Companion Policy 91-502CP
Trade Repositories and Derivatives Data Reporting

Companion Policy 91-502CP
Trade Repositories and Derivatives Data Reporting

PART 1 GENERAL COMMENTS

Introduction

This companion policy (the "Policy") sets out the views of the Authority ("our" or "we") on various matters relating to CMRA Regulation 91-502 *Trade Repositories and Derivatives Data Reporting* (the "Regulation") and related securities legislation.

The numbering of Parts, sections and subsections from Part 2 on in this Policy generally corresponds to the numbering in the Regulation. Any general guidance for a Part appears immediately after the Part's name. Any specific guidance on a section or subsection follows any general guidance. If there is no guidance for a Part, section or subsection, the numbering in this Policy will skip to the next provision that does have guidance.

Unless defined in the Regulation or this Policy, terms used in the Regulation and in this Policy have the meaning given to them in securities legislation, including, for greater certainty, in National Instrument 14-101 *Definitions*.

1. Definitions and interpretation

(1) In this Policy,

"CPSS" means the Committee on Payment and Settlement Systems,

"FMI" means a financial market infrastructure, as described in the PFMI Report,

"Global LEI System" means the Global Legal Entity Identifier System,

"IOSCO" means the Technical Committee of the International Organization of Securities Commissions,

"LEI" means a legal entity identifier,

"LEI ROC" means the LEI Regulatory Oversight Committee,

"PFMI Report" means the April 2012 final report entitled *Principles for financial market infrastructures* published by CPSS and IOSCO, as amended from time to time,[1] and

"principle" means, unless the context otherwise indicates, a principle set out in the PFMI Report.

(2) A "life-cycle event" is defined in the Regulation as an event that results in a change to derivatives data previously reported to a designated trade repository. Where a life-cycle event occurs, the corresponding life-cycle event data must be reported under section 33

[1] The PFMI Report is available on the Bank for International Settlements' website (www.bis.org) and the IOSCO website (www.iosco.org).

of the Regulation by the end of the business day on which the life-cycle event occurs. When reporting a life-cycle event, there is no obligation to re-report derivatives data that has not changed – only new data and changes to previously reported data need to be reported. Examples of a life-cycle event would include

- a change to the termination date for the transaction,
- a change in the cash flows, payment frequency, currency, numbering convention, spread, benchmark, reference entity or rates originally reported,
- the availability of a legal entity identifier for a counterparty previously identified by name or by some other identifier,
- a corporate action affecting a security or securities on which the transaction is based (e.g., a merger, dividend, stock split, or bankruptcy),
- a change to the notional amount of a transaction including contractually agreed upon changes (e.g., amortization schedule),
- the exercise of a right or option that is an element of the transaction, and
- the satisfaction of a level, event, barrier or other condition contained in the original transaction.

(3) Paragraph (c) of the definition of "local counterparty" captures affiliates of persons mentioned in paragraph (a) of the "local counterparty" definition, provided that such person guarantees the liabilities of the affiliate. It is our view that the guarantee must be for all or substantially all of the affiliate's liabilities.

(4) The term "transaction" is defined in the Regulation and used instead of the term "trade", as defined in the Act, in order to reflect the types of activities that require a unique transaction report, as opposed to the modification of an existing transaction report. The primary difference between the two definitions is that unlike the term "transaction", the term "trade" includes material amendments and terminations.

A material amendment is not referred to in the definition of "transaction" but is required to be reported as a life-cycle event in connection with an existing transaction under section 33. A termination is not referred to in the definition of "transaction", as the expiry or termination of a transaction would be reported to a trade repository as a life-cycle event without the requirement for a new transaction report.

In addition, unlike the definition of "trade", the definition of "transaction" includes a novation to a clearing agency. Each transaction resulting from a novation of a bi-lateral transaction to a clearing agency is required to be reported as a separate, new transaction with reporting links to the original transaction.

(5) The term "valuation data" is defined in the Regulation as data that reflects the current value of a transaction. It is the Authority's view that valuation data can be calculated based upon the use of an industry-accepted methodology such as mark-to-market or mark-to-model, or another valuation method that is in accordance with accounting

principles and will result in a reasonable valuation of a transaction.[2] The valuation methodology should be consistent over the entire life of a transaction.

PART 2 TRADE REPOSITORY DESIGNATION AND ONGOING REQUIREMENTS

Part 2 contains rules for designation of a trade repository and ongoing requirements for a designated trade repository. To obtain and maintain a designation as a trade repository, a person or entity must comply with these rules and requirements in addition to all of the terms and conditions in the designation order made by the Authority. In order to comply with the reporting obligations contained in Part 3, reporting counterparties must report to a designated trade repository. While there is no prohibition on an undesignated trade repository operating in a CMR Jurisdiction, a counterparty that reports a transaction to an undesignated trade repository would not be in compliance with its reporting obligations under this Regulation with respect to that transaction.

The legal entity that applies to be a designated trade repository will typically be the entity that operates the facility and collects and maintains records of completed transactions reported to the trade repository by other persons or companies. In some cases, the applicant may operate more than one trade repository facility. In such cases, the trade repository may file separate forms in respect of each trade repository facility, or it may choose to file one form to cover all of the different trade repository facilities. If the latter alternative is chosen, the trade repository must clearly identify the facility to which the information or changes submitted under this Part apply.

2. Trade repository initial filing of information and designation

(1) In determining whether to designate an applicant as a trade repository under paragraph 17(1)(a) of the Act, it is anticipated that the Authority will consider a number of factors, including

- whether it is in the public interest to designate the applicant,
- the manner in which the trade repository proposes to comply with the Regulation,
- whether the trade repository has meaningful representation on its governing body,
- whether the trade repository has sufficient financial and operational resources for the proper performance of its functions,
- whether the rules and procedures of the trade repository ensure that its business is conducted in an orderly manner that fosters both fair and efficient capital markets, and improves transparency in the derivatives market,

[2] For example, see International Financial Reporting Standard 13, *Fair Value Measurement*.

- whether the trade repository has policies and procedures to effectively identify and manage conflicts of interest arising from its operation or the services it provides,

- whether the requirements of the trade repository relating to access to its services are fair and reasonable,

- whether the trade repository's process for setting fees is fair, transparent and appropriate,

- whether the trade repository's fees are inequitably allocated among the participants, have the effect of creating barriers to access or place an undue burden on any participant or class of participants,

- the manner and process for the Authority and other applicable regulatory agencies to receive or access derivatives data, including the timing, type of reports, and any confidentiality restrictions,

- whether the trade repository has robust and comprehensive policies, procedures, processes and systems to ensure the security and confidentiality of derivatives data, and

- whether the Authority has entered into a memorandum of understanding with the trade repository's local securities regulator.

The Authority will examine whether the trade repository has been, or will be, in compliance with securities legislation. This includes compliance with the Regulation and any conditions, restrictions or requirements attached to the Authority's designation order in respect of a designated trade repository.

A trade repository that is applying for designation must demonstrate that it has established, implemented, maintained and enforced appropriate written rules, policies and procedures that are in accordance with standards applicable to trade repositories. We consider that these rules, policies and procedures include, but are not limited to, the principles and key considerations and explanatory notes applicable to trade repositories in the PFMI Report. These principles are set out in the following chart, along with the corresponding sections of the Regulation the interpretation of which we consider ought to be consistent with the principles:

Principle in the PFMI Report applicable to a trade repository	***Relevant section(s) of the Regulation***
Principle 1: Legal Basis	Section 7 – Legal framework Section 17 – Rules (in part)
Principle 2: Governance	Section 8 – Governance Section 9 – Board of directors Section 10 – Management
Principle 3: Framework for the comprehensive management of risks	Section 19 – Comprehensive risk management framework Section 20 – General business risk (in part)
Principle 15: General business risk	Section 20 – General business risk
Principle 17: Operational risk	Section 21 – System and other operational risk requirements Section 22 – Data security and confidentiality Section 24 – Outsourcing
Principle 18: Access and participation requirements	Section 13 – Access to designated trade repository services Section 16 – Due process (in part) Section 17 – Rules (in part)
Principle 19: Tiered participation arrangements	No equivalent provisions in the Regulation; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 20: FMI links	No equivalent provisions in the Regulation; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 21: Efficiency and effectiveness	No equivalent provisions in the Regulation; however, the trade repository may be expected to observe or broadly observe the principle, where applicable.
Principle 22: Communication procedures and standards	Section 15 – Communication policies, procedures and standards
Principle 23: Disclosure of rules, key procedures, and market data	Section 17 – Rules (in part)
Principle 24: Disclosure of market data by trade repositories	Sections in Part 4 – Data Dissemination and Access to Data

It is anticipated that the Authority will apply the principles in its oversight activities of designated trade repositories. Therefore, in complying with the Regulation, designated trade repositories will be expected to observe the principles.

The forms filed by an applicant or designated trade repository under the Regulation will be kept confidential in accordance with the provisions of securities legislation. The Authority is of the view that the forms generally contain proprietary financial, commercial and technical information, and that the cost and potential risks to the filers of disclosure outweigh the benefit of the principle requiring that forms be made available for public inspection. However, the Authority would expect a designated trade repository to publicly disclose its responses to the CPSS-IOSCO consultative report entitled *Disclosure framework for financial market*

infrastructures, which is a supplement to the PFMI Report.[3] In addition, much of the information that will be included in the forms that are filed will be required to be made publicly available by a designated trade repository pursuant to the Regulation or the terms and conditions of the designation order imposed by the Authority.

While Form 91-502F1 – *Application for Designation and Trade Repository Information Statement* and any amendments to it will be kept generally confidential, if the Authority considers that it is in the public interest to do so, it may require the applicant or designated trade repository to publicly disclose a summary of the information contained in such form, or amendments to it.

Notwithstanding the confidential nature of the forms, an applicant's application itself (excluding forms) will be published for comment for a minimum period of 30 days.

3. Change in information

(1) Under subsection 3(1), a designated trade repository is required to file an amendment to the information provided in Form 91-502F1 at least 45 days prior to implementing a significant change. The Authority considers a change to be significant when it could impact a designated trade repository, its users, participants, market participants, investors, or the capital markets (including derivatives markets and the markets for assets underlying a derivative). The Authority would consider a significant change to include, but not be limited to,

- a change in the structure of the designated trade repository, including procedures governing how derivatives data is collected and maintained (included in any back-up sites), that has or may have a direct impact on users in a CMR Jurisdiction,

- a change to the services provided by the designated trade repository, or a change that affects the services provided, including the hours of operation, that has or may have a direct impact on users in a CMR Jurisdiction,

- a change to means of access to the designated trade repository's facility and its services, including changes to data formats or protocols, that has or may have a direct impact on users in a CMR Jurisdiction,

- a change to the types of derivative asset classes or categories of derivatives that may be reported to the designated trade repository,

- a change to the systems and technology used by the designated trade repository that collect, maintain and disseminate derivatives data, including matters affecting capacity,

- a change to the governance of the designated trade repository, including changes to the structure of its board of directors or board committees and their related mandates,

[3] Publication available on the BIS website (www.bis.org) and the IOSCO website (www.iosco.org).

- a change in control of the designated trade repository,
- a change in affiliates that provide key services or systems to, or on behalf of, the designated trade repository,
- a change to outsourcing arrangements for key services or systems of the designated trade repository,
- a change to fees or the fee structure of the designated trade repository,
- a change in the designated trade repository's policies and procedures relating to risk-management, including relating to business continuity and data security, that has or may have an impact on the designated trade repository's provision of services to its participants,
- the commencement of a new type of business activity, either directly or indirectly through an affiliate, and
- a change in the location of the designated trade repository's head office or primary place of business or the location where the main data servers or contingency sites are housed.

(2) The Authority generally considers a change in a designated trade repository's fees or fee structure to be a significant change. However, the Authority recognizes that designated trade repositories may frequently change their fees or fee structure and may need to implement fee changes within timeframes that are shorter than the 45-day notice period contemplated in subsection (1). To facilitate this process, subsection 3(2) provides that a designated trade repository may provide information that describes the change to fees or fee structure in a shorter timeframe (at least 15 days before the expected implementation date of the change to fees or fee structure). See section 12 of this Policy for guidance with respect to fee requirements applicable to designated trade repositories.

The Authority will make best efforts to review amendments to Form 91-502F1 filed in accordance with subsections 3(1) and 3(2) before the proposed date of implementation of the change. However, where the changes are complex, raise regulatory concerns, or when additional information is required, the Authority's review may exceed these timeframes.

(3) Subsection 3(3) sets out the filing requirements for changes to information provided in a filed Form 91-502F1 other than those described in subsections 3(1) or (2). Such changes to information are not considered significant and include changes that:

- would not have an impact on the designated trade repository's structure or participants, or more broadly on market participants, investors or the capital markets; or
- are administrative changes, such as

- changes in the routine processes, policies, practices, or administration of the designated trade repository that would not impact participants,
- changes due to standardization of terminology,
- corrections of spelling or typographical errors,
- changes to the types of designated trade repository participants in a CMR Jurisdiction,
- necessary changes to conform to applicable regulatory or other legal requirements of a CMR Jurisdiction or Canada, and
- minor system or technology changes that would not significantly impact the system or its capacity.

For the changes referred to in subsection 3(3), the Authority may review these filings to ascertain whether they have been categorized appropriately. If the Authority disagrees with the categorization, the designated trade repository will be notified in writing. Where the Authority determines that changes reported under subsection 3(3) are in fact significant changes under subsection 3(1), the designated trade repository will be required to file an amended Form 91-502F1 that will be subject to review by the Authority.

6. Ceasing to carry on business

(1) In addition to filing a completed Form 91-502F3 – *Cessation of Operations Report for Trade Repository*, a designated trade repository that intends to cease carrying on business in a CMR Jurisdiction as a designated trade repository must make an application to voluntarily surrender its designation to the Authority pursuant to securities legislation. The Authority may accept the voluntary surrender if it is satisfied that the surrender is not prejudicial to the public interest.[4]

7. Legal framework

(1) Designated trade repositories are required to have rules, policies, and procedures in place that provide a legal basis for their activities in all relevant jurisdictions, whether within Canada or any foreign jurisdiction, where they have activities.

8. Governance

Designated trade repositories are required to have in place governance arrangements that meet the minimum requirements and policy objectives set out in subsections 8(1) and 8(2).

[4] The transfer of derivatives data/information would need to be adequately addressed in the application in order for the Authority to accept the voluntary surrender.

(3) Under subsection 8(3), a designated trade repository is required to make the written governance arrangements required under subsections 8(1) and (2) available to the public on its website. The Authority expects that this information will be posted on the trade repository's publicly accessible website and that interested persons will be able to locate the information through a web search or through clearly identified links on the designated trade repository's website.

9. Board of directors

The board of directors of a designated trade repository is subject to various requirements, such as requirements pertaining to board composition and conflicts of interest. To the extent that a designated trade repository is not organized as a corporation, the requirements relating to the board of directors may be fulfilled by a body that performs functions that are equivalent to the functions of a board of directors.

(2) Paragraph 9(2)(a) requires individuals who comprise the board of directors of a designated trade repository to have an appropriate level of skill and experience to effectively and efficiently oversee the management of its operations. This would include individuals with experience and skills in areas such as business recovery, contingency planning, financial market systems and data management.

Under paragraph 9(2)(b), the board of directors of a designated trade repository must include individuals who are independent of the designated trade repository. The Authority would view individuals who have no direct or indirect material relationship with the designated trade repository as independent. The Authority would expect that independent directors of a designated trade repository would represent the public interest by ensuring that regulatory and public transparency objectives are fulfilled, and that the interests of participants who are not derivatives dealers are considered.

11. Chief compliance officer

(3) References to harm to the capital markets in subsection 11(3) may be in relation to domestic or international capital markets.

12. Fees

A designated trade repository is responsible for ensuring that the fees it sets are in compliance with section 12. In assessing whether a designated trade repository's fees and costs are fairly and equitably allocated among participants as required under paragraph 12(a), the Authority will consider a number of factors, including

- the number and complexity of the transactions being reported,
- the amount of the fee or cost imposed relative to the cost of providing the services,
- the amount of fees or costs charged by other comparable trade repositories, where relevant, to report similar transactions in the market,

- with respect to market data fees and costs, the amount of market data fees charged relative to the market share of the designated trade repository, and

- whether the fees or costs represent a barrier to accessing the services of the designated trade repository for any category of participant.

A designated trade repository should provide clear descriptions of priced services for comparability purposes. Other than fees for individual services, a designated trade repository should also disclose other fees and costs related to connecting to or accessing the trade repository. For example, a designated trade repository should disclose information on the system design, as well as technology and communication procedures, that influence the costs of using the designated trade repository. A designated trade repository is also expected to provide timely notice to participants and the public of any changes to services and fees.

13. Access to designated trade repository services

(3) Under subsection 13(3), a designated trade repository is prohibited from unreasonably limiting access to its services, permitting unreasonable discrimination among its participants, imposing unreasonable burdens on competition or requiring the use or purchase of another service in order for a person to utilize its trade reporting service. For example, a designated trade repository should not engage in anti-competitive practices such as setting overly restrictive terms of use or engaging in anti-competitive price discrimination. A designated trade repository should not develop closed, proprietary interfaces that result in vendor lock-in or barriers to entry with respect to competing service providers that rely on the data maintained by the designated trade repository.

14. Acceptance of reporting

Section 14 requires that a designated trade repository accept derivatives data for all derivatives of the asset class or classes set out in its designation order. For example, if the designation order of a designated trade repository includes interest rate derivatives, the designated trade repository is required to accept transaction data for all types of interest rate derivatives that are entered into by a local counterparty. It is possible that a designated trade repository may accept derivatives data for only a subset of a class of derivatives if this is indicated in its designation order. For example, there may be designated trade repositories that accept derivatives data for only certain types of commodity derivatives such as energy derivatives.

15. Communication policies, procedures and standards

Section 15 sets out the communication standard required to be used by a designated trade repository in communications with other specified entities. The reference in paragraph 15(d) to "other service providers" could include persons or companies who offer technological or transaction processing or post-transaction services.

17. Rules, policies and procedures

Section 17 requires that the publicly disclosed written rules and procedures of a designated trade repository be clear and comprehensive, and include explanatory material written in plain language so that participants can fully understand the system's design and operations, their rights and obligations, and the risks of participating in the system. Moreover, a designated trade repository should disclose to its participants and to the public, basic operational information and responses to the CPSS-IOSCO *Disclosure framework for financial market infrastructures*.

(2) Subsection 17(2) requires that a designated trade repository monitor compliance with its rules and procedures. The methodology of monitoring such compliance should be fully documented.

(3) Subsection 17(3) requires a designated trade repository to implement processes for dealing with non-compliance with its rules and procedures. This subsection does not preclude enforcement action by any other person, including the Authority or other regulatory body.

(5) Subsection 17(5) requires a designated trade repository to file its rules and procedures with the Authority for approval, in accordance with the terms and conditions of the designation order. Upon designation, the Authority may develop and implement a protocol with the designated trade repository that will set out the procedures to be followed with respect to the review and approval of rules and procedures and any amendments thereto. Generally, such a rule protocol will be appended to and form part of the designation order. Depending on the nature of the changes to the designated trade repository's rules and procedures, such changes may also impact the information contained in Form 91-502F1. In such cases, the designated trade repository will be required to file a revised Form 91-502F1 with the Authority. See section 3 of this Policy for a discussion of the filing requirements.

18. Records of data reported

A designated trade repository is a market participant under securities legislation and therefore subject to the record-keeping requirements under securities legislation. The record-keeping requirements under section 18 are in addition to the requirements under securities legislation.

(2) Subsection 18(2) requires that records be maintained for 7 years after the expiration or termination of a transaction. The requirement to maintain records for 7 years after the expiration or termination of a transaction, rather than from the date the transaction was entered into, reflects the fact that transactions create on-going obligations and information is subject to change throughout the life of a transaction.

19. Comprehensive risk-management framework

Requirements for a comprehensive risk-management framework of a designated trade repository are set out in section 19.

Features of a framework

A designated trade repository should have a written risk-management framework (including policies, procedures, and systems) that enable it to identify, measure, monitor, and manage effectively the range of risks that arise in, or are borne by, a designated trade repository. A designated trade repository's framework should include the identification and management of risks that could materially affect its ability to perform or to provide services as expected, such as interdependencies.

Establishing a framework

A designated trade repository should have comprehensive internal processes to help its board of directors and senior management monitor and assess the adequacy and effectiveness of its risk-management policies, procedures, systems, and controls. These processes should be fully documented and readily available to the designated trade repository's personnel who are responsible for implementing them.

Maintaining a framework

A designated trade repository should regularly review the material risks it bears from, and poses to, other entities (such as other FMIs, settlement banks, liquidity providers, or service providers) as a result of interdependencies, and develop appropriate risk management tools to address these risks. These tools should include business continuity arrangements that allow for rapid recovery and resumption of critical operations and services in the event of operational disruptions and recovery or orderly wind-down plans should the trade repository become non-viable.

20. General business risk

(1) Subsection 20(1) requires a designated trade repository to manage its general business risk effectively. General business risk includes any potential impairment of the designated trade repository's financial position (as a business concern) as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that must be charged against capital or an inadequacy of resources necessary to carry on business as a designated trade repository.

(2) For the purposes of subsection 20(2), the amount of liquid net assets funded by equity that a designated trade repository should hold is to be determined by its general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services, if such action is taken.

(3) Subsection (3) requires a designated trade repository, for the purposes of subsection (2), to hold liquid net assets funded by equity equal to no less than six months of current operating expenses.

(4) For the purposes of subsections 20(4) and (5), and in connection with developing a comprehensive risk-management framework under section 19, a designated trade repository should identify scenarios that may potentially prevent it from being able to provide its critical operations and services as a going concern, and assess the

effectiveness of a full range of options for recovery or orderly wind-down. These scenarios should take into account the various independent and related risks to which the designated trade repository is exposed.

Based on the required assessment of scenarios under subsection 20(4) (and taking into account any constraints potentially imposed by legislation), the designated trade repository should prepare appropriate written plans for its recovery or orderly wind-down. The plan should contain, among other elements, a substantive summary of the key recovery or orderly wind-down strategies, the identification of the designated trade repository's critical operations and services, and a description of the measures needed to implement the key strategies. The designated trade repository should maintain the plan on an ongoing basis, to achieve recovery and orderly wind-down, and should hold sufficient liquid net assets funded by equity to implement this plan (see also subsections 20(2) and (3) above). A designated trade repository should also take into consideration the operational, technological, and legal requirements for participants to establish and move to an alternative arrangement in the event of an orderly wind-down.

21. Systems and other operational risk requirements

(1) Subsection 21(1) sets out a general principle concerning the management of operational risk. In interpreting subsection 21(1), the following key considerations should be applied:

- a designated trade repository should establish a robust operational risk-management framework with appropriate systems, policies, procedures, and controls to identify, monitor, and manage operational risks;

- a designated trade repository should review, audit, and test systems, operational policies, procedures, and controls, periodically and after any significant changes; and

- a designated trade repository should have clearly defined operational-reliability objectives and policies in place that are designed to achieve those objectives.

(2) The board of directors of a designated trade repository should clearly define the roles and responsibilities for addressing operational risk and approve the designated trade repository's operational risk-management framework.

(3) Paragraph 21(3)(a) requires a designated trade repository to develop and maintain an adequate system of internal control over its systems as well as adequate general information-technology controls. The latter controls are implemented to support information technology planning, acquisition, development and maintenance, computer operations, information systems support, and security. Recommended Canadian guides as to what constitutes adequate information technology controls include '*Information Technology Control Guidelines*' from the Canadian Institute of Chartered Accountants and '*COBIT*' from the IT Governance Institute. A designated trade repository should ensure that its information-technology controls address the integrity of the data that it maintains, by protecting all derivatives data submitted from corruption, loss, improper disclosure, unauthorized access and other processing risks.

Paragraph 21(3)(b) requires a designated trade repository to thoroughly assess future needs and make systems capacity and performance estimates in a method consistent with prudent business practice at least once a year. The paragraph also imposes an annual requirement for designated trade repositories to conduct periodic capacity stress tests. Continual changes in technology, risk management requirements and competitive pressures will often result in these activities or tests being carried out more frequently.

Paragraph 21(3)(c) requires a designated trade repository to notify the Authority of any material systems failure. The Authority would consider a failure, malfunction, delay or other disruptive incident to be "material" if the designated trade repository would in the normal course of its operations escalate the incident to, or inform, its senior management that is responsible for technology, or the incident would have an impact on participants. The Authority also expects that, as part of this notification, the designated trade repository will provide updates on the status of the failure, the resumption of service, and the results of its internal review of the failure.

(4) Subsection 21(4) requires that a designated trade repository establish, implement, maintain and enforce business continuity plans, including disaster recovery plans. The Authority believes that these plans should allow the designated trade repository to provide continuous and undisrupted service, as back-up systems ideally should commence processing immediately. Where a disruption is unavoidable, a designated trade repository is expected to provide prompt recovery of operations, meaning that it resumes operations within 2 hours following the disruptive event. Under paragraph 21(4)(c), an emergency event could include any external sources of operational risk, such as the failure of critical service providers or utilities or events affecting a wide metropolitan area, such as natural disasters, terrorism, and pandemics. Business continuity planning should encompass all policies and procedures to ensure uninterrupted provision of key services regardless of the cause of potential disruption.

(5) Subsection 21(5) requires a designated trade repository to test its business continuity plans at least once a year. The expectation is that the designated trade repository would engage relevant industry participants, as necessary, in tests of its business continuity plans, including testing of back-up facilities for both the designated trade repository and its participants.

(6) Subsection 21(6) requires a designated trade repository to engage a qualified party to conduct an annual independent assessment of the internal controls referred to in paragraphs 21(3)(a) and (b) and subsections 21(4) and (5). A qualified party is a person or a group of persons with relevant experience in both information technology and in the evaluation of related internal controls in a complex information technology environment, such as external auditors or third party information system consultants. The Authority is of the view that this obligation may also be satisfied by an independent assessment by an internal audit department that is compliant with the International Standards for the Professional Practice of Internal Auditing published by the Institute of Internal Audit. Before engaging a qualified party, the designated trade repository should notify the Authority.

(8) Subsection 21(8) requires designated trade repositories to make public all material changes to technology requirements to allow participants a reasonable period to make system modifications and test their modified systems. In determining what a reasonable period is, the Authority of the view that the designated trade repository should consult

with participants and that a reasonable period would allow all participants a reasonable opportunity to develop, implement and test systems changes. We expect that the needs of all types of participants would be considered, including those of smaller and less sophisticated participants.

(9) Subsection 21(9) requires designated trade repositories to make available testing facilities in advance of material changes to technology requirements to allow participants a reasonable period to test their modified systems and interfaces with the designated trade repository. In determining what a reasonable period is, the Authority of the view that the designated trade repository should consult with participants and that a reasonable period would allow all participants a reasonable opportunity to develop, implement and test systems changes. We expect that the needs of all types of participants would be considered, including those of smaller and less sophisticated participants.

22. Data security and confidentiality

(1) Subsection 22(1) provides that a designated trade repository must establish policies and procedures to ensure the safety, privacy and confidentiality of derivatives data to be reported to it under the Regulation. The policies must include limitations on access to confidential trade repository data and safeguards to protect against persons and companies affiliated with the designated trade repository from using trade repository data for their personal benefit or the benefit of others.

(2) Subsection 22(2) prohibits a designated trade repository from releasing reported derivatives data, for a commercial or business purpose, that is not required to be publicly disclosed under section 40 without the express written consent of the counterparties to the transaction or transactions to which the derivatives data relates. The purpose of this provision is to ensure that users of the designated trade repository have some measure of control over their derivatives data.

23. Confirmation of data and information

Subsection 23(1) requires a designated trade repository to have and follow written policies and procedures for confirming the accuracy of the derivatives data received from a reporting counterparty. A designated trade repository must confirm the accuracy of the derivatives data with each counterparty to a reported transaction provided that the non-reporting counterparty is a participant of the trade repository. Where the non-reporting counterparty is not a participant of the trade repository, there is no obligation to confirm with such non-reporting counterparty.

The purpose of the confirmation requirement in subsection 23(1) is to ensure that the reported information is agreed to by both counterparties. However, in cases where a non-reporting counterparty is not a participant of the relevant designated trade repository, the designated trade repository would not be in a position to confirm the accuracy of the derivatives data with such counterparty. As such, under subsection 23(2) a designated trade repository will not be obligated to confirm the accuracy of the derivatives data with a counterparty that is not a participant of the designated trade repository. Additionally, similar to the reporting obligations in section 27, confirmation under subsection 23(1) can be delegated under section 27(3) to a third-party representative.

A trade repository may satisfy its obligation under section 23 to confirm the derivatives data reported for a transaction by notice to each counterparty to the transaction that is a participant of the designated trade repository, or its delegated third-party representative where applicable, that a report has been made naming the participant as a counterparty to a transaction, accompanied by a means of accessing a report of the derivatives data submitted. The policies and procedures of the designated trade repository may provide that if the designated trade repository does not receive a response from a counterparty within 48 hours, the counterparty is deemed to confirm the derivatives data as reported.

24. Outsourcing

Section 24 sets out requirements applicable to a designated trade repository that outsources any of its material services or systems to a service provider. Generally, a designated trade repository must establish policies and procedures to evaluate and approve these outsourcing arrangements. Such policies and procedures include assessing the suitability of potential service providers and the ability of the designated trade repository to continue to comply with securities legislation in the event of bankruptcy, insolvency or the termination of business of the service provider. A designated trade repository is also required to monitor the ongoing performance of a service provider to which it outsources a key service, system or facility. The requirements under section 24 apply regardless of whether the outsourcing arrangements are with third-party service providers or affiliates of the designated trade repository. A designated trade repository that outsources its services or systems remains responsible for those services or systems and for compliance with securities legislation.

PART 3 DATA REPORTING

Part 3 deals with reporting obligations for transactions and includes a description of the counterparties that will be subject to the duty to report, requirements as to the timing of reports and a description of the data that is required to be reported.

In Part 3 of this Policy, the term “contract” is interpreted to mean “contract or instrument”.

25. Application

Section 25 excludes transactions in certain contracts from the data reporting requirements of Part 3.

(a) *Gaming contracts*

Subsection 25(a) excludes transactions in certain domestic and foreign gaming contracts from the requirements of Part 3. While a gaming contract may come within the definition of “derivative”, it is generally not recognized as being a financial derivative and typically does not pose the same potential risk to the financial system as other derivatives products.

With respect to paragraph 25(a)(ii), a transaction in a contract that is regulated by gaming control legislation of a foreign jurisdiction would only qualify for this exclusion from the requirements of Part 3 if: (1) the contract’s execution does not violate legislation of Canada or a

CMR Jurisdiction, and (2) the contract would be considered a gaming contract under domestic legislation. If a contract would be treated as a derivative if entered into in a CMR Jurisdiction, but would be considered a gaming contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction.

(b) *Insurance and annuity contracts*

Subsection 25(b) of the Regulation excludes transactions in qualifying insurance or annuity contracts from the requirements of Part 3. A reinsurance contract would be considered to be an insurance or annuity contract.

While an insurance contract may come within the definition of "derivative", it is generally not recognized as a financial derivative and typically does not pose the same potential risk to the financial system as other derivatives products.

Certain derivatives that have characteristics similar to insurance contracts, including credit derivatives and climate-based derivatives, will not be treated as insurance or annuity contracts. Transactions in these derivatives will be subject to the requirements of Part 3.

Paragraph 25(b)(i) requires an insurance or annuity contract to be entered into with a domestically licensed insurer and that the contract be regulated as an insurance or annuity contract under Canadian insurance legislation. Therefore, for example, a transaction in an interest rate derivative entered into by a licensed insurance company would be subject to the requirements of Part 3.

With respect to paragraph 25(b)(ii), an insurance or annuity contract that is made outside of Canada would only qualify for this exclusion if it would be regulated under insurance legislation of Canada or a CMR Jurisdiction if made in a CMR Jurisdiction. Where a contract would otherwise be treated as a derivative if entered into in Canada, but is considered an insurance contract in a foreign jurisdiction, the contract does not qualify for this exclusion, irrespective of its characterization in the foreign jurisdiction. Paragraph 25(b)(ii) is included to address the situation where a local counterparty purchases insurance for an interest that is located outside of Canada and the insurer is not required to be licensed in Canada.

(c) *Currency exchange contracts*

Subsection 25(c) of the Regulation excludes transactions in a short-term contract for the purchase and sale of a currency from the requirements of Part 3 if the contract is settled within the time limits set out in paragraph 25(c)(i). This provision is intended to apply exclusively to contracts that facilitate the conversion of one currency into another currency specified in the contract. These currency exchange services are often provided by financial institutions or other businesses that exchange one currency for another for clients' personal or business use (e.g., for purposes of travel or to make payment of an obligation denominated in a foreign currency).

Timing of delivery (paragraph 25(c)(i))

To qualify for this exclusion the contract must require physical delivery of the currency referenced in the contract within the time periods prescribed in paragraph 25(c)(i). If a contract does not have a fixed settlement date or otherwise allows for settlement beyond the prescribed periods or permits settlement by delivery of a currency other than the currency referenced in the contract, it will not qualify for this exclusion.

Subparagraph 25(c)(i)(A) applies to a transaction that settles by delivery of the referenced currency within two business days – being the industry standard maximum settlement period for a spot foreign exchange transaction.

Subparagraph 25(c)(i)(B) allows for a longer settlement period if the foreign exchange transaction is entered into contemporaneously with a related securities trade. This exclusion reflects the fact that the settlement period for certain securities trades can be three or more days. In order for the provision to apply, the securities trade and foreign exchange transaction must be related, meaning that the currency to which the foreign exchange transaction pertains was used to facilitate the settlement of the related security purchase.

Where a contract for the purchase or sale of a currency provides for multiple exchanges of cash flows, all such exchanges must occur within the timelines prescribed in paragraph 25(c)(i) in order for the exclusion in subsection 25(c) to apply.

Settlement by delivery except where impossible or commercially unreasonable (paragraph 25(c)(i))

Subparagraph 25(c)(i) requires that a contract must not permit settlement in a currency other than what is referenced in the contract unless delivery is rendered impossible or commercially unreasonable as a result of events not reasonably within the control of the counterparties.

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 the exclusion in subsection 25(c) would not apply.

We consider events that are not reasonably within the control of the counterparties to include events that cannot be reasonably anticipated, avoided or remedied. An example of an intervening event that would render delivery to be commercially unreasonable would include a situation where a government in a foreign jurisdiction imposes capital controls that restrict the flow of the currency required to be delivered. A change in the market value of the currency itself will not render delivery commercially unreasonable.

Intention requirement (paragraph 25(c)(ii))

Paragraph 25(c)(ii) excludes from the requirements of Part 3 a contract for the purchase and sale of a currency that is intended to be settled through the delivery of the currency referenced in such contract. The intention to settle a contract by delivery may be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the currency and not merely an option to make or take delivery. Any agreement, arrangement or understanding between the counterparties, including a side agreement, standard account terms or operational procedures that allow for the settlement in a currency

other than the referenced currency or on a date after the time period specified in paragraph 25(c)(i) is an indication that the counterparties do not intend to settle the transaction by delivery of the prescribed currency within the specified time periods.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, will not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the contracted currency. Examples of provisions that may be consistent with the intention requirement under paragraph 25(c)(ii) include:

- a netting provision that allows two counterparties who are party to multiple contracts that require delivery of a currency to net offsetting obligations, provided that the counterparties intended to settle through delivery at the time the contract was created and the netted settlement is physically settled in the currency prescribed by the contract, and

- a provision where cash settlement is triggered by a termination right that arises as a result of a breach of the terms of the contract.

Although these types of provisions permit settlement by means other than the delivery of the relevant currency, they are included in the contract for practical and efficiency reasons.

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 subsection 25(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.

Rolling over (paragraph 25(c)(iii))

Paragraph 25(c)(iii) provides that, in order to qualify for the reporting exclusion in subsection 25(c), a currency exchange contract must not permit a rollover of the contract. Therefore, physical delivery of the relevant currencies must occur in the time periods prescribed in paragraph 25(c)(i). To the extent that a contract does not have a fixed settlement date or otherwise allows for the settlement date to be extended beyond the periods prescribed in paragraph 25(c)(i), the Authority would consider it to permit a rollover of the contract. Similarly, any terms or practice that permits the settlement date of the contract to be extended by simultaneously closing the contract and entering into a new contract without delivery of the relevant currencies would also not qualify for the exclusion in subsection 25(c).

The Authority does not intend that the exclusion in subsection 25(c) will apply to contracts entered into through platforms that facilitate investment or speculation based on the relative value of currencies. These platforms typically do not provide for physical delivery of the currency referenced in the contract, but instead close out the positions by crediting client

accounts held by the person operating the platform, often applying the credit using a standard currency.

(d) *Commodities*

Subsection 25(d) of the Regulation excludes transactions in a contract for the delivery of a commodity from the requirements of Part 3 if the contract meets the criteria in paragraphs 25(d)(i) and (ii).

Commodity

The exclusion available under subsection 25(d) is limited to commercial transactions in goods that can be delivered either in a physical form or by delivery of the instrument evidencing ownership of the commodity. We take the position that commodities include goods such as agricultural products, forest products, products of the sea, minerals, metals, hydrocarbon fuel, precious stones or other gems, electricity, oil and natural gas (and by-products, and associated refined products, thereof), and water. We also consider certain intangible commodities, such as carbon credits and emission allowances, to be commodities. In contrast, this exclusion will not apply to financial commodities such as currencies, interest rates, securities and indexes.

Intention requirement (paragraph 25(d)(i))

Paragraph 25(d)(i) of the Regulation requires that counterparties *intend* to settle the contract by delivering the commodity. Intention can be inferred from the terms of the relevant contract as well as from the surrounding facts and circumstances.

When examining the specific terms of a contract for evidence of an intention to deliver, we take the position that the contract must create an obligation on the counterparties to make or take delivery of the commodity and not merely an option to make or take delivery. Subject to the comments below on paragraph 25(d)(ii), we are of the view that a contract containing a provision that permits the contract to be settled by means other than delivery of the commodity, or that includes an option or has the effect of creating an option to settle the contract by a method other than through the delivery of the commodity, would not satisfy the intention requirement and therefore does not qualify for this exclusion.

We are generally of the view that certain provisions, including standard industry provisions, the effect of which may result in a transaction not being physically settled, may not necessarily negate the intention to deliver. The contract as a whole needs to be reviewed in order to determine whether the counterparties' intention was to actually deliver the commodity. Examples of provisions that may be consistent with the intention requirement under paragraph 25(d)(i) include:

- an option to change the volume or quantity, or the timing or manner of delivery, of the commodity to be delivered;

- a netting provision that allows two counterparties who are party to multiple contracts that require delivery of a commodity to net offsetting obligations provided that the counterparties intended to settle each contract through delivery at the time the contract was created,

- an option that allows the counterparty that is to accept delivery of a commodity to assign the obligation to accept delivery of the commodity to a third-party; and

- a provision where cash settlement is triggered by a termination right arising as a result of the breach of the terms of the contract or an event of default thereunder.

Although these types of provisions permit some form of cash settlement, they are included in the contract for practical and efficiency reasons.

In addition to the contract itself, intention may also be inferred from the conduct of the counterparties. 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, cash settlement, the contract will not qualify for this exclusion. Similarly, a contract will 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, cash settlement of the original contract.

When determining the intention of the counterparties, we will examine their conduct at execution and throughout the duration of the contract. Factors that we will consider include whether a counterparty is in the business of producing, delivering or using the commodity in question and whether the counterparties regularly make or take delivery of the commodity relative to the frequency with which they enter into such contracts in relation to the commodity.

Situations may exist where, after entering into the contract for delivery of the commodity, the counterparties enter into an agreement that terminates their obligation to deliver or accept delivery of the commodity (often referred to as a "book-out" agreement). Book-out agreements are typically separately negotiated, new agreements where the counterparties have no obligation to enter into such agreements and such book-out agreements are not provided for by the terms of the contract as initially entered into. We will generally not consider a book-out to be subject to the requirements of Part 3 provided that, at the time of execution of the original contract, the counterparties intended that the commodity would be delivered.

<u>Settlement by delivery except where impossible or commercially unreasonable (paragraph 25(d)(ii))</u>

Paragraph 25(d)(ii) requires that a contract not permit cash settlement in place of delivery unless physical settlement is rendered impossible or commercially unreasonable as a result of an intervening event or occurrence not reasonably within the control of the counterparties, their affiliates or their agents. A change in the market value of the commodity itself will not render delivery commercially unreasonable. In general, we consider examples of events not reasonably within the control of the counterparties would include:

- events to which typical *force majeure* clauses would apply,

- problems in delivery systems such as the unavailability of transmission lines for electricity or a pipeline for oil or gas where an alternative method of delivery is not reasonably available, and

- problems incurred by a counterparty in producing the commodity that they are obliged to deliver such as a fire at an oil refinery or a drought preventing crops from growing where an alternative source for the commodity is not reasonably available.

In our view, cash settlement in these circumstances would not preclude the requisite intention under paragraph 25(d)(i) from being satisfied.

(e) and (f) *Evidence of a deposit*

Subsections 25(e) and (f) of the Regulation exclude transactions in certain evidence of deposits from the requirements of Part 3.

Subsection 25(f) refers to an entity "…authorized by an enactment of a jurisdiction of Canada to carry on business in a jurisdiction of Canada". It is intended that all federal or province-specific statutes will receive the same treatment in every province or territory. For example, if a credit union to which a CMR Jurisdiction's provincial legislation applies issues an evidence of deposit to a market participant that is located in a non-CMR Jurisdiction, that jurisdiction would apply the same treatment under its equivalent legislation.

(g) *Exchange-traded derivatives*

Subsection 25(g) of the Regulation excludes a transaction in a derivative from the requirements of Part 3 if the derivative is traded on certain prescribed exchanges. Exchange-traded derivatives provide a measure of transparency to regulators and to the public, and for this reason these transactions are not required to be reported. We note that where a transaction is cleared through a clearing agency, but not traded on an exchange, it will not be considered to be exchange-traded and will be required to be reported.

Derivatives trading facilities are not considered "exchanges" for the purposes of subsection 25(g). A derivatives trading facility means a person that constitutes, maintains, or provides a facility or market that brings together buyers and sellers of OTC derivatives, brings together the orders of multiple buyers and multiple sellers, and uses methods under which the orders interact with each other and the buyers and sellers agree to the terms of trades (see CSA Consultation Paper 92-401 *Derivatives Trading Facilities*). For example, the following would not be considered an exchange for purposes of subsection 25(g):

- a "swap execution facility" as defined in the Commodity Exchange Act 7 U.S.C. §(1a)(50);
- a "security-based swap execution facility" as defined in the Securities Exchange Act of 1934 15 U.S.C. §78c(a)(77);
- a "multilateral trading facility" as defined in Directive 2014/65/EU Article 4(1)(22) of the European Parliament; and
- an "organized trading facility" as defined in Directive 2014/65/EU Article 4(1)(23) of the European Parliament.

Therefore transactions in derivatives traded on the foregoing facilities would not be excluded by this Regulation and would therefore be subject to the reporting requirement in Part 3.

(h) *Certain securities*

Subsection 25(h) of the Regulation excludes from the requirements of Part 3 transactions in certain derivatives that are also securities. Derivatives that are securities and which are contemplated as falling within this exclusion include structured notes, asset-backed securities, exchange-traded notes, capital trust units, exchangeable securities, income trust units, securities of investment funds and warrants.

The exclusion in subsection 25(h) applies to transactions in a derivative that is also a security, other than a derivative that is a security solely by reason of being an investment contract under paragraph (n) of the definition of "security" in section 2 of the Act or a security solely by reason of being an option described in paragraph (d) of the definition of "security" in section 2 of the Act. Some types of contracts traded over-the-counter, such as foreign exchange contracts and contracts for difference meet the definition of "derivative" (because their market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest) but also meet the definition of "security" (because they are investment contracts). This provision prescribes that transactions in such contracts will be required to be reported to a designated trade repository.

The exception described above does not apply if the contract is used by an issuer or affiliate of an issuer solely to compensate a director, officer, employee or service provider or as a financing instrument and whose underlying interest is a share or stock of that issuer or its affiliate. Options fall within both the definition of "derivative" and the definition of "security". Accordingly, an option that is only a security by virtue of paragraph (d) of the definition of "security" in section 2 of the Act, is subject to the trade reporting requirements of Part 3, unless it is used by an issuer or affiliate of an issuer solely to compensate an employee or service provider or as a financing instrument and its underlying interest is a share or stock of that issuer or its affiliate. This treatment will only apply to options that are traded over-the-counter. Exchange-traded options will not be required to be reported to a designated trade repository.

<u>Contracts used as compensation</u>

A derivative that is a security only by virtue of paragraph (d) or paragraph (n) of the definition of "security" in section 2 of the Act, but is used by an issuer or its affiliate solely to compensate a director, officer, employee or service provider and whose underlying interest is a share or stock of that issuer or its affiliate, is not subject to the reporting requirements of Part 3. Examples of such compensation instruments include stock options, phantom stock units, restricted share units, deferred share units, restricted share awards, performance share units, stock appreciation rights and compensation instruments provided to service providers, such as broker options.

<u>Contracts used as financing instruments</u>

Similarly, a derivative that is a security only by virtue of paragraph (d) or paragraph (n) of the definition of "security" in section 2 of the Act, but is used by an issuer or its affiliate as a financing instrument and whose underlying interest is a share or stock of that issuer or its affiliate, is not subject to the reporting requirements of Part 3. The Authority takes the view that an instrument would only be considered a financing instrument if it is used for capital-raising purposes. For example, rights, warrants and special warrants, or subscription rights/receipts or

convertible instruments issued to raise capital for any purpose would not be subject to the requirements of Part 3. An equity swap, for example, would generally not be considered a financing instrument.

(i) *Additional contracts not considered to be derivatives*

Apart from transactions expressly excluded by section 25 of the Regulation, there are other contracts that we do not consider to be "derivatives" for the purposes of securities or derivatives legislation. A feature common to these contracts is that they are entered into for consumer, business or non-profit purposes that do not involve investment, speculation or hedging. Typically, they provide for the transfer of ownership of a good or the provision of a service. In most cases, they are not traded on a market.

These contracts include, but are not limited to:

- a consumer or commercial contract to acquire, or lease real or personal property, to provide personal services, to sell or assign rights, equipment, receivables or inventory, or to obtain a loan or mortgage, including a loan or mortgage with a variable rate of interest, interest rate cap, interest rate lock or embedded interest rate option;

- a consumer contract to purchase non-financial products or services at a fixed, capped or collared price;

- an employment contract or retirement benefit arrangement;

- a guarantee;

- a performance bond;

- a commercial sale, servicing, or distribution arrangement;

- a contract for the purpose of effecting a business purchase and sale or combination transaction;

- a contract representing a lending arrangement in connection with building an inventory of assets in anticipation of a securitization of such assets; and

- a commercial contract containing mechanisms indexing the purchase price or payment terms for inflation such as via reference to an interest rate or consumer price index.

26. Reporting counterparty

Section 26 outlines how the counterparty required to report derivatives data and fulfil the ongoing reporting obligations under the Regulation is determined. Reporting obligations on derivatives dealers apply irrespective of whether the derivatives dealer is a registrant.

(1) Subsection 26(1) outlines a hierarchy for determining which counterparty to a transaction will be required to report the transaction based on the counterparty to the transaction that is best suited to fulfill the reporting obligation. For example, for transactions that are cleared through a recognized or exempt clearing agency, the clearing agency is best positioned to report derivatives data and is therefore required to act as reporting counterparty

For a transaction between two derivatives dealers or two end-users – that is, a transaction to which neither of paragraphs 26(1)(a) or (c) apply – paragraphs 26(1)(b) and (d) allow the counterparties to agree, in writing, at or before the time the transaction occurs, which counterparty will act as the reporting counterparty for the transaction. The intention of paragraphs 26(1)(b) and (d) is to facilitate one counterparty reporting while requiring both counterparties to have procedures or contractual arrangements in place to ensure that reporting occurs.

One example of wording where a person agrees to act as the reporting counterparty is the wording referenced in the ISDA methodology publicly available at www.isda.org. It has been developed for Canada in order to facilitate one-sided transaction reporting and provide a consistent method for determining the party required to act as reporting counterparty.

27. Duty to report

Section 27 outlines the duty to report derivatives data.

(1) Subsection 27(1) requires that, subject to section 41, derivatives data for each transaction to which one or more counterparties is a local counterparty be reported to a designated trade repository. The counterparty required to report the derivatives data is the reporting counterparty as determined under section 26.

(2) Under subsection 27(2), the reporting counterparty for a transaction must ensure that all reporting obligations are fulfilled. This includes ongoing requirements such as the reporting of life-cycle event data and valuation data.

(3) Subsection 27(3) permits the delegation of all reporting obligations of a reporting counterparty. This includes reporting of initial creation data, life-cycle event data and valuation data. For example, some or all of the reporting obligations may be delegated to a third-party service provider. However, the reporting counterparty remains responsible for ensuring that the derivatives data is accurate and reported within the timeframes required under the Regulation.

(4) With respect to subsection 27(4), prior to the reporting rules in Part 3 coming into force, the Authority will provide public guidance on how reports for transactions that are not accepted for reporting by any designated trade repository should be electronically submitted to the Authority.

(5) Subsection 27(5) provides for limited substituted compliance with this Regulation where a transaction has been reported to a designated trade repository pursuant to the law of a province of Canada other than a CMR Jurisdiction or of a foreign jurisdiction listed in

Appendix B, provided that the additional conditions set out in paragraphs (a) and (c) are satisfied.

(6) Paragraph 27(6)(a) requires that all derivatives data reported for a given transaction be reported to the same designated trade repository to which the initial report is submitted or, with respect to transactions reported under section 27(4), to the Authority. For a bi-lateral transaction that is assumed by a clearing agency (novation), the designated trade repository to which all derivatives data for the assumed transactions must be reported is the designated trade repository to which the original bi-lateral transaction was reported.

The purpose of this requirement is to ensure the Authority has access to all reported derivatives data for a particular transaction from the same entity. It is not intended to restrict counterparties' ability to report to multiple trade repositories. Where the entity to which the transaction was originally reported is no longer a designated trade repository, all data relevant to that transaction should be reported to another designated trade repository as otherwise required by the Regulation.

(7) The Authority interprets the requirement in subsection 27(7) to report errors or omissions in derivatives data "as soon as technologically practicable" after it is discovered, to mean upon discovery and in any case no later than the end of the business day on which the error or omission is discovered.

(8) Under subsection 27(8), where a local counterparty that is not a reporting counterparty discovers an error or omission in respect of derivatives data that is reported to a designated trade repository, such local counterparty has an obligation to report the error or omission to the reporting counterparty. Once the error or omission is reported to the reporting counterparty, the reporting counterparty then has an obligation under subsection 27(7) to report the error or omission to the designated trade repository or to the Authority in accordance with subsection 27(6). The Authority interprets the requirement in subsection 27(8) to notify the reporting counterparty of errors or omissions in derivatives data to mean upon discovery and in any case no later than the end of the business day on which the error or omission is discovered.

29. Legal entity identifiers

(1) Subsection 29(1) requires that a designated trade repository identify all counterparties to a transaction by a legal entity identifier. It is envisioned that this identifier be a LEI under the Global LEI System. The Global LEI System is a G20 endorsed initiative[5] that will uniquely identify counterparties to transactions. It is currently being designed and implemented under the direction of the LEI ROC, a governance body endorsed by the G20.

(2) The "Global Legal Entity Identifier System" referred to in subsection 29(2) means the G20 endorsed system that will serve as a public-good utility responsible for overseeing the issuance of legal entity identifiers globally to counterparties who enter into transactions.

[5] See http://www.financialstabilityboard.org/list/fsb_publications/tid_156/index.htm for more information.

(3) If the Global LEI System is not available at the time counterparties are required to report their LEI under the Regulation, they must use a substitute legal entity identifier. The substitute legal entity identifier must be in accordance with the standards established by the LEI ROC for pre-LEI identifiers. At the time the Global LEI System is operational; counterparties must cease using their substitute LEI and commence reporting their LEI. The substitute LEI and LEI could be identical.

(4) Subsection 29(4) provides an exception to the requirements of subsection 29(1) so that, where a counterparty to a transaction does not qualify to receive a legal entity identifier, the designated trade repository must instead identify the counterparty with a client code.

30. Unique transaction identifier

A unique transaction identifier will be assigned by the designated trade repository to each transaction which has been submitted to it. The designated trade repository may utilize its own methodology or incorporate a previously assigned identifier that has been assigned by, for example, a clearing agency, trading platform, or third-party service provider. However, the designated trade repository must ensure that no other transaction shares the same identifier.

A transaction in this context means a transaction from the perspective of all counterparties to the transaction. For example, both counterparties to a single swap transaction would identify the transaction by the same single identifier. For a bi-lateral transaction that is novated to a clearing agency, the reporting of the novated transactions should reference the unique transaction identifier of the original bi-lateral transaction.

31. Unique product identifier

Section 31 requires that a reporting counterparty identify each transaction that is subject to the reporting obligation under the Regulation by means of a unique product identifier. There is currently a system of product taxonomy that may be used for this purpose.[6] To the extent that a unique product identifier is not available for a particular transaction type, a reporting counterparty would be required to create one using an alternative methodology.

32. Creation data

Subsection 32(2) requires that reporting of creation data be made in real time, which means that creation data should be reported as soon as technologically practicable after the execution of a transaction. In evaluating what will be considered to be "technological practicable", the Authority will take into account the prevalence of implementation and use of technology by comparable counterparties located in Canada and in foreign jurisdictions. The Authority may also conduct independent reviews to determine the state of reporting technology.

(3) Subsection 32(3) is intended to take into account the fact that not all counterparties will have the same technological capabilities. For example, counterparties that do not regularly engage in transactions would, at least in the near term, likely not be as well situated to achieve real-time reporting. Further, for certain post-transaction operations,

[6] See http://www2.isda.org/identifiers-and-otc-taxonomies/ for more information.

such as trade compressions involving numerous transactions, real time reporting may not currently be practicable. In all cases, the outside limit for reporting is the end of the business day following execution of the transaction.

33. Life-cycle event data

The Authority notes that, in accordance with subsection 27(6), all reported derivatives data relating to a particular transaction must be reported to the same designated trade repository to which the initial report was made, or to the Authority for transactions for which derivatives data was reported to the Authority in accordance with subsection 27(4).

(1) Life-cycle event data is not required to be reported in real time but rather at the end of the business day on which the life-cycle event occurs. The end of business day report may include multiple life-cycle events that occurred on that day.

34. Valuation data

Valuation data with respect to a transaction that is subject to the reporting obligations under the Regulation is required to be reported by the reporting counterparty. For both cleared and uncleared transactions, counterparties may, as described in subsection 27(3), delegate the reporting of valuation data to a third party, but such counterparties remain ultimately responsible for ensuring the timely and accurate reporting of this data. The Authority notes that, in accordance with subsection 27(6), all reported derivatives data relating to a particular transaction must be reported to the same designated trade repository to which the initial report was made, or to the Authority for transactions for which the initial report was made to the Authority in accordance with subsection 27(4).

(1) Subsection 34(1) provides for differing frequency of valuation data reporting based on the type of entity that is the reporting counterparty.

35. Pre-existing derivatives

Section 35 outlines reporting obligations in relation to transactions that were entered into prior to the commencement of the reporting obligations. Where the reporting counterparty is a derivatives dealer or a recognized or exempt clearing agency, subsection 35(1) requires that pre-existing transactions that were entered into before ● and that will not expire or terminate on or before ● to be reported to a designated trade repository no later than ●. Similarly, where the reporting counterparty is neither a derivatives dealer nor a recognized or exempt clearing agency, subsection 35(1.1) requires that pre-existing transactions that were entered into before ● and that will not expire or terminate on or before ● to be reported to a designated trade repository no later than ●. In addition, only the data indicated in the column entitled “Required for Pre-existing Transactions” in Appendix A will be required to be reported for pre-existing transactions.

Transactions that are entered into before ● and that expire or terminate on or before ● will not be subject to the reporting obligation, if the reporting counterparty to the transaction is a derivatives dealer or a recognized or exempt clearing agency. Similarly, transactions for which the reporting counterparty is neither a derivatives dealer nor a recognized or exempt clearing

agency will not be subject to the reporting obligation if they are entered into before ● but will expire or terminate on or before ●. These transactions are exempted from the reporting obligation in the Regulation, to relieve some of the reporting burden for counterparties and because they would provide marginal utility to the Authority due to their imminent termination or expiry.

The derivatives data required to be reported for pre-existing transactions under section 35 is substantively the same as the requirement under CFTC Rule 17 CFR Part 46 – *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*. Therefore, to the extent that a reporting counterparty has reported pre-existing transaction derivatives data required by the CFTC rule, this would meet the derivatives data reporting requirements under section 35. This interpretation applies only to pre-existing transactions.

PART 4 DATA DISSEMINATION AND ACCESS TO DATA

38. Data available to regulators

(1) Subsection 38(1) requires designated trade repositories to provide to the Authority, among other things, continuous and timely electronic access to derivatives data. Electronic access includes the ability of the Authority to access, download, or receive a direct real-time feed of derivatives data maintained by the designated trade repository.

The derivatives data covered by this subsection are data necessary to carry out the Authority's mandate to protect against unfair, improper or fraudulent practices, to foster fair and efficient capital markets, to promote confidence in the capital markets, and to address systemic risk. This includes derivatives data with respect to any transaction or transactions that may impact capital markets in a CMR Jurisdiction.

Transactions that reference an underlying asset or class of assets with a nexus to a CMR Jurisdiction can impact a CMR Jurisdiction's capital markets even if the counterparties to the transaction are not local counterparties. Therefore, the Authority has a regulatory interest in transactions involving such underlying interests even if such data is not submitted pursuant to the reporting obligations in the Regulation, but is held by a designated trade repository.

(2) Subsection 38(2) requires a designated trade repository to conform to internationally accepted regulatory access standards applicable to trade repositories. Trade repository regulatory access standards have been developed by CPSS and IOSCO. It is expected that all designated trade repositories will comply with the access recommendations in CPSS-IOSCO's final report.[7]

(3) The Authority interprets the requirement for a reporting counterparty to use best efforts to provide the Authority with access to derivatives data to mean, at a minimum, instructing the designated trade repository to release derivative data to the Authority.

[7] See report entitled "Authorities' Access to TR Data" available at http://www.bis.org/publ/cpss110.htm.

39. Data available to counterparties

Section 39 is intended to ensure that each counterparty, and any person acting on behalf of a counterparty, has access to all derivatives data relating to its transaction(s) in a timely manner. The Authority is of the view that where a counterparty has provided consent to a trade repository to grant access to data to a third-party service provider, the trade repository shall grant such access on the terms consented to.

40. Data available to public

(1) Subsection 40(1) requires a designated trade repository to make available to the public, free of charge, certain aggregate data for all transactions reported to it under the Regulation (including open positions, volume, number of transactions, and price). It is expected that a designated trade repository will provide aggregate data by notional amounts outstanding and level of activity. Such aggregate data is expected to be available on the designated trade repository's website.

(2) Subsection 40(2) requires that the aggregate data that is disclosed under subsection 40(1), be broken down into various categories of information. The following are examples of the aggregate data required under subsection 40(2):

- currency of denomination (the currency in which the derivative is denominated);
- geographic location of the underlying reference entity (e.g., Canada for derivatives which reference the TSX60 index);
- asset class of reference entity (e.g., fixed income, credit, or equity);
- product type (e.g., options, forwards, or swaps);
- cleared or uncleared;
- maturity (broken down into maturity ranges, such as less than one year, 1-2 years, 2-3 years).

(3) Subsection 40(3) requires a designated trade repository to publicly report the data indicated in the column entitled "Required for public dissemination" in Appendix A of the Regulation. For transactions where at least one counterparty is a derivatives dealer, paragraph 40(3)(a) requires that such data be publicly disseminated by the end of the day following the day on which the designated trade repository receives the data. For transactions where neither counterparty is a derivatives dealer, paragraph 40(3)(b) requires that such data be publicly disseminated by the end of the second day following the day on which the designated trade repository receives the data. The purpose of the public reporting delays is to ensure that counterparties have adequate time to enter into any offsetting transaction that may be necessary to hedge their positions. These time delays apply to all transactions, regardless of transaction size.

(4) Subsection 40(4) provides that a designated trade repository must not disclose the identity of either counterparty to the transaction. This means that published data must

be anonymized and the names or legal entity identifiers of counterparties must not be published. This provision is not intended to create a requirement for a designated trade repository to determine whether anonymized published data could reveal the identity of a counterparty based on the terms of the transaction.

PART 5 EXCLUSIONS

41. Section 41 provides that the reporting obligation for a physical commodity transaction entered into between two non-derivatives dealers does not apply in certain limited circumstances. This exclusion only applies if a local counterparty to a transaction has less than $● [to be determined] aggregate notional value under all outstanding derivatives transactions, including the additional notional value related to that transaction. In calculating this exposure, the notional value of all outstanding transactions, including transactions from all asset classes and with all counterparties, domestic and foreign, should be included.

The notional value of a physical commodity transaction would be calculated by multiplying the quantity of the physical commodity by the price for that commodity. A counterparty that is above the $● [to be determined] threshold is required to act as reporting counterparty for a transaction involving a party that is exempt from the reporting obligation under section 41. In a situation where both counterparties to a transaction qualify for this exclusion, it would not be necessary to determine a reporting counterparty in accordance with section 26.

This relief applies to physical commodity transactions that are not excluded derivatives under section 25. An example of a physical commodity transaction that is required to be reported (and therefore could benefit from this relief) is a physical commodity contract that allows for cash settlement in place of delivery.