

December 15, 2017

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO, QUÉBEC AND MANITOBA
(THE "JURISDICTIONS")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
THE TORONTO-DOMINION BANK
(THE APPLICANT)

DECISION

Background

The securities regulatory authority or regulator in each Jurisdiction (each a "**Decision Maker**") has received an application from the Applicant for an order, in Ontario, pursuant to Part 6 of OSC Rule 91-507 – *Trade Repositories and Derivatives Data Reporting*, in Manitoba pursuant to Part 6 of MSC Rule 91-507 – *Trade Repositories and Derivatives Data Reporting* and in Québec pursuant to Section 86 of the *Derivatives Act*, CQLR, c. I-14.01, varying the Director's decision dated December 17, 2014 (as varied on December 16, 2015, and December 16, 2016, the "**Existing Relief Decision**"), which provides relief from the following derivatives data reporting requirements in relation to new and existing transactions under Part 3 of OSC Rule 91-507 – *Trade Repositories and Derivatives Data Reporting*, in Manitoba under Part 3 of MSC Rule 91-507 – *Trade Repositories and Derivatives Data Reporting* and in Québec under Chapter 3 of the Autorité des marchés financiers' Regulation 91-507 – *respecting Trade Repositories and Derivatives Data Reporting*, CQLR, c. I-14.01 (collectively, the "**Local Reporting Provisions**"):

- (a) the requirement for a reporting counterparty to report, update, amend or supplement (collectively, "**Report**" or "**Reporting**") the Legal Entity Identifier ("**LEI**") of a transaction counterparty where such Reporting could result in the reporting counterparty breaching laws applicable in the transaction counterparty's own jurisdiction that restrict or limit the disclosure of information relating to the transaction or to the counterparty or that require the transaction counterparty's consent to such disclosure in circumstances where such consent has not been obtained; and
- (b) the requirement for a reporting counterparty to Report certain information (as more fully described below) related to or dependent on a transaction counterparty, which information has not been provided to the reporting counterparty by the transaction counterparty or has not otherwise been obtained by the reporting counterparty at the time of reporting.

The Existing Relief Decision ceases to be available on December 18, 2017 (the "**Sunset Provision**").

The Applicant has requested that the Existing Relief Decision be varied (collectively, the “**Variation Relief Sought**”) so that the Sunset Provision in the Existing Relief Decision will (1) not apply with respect to the relief described in paragraphs 1 and 2 for so long as the Applicant determines that its transaction counterparty or the Subject Transaction is subject to a Blocking Law or Consent Requirement (as defined below), as applicable, and (2) be extended until December 18, 2018, as it applies to the relief described in paragraph 3.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a coordinated review application):

1. the Ontario Securities Commission (“**OSC**”) is the Principal Regulator for this application; and
2. the decision is the decision of the Principal Regulator and evidences the decision of each other Decision Maker.

Interpretation

Terms defined in National Instrument 14-101 – *Definitions* and Multilateral Instrument 11-102 – *Passport System* have the same meaning if used in this decision, unless otherwise defined.

For the purposes of this decision the following terms have the meanings provided in the Existing Relief Decision, which are restated below:

“**Blocking Law**” means any statute, law, enactment, rule, order, judgement, practice, guideline or decree that would restrict or limit a subject person's disclosure of information relating to a Subject Transaction or to the counterparty of a Subject Transaction.

“**Consent Requirement**” means any statute, law, enactment, rule, order, judgement, practice, guideline or decree that would require a counterparty to a Subject Transaction to consent to a subject person's disclosure of information relating to such Subject Transaction or counterparty.

“**Identifier**” means the data contemplated in Appendix A of the applicable Local Reporting Provisions under “Identifier of non-reporting counterparty” in respect of a Subject Transaction.

“**Trade Specific Requirement**” means a requirement arising under or in connection with a Consent Requirement that would require that steps be taken to comply therewith in connection with and at the time of a Subject Transaction, on a transaction by transaction basis.

Representations

This decision is based on the facts represented by the Applicant set out in the Existing Relief Decision as stated and varied below:

1. the Applicant is a Canadian Schedule I bank under the *Bank Act*, with its head office located in Toronto, Ontario;
2. the Applicant enters into derivatives transactions with multiple counterparties across Canada and around the world;
3. the Applicant is required to Report derivative transaction data in accordance with the applicable Local Reporting Provisions, as mandated by Guideline B-7 of the Office of the Superintendent of Financial Institutions (“**OSFI**”);

4. while it is not specifically required by Guideline B-7, the Applicant believes that adhering to the Local Reporting Provisions in Québec and Manitoba is consistent with the principles of the G-20 OTC derivatives reforms, which have been supported by the Government of Canada;
5. on October 29, 2014, the OSC and the Manitoba Securities Commission, and on October 30, 2014, the Autorité des marchés financiers, each published a press release (collectively, the "**Press Releases**") to among other things, provide guidance on the situation where a reporting counterparty may be required to Report a transaction counterparty's LEI despite the fact that such LEI has not been obtained by the transaction counterparty or provided by the transaction counterparty to a reporting counterparty;
6. to the extent that the Press Releases provide guidance in relation to compliance matters pertaining to a transaction counterparty's failure to obtain an LEI or to provide its LEI to the Applicant and have not been withdrawn, the Applicant intends to reflect its understanding of such guidance in complying with the applicable Local Reporting Provisions;
7. the Applicant has established or procured internal technology, systems and procedures in order to give effect to the Local Reporting Provisions;
8. in order to comply with the Local Reporting Provisions applicable to a transaction, the Applicant may need to: (a) if required by applicable law, obtain a consent from the counterparty to enable the reporting counterparty to disclose information relating to the transaction or counterparty; and (b) receive certain counterparty-specific information, including the counterparty's LEI (or its equivalent), its broker's LEI (where applicable), or information sufficient to enable the Applicant to determine whether the counterparty is a local counterparty (collectively, in respect of a counterparty to a transaction, the "**Required Counterparty Feedback**");
9. the Applicant has engaged in diligent efforts to solicit Required Counterparty Feedback through direct client outreach and through industry efforts and as a result has received Required Counterparty Feedback from a majority of its counterparties; however, despite these efforts, the Applicant has not received Required Counterparty Feedback from all of its counterparties;
10. a failure to provide the Variation Relief Sought could result in inconsistent or disrupted reporting of derivatives data by the Applicant, or in the Applicant not entering into new derivatives transactions with affected transaction counterparties, all of which could have negative implications for the Applicant, the Canadian financial system and the broader Canadian economy;
11. if the Variation Relief Sought is granted, the Applicant will continue to have the opportunity to make diligent efforts to obtain Required Counterparty Feedback while avoiding such negative implications in respect of existing and prospective derivatives transactions other than to the extent contemplated in paragraphs 3.(A) and (C) of this decision;
12. if the Variation Relief Sought is granted, the Applicant will continue to make diligent efforts to obtain the Required Counterparty Feedback from its counterparties;
13. the Applicant has complied with the requirements of the Existing Relief Decision; and
14. the Applicant is not in default of securities legislation in any jurisdiction.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Principal Regulator is that the Variation Relief Sought is granted and it orders that, in respect of each transaction that is subject to Reporting in accordance with the applicable Local Reporting Provisions (in each case, a "**Subject Transaction**"), the Existing Relief Decision be varied in part, on the foregoing basis and restated as set forth below:

1. Relief related to Blocking Laws – The Applicant is exempted from the Reporting of creation data under Reporting requirements contained in sections 26, 27(a), 28, 31, 32, 34 and 35 of the applicable Local Reporting Provisions (the "**Reporting Provisions**") only to the extent that the Applicant would be required to Report the Identifier in respect of a Subject Transaction, in the following circumstances:

(A) the Applicant determines that its transaction counterparty or the Subject Transaction is subject to a Blocking Law; or

(B) the Applicant has yet to determine, or having used reasonable efforts has been unable to determine, if its transaction counterparty or the Subject Transaction is subject to a Blocking Law,

provided that the Applicant:

(i) either (x) reports an internal identifier code for its transaction counterparty or (y) if it is not feasible or not practical for the Applicant to Report an internal identifier code for the transaction counterparty in compliance with the applicable Blocking Law, reports that the LEI of the transaction counterparty is undisclosed;

(ii) prepares and makes available in a timely manner to OSFI and in turn to the OSC (x) a list of all jurisdictions that it reasonably determines are subject to an applicable Blocking Law; and (y) a list of jurisdictions in respect of which the Applicant has yet to determine, or using reasonable efforts has been unable to determine, if an applicable Blocking Law exists;

(iii) makes diligent efforts to determine whether Blocking Laws exist in the jurisdiction where its transaction counterparty is located; and

(iv) makes diligent efforts, where required, to correct any Reporting it has made in relation to a Subject Transaction in reliance on the foregoing exemptions on a timely basis after any previously applicable Blocking Law no longer applies to limit or restrict the Applicant's disclosure of information relating to the Subject Transaction or the transaction counterparty,

and provided further that the foregoing exemption will continue to apply in respect of the Subject Transaction during a period of up to 3 months following the date on which the Applicant becomes aware that any previously applicable Blocking Law no longer applies to limit or restrict the Applicant's disclosure of information relating to the Subject Transaction or the transaction counterparty.

2. Relief Related to Consent Requirements – The Applicant is exempted from the Reporting of creation data under the Reporting Provisions only to the extent that the Applicant would be required to Report the Identifier in respect of the Subject Transaction, in the following circumstances:

(A) the Applicant determines that its transaction counterparty or the Subject Transaction is subject to a Consent Requirement and that a required consent has not been provided by the transaction counterparty to the Applicant; or

(B) the Applicant has yet to determine, or having used reasonable efforts has been unable to determine, if its transaction counterparty or the Subject Transaction is subject to a Consent Requirement,

provided that the Applicant:

(i) either (x) reports an internal identifier code for its transaction counterparty or (y) if the Applicant has all necessary processes in place to internally identify its transaction counterparty and it is not feasible or not practical for the Applicant to Report an internal identifier code for the transaction counterparty in compliance with the applicable Consent Requirement, reports that the LEI of the transaction counterparty is undisclosed;

(ii) prepares and makes available in a timely manner to OSFI and in turn to the OSC (x) a list of all jurisdictions that it reasonably determines are jurisdictions in which an applicable Consent Requirement exists; and (y) a list of jurisdictions in respect of which the Applicant has yet to determine, or using reasonable efforts has been unable to determine, if an applicable Consent Requirement exists;

(iii) makes diligent efforts to obtain any required consent from the transaction counterparty, other than any consent that would arise in connection with a Trade Specific Requirement; and

(iv) makes diligent efforts, where required, to correct any Reporting it has made in relation to the Subject Transaction in reliance on the foregoing exemptions on a timely basis after all consents required to satisfy a Consent Requirement in relation to the Subject Transaction have been obtained by the Applicant,

and provided further that the foregoing exemption will continue to apply in respect of the Subject Transaction during a period of up to 3 months following the earlier of (x) the date on which the transaction counterparty has provided the Applicant with all such required consents and (y) the date on which the Applicant becomes aware that any previously applicable Consent Requirement no longer applies to limit or restrict the Applicant's disclosure of information relating to the Subject Transaction or the transaction counterparty.

3. Required Counterparty Feedback – The Applicant is exempted from the Reporting of creation data under the applicable Local Reporting Provisions only to the extent that the Applicant would be required to Report the creation data contemplated in Appendix A of the applicable Local Reporting Provisions under “Jurisdiction of non-reporting counterparty” or “Broker/Clearing Intermediary” in respect of the Subject Transaction, in the following circumstances:

(A) Counterparty Status as a Local Counterparty – if the transaction counterparty has not provided the Applicant with Required Counterparty Feedback sufficient to enable the Applicant to determine if the transaction counterparty is a “local counterparty” under the Local Reporting Provisions of the Jurisdiction, provided that the Applicant Reports the Subject Transaction to the jurisdiction in which the Applicant has its principal place of business and, if reasonably practicable, makes diligent efforts to use the information from its own systems to Report the Subject Transaction in the transaction counterparty’s jurisdiction, in each case if and to the extent it is reportable by the Applicant in such jurisdiction, and provided further that the foregoing exemption detailed in this paragraph 3.(A) shall not be available in respect of a Subject Transaction whenever the transaction counterparty is a person or company with whom the Applicant has no pre-existing contractual relationship relating to transacting in derivatives:

- (a) as of June 30, 2017 when the transaction counterparty is a person or company that the Applicant determines (having made diligent efforts to use the information from its own systems) is organized under the laws of the Jurisdiction or has its head office or principal place of business in the Jurisdiction; and
- (b) as of June 30, 2018 for any other transaction counterparty;

(B) Existence of a Guaranteed Affiliate – if the transaction counterparty has not provided the Applicant with Required Counterparty Feedback sufficient to enable the Applicant to determine if the transaction counterparty has an affiliate that is organized under the laws of a Jurisdiction or that has its head office or principal place of business in a Jurisdiction and that is responsible for the liabilities of the transaction counterparty (a “**Guaranteed Affiliate**”), provided that the Applicant otherwise reports the Subject Transaction on the basis that the transaction counterparty is not a Guaranteed Affiliate if the transaction counterparty is otherwise a “local counterparty” under the applicable Local Reporting Provisions; or

(C) Broker LEI – if any applicable broker, who acts as an intermediary for the Applicant in respect of the Subject Transaction, without itself becoming a counterparty, has not provided its LEI to the Applicant, provided that the Applicant Reports the Subject Transaction on the basis that the creation data contemplated in Appendix A of the applicable Local Reporting Provisions under “Broker/Clearing Intermediary” is undisclosed, until such time as such information has been provided to the Applicant, and provided further that the foregoing exemption detailed in this paragraph 3.(C) shall not be available with respect to a Subject Transaction entered into by the Applicant on or after June 30, 2018, in the event the Applicant had no pre-existing contractual relationship relating to transacting in derivatives with any applicable broker, who acts as an intermediary for the Applicant in respect of the Subject Transaction, without itself becoming a counterparty, as of such date,

provided that the Applicant:

- (i) makes diligent efforts to prepare quarterly compliance reports regarding its efforts to obtain Required Counterparty Feedback, substantially in a form acceptable to OSFI, and in turn acceptable to the OSC;
- (ii) makes such quarterly compliance reports available in a timely manner to OSFI and in turn to the OSC; and

(iii) makes diligent efforts, where required, to correct any Reporting it has made in relation to the Subject Transaction in reliance on the foregoing exemptions on a timely basis after Required Counterparty Feedback has been obtained.

The foregoing exemptions will continue to apply in respect of the Subject Transaction during a period of up to 3 months following the date on which previously unknown or unavailable Required Counterparty Feedback has been provided to the Applicant by the transaction counterparty.

4. Effectiveness of the Order – The exemptions provided pursuant to paragraphs 1 and 2 shall continue to be available for so long as the Applicant determines that its transaction counterparty or the Subject Transaction is subject to a Blocking Law or Consent Requirement, as applicable,

The exemptions provided pursuant to paragraph 3 shall cease to be available on December 18, 2018.



Kevin Fine
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Ontario Securities Commission