From: Belani, Akshay N. <akshay.belani@bingham.com>
Sent: Monday, September 20, 2010 8:30 PM
To: dfadefinitions <dfadefinitions@CFTC.gov>; 'rule-comments@sec.gov'
Cc: 'William Harvey' <William.Harvey@unionbank.com>; 'Thomas.ruebel@53.com'
Subject: Advance Notice of Proposed Rulemaking; Request for Comments: Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Definition of "Swap Dealer"; SEC File Number S7-12-10
Attach: Regional Banks_ CFTC_SEC Comment Letter re Dodd-Frank (20Sept10).PDF

VIA ELECTRONIC DELIVERY

Dear Mr. Stawick and Ms. Murphy:

On behalf of Union Bank, N.A., Regions Bank and Fifth Third Bancorp (the "Banks"), Bingham McCutchen LLP hereby submits the attached letter providing pre-rulemaking, preliminary comments addressing the definition of "swap dealer," as adopted in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

If you have any questions or require additional information please feel free to contact us.

Respectfully submitted,

Akshay N. Belani

Akshay N. Belani
Associate
T 212.705.7860
F 212.702.3613
akshay.belani@bingham.com

B I N G H A M
Bingham McCutchen LLP
399 Park Avenue
New York, NY 10022-4689

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BINGHAM

Kenneth A. Kopelman
Direct Phone: 212.705.7278
Direct Fax: 212.702.3645
ken.kopelman@bingham.com

September 20, 2010

Via Email: dfadefinitions@cftc.gov
Via Email: rule-comments@sec.gov

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act (SEC File Number S7-12-10) - "Swap Dealer" Definition and the Loan Origination Exception

Dear Mr. Stawick and Ms. Murphy:

On behalf of Union Bank, N.A., Regions Bank and Fifth Third Bancorp (the "Banks"), Bingham McCutchen LLP submits for your consideration the Banks' comments in response to the advance notice of proposed rulemaking issued by the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC") relating to the definitions of certain key terms in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Title VII").

The comments of the Banks in this letter ("Comment Letter") specifically address the bank lender carve-out from the definition of "swap dealer" in Title VII. The bank lender carve-out is the exception from the definition of a swap dealer under Section 721(a)(21) and is applicable in situations where the insured depository institution "offers to enter into a swap with a customer in connection with originating a loan with that customer." The Banks believe that Congress intended this language to permit commercial and corporate lenders, such as the Banks, who are not in any sense acting as swap dealers or market makers and who enter into swaps[1] in the context of providing corporate and

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Washington

Bingham McCutchen LLP
399 Park Avenue
New York, NY 10022-4689

T +1.212.705.7000
F +1.212.752.5378
bingham.com

[1] The term "swap" is very broadly defined in Section 721(a)(21) of Title VII and includes all types of swap products offered in the market. In this Comment Letter, however, the Banks are concerned only with those customary swaps, options and hedging products offered in connection with lending activities, which is a

business loans, to be able to continue to offer to their borrowers hedging products that facilitate and supplement the lending relationship.

We appreciate the opportunity to submit these comments. In this Comment Letter we will discuss the types of swaps and hedging products typically required in connection with the corporate and business lending activities of the Banks, and the various ways in which they interconnect with the Banks' loan arrangements. Because of the importance of this issue to the Banks' core lending functions, and the critical interplay between the "swap dealer" definition and the "push-out provision" (Section 716 of Title VII), we request confirmation that swaps entered into in connection with lending arrangements will be viewed appropriately as within the bank lender carve-out to the swap dealer definition in Title VII.

INTRODUCTION

Lending to corporate and business borrowers is a core business of the Banks, and entering into swaps in connection with loan transactions is an integral part of that core business. The bank lender carve-out to the swap dealer definition was intended to ensure that these activities did not require banks to register as swap dealers or compel banks to push out their loan-related swap activities into separate non-bank entities under Section 716.

The swap hedging products that should be covered by the carve-out include interest rate hedging products, foreign currency and exchange hedging products, and commodity hedging products, when such products are offered in connection with commercial loan transactions. In those situations, the hedges are connected to the loan when they are entered into to protect against commercial risks to which a borrower has actual exposure and which affect the risk profile of the lender to that borrower for loan underwriting purposes. These products are not offered in this context to facilitate speculation. Instead, they are routine and prudent hedging products that provide important (and customary) ancillary support to a bank's lending activities. They are closely linked to the Banks' lending products through the Banks' credit documentation, as discussed below.

This Comment Letter is not proposing that the bank lender carve-out extend to structured and highly leveraged or speculative derivative products. It proposes that the carve-out include those hedging products, including commodity hedging products, that are entered into in connection with the Banks' lending business. The Banks believe that the CFTC's failure to properly delineate the bank lender exclusion in this manner would in practice have the unintended effect of disadvantaging regional and community banks' ability to compete for commercial loan business and loan-related swap and hedging business. It

much smaller universe of the swap market. In this Comment Letter we refer to swaps and options, swap hedging products and hedging products interchangeably.

would ultimately direct loan-related swap and hedging business and, indeed, the loan activity itself, toward the largest swap dealer banks, in the U.S. and elsewhere.

Below we identify the Banks and describe the relevant provisions of Title VII before discussing our analysis. We conclude with our request for confirmation regarding the treatment of lending-connected swaps under the bank lender carve-out.

THE BANKS

The Banks are mid-sized, regional banks engaging in full-service commercial banking activity, including retail banking activity offering individuals a wide range of personal banking products and services, small business banking, wealth management services, and commercial banking products and services. The Banks' commercial products are offered with a particular focus on middle market companies with operations in the Banks' geographic footprint.

Union Bank, N.A. ("Union Bank") is a full-service commercial bank providing an array of financial services to individuals, small businesses, middle-market companies, and major corporations. Union Bank is headquartered in San Francisco, California. It operated 396 banking offices in California, Oregon, Washington, and Texas, and two international offices, as of June 30, 2010. It is the principal subsidiary of UnionBanCal Corporation, a financial holding company with assets of $84 billion as of June 30, 2010, and a wholly-owned subsidiary of The Bank of Toyko-Mitsubishi UFJ, Ltd. Additional information about Union Bank is available at www.unionbank.com.

Regions Bank is a wholly owned subsidiary of Regions Financial Corporation. Regions Financial Corporation ("Regions"), with $135 billion in assets, is a member of the S&P 100 Index and is a full-service provider of consumer and commercial banking, trust, securities brokerage, mortgage and insurance products and services. Regions serves customers in 16 states across the South, Midwest and Texas, and through Regions Bank, operates approximately 1,800 banking offices and 2,200 ATMs. Its investment and securities brokerage trust and asset management division, Morgan Keegan & Company Inc., provides services from over 300 offices. Additional information about Regions and its full line of products and services can be found at www.regions.com.

Fifth Third Bancorp is a diversified financial services company headquartered in Cincinnati, Ohio. Through its wholly-owned insured depositary institution, Fifth Third Bank ("Fifth Third"), it provides commercial lending to large and small domestic and international corporations in over 16 affiliate markets. Commercial lending customers rely upon Fifth Third to provide risk mitigation and hedging for myriad business contingencies, including foreign exchange, interest rate and commodity exposures. Additional information about Fifth Third is available at www.53.com.

RELEVANT PROVISIONS OF TITLE VII

The term "swap dealer" is defined in Section 721(a)(21) of Title VII. Swap dealers may be designated as such for one type, class or category of swap but not for others. "Swap dealer" means any person who --

(i) holds itself out as a dealer in swaps;

(ii) makes a market in swaps;

(iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or

(iv) engages in any activity causing the person to be commonly known in the trade as dealer or market maker in swaps.

The foregoing attributes of a "swap dealer" are then subject to a proviso that establishes a specific carve-out from the definition (the "bank lender carve-out"). The proviso states that "in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer." [2]

Under Title VII, a swap dealer is required to register with the CFTC and will be subject to capital, margin and conduct of business rules. In addition, and importantly for the Banks, where an insured depository institution is deemed a swap dealer as to a specified product, Section 716, the so-called "push-out" provision,[3] may preclude the bank from offering the swap product, at least where the swap product is a commodity swap. The effect of the push-out provision may be to require activity considered swap dealer business to be conducted outside the insured depository institution, in a non-bank affiliate. Thus, whether or not the Banks are viewed as swap dealers with regard to commodity hedging products linked to loans may well determine whether they can continue to offer such products to their borrower customers.[4]

[2] The term "security-based swap dealer" contains no comparable carve-out, and the clarification requested is for the definition of "swap dealer" and for CFTC purposes only.

[3] Under Section 716, "swap dealers" as defined under Title VII are prohibited from receiving certain types of Federal assistance, such as Federal deposit insurance and Federal Reserve discount window access. The practical effect of Section 716 (as discussed herein) is to require banks to push certain of their swap dealer activities out to a non-bank (uninsured) affiliate.

[4] The prohibitions of Section 716 do not apply to "[h]edging and other risk mitigating activities directly related to" the Bank's activities, or to acting as a swap dealer for swaps involving rates or other assets permissible under specified portions of section 5136 of the National Bank Act, 12 U.S.C. 24. The Banks believe these swap activities will clearly include interest rate and foreign currency and exchange swaps.

The effect of inclusion within the swap dealer definition on regional banks such as the Banks may be two-fold. The first effect relates to competition. In some cases, unlike the situation for a large national money-center bank, it may not be financially feasible for regional banks such as the Banks to set up, capitalize and maintain non-bank affiliates to provide loan-related hedging products. In that case, the result may be that certain regional banks may cease offering certain swap hedging products that are linked to their lending activities.

A second effect relates to risk management. The bank lender carve-out is important to ensure that ordinary bank activity related to loan transactions stays in the bank and that risk management for these loans and their connected swaps is centralized at the bank level.

The bank lender carve-out addresses both of these effects. The purpose behind the bank lender carve-out was articulated by Senator Lincoln in her Senate colloquy:

> "A significant issue which was fixed during conference was clarifying that in most situations community banks aren't swap dealers or major swap participants. The definition of swap dealer was adjusted in a couple of respects so that a community bank which is hedging its interest rate risk on its loan portfolio would not be viewed as a Swap Dealer. In addition, *we made it clear that a bank that originates a loan with a customer and offers a swap in connection with that loan shouldn't be viewed as a swap dealer.* It was never the intention of the Senate Agriculture Committee to catch community banks in either situation… *These changes and clarifications should ensure that community banks, when acting as banks, are not caught by the swap dealer or major swap participant definitions.*"[5] [emphasis added]

As discussed further below, the foregoing Senate colloquy strongly evidences Congress' intent that the bank lender carve-out should not be subject to a narrow or limited reading, and that swaps offered "in connection with" or ancillary to a bank's loan activities were meant to be included in this exemption. The Banks further believe that Congress did not intend to reduce the availability of loans to middle market businesses who rely on bank loans (and in particular, regional bank loans) for their debt funding, which could result from an overly narrow interpretation of the bank lender carve-out.

[5] 156 Cong. Rec. S5902-01, 2010 WL 2788026 (Cong.Rec.). We note that while Senator Lincoln referred in this passage to community banks, she surely did not intend to limit the benefit solely to community banks (and the proviso clause in the definition makes no such limitation). Rather, she meant to differentiate the major swap dealers who engage in dealing activities outside of the lending context, on the one hand, from regional and community banks, on the other, whose swap activities are largely linked to their lending activities. Senator Lincoln, later in the referenced colloquy, discussed Section 716 as pushing out ". . . the riskiest swap activities," which she stated included swaps on equities, energy and agriculture, all of which she described as not being permissible bank activities. All of the commodity swaps discussed in this Comment Letter are, in fact, permissible bank activities, and are connected to the loan origination and are not being used for speculative or dealing purposes, but for risk mitigation and hedging connected to bank lending.

Finally and importantly, commodity hedging products should be included in the carve-out. It is clear from the legislative history that Congress intended that the bank lender carve-out apply to loan-related interest rate and foreign currency and exchange swaps that hedge market risks. Because commodity hedging products are provided by the lender for the same hedging purposes and are interlinked with commercial loans in the same manner as is the case for interest rate and foreign exchange hedging products, they should be included in the carve-out when they are so provided.

DISCUSSION

The Commercial Lending Business

Lending money to corporate and business borrowers is a core business for regional and community banks, who historically have supported small to mid-sized companies with loans products, since such companies typically do not have access to the capital markets. These regional and community banks, however, do not offer as wide of a range of financial products and services as do the very large financial institutions or engage in investment banking activity to any appreciable extent. The manner in which corporate and business loans are made, and the ways in which borrowers hedge their exposure to various risks connected to the loans, are critical to an understanding of the scope of swap activity appropriately subject to the bank lender carve-out.

Corporate and business loans come in many varieties -- bilateral and syndicated, secured and unsecured, term and revolver, long and short tenors, etc. Swaps and other hedging products are necessary and integral to the provision of these loan products and come into play in different ways. Interest rate and foreign currency and exchange swap hedging products are often provided in connection with a bank's loan activity, as are commodity swap hedging products.

Corporate and business loans are typically originated by individual banks, but may also be made by a group of banks (often referred to as a syndicate), a structure that has the benefit of spreading credit risk among the various lenders. In a syndicated loan, an agent bank will act as representative for the bank syndicate, but each bank is a direct "lender" to the borrower. Under the plain language of the bank lender carve-out, the "customer" is obviously the borrower (there is no other interpretation). Similarly, each of the banks in the syndicate is a lender originating the loan to the customer. Accordingly, the bank lender carve-out should apply to each lender participating in the loan, whether the lender is lending under a bilateral loan facility or is a member of a syndicate in a syndicated loan.

Further, the Banks believe that the bank lender carve-out should apply to loans that after origination are amended, restructured or worked out. Amended, restructured and worked out loans are conducted under similar constraints as loan originations -- there is an underwriting process with credit documentation, where the provision of swap hedging products may reduce risk. The amended, restructured or worked out loan often requires amended or new hedges, and the purposes behind these hedges are the same as the

purposes behind hedges of the original loan. The bank lender carve-out should apply in these circumstances as well.

The Relationship of Swaps to Corporate and Business Lending Activities

Consistent with prudent and customary loan underwriting standards, corporate and business loans often require that borrowers enter into swaps relating to the value of underlying instruments or indexes that are connected to the loan or the borrower's business. These arrangements can reduce a borrower's exposure to potentially volatile market conditions and, accordingly, reduce the credit risk faced by the lender. The requirement for these arrangements to be in place then becomes part of the bank's risk evaluation in the underwriting process. The following are key types or categories of swaps that bank lenders require borrowers to enter into in connection with their loan originations:

Interest Rate Hedging Products -- Borrowers often enter into interest rate hedging products (including swaps, options, swaptions, rate caps, and collars) with lenders to hedge their interest rate exposure to the loan itself, to syndicated loans (as to which the bank may be a syndicate member) or as to third party loans. Certain borrowers, such as commercial finance companies, are engaged in businesses that subject them to exposure to interest rate fluctuations, and other borrowers may have a large amount of floating-rate debt. Prudent lenders who understand their borrowers' businesses often require such borrowers, in connection with making a loan, to hedge interest rate risk through any of the foregoing interest rate hedging products.

Foreign Currency and Exchange Hedging Products -- Foreign currency and foreign exchange hedging products include FX forwards, foreign currency swaps and FX options of various types. They are used by borrowers having revenue or expense sources in foreign currencies in a wide array of circumstances, such as where they take out loans in United States dollars but have revenues that are denominated in other currencies. As a matter of prudent loan underwriting standards, such borrowers commonly are required to enter into foreign exchange hedges to protect against the possibility that currency fluctuations could make it difficult for the loan to be repaid. In addition, borrowers are often engaged in businesses that have exposure to currency fluctuations. This exposure, which could result from expenses in one currency and revenues in another, could be significant and could have a negative effect on the borrower's ability to repay the loan. Prudent lenders who understand their borrowers' business often require such borrowers, in connection with making a loan, to hedge foreign currency and exchange risk through any of the foregoing currency hedging products.

Commodity Hedging Products -- Borrowers are often engaged in businesses that have exposure to fluctuations in commodity prices. This exposure could result from revenues that are sensitive to commodity prices, such as an oil company's exposure to falling oil prices. It also could result from raw materials and other expenses that are sensitive to commodity prices, such as an airline's exposure to rising oil prices. Prudent lenders who understand their borrowers' businesses often require such borrowers, in connection with

making a loan, to hedge commodity price risks, through commodity swaps and similar instruments. Banks may also require that collateral be pledged to support a loan. The collateral posted may itself be subject to changes in value. Accordingly, swaps are often used to hedge the value of the collateral.[6] The commodity hedging products offered by the Banks are primarily energy-related, but may also include precious and base metals.

When a lender enters into a loan transaction and the loan underwriting criteria require that the borrower engage in hedging activity using the foregoing products, and where the borrower elects to obtain such products from the lender, the swap is connected to, and is an integral part of, the loan origination. Particularly for middle market commercial credits, it is customary for the swaps to be linked to the loans through collateral sharing, cross-defaults and combined enforcement provisions, among other provisions. From the lender's perspective, these hedging products reduce the risks presented by the borrower's business model and the bank lender takes the ready availability of such hedging products into account as part of its underwriting review. A hedge contract may also become part of the collateral package for secured loans.

A borrower's unhedged exposure to potentially volatile interest rate, foreign currency or exchange or commodity price fluctuations can quickly result in financial distress for that borrower. The swaps, designed as rate, expense, revenue or value hedges, are often required by loan covenants in order to mitigate against such volatility. They are viewed as customary terms and conditions for the provision of the loan. These swaps are non-speculative, risk reducing tools that are typically associated with corporate lending by banks. Accordingly, these activities are ancillary to a bank's lending operations and are not the activities of a "swap dealer," as historically viewed by regulators and as intended by Congress.

Just as lenders benefit from swaps in that swaps hedge certain risks associated with their borrowers' business operations and enhance the borrower's ability to pay, borrowers themselves also benefit from the ready availability of swaps by their relationship banks in connection with loan offerings. In many cases, corporate and business loan customers strongly prefer to obtain the swap products from their bank lenders, instead of from other financial services companies, because their bank lenders already understand the borrower's business and have already demonstrated support for the business by providing the borrower with a loan. In addition, the collateral arrangements are simpler (and therefore involve less expense to the borrower to arrange) because the lender or an agent, on behalf of the bank syndicate, holds and monitors collateral posted by the borrower.

[6] Here is another example of the "value hedge" concept at work. In a project financing, one of the core principles is to ensure that the input costs are hedged in some way such that the cost of the final product (e.g., electricity, ethanol) is linked to the price of the raw materials used to generate the product (e.g., natural gas, corn). Sometimes the structure of the deal will provide a natural hedge, such as when the electricity or ethanol sales agreement provides for pass-through to the purchaser of the natural gas or corn costs. But if the deal does not provide a natural hedge (such as when there is no long-term sales contract), a prudent borrower/producer and its lender will want a third-party hedge to protect against price volatility.

The administrative and documentation aspects of the transactions are also simpler (and cheaper) for borrowers when done with one lender or within one lending syndicate. Because regional banks have traditionally focused on middle market lending, middle market borrowers appreciate that their regional banks provide them with products and services tailored to their business.

Relationship of Loan-Related Swaps to Title VII

If loan-related swap products are not clearly defined through the rulemaking process to be subject to the bank lender carve-out and banks are forced to push certain of these common products out to non-bank affiliates, banks will need to establish and separately capitalize non-bank affiliates. For regional and community banks, the costs associated with this may be too high and some of these banks may stop offering these products. If regional and community banks cannot offer a comprehensive financial solution to customers at a competitive cost, their customers may look elsewhere for combined solutions, thus putting the regional and community banks at a competitive disadvantage and leaving their customers scrambling for new banking relationships with other institutions which may be less motivated to meet their needs. The above scenario could lead to the unintended consequence that smaller regional and community banks will capture less of the corporate and business lending market that is central to their business mandate and could lead to the result that corporate and business borrowers may increasingly need to bring their business to the larger national money-center banks that already control a large majority of the U.S. derivatives market.[7] Middle market borrowers rely heavily on regional banks to meet their credit and other banking needs, and the Banks believe that pushing them to move to the money-center banks means that the tailored products and focused service they have previously enjoyed may not be available.

Unlike the largest swap dealer banks, who engage in large volumes of swaps independent of lending relationships (and who will therefore be deemed "swap dealers" regardless of the CFTC's interpretation of the bank lender carve-out), for regional banks such as the Banks, all or virtually all customer-driven swap and hedging product activity is undertaken in connection with their bank lending activity. In other words, virtually all swap activity conducted among these institutions is ancillary to their lending business, and relates to the three basic product categories discussed above -- interest rate, foreign currency and exchange, and commodity hedging products. They do not engage in general dealing activities or offer highly leveraged products. They also do not offer credit default swaps.

[7] According to the *OCC's Quarterly Report on Bank Trading and Derivatives Activities: First Quarter 2009*, "[t]he five banks with the most derivatives activity hold 96% of all derivatives, while the largest 25 banks account for nearly 100% of all contracts," *available at* http://www.occ.treas.gov/ftp/release/2009-72a.pdf.

The legislative history of Title VII, as shown in Senator Lincoln's Senate colloquy cited above, supports the view that interest rate swaps that hedge a bank's own loans, and presumably the loans of any syndicate of which it is a member, are covered by the bank lender carve-out. The same analysis and policy concerns should apply to other types of swaps (which term is broadly defined under Section 721(a)(21) of Title VII), e.g., foreign currency and commodity swaps, that are also offered "in connection with" the making of the loan, and that reduce the risks to the bank in making the loan by enabling the borrower to hedge against the expense, revenue and value risks associated with the borrower's business operations, thereby increasing the likelihood that the borrower will be able to repay its loan to the bank. The legislative history is important because it shows that the plain language of the statutory exception refers to "swaps," where swaps are broadly defined under Title VII, and is not limited to a carve-out only for interest rate swaps. The Senate colloquy cited herein repeats and reinforces this point. There is no principled basis on which to differentiate, interest rate or foreign currency or exchange swaps, on the one hand, from commodity swaps, on the other hand. All of these swaps may be offered "in connection with" the making of loans, are important to a bank's lending activities, and depending on the given circumstances, either reduce borrower credit risk, or stabilize collateral values, or both, in order to permit successful and cost-effective loan origination activities.

Existing Regulatory Support for Loan-Related Swaps

All of the swaps that we have identified that the Banks offer in connection with their lending activities are ones which were approved by the Office of the Comptroller of the Currency (the "OCC") as permissible activities for national banks and are subject to regulatory supervision and examination. The OCC's positions on these issues have been adopted and reinforced by the other banking regulatory agencies, including the Federal Reserve Board.

The OCC has published specific guidance which determined that national banks and their operating subsidiaries may advise, structure, arrange and execute transactions, as agent or principal, in connection with interest rate, basis rate, currency, currency coupon, cash-settled commodity, commodity price index, equity and equity index swaps, and other related derivatives products, such as caps, collars, floors, swaptions, forward rate agreements, and other similar products known as derivatives. Banks may arrange matched swaps or enter into unmatched swaps of an individual or on a portfolio basis and may offset unmatched positions with exchange-traded futures and options contracts and over-the-counter cash-settled options. Banks may also provide financial advice and counselling for these activities as permissible incidental activities, consistent with 12 USC 24 (Seventh) of the National Bank Act.[8]

[8] OCC Interpretive Letter No. 725, *reprinted in* [1995-1996 Transfer Binder], Fed. Banking L. Rep. (CCH) Par. 81,040 (May 10, 1996).

The OCC further recognized the importance of such swap activity in connection with loan originations, restructurings and workouts, and for risk management purposes has identified and examined controls in connection with such activity. The OCC has determined that "[a]n effective risk management process includes board supervision, managerial and staff expertise, comprehensive policies and operating procedures, risk identification, measurement and management information systems, as well as effective risk control functions that oversee and ensure the continuing appropriateness of the risk management process."[9] All of the Banks joining this Comment Letter have been examined by their respective federal and state banking agencies over the years and passed regulatory scrutiny in connection with the risk management processes employed for their loan-related swap transactions.

The existence of a well-developed bank regulatory regime monitoring the bank loan-related swap activities is another factor why the scope of the bank lender carve-out should be broad enough to allow the Banks to avoid push out to non-bank affiliates under Section 716. The banking agencies have historically regulated the swap and hedging activity related to banks' corporate and business lending, and have done so effectively -- there is no evidence to suggest that these loan-related swaps caused or otherwise contributed to the financial crisis, or that the banking agencies had been deficient in supervising these loan-related products.

Competition and Risk Management Concerns

As a general rule regional and community banks do not engage in swap activities that are independent of their commercial lending activities or engage in general swap dealing and market making activities. Accordingly, requiring regional and community banks to push out their commodity swap activities conducted with respect to their lending activity to separately formed and capitalized non-bank affiliates would especially disadvantage these institutions against other institutions that are primarily engaged in broader derivatives activities, and in doing so, adversely affect the availability of credit to middle market companies, which are the primary corporate and business customer base for these regional and community bank lenders. In contrast, for banks which offer various structured products and engage in significant swap dealing and market making activities independent of their commercial loan business, pushing out their swap activity to a non-bank affiliate will not be a particular hardship or result in competitive disadvantage to them -- they are likely to roll all their swap and derivatives activities, including certain loan-related swap activity, into the non-bank affiliate, and attain certain efficiencies from that.

In addition, because the provision of swaps as hedging tools is in connection with the underwriting of loans, it is important for risk management purposes that the swaps be considered as a package with the origination, workout and restructuring of loans as part

[9] Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, dated August 21, 2000.

of the normal credit approval and monitoring processes of the bank. Confirmation that the bank lender carve-out includes such swaps ensures that ordinary bank activity related to loan transactions and loan-related swaps will be centralized at the bank level and will facilitate overall credit risk management.

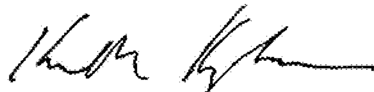
CONCLUSION

In the interest of certainty, we request confirmation that the full range of interest rate, foreign currency, and commodity (particularly energy and base metals) swaps provided in connection with the Banks' lending activities were intended by Congress to be differentiated from swap dealer activity and included in the bank lender carve-out to the swap dealer definition of Title VII. The Banks' customer activities described in this Comment Letter are consistent with both the policy behind the bank lender carve-out and the letter of the statutory language. Further, these swap activities (including commodity swaps) should not be subject to the "push out" provisions of Section 716. For risk management and prudential reasons, swaps and other hedging products offered by banks to their corporate and business customers in connection with bank loan originations, restructurings and workouts undertaken with those customers should, if possible, be conducted in the insured depository institution. The Banks believe that the rules promulgated through the CFTC and SEC rulemaking process, in coordination with the Board of Governors of the Federal Reserve System, should support these views and remove any uncertainty in the market with respect to such interest rate, foreign currency and exchange, and commodity hedging products offered in connection with a bank's commercial loan activities.

Accordingly, we request that the CFTC further clarify the bank lender carve-out through the rulemaking process to: (i) include as swaps covered by the bank lender carve-out any type of hedging product entered into in connection with a bank's lending activity, including interest rate, foreign currency and exchange, and commodity hedging products, where the swap hedging products are provided as ancillary products to the bank's lending activity, and (ii) include as a bank's lending activity to which the bank lender carve-out applies, amendments, restructurings and workouts of business loans.

Please contact the undersigned if you require additional information or have any questions.

Sincerely yours,



Kenneth A. Kopelman

Cc:
Scott Alvarez, General Counsel
Board of Governors of the Federal Reserve System

Julie L. Williams, Chief Counsel
Office of the Comptroller of the Currency

William L. Harvey, VP and Senior Counsel
Union Bank, N.A.

Christopher Scribner, Director of Public Policy
Regions Bank

Thomas Ruebel, Vice President and Government Affairs Director
Fifth Third Bank