

CSA Multilateral Staff Notice 91-305
Frequently Asked Questions relating to
Multilateral Instrument 91-101 Derivatives: Product Determination
and
Multilateral Instrument 96-101 Trade Repositories and Derivatives
Data Reporting

September 29, 2016

Introduction

Staff of the securities regulatory authorities (each an **Authority** and collectively the **Authorities** or **we**) in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon (the **Participating Jurisdictions**) are publishing staff views, in the form of Frequently Asked Questions, on certain matters relating to:

- Multilateral Instrument 91-101 *Derivatives: Product Determination* (the **Product Determination Rule**),
- Companion Policy 91-101 *Derivatives: Product Determination* (the **Product Determination CP**),
- Multilateral Instrument 96-101 *Trade Repositories and Derivatives Data Reporting* (the **Trade Reporting Rule**), and
- Companion Policy 96-101 *Trade Repositories and Derivatives Data Reporting* (the **Trade Reporting CP**).

Collectively, the Product Determination Rule, the Trade Reporting Rule and the related companion policies are referred to as the “Instruments”.

Background

The Instruments are effective in all of the Participating Jurisdictions and are substantively harmonized with corresponding local rules in Manitoba, Ontario and Québec.

The Product Determination Rule sets out the types of over-the-counter (**OTC**) derivatives – defined as “specified derivatives” – that are subject to the reporting requirements under the Trade Reporting Rule. The Trade Reporting Rule (i) sets out a framework for recognizing and regulating trade repositories, and (ii) establishes a requirement to report a specified derivative involving a local counterparty to a recognized trade repository, as well as requirements relating to determining which counterparty is required to fulfil the reporting obligations and relating to public dissemination of transaction-level data.

In all Participating Jurisdictions except Newfoundland and Labrador, Reporting obligations under the Trade Reporting Rule began on July 29, 2016 for reporting counterparties that are clearing agencies or “derivatives dealers”, as that term is defined in the Trade Reporting Rule. Trade reporting will begin in those jurisdictions on November 1, 2016 for all other reporting counterparties. Staff of the Authority in Newfoundland and Labrador anticipate that trade reporting obligations will begin in that province, for all reporting counterparties, on November 1, 2016.

Frequently Asked Questions

The Trade Reporting Rule and the Trade Reporting CP

Q1: Where do I report my specified derivatives?

A: Each of the Participating Jurisdictions, except Newfoundland and Labrador, have recognized three trade repositories to provide trade reporting services for market participants. Staff in Newfoundland and Labrador anticipate recognizing the trade repositories before November 1, 2016. These trade repositories and the contact details for each are as follows:

1. **Chicago Mercantile Exchange Inc.**
Contact: igor.kaplun@cmegroup.com
Website: www.cmegroup.com
2. **DTCC Data Repository (U.S.) LLC**
Contact: ddr-onboarding@dtcc.com
Website: <https://dtcclearning.com/learning/gtr/>
3. **Ice Trade Vault, LLC**
Contact: tradevaultsupport@theice.com / 770.738.2102, option 4
Website: www.icetradevault.com

Q2: Are the trade reporting requirements similar to the requirements in the US under the *Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)*?

A: Yes, the trade reporting requirements under the Trade Reporting Rule are similar in concept to the Dodd-Frank swaps reporting requirements, as set out under the US Commodity Futures Trading Commission’s (CFTC) swaps data reporting rules and the US Securities and Exchange Commission’s (SEC) security-based swaps data reporting rules. However, the requirements in the Trade Reporting Rule are not exactly the same as they have been tailored to suit the Canadian market and, as a result, there are some significant differences from the CFTC and SEC reporting requirements. For example, the data fields required to be reported under the Trade Reporting Rule, while based on the CFTC data fields, include some Canada-specific fields. All market participants are encouraged to read the rule in its entirety, and may wish to seek legal counsel, to fully understand their trade reporting obligations and any exclusions from those obligations.

Q3: Does the obligation to report pre-existing derivatives include an obligation to report contracts that have been settled and are no longer open?

A: The term “pre-existing derivatives” is meant to capture specified derivatives that were entered into prior to the start of trade reporting requirements and that are still open (also referred to as “outstanding”) as of the relevant pre-existing derivatives reporting date. For derivatives dealers and clearing agencies, the pre-existing derivatives reporting date is December 1, 2016. For all other counterparties, the pre-existing derivatives reporting date is February 1, 2017. Derivatives that are still outstanding as of the relevant date must be reported. Derivatives that have expired or been terminated as of the relevant date are not required to be reported.

Q4: Do I need to report a specified derivative in a Participating Jurisdiction if it is reported in another jurisdiction?

A: Specified derivatives involving a local counterparty are generally required to be reported in the local jurisdiction under the Trade Reporting Rule. However, in two scenarios an exemption is available under the Trade Reporting Rule if the specified derivative is reported in accordance with the requirements of another jurisdiction: (i) the derivative is only required to be reported because one or both counterparties is organized, but does not otherwise conduct business, in the local jurisdiction (e.g., unlimited liability corporations); or (ii) the derivative is only required to be reported because one or both counterparties is a guaranteed affiliate of a local counterparty. This type of relief is frequently referred to as substituted compliance relief.

In order to benefit from this relief, the derivative must be reported under the trade reporting rules in another Participating Jurisdiction, or in Manitoba, Ontario or Québec, or in accordance with the CFTC swaps data reporting rules or the European Market Infrastructure Regulation derivatives reporting requirements. We anticipate determining in the near future whether derivatives reported in accordance with the SEC security-based swaps reporting rules would also benefit from this relief.

Q5: Is there a requirement for the counterparty that is not reporting the trade (the non-reporting counterparty) to verify the accuracy of the trade and valuation data reported by the reporting counterparty?

A: The reporting counterparty is responsible for reporting accurate derivatives data to a recognized trade repository. The recognized trade repository is required to have rules, policies and procedures to facilitate that verification by the reporting counterparty.

The non-reporting counterparty is under no obligation to verify the accuracy of the derivatives data that is reported. However, if the non-reporting counterparty does discover an error or omission in the derivatives data that was reported, it is required to notify the reporting counterparty of the error or omission. The reporting counterparty is then responsible for correcting that error or omission in the derivatives data reported to the trade repository.

Q6: How would a non-reporting counterparty catch reporting errors made by the reporting counterparty?

A: A non-reporting counterparty will have access to, and may choose to review, the data reported by the reporting counterparty to a recognized trade repository in respect of a specified derivative between the non-reporting counterparty and the reporting counterparty. Recognized trade repositories are required to offer this access free of charge.

Q7: If the derivatives dealer in a specified derivative is a crown corporation, who reports the specified derivative?

A: The determination of which counterparty will act as the reporting counterparty does not differ when one counterparty is a crown corporation. The Trade Reporting Rule requires any entity that is acting as a derivatives dealer in the local jurisdiction, when trading with a local counterparty that is not a derivatives dealer, to fulfil the reporting obligations. In a derivative between a crown corporation acting as a derivatives dealer and a counterparty that is neither a derivatives dealer nor a clearing agency, the crown corporation acting as a derivatives dealer would be required to fulfil the reporting obligations.

Q8: Is a Legal Entity Identifier (LEI) mandatory for all counterparties? If the counterparty does not have an LEI can it still enter into a derivative contract?

A: Under amendments to the Trade Reporting Rule that take effect September 30, 2016, all local counterparties, other than individuals, that are eligible to obtain an LEI must have an LEI prior to transacting in a derivative that is required to be reported. The reporting counterparty to a derivative is required to report the LEI for each counterparty as part of the creation data reported immediately following the transaction. All counterparties, local or foreign, that are eligible to receive an LEI are required to obtain an LEI to facilitate the reporting counterparty's fulfillment of its reporting obligations.

If a counterparty is an individual or is not eligible to receive an LEI, the reporting counterparty must identify the counterparty by a single alternative identifier when reporting the derivative.

The Authorities have each issued a temporary order providing reporting counterparties with relief from the requirement to report their counterparties' LEI in certain limited circumstances.¹ Unless an exemption is available, a reporting counterparty that did not provide an LEI for the other counterparty would be in breach of the Trade Reporting Rule. The Authorities will monitor compliance with reporting of LEIs. If issues are identified with respect to adoption or reporting of LEIs, we may consider whether additional relief, further requirements or trading restrictions are warranted.

¹ Each of these orders is referred to as 96-501 *Exemption from certain derivatives reporting requirements in Multilateral Instrument 96-101 Trade Repositories and Derivatives Data Reporting*

Q9: Are trades between US and Canadian affiliates reportable?

A: A derivative between affiliated entities is not required to be reported under the Trade Reporting Rule, provided that neither affiliated entity is a derivatives dealer, a clearing agency, or an affiliated entity of a derivatives dealer or a clearing agency. The exemption for derivatives between affiliated entities applies regardless of where the affiliated entities are located. As noted in the Notice published in June 2016 along with the amendments to the Instruments, we intend to re-examine this broad exemption in the near to mid-term. The Authorities will seek public comment on any future revisions to the exemption.

Q10: Can you explain the commodity derivatives exclusion from the reporting requirements and the \$250 000 000 threshold?

A: This exclusion, in section 40 of the Trade Reporting Rule, is only available to a local counterparty that is not a derivatives dealer or a clearing agency, or an affiliated entity of a derivatives dealer or a clearing agency, and only applies with respect to that local counterparty's commodity derivatives. If the local counterparty is the reporting counterparty for a commodity-based derivative, it is not required to report derivatives data for the commodity derivative if the local counterparty's aggregate month-end gross notional amount under all outstanding commodity derivatives did not exceed \$250 000 000 in any calendar month in the preceding 12 months. In such a case, the other counterparty will be the reporting counterparty unless they also qualify for the exclusion. Aggregate month-end gross notional amount is to be calculated on a group basis, excluding derivatives with an affiliated entity.

Q11: Can the reporting counterparty delegate any of its reporting obligations under the Trade Reporting Rule?

A: Yes, the reporting counterparty may delegate some or all of its reporting obligations to a third-party. However, the reporting counterparty retains ultimate responsibility for the accurate and timely reporting of derivatives data. The reporting counterparty should ensure that the third-party is willing and able to fulfil the delegated reporting obligations.

A reporting counterparty may delegate its reporting obligations to an affiliated entity, to the other counterparty, or to a third-party service provider. If the trade repository is willing and able, a reporting counterparty may also delegate to the trade repository the obligations to

- report the unique product identifier for the derivative, and/or
- report an alternative identifier for the non-reporting counterparty, in the case that the non-reporting counterparty is an individual or is not eligible to obtain an LEI.

Q12: If my trades are already being reported in Manitoba, Ontario and/or Québec, what do I need to do to be compliant with the Trade Reporting Rule? Do I have to update reported trades with new provinces?

A: If you are the non-reporting counterparty, your obligation is to provide your reporting counterparty with sufficient information to ensure it knows where your trade needs to be reported – this is often done through a Representation Letter. We would generally expect that you would check any Representation Letters you have submitted to your reporting counterparties for accuracy, and ensure that they indicate all jurisdictions where you are a local counterparty, under any of the Trade Reporting Rule or the corresponding local rules in Manitoba, Ontario and/or Québec. An example of a Representation Letter has been posted on the International Swaps and Derivatives Association website.²

If you are the reporting counterparty, please consult with your recognized trade repository or repositories to discuss what steps may need to be taken to update reports already submitted.

The Product Determination Rule and the Product Determination CP

Q13: Spot FX derivatives are excluded from the definition of “specified derivative” in the Product Determination Rule. Are FX forwards also excluded?

A: FX forwards and spot derivatives are not the same. Section 2(1)(c)(i) of the Product Determination Rule provides and the Product Determination CP clarifies that in order for an FX derivative to qualify as a “spot”, settlement in the contract currency must occur within two business days, unless the contract relates to a securities trade where settlement must occur on the same day as the settlement of the securities trade. In some situations, physical delivery may not be possible within two business days – for example, where the contract currency is not physically available within two business days. Counterparties that engage in such transactions may need to consider whether an application for a discretionary exemption is necessary and would be available. Any application for such relief should be made sufficiently in advance of a proposed transaction.

FX forwards have longer maturities and thus different potential risk profiles, and are therefore not excluded from the definition of “specified derivative” in the Product Determination Rule. As a result, FX forwards are required to be reported under the Trade Reporting Rule.

Q14: For an FX derivative to be considered spot, do the currency or currencies referenced in the contract need to be physically exchanged within two days?

A: Yes, in order for the spot currency contract exemption to apply, the currency or currencies referenced in the contract must be physically exchanged within two business days. This settlement can occur by delivery of the contract currency or by making a credit to the counterparty’s account at a financial institution in the contract currency. Contracts that can be

² <http://www2.isda.org/regions/canada/>

settled in a currency other than the currency referenced in the contract or that are settled by crediting a trading account are not considered to be physically settled.

Q15: Exchange-traded products are excluded from the definition of “specified derivative” in the Product Determination Rule. Are cleared products also excluded?

A: The exclusion of exchange-traded derivatives is based on the post-trade transparency that is available, to the public and to the regulators, for derivatives transactions executed on an exchange. If a derivative is cleared by a clearing agency, including a clearing agency affiliated with an exchange, but not executed in accordance with the rules of the exchange and reported to the exchange after execution, the post-trade transparency regime of the exchange would not apply. Therefore, cleared products are not excluded from the definition of “specified derivative” in the Product Determination Rule unless the transaction relating to that derivative is executed on an exchange.

Q16: Are physical commodity contracts with provisions for liquidated damages or force majeure clauses excluded from the definition of “specified derivative” in the Product Determination Rule?

A: Yes, these contracts are excluded as long as the counterparties intended, at the time the contract was entered into, to physically deliver the commodity. The Product Determination CP discusses factors that may be considered when assessing the intention of the counterparties.

Q17: Are Contracts for Difference (CFDs) excluded from the definition of “specified derivative” in the Product Determination Rule?

A: No, CFDs are included in the definition of “specified derivative” in the Product Determination Rule and therefore must be reported under the Trade Reporting Rule.

Q18: Are restricted share unit (RSU) contracts excluded from the definition of “specified derivative” in the Product Determination Rule?

A: Yes, RSUs are excluded from the definition of “specified derivative” and therefore are not required to be reported under the Trade Reporting Rule. The requirements generally applicable to securities are more appropriate for these types of contracts.

Q19: Is a derivative transacted with or through a power pool excluded from the definition of “specified derivative” in the Product Determination Rule?

A: The Product Determination Rule excludes physically settled commodity derivatives from the definition of “specified derivative”. The Product Determination CP provides guidance as to what constitutes physical delivery. The Product Determination CP also provides that, to the extent that a derivative provides for physical delivery of the underlying commodity to or through a regulated pool, the “physical delivery” element of the commodity derivatives exclusion would be satisfied.

Note that a financially settled commodity derivative, or any other type of derivative (e.g., an interest rate derivative or an FX derivative that does not meet the spot FX exclusion), entered into with a power pool operator would not be excluded from the definition of “specified derivative” in the Product Determination Rule. Note also that some Authorities have implemented an exemption³ from trade reporting for certain financially settled electricity derivatives, that are “specified derivatives” under the Product Determination Rule, traded with certain US-based independent systems operators, regional transmission operators or with the Ontario-based IESO. Please visit the website of the applicable Authority to determine whether an exemption is available.

Q20: If an option contract that is “in the money” for a commodity is settled physically, would this contract be exempt from the definition of “specified derivative” in the Product Determination Rule?

A: An option contract that provides that the option, if exercised, results only in physical delivery of the underlying commodity (and does not allow for financial settlement) could meet the physical delivery criteria for the commodity derivatives exclusion in the Product Determination Rule. Note that the other criteria for the commodity derivatives exclusion discussed in the Product Determination CP must also be met for the exclusion to apply.

³ British Columbia Securities Commission instrument 96-502 *Exemption from derivatives reporting requirements in Multilateral Instrument 96-101 – Trade Repositories and Derivatives Data Reporting for certain electricity-based derivatives*; and Saskatchewan General Order 96-505 *Exemptions from derivatives reporting requirements in Multilateral Instrument 96-101 - Trade Repositories and Derivatives Data Reporting for certain electricity-based derivatives*.

Questions

Questions with respect to this Notice may be referred to:

Martin McGregor
Legal Counsel
Alberta Securities Commission
Tel: 403-355-2804
Email: martin.mcgregor@asc.ca

Jag Brar
Derivatives Market Specialist
British Columbia Securities Commission
Tel : 604-899-6839
Email : jbrar@bcsc.bc.ca

Michael Brady
Manager, Derivatives
British Columbia Securities Commission
Tel: 604-899-6561
Email: mbrady@bcsc.bc.ca

Wendy Morgan
Senior Legal Counsel, Securities
Financial and Consumer Services Commission (New Brunswick)
Tel: 506-643-7202
Email: wendy.morgan@fcnb.ca

Abel Lazarus
Senior Securities Analyst
Nova Scotia Securities Commission
Tel: 902-424-6859
Email: abel.lazarus@novascotia.ca

Liz Kutarna
Deputy Director, Capital Markets, Securities Division
Financial and Consumer Affairs Authority of Saskatchewan
Tel: 306-787-5871
Email: liz.kutarna@gov.sk.ca