March 18, 2014

DELIVERED VIA ELECTRONIC MAIL

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

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Dear Sirs/Mesdames:

Re: Comment Letter to CSA Staff Notice 91-303 – Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives & CSA Staff Notice 91-304 – Model Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions

Enbridge Inc. ("**Enbridge**") hereby respectfully submits these comments below in response to Canadian Securities Administrators' (the "**CSA**") Derivatives Committee (the "**Committee**") request for comments in connection to the *CSA Staff Notice 91-303 – Proposed Model Provincial Rule on Mandatory Central Counterparty Clearing of Derivatives* (the "**CSA Paper 91-303**") including the associated explanatory guidance published on December 19, 2013 and *CSA Staff Notice 91-304 – Model Rule – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (the "**CSA Paper 91-304**") including the associated explanatory guidance published on January 16, 2014. These proposed model rules outline the CSA's proposals regarding requirements for central counterparty clearing of over-the-counter ("OTC") derivatives transactions, protection of customer collateral and positions, and resilience against clearing member defaults. All comments are from the point of view that the Committee has drafted these rules not only to regulate derivative participants, but to also "strike a balance between proposing regulation that does not unduly burden participants in the derivatives market".

I. INTRODUCTION OF ENBRIDGE

Enbridge is a transporter of energy, operating the world's longest, most sophisticated crude oil and liquids pipeline system in Canada and the United States, shipping on average more than 2.2 million barrels every day. Enbridge's natural gas gathering and transmission system transports natural gas throughout North America, moving billions of cubic feet of gas per day. It also operates Canada's largest natural gas distribution company in Ontario, and provides distribution services in Quebec, New Brunswick, and New York State.

Like many other "end-users", Enbridge transacts in both OTC and cleared derivatives to manage and mitigate the risks associated with its core business of transporting and processing energy commodities.

Enbridge appreciates the opportunity to comment on the CSA Paper 91-303 and CSA Paper 91-304 and commends the CSA's efforts to support Canada in meeting its G-20 commitments and establish a regulatory regime for the over-the-counter derivatives market in Canada. However, while Enbridge supports the CSA's general intentions to "protect participants in the derivatives markets from unfair, improper and fraudulent practices; protect the soundness of Canadian financial markets and reduce risks, including systemic risks, resulting from the derivatives activities of key market participants", Enbridge is very concerned that attention is being paid to the practical application of the proposed rules. One of Enbridge's main concerns is the staggered implementation of the rules across Canada and the compliance implications for companies like Enbridge that conduct business in more than one province and in foreign jurisdictions. If compliance is too burdensome, liquidity in the derivatives market will disappear for Canadian companies as the costs of compliance will be prohibitive. Where possible, Enbridge urges the Committee to learn from the past successes and mistakes of regulators in the United States and Europe and implement practical, achievable and understandable rules.

II. ENBRIDGE'S GENERAL COMMENTS ON THE CSA PAPER 91-303

A) Part 1 – Definitions and Interpretation

Section 1 - Definitions

With respect to the definition of "financial entity" in Section 1, since the registration rule has not been finalized, parties will be unable to determine whether or not they or their counterparty are required to clear a derivative. For this reason, the Mandatory Central Counterparty Clearing of Derivatives rule should not come into force until the registration rule is in force.

The "local counterparty" definition will need to be further clarified. It is not completely clear how the test would be applied to a company that is only federally registered and has not been extra-provincially registered. Further guidance on this point to clarify would be appreciated. Also, if a company is registered in multiple provinces, can the company default to its "principal place of business" if not all provinces have published harmonized rules that determine which derivatives are "clearable derivatives"? In subsection (b) of the "local counterparty" definition, Enbridge urges the Committee to clearly define who would be considered to be an "affiliate". The U.S. Commodity Futures Trading Commission's ("CFTC") in its final rule *Clearing Exemption for Swaps Between Certain Affiliated Entities* implementing the Dodd Frank Act and the European Commission in implementing the European Market Infrastructure Regulation ("**EMIR**") both have a control test for "affiliate" status which the Committee could borrow to

provide clarity of what it would consider an affiliate[1]. Both the CFTC and the European Commission have emphasized that the affiliate status definition ***'strike an appropriate balance between ensuring that the inter-affiliate or intragroup exemption is not overly broad, but broad enough to provide companies with the flexibility to account for differences in corporate structures'***. [Emphasis added]

In addition, Enbridge asks that the Committee clarify what is meant by "responsible for liabilities of that affiliated party"? Some affiliates require parental support either through a guarantee or other means, while other affiliates can stand on their own in their contractual relationships as they have the assets and an external credit rating. Yet the parent company may still consider supporting that affiliate should there be difficulties. How would the Committee interpret the term 'responsible'? Would the Committee's interpretation hinge on the fact that credit support has been provided in the past or the fact that the affiliate is the parent entity?

In the definition of "transaction", what would be considered to be a "material amendment"? Will market participants have to look to each Securities Act in each province for a definition? From the Explanatory Guidance document, a material amendment is considered to be a "large change". This is a subjective test and it would be beneficial to have an objective test. For example, a certain percentage change in the value of the transaction (for example 5% and above a dollar threshold value).

Section 3 - Interpretation of hedge or mitigation of commercial risk

In Section 3(a)(i), the addition of "incurring in the normal course of its business" at the end of the section could be problematic. Enbridge states that it should be enough that there is a risk that the company needs to manage using derivatives. Companies develop new risk management strategies as they enter into new lines of business and new commercial arrangements, as long as any new strategies are considered by the company under their existing risk management practices that should be sufficient. Also, Enbridge would suggest removing the words, "or its group" and replacing it with "or its affiliates".

In Section 3(b)(i), the term "speculation" should be defined.

In order to be aligned with the Dodd Frank Act definition of hedging, there should also be a factor that states that if a transaction qualifies for hedge accounting treatment under either the IFRS or GAAP accounting standards, that the transaction will be considered to be a hedge under this Model Rules in addition to the current factors proposed by the Committee.

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[1] The CFTC provides a definition of affiliate status as "counterparties to a swap where the financial statements of both counterparties are reported on a consolidated basis, and either one counterparty directly or indirectly holds a majority ownership interest in the other, or a third party directly or indirectly holds a majority ownership interest in both counterparties. The CFTC further specified in its final rule that a counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of a majority of the capital of a partnership. Article 3(1) of the EMIR defines an 'intragroup' transaction in relation to a non-financial counterparty as "an OTC derivative contract entered into with another counterparty which is part of the same group provided that both counterparties are included in the same consolidation on a full basis and they are subject to an appropriate centralized risk evaluation, measurement and control procedures and that counterparty is established in the Union or, if it is established in a third country, the Commission has adopted an implementing act under Article 13(2) in respect of that third country".

In the Explanatory Guidance for Section 3, it states, "The strategy or program should be documented and subject to regular compliance audits to ensure it continues to be used for relevant hedging purposes". What is meant by "documented and subject to regular compliance audits"? Any sophisticated company will have its own risk management program and oversight by the appropriate internal risk committee and internal auditors. The Explanatory Guidance is confusing in that it uses the words "program" and "transactions" interchangeably so that the level of detail the provincial securities regulator is expecting in any risk documentation is not clear. In addition, with respect to compliance audits, by whose standard is the application of "regular" compliance audits? Does this have to be on an annual basis? By internal auditors? External auditors? Does oversight by an internal risk committee designated by the company's board fulfil this requirement? Would the company be expected to provide details of the strategies or programs to the provincial securities regulator? Given this is highly confidential information, what protections are there for companies once the information is provided to the appropriate provincial securities regulator. Would the entities need to apply for a confidentiality order under the appropriate provincial Securities Act to protect this information? In addition, if companies will be expected to provide this level of detail, what is the rationale for asking for this information given that the U.S. does not require this disclosure, but simply that the board has either reviewed or delegated oversight of the risk management process to the appropriate internal risk committee?

The Explanatory Guidance also states in Section 3 that, "a **local counterparty** should develop policies and procedures sufficient to ensure that supporting documentation is prepared and retained with respect to **transactions** for which the end-user exemption will be relied upon. Such documentation should include: risk management objective and nature of risk being hedged, date of hedging, hedging instrument, hedged item or risk, how hedge effectiveness will be assessed, and how hedge ineffectiveness will be measured and corrected as appropriate." (Emphasis added). It would seem to be more efficient to have a blanket end-user exemption used for all transactions and then communication when a particular transaction does not fall under the exemption. The way the rule and Explanatory Guidance are currently drafted, it would seem companies would have to seek the end-user exemption for each transaction. Also, if the risk management of the enterprise as a whole is managed centrally, the "local counterparty" may not have specific policies and procedures, but rather rely on say the parent entity's policies and procedures. Given both the U.S. and Europe do not require this level of detail, why would Canadian participants be required to keep detailed records on a transaction by transaction basis versus a portfolio, strategy or program approach? Hedge effectiveness can be assessed generally in a risk management program or through a technical accounting definition. Enbridge believes that both ways of assessing hedge effectiveness are appropriate.

B) Part 2 - Mandatory Central Counterparty Clearing

Section 4 – Duty to submit for clearing

Under Section 4(1), there is a possible scenario where a transaction is executed a few minutes before the clearing agency closes during a business day and there will not be enough time to clear the transaction. This section could be reworded to allow for transactions executed late in a business day to be cleared the next business day. The Committee would have to have further discussions with clearing agencies and market participants for the clearing agencies to determine how fast they could practically clear a transaction if received at the end of a business day.

Our experience with clearing members/intermediaries is that they have been incredibly slow in negotiating clearing documentation and setting up an entity within their systems. Any implementation of

this rule should consider how long it will take counterparties to get set up with their clearing intermediaries and agents and perhaps seek comment from those clearing agencies, members and intermediaries on the practical aspects of implementation given some derivatives that are going to be required to be cleared are not being currently cleared.

The substituted compliance section in Section 4(2) will work once every province (and foreign jurisdiction) has their clearing rules in place, but Enbridge has major concerns regarding how this will practically work during the transition period. Not only with respect to whether or not clearing facilities will be available, but what if different classes of transactions are required to be cleared in different provinces (as there is not guarantee that each province will mandate the same derivatives to be cleared), during different time periods and potentially different clearing agencies/intermediaries operating in some but not all provinces and potentially not for all derivatives and classes of derivatives as this is up to the clearing agency. Is there some guidance that can be given to ensure a smooth transition period and not impose undue cost to market participants who might be forced to clear transactions in multiple provinces and deal with multiple clearing agencies/intermediaries?

C) Part 3 – Exemptions From the Mandatory Central Counterparty Clearing

Section 7 – End-user exemption

With respect to Section 7(b), the concept of an affiliate should be added to this section as there are sleeving entities used by energy companies to centrally manage risk activities to outwardly face the market and then internally sleeve the hedge to the appropriate internal entity.

In Section 7(2)(a), what is meant by "acting as agent" on behalf of the person or company? This issue was a controversial one in the U.S. and the CFTC ended up issuing a no action letter[2] to allow treasury affiliates (or sleeving entities) to use the end-user exemption as they were really trading on behalf of another internal entity within the corporate family that could utilize the end-user exemption. This section should be amended taking into account the lessons learned in the U.S. regarding how energy companies use sleeving entities for hedging to outwardly face the market. If this section is not amended, then the question becomes can these sleeving entities even enter into hedges as "principals" or does all of the documentation need to be amended facing the market showing that the particular sleeving entity is "acting as agent" for each internal company entity? Will there have to be internal agency agreements put in place between each sleeving entity and internal entity it sleeves hedges to?

Section 8 – Intragroup exemption

In order to take advantage of the "intragroup exemption", the two counterparties (affiliates?) have to agree to rely on this exemption? Is this going to require an agreement or in the words of the Explanatory Guidance "appropriate legal documentation" or would some other form of documentation imbedded in centralized risk management policies be required? As guidance, the Committee should look at what the CFTC and the European Commission require. The CFTC in its final rule on the clearing exemption between certain affiliated entities that are not swap dealers or major swap participants adopted a flexible standard of a documentation requirement to focus the documenting all of an inter-affiliate transaction's terms only to require that "the terms of the swap are documented in a swap trading relationship document that shall be in writing and shall include all terms governing the trading relationship

[2] CFTC No-Action Letter 13-22 dated June 4, 2013

between the eligible affiliate counterparties". Like the CFTC, the European Commission in the Regulatory Technical Standards supplementing the EMIR, *with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP*, the European Commission requires that intragroup undertakings keep details of the supporting contractual relationships between the parties.

In the Explanatory Guidance, section 8(5)(ii), what does "any significant amendment to the risk evaluation, measurement and control procedures" mean? Risk policies and procedures are amended over time as new lines of business and new commercial arrangements are entered into or more experience gained in current lines of business and new commercial arrangements. How do the provincial security regulators measure what is "significant"? Also, in Form F1 the Committee requires that we are to describe the appropriate centralized risk evaluation, measurement and control procedures. How can this type of information be summarized on a short form? The information also is required for each "**transaction**" versus on a strategy, portfolio or program basis? What about the previous concerns Enbridge has identified in our comments to Section 3 above regarding confidentiality of company risk management processes and procedures?

Section 9 – Improper use of exemption

If a company disagrees with the provincial securities regulator with respect to whether or not the end-user exemption was used improperly, what is the company's remedy or process of appeal? What impact does it have on other similar transactions which the company has claimed an end-user exemption? Enbridge requests that the Committee provides details of how provincial securities regulators would determine that an entity has improperly used an exemption.

Section 10 – Recordkeeping

In Section 10(1) what does "all documents" in a "durable format" actually mean? It would be good to know what a provincial securities regulator would expect to receive from a company during an audit and what format would be the easiest for the regulator. Also, under the Dodd Frank Act, the board can delegate its authority to review the use of the end-user exemption to an appropriate committee. Perhaps the rule would be clearer if this was also the case in Canada versus the wording, "acts in a capacity similar to a board of directors". The Explanatory Guidance for this section clearly states that the board of directors is required to approve the business plan or strategy. The question becomes how long is this approval good for? If the board of directors approved the use of derivatives many years ago, is this all that is required, or do they need to re-visit this approval again? Is this rule intended to align with the Dodd Frank Act where an appropriate committee designated by the board of directors reviews the use of the end-user exemption annually? There are really two different approvals being discussed in this section, the first being the use of derivatives by the company generally and second, the use of the end-user exemption. The Dodd Frank Act **only** requires the board or committee to consider the use of the end-user exemption.

As we have commented in Section 3 above, detailed documentation on a transaction-by-transaction basis for each hedge is most likely not kept in the manner prescribed by the rule and guidance. In addition, more guidance needs to be given with respect to the prescribed compliance audits.

Section 11 – Non-Application- Crown Corporations Exemption

This Section clearly gives entities that are guaranteed by government an unfair competitive advantage as there is going to be a significant cost to companies with respect to clearing, including but not limited to, extra internal processes created and maintained (human resources and information technology resources), recordkeeping requirements and eventually margin provided to clearing agencies (and/or intermediaries, members) that cannot be used for other company business that would generate revenues. Governments, provinces, territories, crown corporations or entities guaranteed by a government could create systemic risk in the market just as easily as end-users and other derivative market participants.

D) Part 4 – Determination by regulator

Section 12 – Submission of information on clearing services of derivatives by the clearing agency

Section 12(a) of the Explanatory Guidance, not sure what the existence of master agreements or short form confirmations have to do with the determination of whether a derivative will be subject to a clearing requirement? Enbridge urges the Committee to please provide clarification.

E) Part 5 – Transition

Section 16 – Transition

Parties should not have to clear transactions entered into before the coming into force of this rule just because they are "materially amended". There are going to be substantial costs to clearing and many market participants would not have entered into certain transactions if they had calculated these costs into the economics of the transaction at time of execution which may have been several years in the past. Costs could include margin required by clearing agency, revised documentation between parties and clearing agency/intermediary/member, and other transaction costs between the parties.

Generally speaking, companies need enough time to implement any new rules that come into effect. Enbridge is already finding that with the reporting model rules that came out on November 14, 2013[3], companies that will be offering to be the trade repositories are still not able to even onboard our companies to their system (so that we can commence mapping information so trade reporting can take place later on this year). The proposed trade repositories have stated that the onboarding process will take several weeks and that Europe has been too time consuming for them to consider Canada reporting obligations. We have already seen in Europe and the U.S. the turmoil caused by implementation dates that are unrealistic. This leads to the next concern of how does the CSA Committee/provincial security regulators propose to amend model rules in a timely and efficient manner if and when (as it is extremely unlikely the rules will anticipate every nuance and consequence as has been shown time and time again in both the U.S. and Europe) the need arises? In the U.S., the CFTC has the ability to send out No Action Letters. What procedure in the CSA rule-making process does the Committee proposes to use to grant time-limited relief to derivative market participants?

[3] OSC Rule 91-506 Derivatives: Product Determination and OSC Rule 91-507 Trade Repositories and Derivatives Data Reporting; MSC Rule 91-506 Derivatives: Product Determination and MSC Rule 91-507 Trade Repositories and Derivatives Data Reporting; Quebec Regulation 91-506 respecting Derivatives Determination and Regulation 91-507 respecting Trade Repositories and Derivatives Data Reporting.

F) Form F1 Questions

How much detail is expected on this form? How senior should the person be who is listed as the contact? Does it have to be someone with direct knowledge of risk practices or an officer of the entity? Does the Committee only want to know the contract information for external legal counsel? What about internal legal counsel contact information? What if only a contact person has changed, does a new form have to be submitted? In Section 2(5) of the form, it states that there will be signatories to the terms of a transaction. It would not be typical for internal entities to sign off on a confirmation under a master agreement. The information regarding the transaction would be available in the company's risk systems. Is this extra step required as it has no value to a company from an internal compliance perspective.

III. ENBRIDGE'S GENERAL COMMENTS ON THE CSA PAPER 91-304

A) Part 1 – Definitions

Section 1 – Definitions

Has the CSA Committee discussed the implications of having different definitions for "customer" versus "local counterparty" and "transaction" in Rules 91-303 and 91-304?

The definitions of "permitted depository" and "permitted investments" should include a rating of at a minimum A- by Standard & Poor's (with respect to senior unsecured long-term debt obligations) or the equivalent rating of any other designated rating agency (e.g. Moody's).

B) Part 2 – Treatment of Customer Collateral

In general, why has the CSA Committee proposed a rule that partially implements margining procedures when globally there is no consensus on the margining rules for uncleared derivatives transactions entered into by derivative market participants?

Section 3 – Segregation of customer collateral

While it is appreciated that the CSA Committee has tried to draft a rule that protects customer's collateral as much as possible, there is still the underlying legal issue that Canadian companies deal with regarding holding cash as collateral in Canada. Until our bankruptcy laws are changed, regardless of the disclosure given to us by our clearing agents, intermediaries or members, the fact is our cash is still at risk. End-users routinely provide letters of credit as collateral to counterparties. As end-users, we should be allowed to provide letters of credit for margining purposes.

C) Part 5 – Transfer of Positions

Section 30 – Transfer of customer collateral and positions

In the event of a clearing member's default, there is going to be a lot of activity and it is doubtful the derivatives clearing agency and its members will be able to handle this in an orderly manner. Given the list in section 30(3), it is conceivable that a request for transfer will be rejected if the clearing agency and its members are overwhelmed citing one of the items on the list. Is there any way the regulators can ensure the clearing agency and clearing member's compliance and maximum effort in transferring positions and collateral?

D) Specific feedback

1. Should excess customer collateral be permitted to be held by clearing members and clearing intermediaries? Some jurisdictions believe that all collateral including excess collateral should flow directly to and be held at a derivatives clearing agency?

Answer: Having your excess customer collateral held by your clearing members and intermediaries is fine as long as appropriate protections are in place for the collateral. Would even be preferable if excess customer collateral could be letters of credit?

2. If all customer collateral was required to be held at a derivatives clearing agency should additional requirements for the holding of excess customer collateral be applied to derivatives clearing agencies?

Answer: Yes, all protections should be in place no matter which clearing entity holds the customer collateral.

3. What specific role is it anticipated that a clearing intermediary will play in the context of clearing OTC derivatives and are the obligations on clearing intermediaries appropriate?

Answer: The clearing intermediaries could assist with enabling companies with different clearing members in different provinces decreasing the amount of documentation required. Might even be able to hold excess collateral in the form of letters of credit.

4. Should a customer's cleared derivatives collateral held at the clearing member or clearing intermediary level be permitted to be commingled with other collateral of that customer such as collateral for futures transactions?

Answer: Yes, it would be a more efficient use of the collateral.

IV. CONCLUSION

Enbridge thanks the CSA and the Committee again for the opportunity to submit our comments on CSA Paper 91-303 and CSA Paper 91-304 and hope the Committee would consider our comments and recommendations as the Committee drafts its model rules to establish a regulatory regime for the OTC derivatives market in Canada. We would be pleased to discuss our thoughts with you further. If you have any questions or comments, please contact the undersigned.

Respectfully submitted,
Enbridge Inc.

Kari Olesen
Legal Counsel