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Autorité des marchés financiers
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Manitoba Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Ontario Securities Commission

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Dear Sirs/Mesdames:

TransCanada Corporation (TransCanada) is pleased to submit its comments in response to *CSA Consultation Paper 91-303 – Mandatory Central Counterparty Clearing of Derivatives* (Consultation Paper 91-303) and *Consultation Paper 91-304 – Derivatives: Customer Clearing and Protection of Customer Collateral and Positions* (Consultation Paper 91-304) drafted by the Canadian Securities Administrators OTC Derivatives Committee (the Committee).

With more than 60 years' experience, TransCanada is a leader in the responsible development and reliable operation of North American energy infrastructure including natural gas and oil pipelines, power generation and gas storage facilities. TransCanada operates a network of natural gas pipelines that extends more than 68,500 kilometres, tapping into virtually all major gas supply basins in North America. TransCanada is one of the continent's largest providers of gas storage and related services with more than 400 billion cubic feet of storage capacity. A growing independent power producer, TransCanada owns or has interests in over 11,800 megawatts of power generation in Canada and the United States. TransCanada is developing one of North America's largest oil delivery systems.

TransCanada constructs and invests in large infrastructure projects, purchases and sells energy commodities, issues short-term and long-term debt, including amounts in foreign currencies, and invests in foreign operations. These activities expose the company to market risk from changes in commodity prices, foreign exchange rates and interest rates. TransCanada uses derivatives as part of its overall risk management strategy to assist in mitigating the impact of these market risk exposures.

TransCanada respectfully submits the following concerns and observations with regard to Consultation Papers 91-303 and 91-304:

1. **Registration** – The requirements of Consultation Paper 91-303 hinge on whether a company is required to register. Because the registration requirement remains unclear at the present time, TransCanada suggests that the Committee finalize and implement the registration rules before

implementing the clearing rules and reporting requirements. An inability for a company to accurately determine its status under the regulations creates significant compliance risk for it and other market participants, and may result in numerous initial reporting errors, unreported transactions and duplicate reporting on an industry-wide basis.

2. **Local counterparty** – The definition of "local counterparty" includes the phrase "responsible for the liabilities of that affiliated party". It is unclear from the rules what is meant by that phrase. Specifically, is the phrase referring to a general guarantee of the liabilities / obligations of the affiliate or is the phrase referring to guarantees on a transaction by transaction basis? TransCanada respectfully suggests that making such determination on a transaction by transaction basis would be easier to apply and more relevant to the stated goal of the regulation. However, if the phrase is referring to a general guarantee, then it would be helpful for regulators to provide further guidance to assist in making such a determination. Clear guidance for substitutive compliance will be very important with respect to the current local counterparty definition since certain entities will likely be subject to compliance requirements in multiple Canadian jurisdictions on the basis of guarantees.

3. **End-user exemption/hedging or mitigating commercial risk** – The additional guidance provided with respect to qualifying as an end-user and hedging and mitigating commercial risk is appreciated and appears to be broad enough and flexible enough to cover an appropriate range of end-user activity. However, the last paragraph in section 3 of the explanatory guidance and section 10(1)(b) indicates the need for very detailed, transaction by transaction documentation which will be very onerous for entities that choose to not apply hedge accounting treatment or for those transactions that may not qualify for hedge accounting under the very restrictive accounting rules. In addition, shorter term transactions entered into and settled between quarters may not have hedge documentation in place for accounting purposes, but such documentation would be required under these regulations. As a result of these factors, the volume of transactions that would require detailed documentation, assessments of effectiveness and record-keeping under Consultation Paper 91-303 would be much greater than under the hedge accounting rules on which this guidance appears to have been based.

   Section 3 of Consultation Paper 91-303 also refers to "compliance audits of hedging strategies or programs" and "correcting" ineffectiveness. Please provide some guidance on what is envisioned here. It would also be useful to provide some clarity on the types of activities that are considered to be in the "nature of speculation". TransCanada suggests that any additional guidance should take into account that whether a transaction generates a short term profit is not an accurate indicator of whether such transaction is speculative in nature.

   Section 3 of Consultation Paper 91-303 requires a local counterparty to develop policies and procedures that include details on assessing hedge effectiveness, and how hedge ineffectiveness will be corrected. What are the implications of no longer meeting the defined hedge effectiveness policies? Similar to the comments below under improper use of exemption, in the event that a hedge is no longer considered effective and clearing is required, clearing may be problematic for a derivative transaction that has already started to settle. TransCanada suggests that the hedge effectiveness test and requirement to clear is a test to be performed at execution only.

   With respect to the terms "highly effective" and "closely correlated" used in the explanatory guidance, TransCanada encourages the Committee to adopt a definition for these terms that expands upon the very restrictive definitions of these terms used for accounting purposes. An expanded definition meets the Committee's goal of applying a flexible approach to the determination of "hedge or mitigation of commercial risk" encompassing "a broad range of co-dependence or co-movement in relevant economic variables."

4. **Intragroup exemption** – TransCanada respectfully questions the need for completion of the written agreement required under Section 8(2)(c) and Form F1 to qualify for an exemption from clearing for intragroup transactions. Because intragroup transactions between 100% owned

entities do not create systemic risk, such transactions should not be subject to any administrative, reporting or clearing requirements under these regulations. The requirement to clear transactions between affiliates may be complicated if one affiliate counterparty to a transaction is a guarantor or is providing assurance for the other affiliate counterparty, or if agreements to net exposures between the transacting affiliates exist. TransCanada suggests that the intragroup exemption be simplified such that transactions between 100% owned affiliates are exempt as long as certain clear, easily verifiable conditions are met without the need for additional agreements or forms.

5. **Improper use of exemption** – Section 9 of Consultation Paper 91-303 describes the ability of the securities regulator to direct a local counterparty to submit a transaction for clearing if it determines that an exemption has been used improperly. For electricity derivatives, for example, it is impractical, if not impossible, to clear a transaction that has already partially settled, therefore clarification must be provided on how to comply with the regulator's direction if the requirement to clear a transaction comes after non-cleared settlement of the transaction has begun.

6. **Record keeping** – Section 10 refers to approval by the board of directors or a group that acts in capacity similar to a board, but there is no previous mention of any required board approval under these regulations. The explanatory guidance further elaborates on this, indicating that "the board of directors would be required to approve the business plan or strategy which authorizes management [more specifically, this should be "the entity"] to use derivatives as a risk management tool. This requirement is intended to ensure both management and the board of directors are required to consider the implications of trading in derivatives and the manner in which a hedging strategy will be implemented prior to relying on the end user exemption." While the Board approves the overall business strategy and approves the use of derivatives in general through its approval of the risk management policies of a corporation, this level of approval appears to be far more detailed than what is generally expected or considered appropriate for a board. The role of the board is not to actively manage the day to day operations of the company but to oversee the management of the business and affairs of the corporation. In addition, this requirement is inconsistent with and goes beyond the requirements already in place under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd Frank Act) in the U.S. for the board or a committee of the board to consider the use of uncleared swaps. On a matter such as this, consistency with the Dodd-Frank Act is suggested to avoid overlapping approvals by the board and audit committee on similar matters.

7. **Non-application** – Section 11 of Consultation Paper 91-303 exempts crown corporations from central counterparty clearing requirements, however many crown corporations in the power industry are active participants in derivatives markets and should be subject to the same requirements as all other market participants. A broad exemption such as this would give such crown corporations a significant competitive advantage in the power industry. Also, it would be beneficial to have a definition of crown corporations.

8. **Determination** – Part 4, Section 12 of the Explanatory Guidance – TransCanada respectfully submits that a "bottom-up approach for determining whether a derivative or class of derivative will be subject to the mandatory clearing obligation" may not be the best method to ensure that only derivatives that create real systemic risk are captured by the clearing requirement. Please consider using a 'top-down' approach of assessing what types of products and transactions create systemic risk in the market, and implementing clearing requirements based on that assessment.

9. **Transition** – Section 16 of Consultation Paper 91-303 requires that any pre-existing transactions, in effect at the time the Rule comes into force, should be cleared if there is a material amendment to the transaction after the date of the Rule coming into force, if a derivative is assigned, or if there is a transfer or alternation of obligations arising from the derivative on or after that date. TransCanada proposes that the requirement to clear historical transactions subject to a material amendment, sale, acquisition or disposition after the coming into force of the mandatory clearing

rules be made expressly subject to the other clearing exemptions contained in Part 3 of the model rule.

10. **Monitoring compliance** – The securities commissions will be receiving very large quantities of data as market participants submit such data to comply with mandatory reporting requirements. Considerable resources will be required to receive, store, and analyze this data, in addition to the resources required to monitor compliance with the regulations. TransCanada is concerned with the impact of increased data management and oversight costs on the fee structure and charges levied by the provincial securities regulators. These additional costs will not be recovered through market mechanisms, thereby directly impacting companies that use derivatives for their own account. This burden could become particularly onerous for companies required to report in multiple jurisdictions. These additional costs are magnified by the existence of multiple provincial securities regulators, which suggests that an aligned federal securities regulator may be a more cost effective and efficient method of implementing these new regulations.

TransCanada hopes these comments will be useful to the Committee in their deliberations. If you have any questions or would like to discuss any of these matters, please do not hesitate to contact me.

Yours very truly,

Nancy Johnson, CA
TransCanada Corporation
Director, Market Risk Analytics and Reporting