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January 25, 2012

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**Re: Canadian Securities Administrators (CSA) Consultation Paper 91-403 on
Derivatives: Surveillance and Enforcement**

Dear Members of the CSA Derivatives Committee:

BP Canada Energy Company and its affiliates (BP Canada) buy and sell hydrocarbon production and requirements for the BP Group. As such, it is a major purchaser, marketer and trader of Canadian natural gas, a trader of power, and is a major trader of crude oil and purchaser of Canadian crude oil for BP's refineries in the United States. BP

Canada welcomes the opportunity to provide comments on Consultation Paper 91-403 setting forth the CSA Derivatives Committee's (Committee) recommendations regarding surveillance and monitoring, market conduct and enforcement of over-the-counter (OTC) derivatives transactions.

To the extent that market registrants pose systemic risk, BP Canada agrees with the Committee that provincial market regulators should be able to monitor, detect, deter and enforce against market misconduct and conduct prudential regulation of registrants that are not otherwise prudently regulated. However, in order to effectively regulate in these areas, BP Canada is of the view that registration requirements for market participants, as well as exemptions from registration and regulation, should be clearly set out prior to the effective date of any surveillance and enforcement regulations.

In addition, not all OTC derivatives pose systemic risk (for example – energy derivatives). Only registrants that pose systemic risk should be prudentially regulated. In other words, there may be participants in the energy derivatives market for which prudential regulation is not required or appropriate.

We encourage Canadian regulators to develop a surveillance and enforcement regime that avoids chilling legitimate market behaviour. Policy and regulatory uncertainty can heighten business risk and result in limiting innovation and appropriate risk taking that should thrive in well functioning markets. In the case of the OTC energy derivatives, this can result in increasing costs to consumers. Moreover, in such an environment, it may become difficult to attract new capital investment to certain markets as the perceived risks of doing business increase due to uncertainty regarding enforcement policies or lack of clarity in the underlying rules themselves.¹

BP Canada supports tailored regulation that brings transparency and stability to the energy derivative markets in Canada. We appreciate the balance Canadian regulators must strike between effective regulation and not hindering the energy derivative markets. Therefore, BP Canada anticipates remaining active in response to the various regulatory reform initiatives that will form the basis of the future consultation papers to be released by the CSA in 2012.

1. Surveillance and Monitoring of OTC Derivatives Markets

As noted by the CSA in Consultation Paper 91-402, the Canadian OTC derivatives market comprises a relatively small share of the global market. Of that market, the majority of the OTC derivatives contracts entered into by Canadians are interest rate swaps and foreign currency forwards while commodity OTC derivative transactions are a minority of the transactions. It is from this perspective that BP Canada asks the CSA and the member regulators, as each looks at the needs of the Canadian OTC market in their respective jurisdictions, to continue to recognize that not all OTC derivatives pose systemic risk and that some, such as commodity derivatives, and in particular energy derivatives, have unique characteristics. For example, energy derivatives are unique in

¹ This statement reflects the position of various energy trade associations, as stated in the White Paper regarding the Federal Energy Regulatory Commission's Enforcement Authority, dated November 14, 2007, by Covington and Burlington LLP.

that they may allow for physical settlement or be used as physical hedges. It is important that the various elements of a comprehensive OTC regulatory framework be designed to accommodate the specific needs of these types of OTC derivatives market transactions.

OTC derivatives are diverse. Only broad regulatory requirements should apply across all derivatives markets. Canadian regulators should permit variation on more granular regulation between derivatives markets. For example, commodity derivatives have many characteristics that are unique from other derivatives, such as equities derivatives. As a result, modeling legislation purely on existing equities or exchange models may not result in effective regulation of commodity derivatives. In addition, many commodity derivatives, and in particular energy commodity derivatives may be exempt from regulation. It is important to market participants in the energy derivative area that these exemptions be clearly and early defined. Further, to the extent that the Committee is unable to provide clear definitions relating to exemptions - and such lack of clarity in turn creates legal and regulatory uncertainty - we would encourage the Committee to include appropriate safe-harbour provisions for market participants making demonstrative, good faith efforts to comply with applicable requirements until those definitions are clarified.

The Committee has noted Alberta's Market Surveillance Administrator ("MSA") as an example of a spot market regulator. This regulator monitors Alberta's electricity spot market and natural gas retail marketers to ensure they operate in a fair, efficient and openly competitive manner. The role of the MSA illustrates the uniqueness of energy commodity derivatives and existing monitoring already in place for the energy commodity spot market. To the extent that energy derivative transactions are not exempt from regulation, it may well be the case that unique regulatory oversight is appropriate for OTC energy derivatives.

However, the spot or cash market for energy commodities is distinct from the derivatives market for those commodities. Member regulators of the CSA should regulate only in the markets where each has jurisdiction – in this case, OTC derivatives. Although the spot market regulated by the MSA is a very small percent of total market activity for the commodities that it regulates, to the extent that the MSA has anti-manipulation authority, the Committee should take care not to impose additional regulations on that market. Rather, any perceived overlap between spot and derivatives markets should be dealt with by the sharing of information between regulators and a single determination, based on evidence, as to which of the markets was hypothetically manipulated. Regulators can then avoid placing market participants in potential double jeopardy due to duplicative regulation over the same market activity.

2. Management of Data

As stated by BP Canada in our September 12, 2011 comments to CSA Consultation Paper 91-402, the preferred option for provincial regulators to obtain access in information regarding trading in derivatives is the use of "memorandums of understanding" with U.S. and other international regulators that permit free exchange of information on an "as needed" basis relative to the exercise of the regulators' mandate. Cooperation and information sharing between provincial regulators and other domestic and international regulators is fundamental to ensure a coordinated market oversight. To the extent that the existing market data can be used to satisfy additional reporting obligations or enable surveillance proposed by the Committee, then this information

should be shared or accessed (subject to confidentiality requirements) by the provincial regulators to the extent possible to avoid duplication and additional resource requirements. For example, energy market participants currently make various filings with the National Energy Board and other provincial regulators. It is possible that data from these filings could be shared with provincial regulators, thus avoiding unnecessary reporting mandates and resource requirements.

While each Province has the jurisdiction to regulate OTC derivatives, as noted by the Supreme Court of Canada in Reference Re Securities Act, 2011 S.C.C. 66 (S.C.C.), “a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available”. BP Canada encourages continued cooperation between the Provinces in the area of surveillance and enforcement, and particularly in relation to the management of data.

In addition to considering a cooperative approach, the time and cost to market participants to address various operational issues associated with any new or supplemental surveillance and monitoring system should be considered by the Committee prior to implementation of such system. In particular, BP Canada encourages the Committee to consider the increased cost to market participants of duplicative reporting requirements. Such costs are both unnecessary and avoidable. In our view, increased costs to market participants should be avoided where possible and prudent, in order to avoid unnecessary disruption to market activities.

3. Market Conduct Rules

As stated above, there are a number of distinctions between equities and OTC derivatives. Likewise, regulation of OTC derivatives should also be distinct from the regulation of equities. For example, insider trading rules that may be appropriate for equities should not be extended to OTC derivatives as these rules are more expansive than rules that are appropriate for OTC derivatives. Similarly, prohibitions against misrepresentations and misleading or untrue statements should not require disclosure of non-public information (except as necessary to make any prior statement not misleading).

Further, equities derivatives and commodities derivatives should also be differentiated. Market conduct rules that are appropriate for equities derivatives may not be appropriate for commodities derivatives. We agree with the statement in the IOSCO Report that “some major participants in commodities derivative markets (e.g., electricity and natural gas producers and distributors, traders specializing in commodities, etc.) currently legitimately operate outside the purview of financial regulation. This approach has been based on a reviewed assessment of these participants’ systemic risk and on the premise that many of them trade only for their own account.”

BP Canada agrees with the Committee that there should not be position limits imposed at this time. As stated by Hunton and Williams LLP in its January 14, 2011 letter regarding CSA Consultation Paper 91-401, the Committee should carefully determine what the associated costs of requirements such as position limits might be. Such requirements should not interfere with legitimate trading activity in the derivatives markets. If they do, then the market likely suffers as a whole.

In our view, position limits should not be considered unless there has first been a finding that there is excessive speculation in the OTC derivatives market and that such excessive speculation is harmful to, or disrupts, that market. It is important to note that any finding of excessive speculation should not be based solely on an increase in price of the underlying commodity. Rather, a non-discriminatory test should be used for determining whether there has been excessive speculation. If, following a finding of excessive speculation, the Committee recommends implementation of position limits, then those limits should be set at a level appropriate to ensure both that the market is not disrupted through a resulting loss of liquidity and that legitimate commercial activity is allowed to operate efficiently.

BP Canada would also like to emphasize the importance of both inter-provincial and international harmonization of market conduct rules. BP Canada's view, as set out in our September 12, 2011 comments to CSA Consultation Paper 91-402, is that the preferred option, to the extent possible, is the use of "memorandums of understanding" with U.S. and other international regulators that permit free exchange of information on an "as needed" basis relative to the exercise of the regulators' mandate, provided that confidentiality provisions are not abrogated through the sharing of such information. As noted by IOSCO in its report FR07/11 Principles for the Regulation and Supervision of Commodity Derivatives Markets Final Report (the "IOSCO Report"), the globally-dispersed nature of markets and market participants requires enhanced forms of sharing of relevant information among market authorities. The scale of global trading and the availability of increasing volumes of data made available electronically require market authorities to define with precision the circumstances that justify the sharing of information to support their market surveillance operations and to develop arrangements that implement such necessary surveillance.

4. Enforcement

BP Canada agrees that each Province requires the authority to regulate in this area, subject to appropriate regulations being put into place. BP Canada suggests that any such new regulations should be available for consultation and comment prior to implementation.

5. Conclusion

BP Canada agrees with the Committee recommendation that further study and research be done prior to implementing any additional or supplemental surveillance of OTC derivatives. In our view, regulators should first determine the information from market participants that is actually required in order to effectively regulate OTC derivatives, as well as the level of transparency that is needed for the functioning of an efficient market. Once this is determined, the benefit of any additional surveillance can be weighed with the cost to market participants and the resulting impact on the market. BP Canada encourages the Committee to engage in round table discussions with industry where possible while conducting such further study.

Given that the matters raised in each of the consultation papers are related and together will form a comprehensive framework for the regulation of the Canadian OTC derivations

market, BP Canada suggests that the CSA have a further round of consultation regarding the comprehensive framework, to ensure that all the individual components work together to achieve the goals the CSA has set out. Such a review also would ensure that market participants have an opportunity to comment on all new information released as the CSA progresses the various consultation papers.

BP Canada thanks the CSA for the opportunity to comment and respectfully requests that the Committee consider its comments set forth herein regarding Consultation Paper 91-403.

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

Respectfully submitted,



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