotte
The Secretary to the Commission
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario, M5H 3S8
comments@osc.gov.on.ca

Re: Comment Letter to OSC Consultation on Proposed Amendment to Rule 91-507

Dear Mrs. Turcotte:

We respectfully submit this letter in response to the request for public comment set forth in the Ontario Securities Commission's (the "OSC" or "Commission") Notice of Amendments and Request for Comments regarding the Commission's Rule 91-507 *Trade Repositories and Derivatives Data Reporting* and Companion Policy 91-507CP.

We are especially pleased to learn that the OSC has proposed amendments to inter-affiliate swaps reporting requirements and considered a reporting exemption to alleviate the burden on many non-financial entities who enter into swaps with their non-financial affiliates. We believe that amending the existing rules in response to the evolution of markets and cross-border regulation will enable the Commission to establish a suitable regulatory regime reflecting contemporary market circumstances while allowing Ontario to remain an attractive place for some of the largest global non-financial companies to maintain operations.

We would, however, like to address some key elements of one of the proposed amendments that do not clearly exempt non-financial entities from reporting where the parent is organized in the United States (the "US") and the relevant inter-affiliate swaps are not required to be reported in the US.

A. Discussion -- U.S. and Canadian Non-financial Affiliates

We represent many public companies and their Canadian subsidiaries, whose activities are predominantly non-financial in nature, and whose parent is organized in, and whose principal place of business is located in, the US (each, a "US Parent").

Each US Parent has numerous subsidiaries organized in various US and non-US jurisdictions such as Ontario and Quebec (such subsidiaries being the "Subsidiaries"; the US Parent and the Subsidiaries collectively being a "Corporate Group") which incur foreign exchange and interest rate risk in the ordinary course of their business activities. Neither the US Parent nor the Canadian Subsidiaries are actively involved in hedging the risks of fluctuations in the prices of physical commodities used, produced or processed in their businesses or in using credit or broad-based equity index derivatives for any purpose.



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i) CFTC exemption

US Commodity Futures Trading Commission (the "CFTC") No-Action Letter 13-09 (the "13-09 No-Action Letter") provides no-action relief for swaps between affiliated counterparties that are neither swap dealers nor major swap participants from certain swap data reporting requirements under parts 45 and 46 and regulation 50.50(b) of the CFTC's regulations.¹ Accordingly, swaps between a US Parent and a subsidiary organized under the laws of Ontario are not required to be reported in the US.

ii) Equivalence: CFTC rules deemed equivalent by the OSC

On August 14, 2014, the Commission adopted amendments to OSC Rule 91-507 ("Rule 91-507") which permit certain market participants to report under the CFTC's swap data reporting rules. These amendments include amendments to Appendix B to Rule 91-507 – *Trade Repositories and Derivatives Data Reporting Equivalent Trade Reporting Laws of Foreign Jurisdictions Subject to Deemed Compliance Pursuant to Subsection 26(5)* ("Appendix B"). The Commission has determined that the swap transaction reporting requirements of the CFTC are equivalent for the purposes of the deemed compliance provision in Subsection 26(5).²

Since the CFTC has decided that inter-affiliate swaps between non-financial entities do not pose a systemic risk important enough to require reporting, and has therefore excluded them from US reporting requirements under the 13-09 No-Action Letter, and since the OSC considers the CFTC reporting rules as equivalent under Appendix B, the OSC should expressly recognize the equivalence granted in the 13-09 No-Action Letter and expressly exempt swaps within a Corporate Group from any reporting requirements in Ontario.

iii) Inter-affiliate swaps between non-financial US and Canadian entities

Most US Parents exist principally to conduct non-financial business operations for themselves and the rest of their Corporate Group. They are not in the primary business of trading swaps or other derivatives and have not established an affiliate or subsidiary for the primary purpose of trading swaps or other derivatives internally or with third parties in the US or in Canada. The US Parent and the Canadian Subsidiaries are not "derivative dealers" as defined by Section 1(1) of Rule 91-507.³

In the specific cases to which we refer, the US Parent enters into swaps with third parties on behalf of particular Subsidiaries in its Corporate Group (each, an "Outward Facing Transaction") for the purpose

¹ CFTC No-Action Letter No. 13-09 (April 5, 2013).

² CFTC Real-Time Public Reporting of Swap Transaction Data, 17 C.F.R. pt. 43 (2013); CFTC Swap Data Recordkeeping and Reporting Requirements, 17 C.F.R. pt. 45 (2013) and CFTC Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 17 C.F.R. pt. 46 (2013).

³ Under Section 1(1) of OSC Rule 91-507, "derivatives dealer" means "a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading derivatives in Ontario as principal or agent".



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of hedging or mitigating risk incurred in the ordinary course of the Corporate Group's business. Intercompany hedging or risk mitigation transactions which correspond to one or more Outward Facing Transactions are used by a Corporate Group to fulfill internal accounting and prudent risk management practices by allocating risks within the Corporate Group to the entity that actually assumes the risk. These transactions are economically equivalent to internal accounting or book entries and do not change the risk profile of the Corporate Group as a whole to the financial system. These Corporate Groups primarily rely on derivatives to hedge and manage foreign exchange risk and interest rate risk associated with the assets and liabilities of the Corporate Group or certain of its members. Since the US Parent is party to each Outward Facing Transaction, such transaction always will be required to be reported in the US regardless of the external counterparty.

iv) Proposed Section 41.1

The Commission is proposing a new exemption under proposed Section 41.1 of Rule 91-507 (the "Proposed Amendment") that excludes transactions between end-users who are affiliated companies from the Rule 91-507 reporting requirement. As stated in the Notice of Amendments and Request of Comments of November 5, 2015, *"the Commission has determined that the value of this information is outweighed by the costs of reporting to end-users. In particular, the Commission has received feedback that due to reporting obligations being assigned to dealers pursuant to paragraph 25(1)(d) of the TR Rule, in many cases end-users would be forced to incur the cost of developing reporting systems and subscribing to trade repository services exclusively for the purpose of reporting inter affiliate transactions."* However, the exemption provided by the Proposed Amendment requires, among other things, in paragraph (c) thereof that each counterparty to an inter-affiliate transaction be "a local counterparty pursuant to the securities legislation of a jurisdiction of Canada", which could be interpreted to include only companies with Canadian parents, and not to include a US Parent that enters into "inter affiliate transactions" with its non-financial Canadian Subsidiaries.

We appreciate the importance of Rule 91-507 in promoting transparency in the derivatives markets in Canada. We also appreciate the efforts of the Commission and its staff in providing direction and clarification to market participants as they make preparations to comply with the various requirements in Canada. However, fundamentally, there should be no distinction made between the case in which an inter-affiliate swap is between a Canadian parent and a US subsidiary and the case in which the inter-affiliate swap is between a US Parent and a Canadian Subsidiary. In both cases, the Outward Facing Transaction will be reported in the US, Canada or both, and in both cases requiring reporting of the inter-affiliate swap would not provide regulators in Canada or elsewhere with any useful information regarding the risk profile of the Corporate Group that is not already provided in the reporting of the Outward Facing Transaction. In fact, requiring reporting of the inter-affiliate swap in such case would distort the actual risk since the ultimate risk to the financial system begins and ends with the parent company that is responsible for settling the Outward Facing Transaction. In addition, regulating inter-affiliate swaps between a US Parent and its Canadian Subsidiaries in a similar manner to Outward Facing Transactions is contrary to the OSC's intent to "alleviate certain reporting burdens on Ontario OTC derivatives market participants and enhance the clarity and utility of data reported to



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the OSC⁴, especially in light of the significant burdens and costs that would be placed on major US Corporate Groups to comply with Rule 91-507.

Given the “closed system” of the parent/subsidiary transactions involving US and Canadian affiliates, inter-affiliate swaps between end-user affiliates organized in Canada and the US should clearly be exempt from Rule 91-507 and the reporting requirements of Section 26 of that Rule, regardless of whether the parent is organized in the US or Canada. Therefore, paragraph (c) of the Proposed Amendment should not be limited to local counterparties. Rather, paragraph (c) should include an affiliate of a local counterparty that is organized under the laws of an approved jurisdiction under Appendix B, as the reporting rules of those jurisdictions are deemed compliant by the Commission under Rule 91-507.

B. Request for Revision

The presence of inter-affiliate swaps as part of the ordinary hedging activities of a non-financial company does not increase risk to the financial system. Applying the Rule 91-507 reporting requirement to inter-affiliate swaps between US and Canadian affiliates will affect large numbers of end-users across various industries in Canada, all of whom operate non-financial businesses and most of whom are wholly unfamiliar with operating in compliance with a financial regulatory regime. To require end-users and, in particular, Corporate Groups to comply with any regulatory requirements related to their internal risk management transactions would result in unintended additional systemic risks and make it prohibitively burdensome and costly for end-users to operate in Canada and to hedge their commercial risk, thereby expressly contravening the Commission’s intent in adopting the recent amendments to Rule 91-507.

Therefore, we respectfully submit that the Commission should use its powers to do either or both of the following:

(1) revise paragraph (c) of the Proposed Amendment to include at the end of the paragraph the words “or an affiliate of a local counterparty, which affiliate is organized under the laws of an approved jurisdiction under Appendix B”, as follows:

“41.1 Despite any other section of this Rule, a counterparty is under no obligation to report derivatives data in relation to a transaction if,

(a) the transaction is between affiliated companies;

(b) neither counterparty is one or more of the following: (i) a derivatives dealer; (ii) a recognized or exempt clearing agency; (iii) an affiliated entity of a person or company referred to in subparagraph (i) or (ii); and

⁴ OSC Amends Trade Repositories and Derivatives Data Reporting Rule, OSC Press Release, June 26, 2015.



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(c) each counterparty to the transaction is a local counterparty pursuant to the securities legislation of a jurisdiction of Canada **or an affiliate of a local counterparty, which affiliate is organized under the laws of an approved jurisdiction under Appendix B**; or

(2) include the 13-09 No-Action Letter under Appendix B to Rule 91-507.

We thank you for the opportunity to provide our comments on the Proposed Amendment. We hope that you will consider our suggestions and we would be happy to discuss our comments further at your convenience. Please feel free to contact Nicolette Kost De Sevres at nicolette.kostdesevres@dlapiper.com or Marc Horwitz at marc.horwitz@dlapiper.com if you have any questions regarding our comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nicolette Kost De Sevres'.

DLA Piper LLP (US)