



BP Canada Energy Group ULC  
240 – 4<sup>th</sup> Ave. S.W.  
Calgary, AB  
T2P 2H8  
Canada

July 02, 2013

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

John Stevenson, Secretary  
Ontario Securities Commission  
20 Queen Street West  
Suite 1900, Box 55  
Toronto, Ontario  
M5H 3S8  
Fax: (416) 593-2318  
Email: [jstevenson@osc.gov.on.ca](mailto:jstevenson@osc.gov.on.ca)

and

Me Anne-Marie Beaudoin  
Secrétaire de l'Autorité  
Autorité des marchés financiers  
800, square Victoria, 22e étage  
C.P. 246, Tour de la Bourse  
Montréal, Québec  
H4Z 1G3  
Fax: (514) 864-6381  
E-mail: [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

**Re: Canadian Securities Administrators (“CSA” or “Committee”)  
Consultation Paper 91-405 on Derivatives: End-User Exemption (“End-User Paper”)**

Dear Members of the CSA Derivatives Committee:

This letter sets out the comments of BP Canada Energy Group ULC and its affiliates (“BP Canada”) with respect to the End-User Paper, entitled *Derivatives: End-User Exemption*, which proposes to provide certain end-users with an exemption from the

proposed financial regulatory reform requirements applicable to over-the-counter (“OTC”) derivatives.<sup>1</sup>

The comments provided by BP Canada in respect of the various discussion papers and draft rules have been prepared with reference to current OTC energy derivative activities. In Canada, BP Canada buys and sells hydrocarbon production and requirements for the BP group of companies. It is a major purchaser, marketer and trader of Canadian natural gas and power, and is a major trader of crude oil and purchaser of Canadian crude oil for BP’s refineries in the United States.

On June 15, 2012, BP Canada provided comments to the Committee on the End-User Paper that highlighted the interdependence of many of the issues raised in each of the published CSA consultation papers. In particular, BP Canada raised a concern that in order to fully understand the scope of the proposed end-user exemption, the regulatory requirements to which the end-user exemption is proposed to be applicable, and ensure completeness of our response, BP Canada would need the opportunity to first review the consultation paper on registration. BP Canada has now had the opportunity to review the recently published Consultation Paper 91-407 on *Derivatives: Registration* (“Registration Paper”). We thank the CSA for the accommodation made to the End-User Paper comment process in order to enable us, and others, to provide comments on the End-User Paper, which have been informed by the contents of the Registration Paper.

The End-User Paper sets out the Committee’s recommendation that certain market participants characterized as end-users of OTC derivatives should be exempt from the proposed OTC financial regulatory reform requirements related to: registration, trading, clearing, margin, capital and collateral.<sup>2</sup> BP Canada supports the efforts of the CSA to exempt a class of participants from the proposed requirements as a means to balance the objectives of systemic risk management and efficient regulation of the OTC derivatives market. BP Canada also believes the CSA should seek, to the extent possible, to ensure that the OTC derivatives rules in Canada are not inconsistent with the OTC derivative regulations in other countries, such as the principles set out in the *U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act* (the “Dodd-Frank Act”)<sup>3</sup>. A case in point is the end-user exception under the U.S. Dodd Frank regime, where the underlying objective of the exception is to exempt those end-users that do not pose systemic risks to the overall market and use OTC derivatives as a means of hedging commercial risk.

The CSA has also recommended within the End-User Paper that end-users should be subject to trade reporting through trade repositories to ensure transparency and monitoring.<sup>4</sup> BP Canada also supports the creation and utilization of a robust and fit for

---

<sup>1</sup> Canadian Securities Administrators, CSA Consultation Paper 91-405: Derivatives: End-User Exemption (April 13, 2010) at p. 5.

<sup>2</sup> *Ibid.* at p. 6.

<sup>3</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub.L.III-203, H.R. 4173, sec. 721(a)(47), online: U.S. Government Printing Office: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4173enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf).

<sup>4</sup> *Super*, note 1 at p. 7.

purpose reporting regime for OTC derivatives transactions that enables Canadian regulators to monitor derivatives markets, as well as gather the information necessary to structure appropriate regulatory reforms and fulfil market oversight mandates and obligations.

### **End-User Exemption Criteria**

BP Canada is of the opinion that establishing defined, narrow criteria for what constitutes an ineligible “end-user” creates uncertainty and may introduce regulatory inefficiency, which contradicts with the goal of minimizing systemic risk. Clarity around the scope of the end-user exemption is necessary so as to ensure that unforeseen risks are not inadvertently imposed on market participants.

To address this uncertainty and inefficiency, BP Canada suggests that the exemption be made available to all market participants, except if: (a) the participant is deemed ineligible to qualify as an end-user (such as certain financial institutions); or (b) the specific circumstances of the participant’s business do not permit such an end-user characterization (for example, the end-user is primarily participating in derivatives trading for purposes other than to hedge or mitigate commercial risk<sup>5</sup>). BP Canada believes that this approach leverages the considerable forethought that the CSA has already dedicated in evaluating the criteria that should characterize an exempt end-user.

The proposal to make the end-user exemption available to all market participants, subject to the aforementioned exemptions, is not a new proposal by BP Canada. This approach is in line with that presented by Hunton and Williams LLP<sup>6</sup> and Davis Ward Phillips & Vineburg LLP<sup>7</sup> in their recommendations previously submitted to this Committee. BP Canada believes that this proposal should be reconsidered by the CSA as the approach seems to align well with the CSA’s stated objectives in both the End-User Paper and the Registration Paper.

### ***Information about Market Activity***

BP Canada understands the regulators’ desire to increase the oversight of and strengthen the Canadian financial markets, as well as to manage specific risks relating to OTC derivatives through increased transparency and regulatory oversight. As a means to achieve these objectives in an efficient and cost effective manner, BP Canada

---

<sup>5</sup> As discussed in BP Canada’s comments to the Registration Paper, a holistic approach should be used when determining whether an individual or firm is in the business of derivatives trading. Specifically, the existence of a single transaction for non-hedging purposes, on its own, is not determinative that a party should be disqualified from the end-user exemption. Canadian Securities Administrators, CSA Consultation Paper 91-407: Derivatives: Registration (April 18, 2013) at p. 23.

<sup>6</sup> Hunton & Williams LLP, Comment letter on CSA Consultation Paper 91-401 – Over-the-Counter Derivatives Regulation in Canada (January 14, 2010 [sic]). Hunton & Williams LLP submitted the referenced comment letter on behalf of the Working Group of Commercial Energy Firms, which BP Canada was a member.

<sup>7</sup> Davis Ward Phillips & Vineburg LLP, Comment letter on CSA Consultation Paper 91-405 – Derivatives: End-User Exemption (June 15, 2012).

encourages and supports the development and use of appropriate and fit for purpose reporting requirements, as further discussed in our comment letter to the Registration Paper. Moreover, such a robust reporting requirement will facilitate information sharing and co-operation with regulators, and reduce and remove additional onerous regulatory requirements and unnecessary duplication.

BP Canada believes that by requiring end-users to report trades to the trade repository, the CSA will be able to capture the necessary information about market activity directly from market participants in order to identify and implement appropriate ineligible categories, criteria and circumstances where market participants do not qualify as end-users.

BP Canada would also like to take this opportunity to refer back to comments it has made in prior submissions to the CSA concerning the importance of establishing clear rules and guidance on reporting<sup>8</sup>, particularly in respect of which entities are required to report, which instruments and/or contracts are to be reported, which jurisdictional repository is acceptable, what is the timing and frequency of the required reporting, what specific information is to be reported, and the formatting and classification of the information that is to be reported and the time frame.

### ***Incentive to use Regulated Execution Facilities and Central Counterparties***

An outcome of introducing the mandatory reporting and registration regimes currently being considered by the CSA and market participants, is that all market participants will be required to report all OTC derivatives trades to approved trading repositories and, where necessary, many may register as derivatives dealers or advisors (see BP Canada's comment letter on the Registration Paper in respect of the need for appropriate definitions and categories). As a result, regulators with derivative market oversight responsibilities will have access to all necessary information on such participants and their business activities.

Incentivising market participants to first consider using regulated execution facilities and central counterparties may have the outcome that market participants will move to using standardized derivatives, or possibly make a choice not to trade. This situation may result in the loss of the ability of market participants to manage commercial risk and minimize overall harm to the market. Such a result would be inconsistent with the objective of encouraging end-users to effectively manage business risk through fit for purpose, non-standardized contractual terms, the need for which has been supported by the CSA throughout its published consultation papers.<sup>9</sup>

---

<sup>8</sup> BP Canada, Comment letter on CSA Consultation Paper 91-402 - Derivatives: Trade Repositories (September 12, 2011).

<sup>9</sup> *Supra*, note 1 at pp. 13-14, and Canadian Securities Administrators, CSA Consultation Paper 91-401 – Over-the-Counter Derivatives Regulation in Canada (November 02, 2010) at pp. 46-47.

### ***Consistent approach with other Jurisdictions***

As noted above, and in the consultation paper 91-401 entitled *Over-the-Counter Derivatives Regulation in Canada*<sup>10</sup>, the U.S. Dodd-Frank Act provides for an end-user exception from the mandatory clearing requirement where one of the two counterparties: “(i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into noncleared swaps.”<sup>11</sup>

Accordingly, the Dodd-Frank Act provides that the end-users exception to clearing requirements is available to all commercial entities, unless: (a) a participant falls within an ineligible category; (b) circumstances of the participant’s business do not permit the end-user characterization – such as the end-user is participating in swap trading for purposes other than to hedge or mitigate commercial risk; or (c) the end-user is required to clear its swap trades because it is a registrant. Therefore, the U.S. swap regulation regime is consistent with BP Canada’s proposal that the end-user exemption should be available to all market participants.

BP Canada would encourage the CSA to adopt a regime that aligns, to the extent possible and practicable, with that in the U.S. to ensure substituted compliance and avoid substantial duplication.

### **Hedging**

To determine if a party is ineligible for the end-user exemption, it is important that the regulator look at the activity driving the regulation, and that the activity be assessed against an appropriate standardized definition. With regard to the activity of hedging, BP Canada supports this Committee’s direction towards a consistent definition for *bona fide* hedging across jurisdictions, and supports the CSA proposed adoption of the International Organization of Securities Commission’s hedging definition<sup>12</sup>.

Market participants, including BP Canada, use derivatives in many ways to reduce risks that arise from the potential change in value of assets, liabilities, or services. The *bona fide* hedging definition should be defined broadly so that it encompasses long-standing and important commercial risk management practices. Specifically, *bona fide* hedging should cover portfolio hedging because market participants, including BP Canada, are involved in multiple segments of the oil and gas industry that exposes them to risks associated with the potential change in the value of commodities they both buy and sell. Rather than hedge the risk of each particular asset, liability, service, or transaction separately, BP Canada, like most commercial market participants, prefers to manage

<sup>10</sup> Canadian Securities Administrators, CSA Consultation Paper 91-401 – Over-the-Counter Derivatives Regulation in Canada (November 02, 2010) at p. 46 (footnote).

<sup>11</sup> See *End-User Exception to the Clearing Requirements from swaps; Final Rules in the Federal Register*, Vol.77 No.139 (Thursday, July 19, 2012), Rules and Regulations, online: U.S. Government Printing Office: <http://www.gpo.gov/fdsys/pkg/FR-2012-07-19/pdf/2012-17291.pdf>

<sup>12</sup> *Supra*, note 1 at pp. 10-11

risk on a portfolio basis. Any definition should preserve the ability of market participants to hedge risk on a portfolio basis.

In addition, the definition of *bona fide* hedging should cover anticipatory hedging so that inventory or other assets that a hedger anticipates owning; hedges of liabilities or services that a hedger anticipates incurring, providing or purchasing; and assets that a person merchandises or anticipates merchandising; as well as swaps used to hedge sales of any underlying commodity, qualify as *bona fide* hedging transactions.

If the *bona fide* hedging definition is defined narrowly, it could disrupt existing commercial market practices, reduce liquidity in listed and OTC derivative markets, and may increase systemic risk by effectively making it too difficult for market participants to hedge cash and swap market risks.

BP Canada recommends that the regulators proceed with implementing the reporting requirements, gather the necessary data, and evaluate that data provided by all market participants prior to adopting a definition for *bona fide* hedging. This, BP Canada believes, will help to ensure that a suitable global definition for hedging is developed, and is one that recognizes the breadth of hedging activities that can mitigate legitimate commercial risk, as well as be comparable, and in alignment, with the definitions applied in other jurisdictions.

### **Intra-Group Trading**

BP Canada commends the CSA for preserving an exemption for intra-affiliate or intra-group transactions, and encourages the CSA to continue to appreciate the objectives of such exemption to reduce overall market risk without jeopardizing transparency and regulatory oversight. All trades that occur between affiliates should be considered as intra-group trading, and should not be considered to contribute to systemic risk.

### **Record-Keeping**

The Committee's proposal that each end-user maintain full and complete records of all trading activity, a record of its board of directors' approval of the use of derivatives as a risk management tool, and records demonstrating what analysis was done by the end-user to demonstrate that it satisfies the requirements necessary to rely on the end-user exemption is unduly onerous given the range of end-user entities in size, resources, and OTC derivatives activity portfolios. As such, BP Canada believes that the Committee's record-keeping proposal appears to be at odds with the policy rationale to promote OTC derivatives activities for end-users in order to minimize commercial risk.

### **Conclusion**

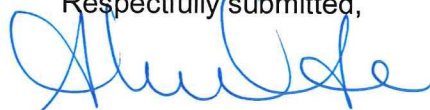
BP Canada supports tailored, fit-for-purpose rules that protect against systemic risk, in a harmonious manner cross border and provide for market transparency and regulatory certainty as appropriate to the Canadian markets. These objectives can be achieved

through an end-user exemption available to all market participants that do not pose a systemic risk to the market. We appreciate the balance that the CSA must strike between effective regulation and meeting the needs of the OTC derivative markets, and recommend that the CSA continue to consult with market participants, and allow them to stay engaged in the process as rules continue to be developed by the CSA.

BP Canada respectfully requests that the CSA consider its comments set forth herein regarding the End-User Paper.

If you have any questions, or if we may be of further assistance, please contact the undersigned.

Respectfully submitted,



for: Krista Friesen, Partnerships and Regulatory  
Affairs Manager Global Oil Canada  
BP Canada Energy Group ULC



Cheryl Worthy, Vice President, Regulatory Affairs,  
BP Canada Energy Group ULC