Bank of Oklahoma Tower
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Tulsa, Oklahoma 74192

February 18, 2011

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

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

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"; Proposed Rule (File No. S7-39-10)

Dear Ms. Murphy and Mr. Stawick:

BOKF, National Association (*"BOK"*)[1], is writing to supplement the comment letter dated January 31, 2011, submitted by it in response to Release No. 34-63452 (the "*NOPR*"), in which the Securities and Exchange Commission (the "*SEC*") and the Commodity Futures Exchange Commission (the "*CFTC*"), in consultation with the Board of Governors of the Federal Reserve System (the "*Federal Reserve*"), issued proposed rules and interpretive guidance under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* (the "*CEA*"), and the Securities Exchange Act of 1934, 15 US.C. 78a *et seq.* to further define the terms "swap dealer", "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant," which terms were added to or modified for purposes of the foregoing statutes by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "*Dodd-Frank Act*").[2]

In our earlier comment letter, we noted concerns with the definition of "swap dealer," and proposed the creation of an exception to that definition for bank-permissible, customer-initiated, riskless principal derivatives transaction effected by insured depository institutions. We do not intend by this letter to modify those comments. We would, however, like to comment on another

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[1] BOK is a national bank and wholly-owned subsidiary of BOK Financial Corporation, a $24 billion regional financial holding company. BOK has full-service banks located in eight states: Oklahoma, Texas, Arkansas, Missouri, Kansas, Colorado, New Mexico and Arizona, and provides riskless principal derivatives transactional services primarily to small- and medium-sized agricultural and energy producers in its eight-state service area. *BOK Financial Corporation is the largest financial holding company in the United States that did not take TARP assistance funds.*

[2] Public Law 111-203, 124 Stat. 1376 (2010).

element of the NOPR, proposed Rule 1.3(ppp)(5), "Insured depository institution swaps in connection with originating loans to customers"[3] (the "*Loan Exception Rule*").

The proposed Loan Exception Rule was written to implement the following proviso contained in the Dodd-Frank Act to the definition of "swap dealer:"

> "provided however, 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."[4]

We believe that the Loan Exception Rule, as proposed in the NOPR, is far narrower than contemplated by the Dodd-Frank Act. We also believe the Loan Exception Rule, if adopted as proposed, will increase systemic risk by reducing the availability and increasing the cost for the bona fide hedging of commodity price risks. We are specifically concerned about loans made to companies in energy or agricultural businesses. Chief among the risks that such companies, and lenders to such companies, face is the risk of changes in commodity pricing over the period of their loans. A wheat farmer, for instance, that wants to borrow to finance his operations is inherently at risk of loan default if the price of wheat falls substantially below the prices anticipated when the loan is taken. Likewise, an oil & gas drilling company that wants to borrow to finance drilling operations is inherently at risk of loan default if the price of oil or natural gas falls substantially when the reserves it produces are sold.

Prudent agricultural and energy borrowers use derivatives to hedge their commodity price risks, and prudent agricultural and energy lenders either will not lend to borrowers who have not hedged, or lend far less to borrowers that have not properly hedged, commodity price risks. These hedges protect borrowers against losses and lenders against loan defaults. Indeed, these types of hedges largely drove the creation of the modern derivatives markets, which formed to provide farmers and energy producers a means to hedge the price risks associated with these commodities.[5] Yet these types of hedges would not qualify for the loan exception under the rule proposed in the NOPR.

As proposed, the Loan Exception Rule would apply only to a swap that relates to a "financial term of such loan. The financial terms of a loan include, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made and its principal amount."[6] A borrower's commodity price risks do not constitute a "financial term" of its loan. Accordingly, under the rule as proposed, swaps designed to mitigate commodity price risks would not qualify for the loan exception.

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[3] NOPR at 80212.

[4] Dodd-Frank Act, §721, amending Section 1a of the CEA by adding subpart (49), "Swap Dealer."

[5] *See* Johnson & Hazen, I Derivatives Regulation, 7-10 (2004) (discussing the history of the U.S. commodities markets and the CEA).

[6] NOPR at 80212.

We find nothing in the Act that directs or requires the CFTC to limit the loan exception to financial-related derivatives. The plain wording of the applicable proviso in the Act refers to "swaps", a term defined a few pages earlier in the Act to include any "put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more ... *commodities*", and then enumerates types of derivatives that specifically constitute "swaps," to include any "*energy swap*" and any "*agricultural swap*."[7]

Moreover, by limiting qualifying swaps to those that relate to a loan term, the draft Loan Exception Rule would preclude loan-related commodities hedging from qualifying under the exception for a second reason. Most loans are for a number of years, and the growing season for a farmer or the period for a drilling program for an energy producer are typically far shorter than the average loan duration. If only swaps entered into on the day that a loan is made were to qualify for the Loan Exception, then commodity price hedges would be functionally precluded from qualifying. It is not realistic to expect a farmer taking a loan with a five-year term, for instance, to decide on that date what he is going to grow, in what quantities and for what delivery dates over the next five years. But only if that farmer were to enter into a swap so structured would the swap qualify for the loan exception as the rule is now written—assuming *arguendo*, that the rule were revised to encompass commodity swaps. If the CFTC decides to revise the Loan Exception Rule to include commodity swaps entered into by agricultural and energy producers, then it should also revise the rule to cover commodity hedges that the borrower commits, in connection with the origination of the loan, to place to hedge or mitigate commercial risk[8], and which the borrower then places during the term of the loan to so hedge or mitigate commercial risk. If instead borrows are required to set swap terms for the life of a loan on the day the loan is placed, the exception will have no realistic use for commodity price risk hedging.

As noted in our previous NOPR comment letter, the potential impact to an insured depository institution from being characterized as a "swap dealer" is devastating. As a result, BOK and most other banks will avoid activities that might cause them to be characterized as "swap dealers." If commodity hedging in connection with lending will turn a bank into a "swap dealer," then such hedges will be offered only by those lenders that can afford the capital impact and costs to push their derivatives-related operations out into subsidiaries of their holding companies. This will be the very few, very large money-center banks that have substantial derivatives trading operations; only these banks will be in a position to offer commodity hedging products to borrowing customers. The result will be a substantial reduction in competition to provide such loans, and a corresponding increase in costs for borrowers. The impact will be more severe for the relatively small and medium-sized energy and agricultural borrowers, as the money-center banks typically do not lend to those companies. These companies may, in many instances, be largely locked out of lending opportunities.

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[7] Dodd-Frank Act Section 720, amending Section 1a of the CEA to insert subpart (47)(emphasis added).

[8] In other words, hedges that meet the requirements of NOPR proposed rule 240.3a67-4, defining "hedging or mitigating commercial risk".

In short, the Loan Exception Rule as written will benefit a few large banks, and injure most other financial institutions, as well as energy and agricultural borrowers of all sizes. Accordingly, we respectfully request that the Commission modify proposed Rule 1.3(ppp)(5) to include within the Loan Exception Rule energy and agricultural swaps entered into by a borrower during the term of its loan to hedge or mitigate commercial risk of that borrower, if the borrower makes, in connection with the origination of such loan, a bona fide commitment to the lender to so hedge or mitigate such risk and such swaps are entered into pursuant to such commitment. For your convenience, we have attached as *Exhibit A* to this letter a proposed revision of Rule 1.3(ppp)(5) that would effect these changes.

We appreciate the opportunity to comment on the NOPR, and would be pleased to discuss any questions you may have with respect to this letter.

Very truly yours,

Stacy C. Kymes
Executive Vice President

SCK/ds

cc: Honorable Gary Gensler, Chairman, CFTC
Honorable Michael Dunn, Commissioner, CFTC
Honorable Jill E. Sommers, Commissioner, CFTC
Honorable Bart Chilton, Commissioner, CFTC
Honorable Scott O'Malia, Commissioner, CFTC
Terry Arbit, Deputy General Counsel, Office of the General Counsel
Julian E. Hammar, Assistant General Counsel, Office of the General Counsel
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David E. Aron, Counsel, Office of the General Counsel
Honorable Mary Schapiro, Chairman, SEC
Honorable Kathleen Casey, Commissioner, SEC
Honorable Elisse Walter, Commissioner, SEC
Honorable Luis Aguilar, Commissioner, SEC
Honorable Troy Paredes, Commissioner, SEC
Matthew Daigler, Senior Special Counsel, Division of Trading and Markets, SEC
Cristie March, Attorney Adviser, Division of Trading and Markets, SEC
Michael Reedich, Special Counsel, Office of Chief Counsel,
Division of Corporate Finance, SEC
Joshua Kans, Senior Special Counsel SEC
Jeffrey Dinwoodie, Attorney Advisor, SEC
Richard Grant, Attorney Advisor, SEC

Exhibit A--Rule 1.3(ppp)(5)

Proposed Changes from the Draft in the NOPR are Italicized

(5) Insured depository institution swaps in connection with originating loans to customers. Swaps entered into by an insured depository institution with a customer in connection with originating a loan with that customer shall not be considered in determining whether such person is a swap dealer.

(i) A swap shall be considered to have been entered into in connection with originating a loan only if *either (A)* the rate, asset, liability or other notional item underlying such swap is, or is directly related to, a financial term of such loan *or (B) the customer enters into the swap at any time commencing on the date the loan is originated and ending on the date the loan is repaid in full, if both (I) in the loan agreement or other agreements entered into between the borrower and the insured depository institution at the time such loan is made the borrower agrees, covenants or commits to the lender to hedge or mitigate commercial risks (as defined in Rule 3a67-4) of such borrower related to an energy or agricultural commodity and (II) the swap is entered into for purposes of hedging or mitigating a commercial risk of such customer related to an energy or agricultural commodity. For purposes of (A), t*he financial terms of loan include, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made and its principal amount.

(ii) An insured depository institution shall be considered to have originated a loan with a customer if the insured depository institution:

(A) Directly transfers the loan amount to the customer;

(B) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(C) Purchases or receives a participation in the loan; or

(D) Otherwise is the source of funds that are transferred to the customer pursuant to the loan or any refinancing of the loan.

(iii) The term loan shall not include:

(A) Any transaction that is a sham, whether or not intended to qualify for the exclusion from the definition of the term swap dealer in this rule; or

(B) Any synthetic loan, including without limitation a loan credit default swap or loan total return swap.