BY EMAIL June 17, 2013

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Autorité des marchés financiers
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Manitoba Securities Commission
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Nova Scotia Securities Commission
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Dear Sirs / Madames,

Re: Canadian Securities Administrators CSA Consultation Paper 91-407 Derivatives: Registration (the "Consultation Paper")

About Nexen

Nexen Inc. is a wholly owned subsidiary of CNOOC Limited, which ultimately is 64.43% owned by the Chinese 'state' and 35.57% owned by investors through shares traded on the Hong Kong and New York stock exchanges. CNOOC Limited has also applied for listing on the Toronto Stock Exchange.

Under CNOOC Limited, Nexen Inc. and its subsidiaries ("Nexen") is part of one of the largest independent oil and gas exploration and production companies in the world with production in excess of 900,000 BOE/day and a market capitalization in excess of $80 Billion. Nexen, in its own right, also operates in various countries including Canada, the US, Columbia, the United Kingdom, Yemen and Africa. As such, Nexen brings a unique

perspective as a Canadian company with global operating and marketing experience, expertise and exposure.

Introduction

Nexen welcomes the opportunity to comment on the Consultation Paper. Nexen also wishes to thank ASC legal counsel, Debrah McInyre and her team for taking the time to meet with Nexen and several other companies on April 22, 2013 to discuss the efforts of the Canadian Securities Administrators Derivatives Committee (the "Committee") to date as well as the current Consultation Paper. Such an open dialogue with the industry is appreciated and we submit will also lead to more informed and therefore better and more relevant and appropriate regulation.

We understand that the Committee had expected to receive a wider participation and higher number of comments than were actually received on the previous consultation papers in this matter. Nexen believes that many companies had internal resources focused on understanding the US Dodd-Frank Act (as defined below) rules and implementing systems and processes for compliance with the Dodd-Frank Act deadlines and therefore, until the Committee's most recent efforts to create industry awareness of the Canadian derivatives reform, had not been aware of the consultation papers requesting industry comments. In light of this, we believe that the industry would benefit from an extended comment period after all the consultation papers have been released in order to have an opportunity to assess the implications of the entire proposed regulatory framework.

Nexen supports the general objective to protect participants in the derivatives market, reduce counterparty risk and protect the soundness of Canadian financial markets as set out on p.9 of the Consultation Paper. However, we are concerned that some of the proposed mechanisms in the Consultation Paper are over reaching, and unnecessarily burdensome in that they seek to go well beyond what would be necessary to achieve the stated objectives. In addition, certain of the proposed mechanisms create unnecessary conflict and inconsistency with the regulatory regimes adopted by the U.S. and European regulators. We believe that (as well as creating duplicative and conflicting regulatory requirements) the likely consequence of implementing such proposals in their current form would be that Canadian companies and, in particular, Canadian energy companies, would be put at a competitive disadvantage to U.S. and European companies.

The comments made in this letter comparing and contrasting areas of the US *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "*Dodd-Frank Act*") and the *European Market Infrastructure Regulation* ("*EMIR*") regimes are simply made as a point of reference. They are not intended to detract from the efforts of the Canadian Regulators to develop a regulatory regime appropriate to Canadian market participants and customers and, where appropriate, to improve on the foreign regimes.

However, in the context of the registration proposals set out in the Consultation Paper (as highlighted below), we believe that a minimum degree of consistency with the foreign

regimes is essential for Canadian market participants and Canadian markets generally to remain competitive and not be placed at a disadvantage.

Relevance to Nexen's Business

Nexen, through its marketing division, engages in financial derivatives contracts primarily for the purposes of hedging risks associated with our commercial or treasury activities (as described in more detail below).

Several hedge scenarios exist for our business, such as the following:

a. Potential change in value of commodities (including crude oil, natural gas and other related commodities) or other assets (including transportation and storage) that Nexen owns, produces, processes, purchases, leases, markets or sells or anticipates owning, producing, processing, purchasing, leasing, marketing or selling in the ordinary course of business; or
b. Potential change in value of liabilities incurred or anticipated to be incurred by Nexen in the ordinary course of business; or
c. Potential change in value of services that Nexen provides, purchases, or anticipates providing or purchasing in the ordinary course of business; or
d. Potential change in value of the overall portfolio (assets, services or commodities) that Nexen owns, produces, processes, purchases, leases, markets or sells or anticipates owning, producing, processing, purchasing, leasing, marketing or selling in the ordinary course of business; or
e. Potential change in value from interest rate, foreign exchange ('FX") or currency associated with any of such current or anticipated assets or liabilities; or
f. Potential change in value due to fluctuation in interest, currency or FX rate exposures arising from any of such current or anticipated assets or liabilities (such as financial risks arising from daily operations).

In addition, we also might enter into a financial derivatives as a substitute for transactions made or to be made or positions taken or to be taken by Nexen at a later time in the physical market. Proxy hedges may also be entered into where an exactly matching hedge (to the relevant underlying physical position) is not available.

The vast majority of our financial derivatives trading activity falls into one or more of the above scenarios of hedging.

Nexen also engages in a handful of financial derivatives trading for a few small Canadian energy producers annually as a means for them to hedge their physical production. This is a service we provide to customers at their request as we are familiar with their business and understand their needs. These producer hedge contracts are typically non-standardized swaps or options which are not available to be transacted on exchanges and as such they are required to be traded OTC.

The majority of our financial derivatives trading activity (approximately 95%) is transacted on global exchanges (mainly in the US) and/or cleared through centralized clearing brokers. These derivatives contracts therefore are already fully transparent to U.S. regulators (given they are traded on exchanges based in the US) and are centrally cleared and margined. The remaining 5% of our derivatives transactions are traded OTC and will be reported to either U.S., European or Canadian regulators (depending on applicable jurisdiction) and, in almost all cases, by our counterparties. A key objective of the Pittsburgh G20 summit was to improve transparency in the OTC derivatives markets, which clearly is achieved by such reporting of OTC derivatives trades.

Response to Specific Questions in the Consultation Paper

Nexen's response to questions 3, 4, and 5 posed in the Consultation Paper is set out below.

Q3: Should registration as a derivatives dealer be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators? Please indicate why such an exemption is appropriate.

Yes. Nexen strongly believes registration as a derivatives dealer should be subject to a *de minimis* exemption similar to the exemption adopted by U.S. regulators and also similar to the rules adopted by European regulators.

Pursuant to the *Dodd-Frank Act* implemented in the US to comply with its G20 commitments, persons that are not currently registered as swap dealers will not be deemed swap dealers if their positions resulting from (potential) dealing activity over a trailing 12 month period in the aggregate do not exceed a gross notional amount of USD$8 billion, (or USD$25 million with "special entities" which are governmental entities, employee benefit plans etc.). The USD$8 billion threshold will be reduced to USD$3 billion following a phase-in period. Hedges are not included in calculating the *de minimis* value.

Pursuant to *EMIR* implemented by the European Union to comply with its G20 commitments, non-financial counterparties whose positions in OTC derivatives contracts do not exceed a clearing threshold (which is a separate €3 billion gross notional value for each of interest rate, foreign exchange and commodity derivatives) on a rolling average basis for 30 working days are subject to lower regulatory requirements (and are exempt from the clearing and margining obligations) relating to OTC derivatives, than the requirements to which a financial counterparty, or a non-financial counterparty that exceeds the threshold, is subject. The calculation must include all OTC derivatives contracts entered into by the non-financial counterparty itself or by other non-financial entities within its group. As with the *Dodd-Frank Act*, hedges are not included in calculating whether the relevant threshold is exceeded.

While Nexen appreciates the Committee's position that the derivatives market should be subject to the same protections regardless of the size or the total derivatives exposure of the dealer, we respectfully submit that the interests of all persons impacted by the derivatives market and the proposed legislation needs to be balanced in the context of the key objectives of the G20 commitments to reform the OTC derivatives market, namely to improve transparency, mitigate systemic risk and protect against market abuse.

We believe that there are numerous reasons as to why a *de minimis* exemption is appropriate for inclusion in the proposed Canadian legislation, for reasons similar in nature to those that were persuasive in aiding the CFTC to conclude it was a necessary exemption, including but not limited to:

1. As the swap dealer market is dominated by large entities which exceed the *de minimis* threshold, the vast majority of swap dealing activity will be regulated even with the *de minimis* exemption in place.

   The *de minimis* factors should take into account the size and unique attributes of the market for swaps. The CFTC believes that factors that exclude entities whose OTC derivative dealing activity is sufficiently modest in light of the total size, concentration and other attributes of the applicable markets can be useful in avoiding the imposition of unnecessary regulatory burdens on those entities for which dealer regulation would not materially contribute to advancing the customer protection, market efficiency and transparency objectives of dealer regulation[1].

2. Regulatory efficiency.

   The *de minimis* exemption under *Dodd-Frank Act* was mandated by Congress in the belief it would further the interests of regulatory efficiency when the amount of a person's dealing activity is limited to an amount that does not warrant registration to address the concerns implicated by government regulation of swap dealers. To advance this interest it was necessary for the CFTC to consider the benefits of the marketplace associated with the regulation of dealers against the total burdens and potential impacts on competition, capital formation and efficiency associated with that regulation.[2]

3. End users other than those genuinely making markets in swaps should not be required to register as swap dealers.

   Inclusion of a *de minimis* exemption under *Dodd-Frank Act* was influenced from many end users who used swaps to hedge their risk.[3] Hedging one's own production does not constitute dealing activity, so swaps for the purpose of

[1] Further Definition of "Swap Dealer", "Security-Based Swap Dealer, "Major Swap Participant" and "Eligible Contract Participant", Securities Exchange Act Release No. 66868, 77 FR 30596 (May 23, 2012) at p. 30629.
[2] Ibid at p. 30629.
[3] Supra at p. 30758.

hedging are not even included in the *de minimis* calculation.[4] However, hedges put in place on behalf of other producers are included in the *de minimis* calculation.

The main justification for the hedging exemption is that when a person enters into a swap for the purpose of hedging one's own risks in specified circumstances, the element of the swap dealer definition requiring the accommodation of the counterparty's needs or demands is absent. Further justification was that the exclusion of such swaps would reduce ongoing costs that persons using such swaps would incur in determining if their activity levels would categorize them as swap dealers.[5] In addition, where OTC derivative contracts are used for hedging by a person, that person is in fact reducing the overall commercial risks in its business activities.

4. We believe that a single *de minimis* value is the most cost effective, manageable and reasonable way to apply such a standard, as opposed to creating several different categories or different amounts for different market categories.

   There is value in setting a single standard so there is a level playing field and a standard that can be easily implemented without the need to categorize swaps or complicate compliance processes that would further increase costs of participants to determine which category might apply to their business.[6] The additional costs that participants incur in simply determining which compliance category applies, in addition to the internal costs of compliance, education and new systems and processes is significant and is not to be underestimated. Such systems are already in place for *Dodd-Frank Act* and *EMIR* compliance, but the current proposal in the Consultation Paper will require entirely new systems and significant additional costs to comply with the different registration and compliance obligations in Alberta and potentially registration and compliance in other Provinces as well.

   While Nexen recognizes that there is always a cost to companies brought about by new regulatory compliance obligations and Nexen accepts that as a cost of doing business, Nexen submits that the extra (and unnecessary) costs that would be incurred in this instance (were the current proposals to be implemented) would be unreasonable and unwarranted and they will put energy companies like Nexen in an uncompetitive situation as compared to U.S., European and other international energy companies. Nexen requests clarification from the Committee as to whether the extent of the cost and competition impact has been fully analyzed (and a detailed cost/benefit study conducted) by the Committee and would invite the Committee to contact companies individually and on a confidential basis in order to gain a better understanding of the potential costs implications (for example by

[4] Supra at p. 30631 and 17 C.F.R. Part 1.3(ggg)(6)(iii).
[5] Further Definition of "Swap Dealer", "Security-Based Swap Dealer, "Major Swap Participant" and "Eligible Contract Participant", Securities Exchange Act Release No. 66868, 77 FR 30596 (May 23, 2012) at p. 30710.
[6] Ibid at p. 30632.

ascertaining the costs companies have incurred in respect of *Dodd-Frank Act* and *EMIR* compliance to date).

The CFTC determined that a fixed notional amount would best protect the markets and the public, foster efficiency and competitiveness and serve the public interest. Adding any more variables would only serve to increase the costs of market participants to evaluate the application of the *de minimis* exemption.[7] Nexen agrees with such an approach.

5. We believe a *de minimis* exemption could increase competition in the marketplace.

   The exception may maintain competition in dealing activity within the swap markets by helping to allow non-registered persons to continue providing dealing services while clients may avoid the costs associated with full-fledged dealers. Competition within the market for swaps may not only decrease the costs for participants in the market, but also may help to decrease systemic risk by discouraging a lessening of the concentration of dealing activity among a few major market participants which could be exacerbated by the proposed regulation.[8]

6. The exception would permit those persons that are already in a relationship of trust with energy companies to accommodate those existing clients that have a need for swaps (such as the small producers for which Nexen conducts hedges), to avoid the need to establish separate relationships with registered dealers with attendant costs.

7. A *de minimis* threshold should be high enough to allow the existing pool of swap dealing entities to participate.

   The threshold should not be set inappropriately low otherwise persons engaged in a smaller quantity of swaps would be forced to choose between reducing their swap activities to a level below the thresholds or register as a swap dealer and incur the additional costs of compliance and regulation, which could reduce the availability of swaps in smaller or niche markets.[9] The CFTC considered this could impact the competitiveness of those markets and undermine the ability of market participants to practice sound, cost effective risk management. A higher threshold would promote a larger pool of swap dealing entities, as entities with activities below the threshold would not incur costs to deal with swap dealer regulations, resulting in more potential counterparties available to swap users. The CFTC recognized that on the other hand, a greater quantity of swap dealing would be undertaken without customer protection, market orderliness and market transparency benefits of dealer regulation. The CFTC balanced all of these

[7] Supra at p. 30708.
[8] Supra at p. 30629.
[9] Supra at p. 30707.

factors in determining the notional amount and balanced the need to better promote the efficiency, competitiveness and financial integrity of the markets.[10]

8. The *de minimis* level should be determined with economic analysis.

   While recognizing its difficulty and limitations, the CFTC evaluated data regarding indexed credit default swaps ("CDS") provided by the Securities Exchange Commission (the "SEC") to establish the *de minimis* notional value.[11] The *de minimis* threshold was considered in light of a $300 trillion notional amount U.S. swaps market.[12] The CFTC believed there was merit in the 0.001 percent ratio suggested by several commenters, and that an appropriate balance of the goal of promoting the benefits of regulation (while recognizing the unquantifiable nature of those benefits) against the competing goal of avoiding the imposition of burdens on those entities for which regulation as a dealer would not be associated with achieving those benefits in a significant way, would be reached by setting the notional standard for swaps at a level that is near 0.001 percent of a reasonable estimate of the overall domestic market for all swaps between all counterparties. The CFTC believed a $3 billion notional value standard was appropriate taking all these considerations into account.[13] The phase in period allows additional time for the CFTC to study swap markets as they evolve with the new regulatory regime while preserving focus on the regulation of the largest and most significant swap dealers.[14]

We acknowledge that a *de minimis* exception by its nature will eliminate key counterparty protections and that the broader the exception, the greater the loss of protection. However, we believe such an exemption is an appropriate balance of the need to balance the protection of counterparties and the promotion of the effective operation and transparency by regulation against the regulatory goals. The Committee could include a mechanism to consider application of any *de minimis* amount in the future based on how the markets evolve as enhancements to pricing and transparency may facilitate new entrants to the swap market.[15] This would be consistent with the approach taken by the CFTC for the much larger U.S. derivatives market and the European regulators.

It should be noted that under the *Dodd-Frank Act*, Nexen's swap dealing activity in connection with swaps falls significantly below the USD$8 billion threshold (and also the subsequent USD$3 billion threshold) and, as such, Nexen is not required to register with the CFTC as a swap dealer. However, under the legislation contemplated by the Consultation Paper, Nexen would likely fall within the derivatives dealer and derivatives advisor categories and therefore would be subject to registration requirements. Such entirely conflicting and contradictory regulatory results could not have been intended by

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[10] Supra at p. 30707.
[11] Supra at p. 30707.
[12] Supra at p. 30758.
[13] Supra at p. 30633.
[14] Supra at p. 30633.
[15] Supra at p. 30628.

U.S. and Canadian regulators in respect of the same dealing activities and legislative goals designed to address the similar market risks. In addition, such difference will put Nexen at a competitive disadvantage in cross-border transactions from a cost of business perspective and willingness of foreign counterparties to transact with parties in a Canadian jurisdiction that has an entirely different regulatory regime from other larger and more significant markets.

Q4: Are derivatives dealer, derivatives adviser and LDP the correct registration categories? Should the Committee consider recommending other or additional categories?

Nexen respectfully submits that the Committee should consider including an end user category that is similar to the *Dodd-Frank Act* regime. Under the *Dodd-Frank Act*, any market participant that does not fall within the swap dealer category or major swap participant category by virtue of exemptions or otherwise is classified as a non-swap dealer or non-major swap participant, otherwise known as an end user. Participants that would otherwise be swap dealers but for the *de minimis* exemption and hedging exemption are classified as end users. As is the case with most of the energy sector companies, Nexen is an end user under the *Dodd-Frank Act*. This means that while Nexen has record keeping and reporting obligations, it is not subject to the registration requirements. Nexen submits that this is an appropriate level of compliance given the nature of its activities.

To give additional perspective, Nexen wishes to clarify that the difference in registration treatment in the U.S. as an end user and under *EMIR* as a non-financial counterparty below the clearing threshold, which subjects Nexen to record keeping and reporting requirements, as compared to Alberta as a derivatives dealer and adviser, which would subject Nexen to additional registration and other compliance requirements, is not unique to Nexen and will be endemic to the whole energy industry. According to a recent IFLR Webcast entitled *Dodd-Frank Act* Title VII Update presented by Morrison Foerster dated May 21, 2013, no major energy company has registered as a swap dealer or a major swap participant under the *Dodd-Frank Act* as at the end of April, 2013. This suggests the majority of energy companies are end users under *Dodd-Frank Act*. Accordingly, the majority of the energy sector in the U.S. is subject to registration exemptions under *Dodd-Frank Act* in stark contrast to the Canadian proposal. Nexen requests clarification as to whether such consequences were intended for the Canadian energy sector and, if so, would like to understand the Committee's reasons for the more onerous treatment in Canada when both regulatory regimes arose from compliance with the G20 commitments in respect of regulation of the OTC derivatives market. This further highlights the extent to which the Committee's proposal could put companies such as Nexen at a competitive disadvantage to those in the U.S. and Europe. Businesses in the energy sector (including Nexen) tend to enter into derivatives or swaps on a cross border perspective and if interpretation of definitions differ from those in other parts of the world this may reduce the number of transactions that occur between foreign and domestic markets.

The end user exemption is further discussed below in the context of hedging activities.

Q5: Are the factors listed the correct factors that should be considered in determining whether a person is in the business of trading derivatives? Please explain your answer.

Nexen submits that hedging for the purpose of mitigating the risk of an underlying asset is a trading activity that should have no place in the registration requirements and should be exempt from registration. The registration requirements should only apply to derivatives dealers. Under the current proposal in the Consultation Paper, Nexen would be subject to the registration requirements for its own hedging activities. This appears to be contrary to the Committee's intent with respect to the end user exemption discussed in CSA Consultation Paper 91-405 in which the Committee states at pp. 5 and 6:

> "The objectives of the proposed framework for the regulation of the OTC derivative market are to strengthen financial market infrastructure and meet the G20 commitments as discussed in Consultation Paper 91-401.
>
> …
>
> It is widely agreed that the proposed regulatory requirements should not be applied to a limited category of end-users of OTC derivatives contracts. This category of end-user enters into OTC derivatives contracts in order to protect itself against a risk arising from its own business activities. The terms of these contracts are negotiated between the parties and are tailored to the needs of the end-user. The limited activity of the end-user in relation to the overall market and the total exposure resulting from the contracts entered into by a single end-user does not represent a substantial risk to our markets or the wider economy. In addition, the end-user is not in the business of trading OTC derivatives contracts for speculative purposes.
>
> ...
>
> The Committee recommends the implementation of an end-user exemption which is intended to provide a qualifying end-user with an exemption from most of the proposed regulatory requirements, such as registration, trading, clearing, margin, capital and collateral."

The requirement for registration of persons in the business of trading derivatives, as set out in the Consultation Paper, will result in disparity with the *Dodd-Frank Act* and *EMIR* regimes and will impact the entire energy sector if there is no exemption for hedging activities.

In considering the exemption applicable to hedging under the *Dodd-Frank Act*, the CFTC clarified the trader-dealer distinction and used it as the basis for a framework that appropriately distinguishes between persons who should be regulated as swap dealers and those who should not.[16] Traders such as hedgers or investors are considered non-dealers by the CFTC. Conversely, dealers hold themselves out and are commonly known in the trade to (i) accommodate demand from other parties and contact counterparties to solicit interest; (ii) develop new types of swaps and inform counterparties of their availability; (iii) tend not to request that other parties propose the terms of the swap but instead enter into the instruments on their own terms; and (iv) usually have membership in a swap association and provide marketing materials.

[16] Supra at p. 30607.

Under the *Dodd-Frank Act*, swaps generally are held for the purpose of "hedging or mitigating commercial risk" if any such position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise where such risks arise from (i) the potential change in the value of assets actually, or anticipated to be, owned, produced, manufactured, processed or merchandised, (ii) the potential change in value of liabilities that a person has incurred in the ordinary course of business of the enterprise or (iii) the potential change in value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise.[17] Similarly, under *EMIR* the genuine hedging test is satisfied where the derivative, (i) covers risk arising from the normal course of business (ii) covers indirect risks relating to the business resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk or (iii) is consistent with the IFRS hedging definition.

The main justification for the hedging exemption by the CFTC is that when a person enters into a swap for the purpose of hedging one's own risks in specified circumstances, the element of the swap dealer definition requiring the accommodation of the counterparty's needs or demands is absent. Further justification was that the exclusion of such swaps reduces costs that persons using such swaps would incur in determining if they were swap dealers.[18]

Under the *Dodd-Frank Act* and *EMIR*, for those companies where swaps activities occur in connection with the hedging of actual physical inventory and exposure, such swaps need not be included in determining whether the entity must register as a swap dealer or exceeds the clearing threshold for a non-financial counterparty. Conversely, swap activities in connection with any third party producer hedges may be viewed as dealing activity and would be included in the calculation of whether a company is required to register as swap dealer, subject to the *de minimis* calculation.

Nexen respectfully submits that the hedging exemption recognized by the regulators in the U.S. and Europe and incorporated in the *Dodd-Frank Act* and *EMIR* is fundamental and a similar concept should be considered by the Canadian regulators for inclusion in the derivatives dealer classification in the proposed Canadian legislation. Further, Nexen submits such an exemption is warranted in that this type of activity does not put the market at risk (and on the contrary actually reduces risk) and the absence of such an exemption in the Canadian legislation does not further the ultimate goals sought to be achieved by the Canadian Regulators, but rather unnecessarily penalizes companies that enter into swaps solely for the purpose of hedging or mitigating commercial risk.

In addition, the Consultation Paper's lack of any exemption for hedging seems contradictory to Consultation Paper 91-405 (p.9) which states hedging to mitigate risk which may lead to compensation is acceptable. Nexen respectfully submits that further

[17] 17 C.F.R. Part 1.3(kkk)
[18] Further Definition of "Swap Dealer", "Security-Based Swap Dealer, "Major Swap Participant" and "Eligible Contract Participant", Securities Exchange Act Release No. 66868, 77 FR 30596 (May 23, 2012) at p. 30710.

guidance from the Committee and alignment of the treatment and categorization of hedging is necessary.

Alignment with International Standards

In addition to the specific questions posed by the Committee, Nexen wishes to comment on the importance of alignment with international standards.

As noted above, the *de minimis* exemption and the hedging exemption in both the *Dodd-Frank Act* and *EMIR* result in vastly different regulatory treatment and obligations for Nexen as compared to the proposed registration requirements and other compliance obligations proposed by the Committee in the Consultation Paper. Nexen recognizes that the different definitions and terminology used in the Canadian and U.S. derivatives regulation legislation (and also of that in Europe) is somewhat driven by the need to align with the different securities legislation applicable in each separate jurisdiction and also, as relevant, within the different Canadian Provincial jurisdictions. However, the concepts and overall effect should be consistent and any differences in definitions and terminology that may be necessary should not be at the expense of the market participants (in terms of increased regulatory burden and cost, reduced liquidity and opportunity to hedge risks and conflicting rules), which we believe will act as a deterrent to competition in the marketplace.

The Committee appears to acknowledge the need for a market participant to only comply with one jurisdiction where the derivatives regulation functions are similar. At p. 2 of CSA Consultation Paper 91-405, the Committee states:

> "The Committee is committed to working with foreign regulators to develop rules that adhere to internationally accepted standards. The Canadian OTC derivative market is a small segment of the global market and the majority of transactions involving Canadian market participants include foreign counterparties. It is therefore crucial that rules developed for the Canadian market accord with international practice to ensure that Canadian market participants and financial market infrastructures have full access to the international market and are regulated in accordance with international principles." [Footnotes omitted]

In addition, at pp. 9 and 42 of the Consultation Paper the Committee states:

> "…the Committee recommends that, where appropriate, the Committee consider relying on third-party regulators to carry out some or all of the regulatory functions. These regulators <u>could include foreign regulators</u>, regulating the registrant in its home jurisdiction, prudential regulators, including those responsible for regulating financial institutions in Canada, and self-regulatory organizations.
> …
> Where such a regime provides for equivalent supervision and regulatory requirements that are monitored and enforced to the satisfaction of Canadian Securities Regulators, those persons should not be subject to redundant requirements."

Nexen agrees with and fully supports this concept (which we respectfully submit is the only sensible course to take to reduce inconsistency in regulatory requirements imposed on market participants and duplication of the burden and costs of compliance). However,

Nexen is concerned that the Committee's ultimate recommendation on p. 42 of the Consultation Paper does not in fact follow this principle and instead only seeks to apply to regulatory regimes imposed by other Canadian regulatory authorities and not U.S. (or other) authorities, despite its previous statement (as highlighted above) that the rules developed by the Committee should adhere to international standards. In contrast to the Committee's stated commitment "to develop rules that adhere to internationally accepted standards", it appears to us that the Committee's proposals are a significant departure from the international standards of the US *Dodd-Frank Act* regime or the European *EMIR* regime.

Once the Committee has reconsidered the proposed registration requirements with a more detailed comparison with the international standards already in place and in the context of keeping Canadian companies on an equal footing with their international counterparts, Nexen would respectfully urge the Committee to apply its recommendation (to rely "on third-party regulators to carry out some or all of the regulatory functions") to the *Dodd-Frank Act* and *EMIR* regulatory regimes or, failing that, to at least include similar exemptions as contained in the *Dodd-Frank Act* and/or the *EMIR* to ensure a more uniform regulatory application and compliance.

It is critical that the Canadian regulators work to minimize any inconsistencies between Canadian and U.S. and European jurisdictions because, among other things:

a. it will enable non-Canadian dealers (as well as Canadian dealers operating in international markets) to process transaction and reporting obligations using the systems and processes they have already implemented. These processes were implemented at a great expense and effort for the purposes of compliance with international requirements (i.e. *Dodd-Frank Act* and *EMIR*) which have already been established;
b. even minor differences in rules may cause dealers to be less incentivized to transact with parties in Canadian jurisdictions;
c. the market in Canada, as acknowledged by the Committee, is relatively small in comparison to the global market. Further compliance restrictions and limitations may have negative implications to the growth of the market in Canada;
d. any reduction in significant derivatives activity may decrease liquidity in the market and potentially negatively impact the Canadian market and the ability of physical market participants to continue to hedge their risks efficiently;
e. inconsistencies in categorization of market participants are likely to render it more difficult from a trade perspective to aggregate the necessary data which would undermine the very purpose of the trade repository reporting rules (due to the difference regarding interpretation and definitions); and
f. businesses in the energy sector tend to enter into derivatives or swaps on a cross border perspective and if interpretation of inconsistent and multiple definitions mean different things in other parts of the world this will likely reduce the number of transactions that occur between foreign and domestic markets. This will in turn lead to reduced liquidity available to domestic participants to hedge

their physical exposures and risks and will also lead to over regulation of a market that is deemed to be considered small by the Committee.

Nexen thanks the Committee for considering the comments set out in this letter and would be pleased to discuss any aspect of our comments in further detail should the Committee so wish. Nexen has full confidence that further clarifications from the Committee will be provided based on the comments received from the public.

All of which is respectfully submitted,

Susan L. Schulli,
VP and General Counsel, Nexen Marketing