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Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission

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c/o:
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Dear Sirs/Mesdames:

RE: Comment Letter to CSA Staff Consultation Paper 91-301 – *Model Provincial Rules – Derivatives; Product Determination and Trade Repositories and Derivatives Data Reporting*

Suncor Energy Inc. and its subsidiaries and affiliates (collectively "**Suncor**") hereby respectfully submits comments on the Canadian Securities Administrators ("**CSA**") Staff Consultation Paper 91-301 – *Model Provincial Rules – Derivatives; Product Determination And Trade Repositories and Derivatives Data Reporting Paper* ("**Model Rules**") published by the CSA over-the-counter (OTC) Derivatives Committee (the "**Committee**") on December 6, 2012. Suncor appreciates the opportunity to submit these comments on the Model Rules and looks forward to further working with the Committee as it moves forward to implementing Canada's G-20 commitments that relate to the regulation of the trading of derivatives in Canada through its participation in the Alberta Securities Commission Derivatives Advisory Committee.

As a preliminary comment, Suncor fully supports the previous comments submitted by the Commercial Energy Working Group with respect to the Committee's Consultation Papers regarding the CSA's proposed regulation of the Canadian OTC derivatives market.[1]

I. DESCRIPTION OF SUNCOR

Suncor is the fifth largest North American energy company and is headquartered in Calgary, Alberta. Suncor's operations include oil sands development and upgrading, conventional and offshore oil and gas production, petroleum refining, and product marketing (under the Petro-Canada brand). Suncor's common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange under the symbol "SU". Suncor's Energy Trading business is organized around four main commodity groups – crude oil, natural gas, sulphur and petroleum coke. Suncor's customers include mid- to large-sized commercial and industrial consumers, utility companies and energy producers. The Energy Trading business is used as a mechanism to support the Suncor's oil sands production by optimizing price realizations, managing inventory levels during unplanned outages at Suncor's facilities and managing the impacts of external market factors, like pipeline disruptions or outages at refining customers. The Energy Trading business has entered into arrangements for other midstream infrastructure, such as pipeline and storage capacity, to optimize delivery of existing and future growth production, while generating trading earnings on select strategies and opportunities.

II. GENERAL COMMENTS

Suncor understands the desire of the CSA and its members to meet the timelines that have been set internationally to develop a regulatory framework for the Canadian OTC derivatives market that both accords with new legislation and regulations being enacted and drafted across the globe and allows the CSA and other Canadian financial regulators to fulfill their regulatory oversight responsibilities. However, Suncor urges the Committee to be mindful of its conclusion in its introductory consultation paper; CSA Consultation Paper 91-401 on *Over-the-Counter Derivatives Regulation in Canada*, where it noted that the Canadian OTC derivatives market comprises a relatively small share of the global market as it works to develop a regulatory framework for the Canadian OTC derivatives market. Most Canadian counterparties, including Suncor, that trade OTC derivatives especially energy commodity OTC derivatives enter into these transactions with US counterparties and have been required to build compliance programs and systems to comply with the new "swap" regulatory regime under the US *Dodd–Frank Wall Street Reform and Consumer Protection Act* ("**Dodd-Frank Act**"). In order to avoid potential inconsistencies, conflict, ambiguities, or duplication and in order to promote consistency, harmony and efficiency, Suncor urges the Committee to reconsider the Model Rules and strive to harmonize the current and future Model Rules with similar rules in the US under the Dodd-Frank Act that affect the same or similar transactions. A different and potentially conflicting regulatory regime in Canada covering the same types of derivatives transactions would be unnecessarily costly, burdensome and in some cases cause legal uncertainty and a competitive disadvantage for Canadian market participants, and would adversely impact the Canadian OTC derivatives market.

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[1] http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20120615_91-405_mcindoed.pdf & http://www.osc.gov.on.ca/documents/en/Securities-Category9-Comments/com_20110114_91-401_mcindoed_menezesm_sweeneyr.pdf

III. MODEL RULE- DERIVATIVES PRODUCT DETERMINATION ("THE SCOPE RULE")

Model Rule- Derivatives Product Determination (the Scope Rule")

Suncor submits that the Committee should adopt the general framework of the US Commodity Futures Trading Commission's ("**CFTC**") ***intent for physical delivery*** test in determining whether a transaction is "a contract or instrument for immediate or deferred delivery of a physical commodity other than cash or currency and a spot market contract or instrument for the purchase and sale of currency" ("**Forward Contracts**"). Suncor suggests that, like in the CFTC's test, the determining factor of the test for exclusion as a Forward Contract under the Scope Rule should be ***the intent for physical delivery***. This would provide clarification to market participants and more importantly, would avoid the unintentional treatment of industry standard agreements used for physically delivered commodities such as the GASEDI or NAESB as derivatives. Additionally, it would be consistent with the US position that governs physical commodity cross-border energy transactions and current market practices.

The CFTC has historically considered Forward Contracts with respect to nonfinancial commodities to be "commercial merchandising transactions". The CFTC has stated that "the primary purpose of a Forward Contract is to transfer the ownership of a commodity between parties; the purpose is not to transfer solely its price risk". The US Congress agreed with this rationale and determined in excluding Forward Contracts from the definition of a "swap", that the new swap regulatory scheme "should not apply to private commercial merchandising transactions that create enforceable obligations to deliver and delivery is deferred for commercial convenience or necessity". As such, the definition of "swap" under the Dodd-Frank Act excludes any contract for the sale of a non-financial commodity or security for deferred shipment or delivery, so long as the transaction is ***intended to be physically settled***. Suncor urges the Committee to consider the general position taken by the US as it appropriately addresses the underlying principles associated with the trading of forward physical commodities.

However, one area where the Scope Rule provides more clarity to market participants compared to the CFTC's approach is in the treatment of Forward Contracts with imbedded volumetric optionality. The guidance to the Scope Rule states: "a contract... that has an option that relates to some aspect of physical delivery such as the volume of physical commodity to be delivered...would not, as a result of such an option, be a derivative." However, the CFTC, because of historical regulatory precedent not present in Canada, would treat certain Forward Contracts with imbedded volumetric optionality as swaps. The Commission 's current guidance on such contracts is consistent with the general proposition that contracts intended to be physically settled should not be treated as derivatives and should not be amended to mirror the CFTC's approach to the regulation of Forward Contracts with imbedded volumetric optionality.

Suncor further submits that the Scope Rule should clarify that book-outs of forward physical commodity transactions that were originally intended to be physically settled are not derivatives provided that the counterparties did not intend for cash settlement to be an alternative method of delivery or settlement when they entered into the transaction. Here again, Suncor encourages the Committee to adopt the CFTC's position on book-outs, as the CFTC regards a book-out achieved through a resulting, separately negotiated agreement (and is not provided for in terms of the initial agreement) as still meeting the Forward Contract Exclusion. In addition, the CFTC recognizes that although a book-out agreement may remove the delivery obligation of a party, any party in a distribution chain that provides the opportunity to book-out with another party or parties is nevertheless entitled to require delivery of the commodity.

IV. MODEL RULE- TRADE REPOSITORIES AND DERIVATIVES DATA REPORTING (THE "TR RULE")

Suncor submits that the Committee should expressly clarify in the TR Rule how it intends to assess substituted compliance if reporting of derivatives data is done to a "foreign-registered" trade repository. As the Committee is aware, the CFTC has provisionally registered two entities as swap data repositories ("**SDRs**") for the commodities and energy asset classes. As a result, many Canadian market participants who trade these asset classes in the US have already set up systems to report derivatives data to either of these SDRs. Asking these market participants to report to trade repositories again in multiple Canadian provinces would place an unnecessary costly burden on these participants and again would adversely impact the Canadian OTC derivatives market.

The Committee should also clarify the interface between the duty to report and how the reporting counterparty is determined as contained in Sections 25 and 27 of the TR Rule respectively.

Pursuant to section 36 (1) of the TR Rule, Suncor recommends that the Committee shorten the recordkeeping requirement from 7 years down to 5 years, to be consistent with Dodd-Frank record keeping requirements. We appreciate that the Committee has taken the common law requirement of 7 years as it stated at the Derivatives Roundtable held on January 16, 2013, but having inconsistent required record-keeping date requirements across jurisdictions will impose unnecessary burden and costs of compliance on market participants.

With respect to Section 38(1) of the TR Rule, Suncor recommends that the Committee expressly include the imposition of timely requirements of the Trade Repository to make data available to the transacting counterparties. Since counterparties will effectively have to reconcile data reported to the TR every day, in order to identify and correct any reporting errors and omissions (and in order to maintain their compliance under Sections 25 (1) (4) (5); and 27 (2) of the TR Rule); access to the TR data will be required no later than the morning of the next day, in order to meet the real-time time requirements imposed under 28 (1) (2) of the TR Rule.

Section 40(2) of the TR Rule refers to "physical commodity transaction" however Section 2 of the Scope Rule excludes these physical commodity transactions from the definition of a derivative as it applies to the TR Rule. It is very difficult to understand how the Committee on one hand excludes physical commodity transactions from the definition of a derivative (and as such they do not need to be reported) and on the other hand, provides an exemption for the same physical commodity transactions. Suncor asks the Committee to clarify the connection between the two referenced sections.

Suncor provides this specific feedback regarding Subsection 40(2) of the TR Rule as requested by the Committee. Suncor finds the threshold of aggregate notional value threshold of $500,000 set by the Committee to trigger reporting obligations for a local counterparty when trading physical commodity transactions to be unjustifiable low. We do not know what criteria the Committee has used to set this value, and Suncor urges the Committee to give market participants an insight as to how it set this value or use the criteria of a notional value that would be based on 50 contracts threshold minimum, to be consistent with the Dodd-Frank Act threshold reportable position under Part 20.4 of the CFTC Regulations[2]. Suncor provides an illustrative example of one possible notional dollar threshold of $5,000,000 (i.e. 50 contracts of SYN-Synthetic Crude Oil = 50,000 barrels x $95.92 US/bbl (SYN Jan price used in this example).

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[2] 17 CFR Part 20.4

Lastly, the proposed definition of "local counterparty" could impose a significant burden on Canadian entities and serve as a competitive disadvantage to those entities' foreign subsidiaries. Specifically, the definition of "local counterparty" in the Rule would capture the direct and indirect subsidiaries of Canadian entities. As such, this definition would subject derivatives transactions between foreign subsidiaries of Canadian enterprises and such subsidiaries' foreign counterparties to Canadian law. Subjecting such transactions to a reporting obligation under Canadian law places an unnecessary burden on subsidiaries of Canadian entities and may also serve as a disincentive for foreign counterparties to enter into derivatives transactions with such subsidiaries. Accordingly, Suncor suggests that the Committee strike subsection (f) of the definition of "local counterparty."

V. CONCLUSION

Suncor thanks the Committee and the CSA for the opportunity to comment on these Model Rules and hopes that the Committee takes its comments into consideration as it finalizes these Model Rules. Suncor respects the efforts of the CSA to regulate the Canadian OTC derivatives market and would continue to provide support and feedback to the CSA as it publishes further consultation papers to regulate the Canadian OTC derivatives market. Should the Committee have any questions, or if Suncor may be of further assistance, please contact the undersigned.

Yours truly,

Suncor Energy Inc.

Curtis Serra
Director, Legal Affairs
Supply, Trading & Corporate Development