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**Re: Canadian Securities Administrators (“CSA” or “Committee”)
Registration Paper 91-407 – Derivatives: Registration (“Registration
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 Registration Paper, entitled *Derivatives: Registration*.¹ As well, BP Canada is separately providing its comments, previously deferred, on the CSA Consultation Paper 91-405 entitled *Derivatives: End-User Exemption*.²

BP Canada buys and sells hydrocarbon production and requirements for the BP group of companies. As such, 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. We look forward to providing comments on future proposed regulation related to over-the-counter (“OTC”) derivatives.

BP Canada supports the Committee’s efforts and commitment to developing an OTC derivatives oversight regime that meets Canada’s G20 commitments, and doing so through consultation with market participants in order to ensure that the complexities of the OTC markets are considered. BP Canada agrees that appropriate clearing and reporting requirements are essential to the regulation of the derivatives market, and is supportive of the implementation of a robust, fit for purpose reporting regime that enables Canadian regulators to monitor the market, as well as gather the information necessary to structure appropriate regulatory reforms and fulfil market oversight mandates and obligations.

The Registration Paper sets out the Committee’s desire to implement a registration regime that protects both participants in the derivatives market, particularly those participants that lack sophistication and solvency, and the soundness of the Canadian financial markets. In this circumstance, however, at the forefront is the matter of crafting a registration regime that will allow for the regulation of key derivatives market participants; it is from this perspective that BP Canada provides its comments. As drafted, the registration requirements set out in the Registration Paper are broad and general, creating an onerous burden on some participants, including those whose primary purpose in the marketplace is to hedge their underlying risk, and potentially a prohibitive burden on foreign participants. BP Canada is concerned that the proposed registration requirements, with no bright-line test for inclusion or exemption of market participants that do not represent significant market risk, will not provide regulators with a meaningful picture of potential systemic risk nor will they accomplish the stated goals for financial regulatory reform.

¹ Canadian Securities Administrators, CSA Consultation Paper 91-407: Derivatives: Registration (April 18, 2013).

² Canadian Securities Administrators, CSA Consultation Paper 91-405: Derivatives: End-User Exemption (April 13, 2010).

Registration Requirement and Categories of Registration

Definition of “Qualified Party”

BP Canada emphasizes the need for a clear definition of “Qualified Party” that captures those market participants that are sophisticated and solvent enough to understand the risks of, and to meet obligations related to, derivatives trading. And, where a transaction occurs between two such Qualified Parties, BP Canada agrees with the recommendation that the same level of oversight and protection as for non-qualified parties is not required.

BP Canada suggests that the CSA’s position, as set out in Section 6.1 of the Registration Paper, that “participants in the derivatives market should be subject to the same protections regardless of the size or the total derivatives exposure of the dealer” could be modified to make clear that smaller, less solvent and less sophisticated participants require greater protection in individual transactions than sophisticated parties with the financial ability to sustain a large loss. BP Canada agrees that all derivatives market participants require equal protection from inappropriate or illegal trading practices that threaten to have a negative impact on the market as a whole, and again recommends that an appropriate reporting regime will better allow securities regulators to effect surveillance and enforcement of the derivatives market as a whole. Furthermore, BP Canada recommends that OTC derivatives transactions between two “Qualified Parties” – as that term is ultimately defined – should not subject the parties’ representatives to *individual* registration requirements, as the need for protection of either party is less than a transaction involving a non-qualified party.

It is important that market participants are able to obtain certainty as to the qualification status of parties with whom they intend to do business. BP Canada asks that the CSA provide clarity as to each participant’s obligation to determine whether a counterparty is a “Qualified Party”. Currently, it is not clear whether a representation from a counterparty is sufficient, or whether further due diligence is expected.

BP Canada would like to highlight for comment the requirement for a dealer to provide a pre-trade report to counterparties not represented by advisers, which includes “a detailed description of the risks to and the rights and responsibilities of the client or counterparty under the terms of the trade”. This could be onerous if the definition of a non-qualified party is too broad, and is similar to the protection that Special Entities have in the US³ – which has tended to reduce the number of dealers that will transact with them.

Jurisdictional Harmonisation

Enhanced harmonization of derivatives regulation is an important component of the G20 commitments. In particular, BP Canada asks the CSA to be mindful of the need for a

³ The term Special Entities is defined in the U.S. *Commodities Exchange Act*, 7 U.F.C. Chapter 1, at Section 15F(h)(2), online: <http://www.law.cornell.edu/uscode/text/7/chapter-1>.

harmonized definition of “derivative” and “derivatives transaction” that applies in all Canadian jurisdictions, and similarly the need for harmonized reporting and registration requirements across the provinces. Moreover, BP Canada suggests that, if implemented, registration requirements for Canadian entities should follow a “lead regulator” model similar to the Passport system⁴, ensuring that once registrants have complied with requirements and been registered in their home jurisdiction, other provincial regulators will allow for substituted compliance, and no additional provincial applications will be required of that entity.

Creating equivalent regulatory regimes in order to avoid duplication and potentially onerous registration requirements in Canada can result in a robust, harmonized reporting process for all market participants. Gathering adequate data and consulting with market participants can further advance coordination between jurisdictions and advance the regulators’ knowledge of trading activities in Canada, whilst reducing the regulatory burden on market participants.

Distinction of Derivatives Trading vs. Dealing

BP Canada asks the Committee to clarify that an entity that is trading in derivatives on its own account is not necessarily dealing in derivatives. The Registration Paper does not make this distinction clear, particularly in the discussion of the factors set out in Section 6.1 – Derivatives Dealer.

As drafted, the Registration Paper recommends that any person carrying on the business of *trading* derivatives in a Canadian jurisdiction should be regulated as a derivatives *dealer* through a registration requirement. Section 6.1 lists factors to be considered when determining whether an entity (a) engages in activities that constitute a trade in a derivative; (b) meets the test for carrying on the business of trading; and (c) is carrying on business in a jurisdiction. But Section 6.1 does not explain that the business triggers listed are intended to be indicative of dealing, rather than trading, in derivatives. BP Canada asks that the Committee make clear that persons who trade only on their own behalf, and do not intermediate trades between unrelated counterparties, will not be considered derivatives dealers.

BP Canada asks whether the Committee has considered the potential consequences of overly broad and unspecific “trading” triggers for the dealer registration requirement. For example, Section 6.1 lists “other acts in furtherance of a trade” as an indicia of trading in derivatives, and “trading with the intention of being remunerated or compensated” as a business trigger. A small producer of natural gas may have a trading bench for the sole purpose of hedging its own production, and those traders will expect to be compensated for successfully hedging risk. Surely it is not the intention of the Committee to require that such a gas producer register as a derivatives dealer, and be required to meet the highest standard of registration requirements, with no recourse to a *de minimis* threshold or other exemptive relief. Registration would be onerous and potentially cost prohibitive, tending to discourage that producer from participating in the OTC derivatives market at

⁴ Multilateral Instrument 11-102 *Passport System*

all, and serve no protective purpose for other participants or the OTC derivatives market as a whole. In fact, the potential unwillingness of a producer to enter into hedge trades could actually increase risk to its business and the broader economic environment.

Further, the factors set out in Section 6.1 of the Registration Paper for determining whether a person is carrying on business in a jurisdiction in Canada are confusing. To the extent there is a connection between Section 6.1(c) and subsections (a) and (b), it is not intuitive or discoverable, and needs to be explained. It seems that a person must first determine that they are trading in a derivative, then that they are in the business of trading derivatives, and then determine in what jurisdictions they must register. But whereas a person is instructed to consider the various “business trigger” factors as an element of a holistic analysis, the presence of any of the enumerated jurisdictional factors would appear to be determinative. The potential result is that a person who is carrying on the business of trading (but not dealing) in one jurisdiction, and has an office in another jurisdiction that is wholly unrelated to their trading activities, would be forced to register in that second jurisdiction as a derivatives dealer. BP Canada can see no benefit to the regulator arising out of this requirement in respect of meeting its objective of protecting the market.

Jurisdictional Criteria for Foreign Dealers

Without a clear test for whether an entity is carrying on the business of trading in derivatives in Canada, many or most foreign market participants could be caught by Canadian registration requirements. With no *de minimis* exemption, a foreign-domiciled entity with no connection to Canada could potentially be in violation of Canadian registration requirements by virtue of one intermediated derivatives transaction with a Canadian counterparty. BP Canada suggests that by casting such a broad net, the CSA may find that it cannot effectively enforce registration requirements for foreign entities, and perhaps that foreign entities not subject to comparable regulatory regimes in their home jurisdiction may be deterred from entering into derivatives transactions with Canadian market participants.

BP Canada asks that the CSA provide clarity as to the criteria regulators will apply when determining whether a foreign entity is subject to “comparable” legislation in its home jurisdiction. Will foreign participants who are not subject to registration requirements in their home jurisdiction be able to satisfy the test for exemption from Canadian registration by providing Canadian regulators with evidence of, for example, proficiency, sophistication, and “know your customer” requirements? Specifically, will the *U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act* (the “Dodd-Frank Act”)⁵ – with its *de minimis* exemption⁶ – be satisfactory for this purpose?

⁵ *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/cqibin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf.

⁶ Federal Register / Vol. 77, No. 100 / Wednesday, May 23, 2012/Rules and Regulations, pp. 30626 to 30643.

De Minimis Threshold or Bright-line Test

BP Canada asks that the CSA clarify its position on why a registration regime, particularly a registration regime without a bright-line test for inclusion, is appropriate for the Canadian market. The Registration Paper states that “The Committee believes that the most appropriate method to regulate *key derivatives market participants* is to impose standard registration requirements based on the activity conducted by the participants.” (*emphasis added*)⁷. BP Canada agrees that Canadian regulators could best provide protection of the market and its participants by focussing on reporting and registration requirements for certain key entities, which again reiterates the need for a bright-line test to determine which participants have a significant enough presence in the market to create systemic risk. Under the Dodd-Frank Act, the Commodity Futures Trading Commission has instated a *de minimis* exemption from registration⁸.

BP Canada asks that the CSA ensure that at such time as a registration requirement is implemented, it be structured to impose reasonable registration requirements on only those key derivatives participants that represent significant potential risks to the derivatives market. BP Canada is concerned that smaller market participants could find extensive registration requirements onerous and cost prohibitive, thereby providing a competitive advantage to larger participants, but with potentially reduced market liquidity for all. Similarly, BP Canada suggests that broad and unspecific registration triggers for foreign participants may stifle business between foreign entities and Canadian participants, particularly those foreign entities domiciled in jurisdictions that do not have a registration regime or where the regime has narrower scope.

The Registration Paper, as written, seems to capture a sweeping array of participants in the derivatives market, rather than just those participants with the potential to create systemic risk, and imposes extensive requirements on those participants. All three categories of registrant, for example, must ensure minimum proficiency standards apply to all directors, partners, officers, employees or agents. As currently drafted, registration requirements would appear to have the potential to capture the vast majority of entities that trade derivatives in Canada, or with Canadian participants, and those same requirements could impose regulation on every employee of those entities.

Such requirements are unworkable: many employees of entities that trade, deal or advise in derivatives are in no position to influence trading, advise market participants, or affect the market in anyway, including all support functions: legal, accounting, credit, tax, clerical, administrative, and settlements, for example. It would be very difficult for any entity to ensure that every employee has met proficiency requirements for derivatives trading. Regulatory requirements with such broad application may have the effect of either suppressing market activity entirely, or creating an unmanageable volume of exemptive relief applications.

⁷ *Supra*, note 1 at Section 6, p. 14.

⁸ *Supra*, note 6.

Derivatives Definition and Exclusions

BP Canada has submitted a comment letter⁹ regarding the CSA Consultation Paper 91-301 – Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting¹⁰, as well as provided more specific input via the Alberta Securities Committee’s Derivatives Advisory Committee. The overarching principle is clarity, consistency and up-front definition of derivatives, with an appropriate exclusion of instruments that require physical delivery of an underlying commodity.

BP Canada notes the recent publication of Updated Model Rules on this subject via the CSA Staff Notice 91-302, as well as Ontario Proposed Rules 91-506 and 91-507, and welcomes the opportunity to comment on these.

Registration of Individual Representatives

BP Canada supports appropriate compliance and risk management systems as part of the registration requirements of derivatives dealers, derivatives advisers and large derivative participants, including the appointment and registration of relevant ultimate designated persons, a chief compliance officer and chief risk officer.

In large, integrated energy companies such as the BP group of companies, business activity is not necessarily organised by legal entity, and may span multiple entities and hence locations; activity in a specific location may also span multiple commodities, in markets with different characteristics. The registration of a single ultimate designated person responsible for conduct and supervision of derivative trading of multiple commodities may not be consistent with organisational reality – or provide the proficient supervision that is sought by the Committee and supported by BP Canada.

Different considerations may apply to the registration of a chief compliance officer and chief risk officer, particularly with the Committee’s expressed emphasis on local officers. These roles may be fulfilled by individuals in central locations, in order to give them oversight of the totality of business activity from a centre of expertise. It is also worth pointing out that roles may not exist on a dedicated, stand-alone basis in smaller companies, and the identification and registration of specific individuals may represent an undue burden for entities that are not a source of systemic risk.

BP Canada would support an individual registration regime for relevant market participants that recognizes a distinction between business activity and legal entity, and allows one or more individuals with the requisite expertise to fulfil the roles of ultimate designated person, chief compliance officer and chief risk officer, including from a central location where appropriate.

⁹ BP Canada, Comment letter on CSA Consultation Paper 91-301 - Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting (February 04, 2013).

¹⁰ Canadian Securities Administrators, CSA Consultation Paper 91-301: Model Provincial Rules – Derivatives: Product Determination and Trade Repositories and Derivatives Data Reporting (December 06, 2012).

Exemptions from Requirement to Register

BP Canada commends the Committee's attention to special circumstances pertaining to government entities and potential exemptions from their requirement to register, which it assumes are intended to address the unique position of national, statutory entities like the Bank of Canada.

However, BP Canada believes in non-discriminatory rules for all qualifying registrants. Several federal and provincial crown corporations whose obligations are fully guaranteed by the applicable government are active participants in the Canadian energy derivatives markets, both as marketing competitors and trading counterparties. While the Committee's recommendation would not exempt such crown corporations from a requirement to register under certain defined circumstances, an exemption would be available in other circumstances where an entity that is not a crown corporation would be required to register. This could have the effect of creating a competitive disadvantage for non-crown entities, in terms of their cost of compliance with the registration regime and the relative complexity of their resulting interactions with other market participants. BP Canada urges the Committee to uphold the competitive nature of the Canadian derivatives markets, and avoid broad exemptions that could unduly favour crown corporations.

BP Canada commends the Committee for not recommending an exemption from the requirement to register for foreign governments, or corporations owned or controlled by foreign governments. Such entities have been major entrants into the Canadian energy sector in recent years, notably through investment in the Oil Sands and Liquefied Natural Gas value chains, with related activity in the derivatives markets. The absence of a registration exemption here would serve to maintain a level playing field for all market participants.

Finally, BP Canada endorses the Committee's view that interaction between affiliated entities would not be considered activity that would typically be considered to be the business of trading.


Conclusion

BP Canada supports tailored, fit-for-purpose rules that ensure market transparency and regulatory certainty as appropriate to the Canadian markets. We appreciate the balance that the CSA must strike between effective regulation and meeting the needs of the OTC derivative markets. BP Canada recommends that the CSA continue to consult 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 Registration Paper.

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

Respectfully submitted,



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