CSA Releases Derivatives Business Conduct Rule for Further Comment

June 25, 2018

On June 14, 2018, the Canadian Securities Administrators ("CSA") published updated versions of Proposed National Instrument 93-101 *Derivatives: Business Conduct* and its companion policy (collectively, the "Business Conduct Rule") for a second round of comments. The Business Conduct Rule was originally published for comment on April 4, 2017 (the "Initial Publication")[1] and is being republished for further comment to allow interested parties to review it in conjunction with Proposed National Instrument 93-102 *Derivatives: Registration* and its companion policy (collectively, the "Derivatives Registration Rule") published by the CSA on April 19, 2018.[2] Comments on both proposals are due by September 17, 2018.

While the Derivatives Registration Rule will be circulated for comment again (with implementation not likely to be in the short term), it is our understanding that it is the intention of the CSA for the Business Conduct Rules to be in force for 2019.

The Business Conduct Rule is intended to protect derivatives market participants by improving transparency, increasing accountability and promoting responsible business conduct by derivatives dealers and derivatives advisers in the over-the-counter ("OTC") derivatives market. The Business Conduct Rule complements the registration regime set out in the Derivatives Registration Rule.

Business Conduct Rule Changes

The Business Conduct Rule has not significantly changed since its Initial Publication. The following are some substantive changes to note:

1. Two new categories of "eligible derivatives party" ("EDPs") have been added. Commercial hedgers that have at least $10 million in net assets and meet other specified conditions will qualify as EDPs, as will entities whose obligations under a derivative are fully guaranteed, or otherwise fully supported under an agreement, by one or more EDPs. The EDP concept is important under both the Business Conduct Rule and the Derivatives Registration Rule — firms that restrict their dealings to only EDPs are exempt from many of the requirements in the rules. In addition, managed accounts of EDPs have been treated as EDPs. In the Initial Publication, managed accounts of EDPs were to be treated as non-

EDPs, meaning that firms advising these managed accounts would have been subject to all of the requirements of the Business Conduct Rule.
2. The obligation for a firm to make a reasonable effort to provide a price that is fair and reasonable has been removed. Guidance with respect to the pricing of derivatives has been included in the companion policy.
3. Firms have been provided with more flexibility with respect to the use and investment of the assets of its derivatives party.
4. The senior derivatives manager has been provided with the ability to delegate his or her responsibility to submit an annual report to the board of directors of the firm to the chief compliance officer, removing the duplication of efforts of each reporting separately to the board of directors on an annual basis. Note that under the Derivatives Registration Rule the firm's chief risk officer must also submit an annual report to the board of directors.
5. Foreign firms that are in the business of trading in derivatives on an exchange or a derivatives trading facility designated or recognized in a Canadian jurisdiction will be able to rely on the foreign derivatives dealer and foreign derivatives adviser exemptions. The Initial Publication disqualified such firms from being able to rely on these exemptions.
6. The know-your-derivatives-party and trade confirmation requirements have been relaxed in certain instances for derivatives traded on a derivatives trading facility that, as soon as technologically practicable, are submitted for clearing to a qualifying clearing agency.
7. Transitional relief has been provided that permits derivatives firms to rely on a derivatives party's "permitted client" status under National Instrument 31-103, "accredited counterparty" status under the *Derivatives Act* (Québec) or "qualified party" status under the relevant blanket orders in the provinces of Alberta, British Columbia, Manitoba, New Brunswick or Nova Scotia, for transactions entered into prior to the coming into force of the Business Conduct Rule. However, the fair dealing obligation, daily reporting and derivatives party statement requirements will apply to these pre-existing transactions.

Contact Us

If you have any questions about the Business Conduct Rule or the changes to it since its Initial Publication, the Derivatives Registration Rule, or would like our assistance in preparing a comment letter on the proposals, please contact one of the authors of this bulletin or any other member of BLG's Derivatives Group. BLG is ranked as the Number One Law firm in Canada for Derivatives by Derivatives Weekly and has been named Canada Law Firm of the Year — Regulatory and Transactions — at Global Capital's Americas Derivatives Awards every year since the inception of these awards.

[1] View our bulletin from April 2017 for more information

[2] View our bulletin from April 2018 for more information

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