

is It Clear Yet? — Final countdown To Clearing Of Derivatives in Canada

March 14, 2016

On February 24, 2016, the Canadian Securities Administrators ("CSA") published for comment proposed National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and its companion policy (collectively, the "Clearing Rule"), which introduces mandatory clearing of certain over-the-counter ("OTC") derivative transactions. [A copy of the Clearing Rule is available here](#). The 90 day comment period for the Clearing Rule expires on May 24, 2016.

Background

The Clearing Rule is based on Draft National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* that was published for comment by the CSA on February 12, 2015. The CSA also considered comments received on the Proposed Model Provincial Rule on *Mandatory Central Clearing of Derivatives* published as CSA Staff Notice 91-303 on December 19, 2013 and on CSA Consultation Paper 91-406 *OTC Central Counterparty Clearing*. Interested readers can view our February 2015 bulletin on the Draft National Instrument 94-101 and our January 2014 bulletin on the Proposed Model Provincial Rule.

Purpose of the Clearing Rule

Central counterparty clearing of OTC derivative transactions is meant to mitigate counterparty risk in the derivatives market, increase financial stability and eliminate opportunities for regulatory arbitrage.

The Clearing Rule provides for:

- the requirement (and limited exemptions) to submit a transaction involving a derivative required to be cleared to a recognized or exempted clearing agency for clearing; and
- the determination of those derivatives (each, a mandatory clearable derivative) subject to the mandatory clearing requirement.

Requirement to Clear

The Clearing Rule establishes a duty on a local counterparty to submit, or cause to be submitted, for clearing to a regulated clearing agency each mandatory clearable derivative transaction that it enters into if it and the other counterparty are one or more of the following:

- a participant that subscribes to the services of a regulated clearing agency for a mandatory clearable derivative;
- an affiliated entity of a participant referred to above;
- a local counterparty that, together with its local affiliated entities, has or has had an aggregate month-end gross notional amount under all outstanding OTC derivatives of more than \$500 billion, after excluding intragroup transactions (described below).

A local counterparty in a province is a person (other than an individual) organized under the laws of that province or that has its head office or principal place of business in that province, as well as an affiliate of such person if such person is responsible for all or substantially all of the liabilities of that affiliate. A regulated clearing agency is one that is recognized, or exempted from recognition, by the relevant provincial securities regulator.

The Clearing Rule includes certain exemptions from the clearing requirement. Two of the proposed exemptions are the intragroup exemption and the multilateral portfolio compression exercise exemption.

The proposed intragroup exemption applies with respect to transactions between:

- two counterparties that are prudentially supervised on a consolidated basis; or
- affiliated entities if the financial statements for each affiliated entity are prepared on a consolidated basis in accordance with standards.

Affiliates that wish to rely on this exemption will be required to file electronic reports (that will be kept confidential) with the applicable securities regulator no later than 30 days after the first time that they rely on the exemption. This exemption is also subject to other conditions, including having a written agreement between the parties.

A second exemption is the proposed multilateral portfolio compression exercise exemption, which applies when two or more counterparties are changing, terminating and replacing prior uncleared transactions that were not mandatory clearable derivatives on the date that the prior transactions were entered into. This exemption may only be used when the resulting transaction is entered into by the same counterparties as the prior transactions and the prior transactions were not cleared by a regulated clearing agency.

Any counterparty relying on either exemption from the clearing requirement is required to keep appropriate supporting documentation for each clearing exempt transaction.

Certain specified entities are excluded from the application of the Clearing Rule, including the government of Canada, certain crown corporations, central banks, the Bank for International Settlement and the International Monetary Fund.

Mandatory Clearable Derivatives

The second part of the Clearing Rule relates to the determination of those OTC derivatives that will be mandatory clearable derivatives.

The CSA Derivatives Committee examined the following areas to determine whether mandatory central clearing is suitable for each OTC derivative or class of OTC derivatives for which the regulated clearing agencies stated they provide clearing services:

- standardization of legal documentation and of the operational processes at the regulated clearing agency;
- sufficient transaction activity and participation;
- fair, reliable and generally accepted pricing information made available in the relevant class of derivatives; and
- sufficient liquidity in the market to allow for close out or hedging of outstanding derivatives.

Initially, it is proposed that certain classes of interest rate derivatives settled in various currencies be mandatory clearable derivatives. The list of the proposed mandatory clearable derivatives for all jurisdictions of Canada, other than Québec, is included in the Clearing Rule as an appendix. The list for Québec will be published at a later date.

Contact Us

If you have any questions about the Clearing Rule, please contact the authors of this alert or any other member of the BLG Derivatives Group. BLG is ranked as the Number One Law firm in Canada for Derivatives by *Derivatives Weekly* and was named Canada Law Firm of the Year at Global Capital's 2014 and 2015 Americas Derivatives Awards. BLG's Derivatives Group is a multi-disciplinary team of lawyers that cuts across several of our practice groups. The team is experienced in negotiating derivatives documentation with sell-side and buy-side market participants around the world. Our clients include financial institutions, investment dealers, futures commission merchants, market intermediaries, securitization conduits and a wide variety of derivative end-users, such as mutual funds, hedge funds, pension funds, other investment vehicles, commodity producers, real estate firms, insurance companies, risk management firms and other corporate end-users. Our advice covers derivative structuring and document negotiation, regulatory compliance, tri-party collateral control practices and close-out issues. We also advise on compliance and registration requirements relating to derivatives in Canada.

By

[Carol Derk](#), [Melanie Bradley](#)

Expertise

[Investment Management](#), [Capital Markets](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.