

Saskatchewan securities division releases registration and prospectus exemption for qualified persons entering into OTC derivatives

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The Saskatchewan *Securities Act*, 1988 (the Saskatchewan Act) includes within its definition of "security" a futures contract or option that is not an exchange contract. Given the wording of the definition, there has been uncertainty as to whether OTC forwards and other OTC derivatives transactions would fall within this category and consequently be subject to the registration and prospectus requirements of the Saskatchewan Act. The issue has now been addressed by the Saskatchewan Financial Services Commission, Securities Division. On November 26, 2009, it issued General Order 91-907 exempting over-the-counter (OTC) derivatives trading among qualified parties from the registration and prospectus requirements under the Saskatchewan Act. The Companion Policy to the General Order states that the Act's definition of "security" includes futures contracts and options that are not exchange contracts and, thus, parties that currently enter into futures contracts or options are subject to the registration and prospectus requirements of the Saskatchewan Act.

Citing the rationale that "qualified parties" are able to "determine for themselves, without assistance from a registrant or any mandated disclosure under the Saskatchewan Act, whether entering into an OTC derivative is appropriate in the circumstances", the General Order permits such parties to enter into OTC derivatives contracts without having to meet the prospectus and registration requirements of the Act. In making the order, the Securities Division cited similarities to Blanket Order 91-503 in Alberta and Blanket Order 91-501 in British Columbia. To rely on the exemptions provided under the order, both parties must be qualified parties. A party is entitled to rely on a representation from its counterparty as to its qualified party status as long as it has no reasonable grounds to believe that the representation is false. In light of the order it will now be appropriate to include a representation in ISDA Master Agreement schedules or other documentation that the parties are "qualified parties within the meaning of Saskatchewan Financial Services Commission General Order 91-907".

The General Order is substantially similar to the British Columbia order adopted in 1999. Two key differences are, in Saskatchewan, (1) the additional condition that a person relying on the exemption in clause (p) of the order be an "accredited investor" and (2) the availability of an additional exemption for certain OTC derivatives where the OTC derivative is a contract for the production, purchase or sale of an agricultural commodity and each party to

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the contract is engaged in the production, purchase or sale of that commodity. The exemption in clause (p) is made available for those that deal in a commodity and enter into an OTC derivative where a material component of the underlying interest is, directly or indirectly, the commodity or a related, affecting or correlating commodity, security or variable and is intended to exempt OTC derivatives entered into for commercial hedging purposes.

The publication of the General Order in Saskatchewan follows a number of developments relating to the regulation of derivatives in Canada. These include a staff notice issued by the Ontario Securities Commission on the applicability of Ontario securities laws to contracts for differences or CFDs, foreign exchange contracts and similar OTC derivatives as well as the publication by the British Columbia Securities Commission of a Companion Policy to Blanket Order 91-502 to clarify circumstances in which a forex contract could be considered a “security” for BC securities law purposes.

Earlier, effective September 28, 2009, the New Brunswick Securities Commission also published Local Rule 91-501 *Derivatives* (the New Brunswick Rule). The New Brunswick rule was adopted in conjunction with amendments to the *Securities Act* (New Brunswick) that clarified the authority of the New Brunswick Securities Commission to regulate exchange contracts and amended the definition of “security” to include futures contracts or options that are not exchange contracts. The New Brunswick Rule applies to trades in derivatives, which term is defined in the rule to include exchange contracts, options, swaps and futures contracts that are not exchange contracts and other contracts determined by the New Brunswick Securities Commission to be derivatives. Notably, the rule also lists specific types of instruments that are excluded from this definition, including certain types of insurance or annuity contracts, conventional convertible securities, asset-backed securities, strip bonds and others. The rule exempts trades in derivatives from certain provisions of the securities legislation (including prospectus and continuous disclosure requirements) and imposes registration and risk disclosure requirements in respect of such trades, other than trades among qualified parties. The New Brunswick Rule also imposes a recognition requirement upon regulated entities, such as exchanges and alternative trading systems, that trade in derivatives.

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