January 19, 2016

Christopher J. Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Comments on Swap Dealer *De Minimis* Exception Preliminary Report

Dear Mr. Kirkpatrick:

BOKF, NA ("BOK"),[1] submits this letter in response to the Swap Dealer *De Minimis* Exception Preliminary Report (the "Preliminary Report") prepared by staff from the Division of Swap Dealer and Intermediary Oversight and the Office of the Chief Economist (collectively, the "Staff") of the Commodity Futures Trading Commission ("CFTC" or "Commission"). We appreciate the opportunity to provide comments on the Preliminary Report regarding the *de minimis* exception to the swap dealer definition.[2]

Like many other regional and mid-size banks, the *de minimis* exception is of particular importance to BOK and our customers. Our business includes providing hedging services and products to our customers, particularly those in industries common to our region: family-owned oil companies in Oklahoma, hog farmers in Arkansas, and cattle ranchers in Kansas. BOK's swaps activities currently consist of customer-driven hedging transactions and matched offsetting transactions with unaffiliated third parties.[3] Swaps with customers are entered into in connection with a loan made by BOK to a customer or that otherwise hedge or mitigate commercial risk related to the customer's business.[4] National bank examiners have examined those activities numerous times since their inception in 2001, consistently opining that those activities comply with prudent safety and soundness standards.

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[1] BOK is a national bank and wholly-owned subsidiary of BOK Financial Corporation, a $31 billion regional financial holding company. BOK operates seven banking divisions and has full-service banks located in eight states: Oklahoma, Texas, Arkansas, Missouri, Kansas, Colorado, New Mexico and Arizona.

[2] *See* 7 U.S.C. § 1a(49) (defining "swap dealer"); 17 C.F.R. § 1.3(ggg) (defining further the term "swap dealer" and providing the *de minimis* exception thereto).

[3] *See, e.g.*, 12 C.F.R. § 44.6(c)(2) (excluding riskless principal transactions from the prohibition on banking entities engaging in proprietary trading); 12 C.F.R. § 225.28(b)(7) (permitting national banks to engage in riskless principal transactions); OCC No-Objection Letter No. 90-1 (February 16, 1990), reprinted in Fed. Banking L. Rep. (CCH) 83,095 (bank acting as riskless principal in commodity index swaps).

[4] BOK also provides hedging services and products to its customers for interest rate and foreign currency asset classes.

In light of our experience and concerns for our customers, our comments are particularly focused on potential impacts that changes to the current *de minimis* exception may have on our commodity hedging customers as well as the treatment of commodity hedges under the *de minimis* exception. As discussed below, BOK recommends that the Commission continue using the gross notional amount of dealing activity as the exclusive threshold metric and that the Commission maintain at $8 billion, or increase, the *de minimis* threshold.[5] We also recommend that the Commission clarify the scope of the IDI exclusion as to commodity hedges[6] by untying commodity hedges completely from the terms of a customer's loan and instead provide that swaps entered into by a bank with a commercial end-user hedging commodity price risks do not constitute swap dealing activity.

Hedging Services Protect Our Customers and Promote Financial Stability

- BOK's providing hedging services and products to its end-user customers reduces risks to us, and to our customers.

    - For BOK, customer-driven hedging protects the value of the collateral securing a customer's loan, which reduces the risk of non-repayment.[7] Fees generated from executing such trades are secondary to this end and serve mostly to cover the costs of providing the service. Consequently, institutions such as BOK have no interest in selling questionable risk management strategies, and are motivated to provide hedge products that serve to reduce systemic risk.

    - For our end-user customers, hedging minimizes the potential impact of price swings while at the same time helping maintain their borrowing bases and reducing the risk of non-repayment. As oil and gas prices plunged throughout 2015, the difference for some of our customers between staying in business or being able to borrow, on the one hand, and closing up business, on the other, was the hedges entered into with BOK.[8]

- If BOK is unable to continue providing hedging services and products to its end-user customers, a number of detrimental impacts would be felt by BOK, its customers and others throughout the region we serve.[9] First, some of our end-user customers simply would not hedge due to the lack of viable hedging alternatives available to those customers. Rather than hedge using exchange-traded futures and spend scarce resources (including borrowing capacity) to meet margin posting requirements, many customers will simply choose to weather the uncertainty of

[5] BOK is not opposed to an increase above the current $8 billion threshold, provided dealing activity continues to be measured solely by gross notional amount.
[6] 17 C.F.R. § 1.3(ggg)(5)(i). More specifically, BOK's comments focus on Rule 1.3(ggg)(5)(i)(B)(2).
[7] Part of that collateral includes the customer's interest in the hedging transactions entered into with BOK. In the downside case of a customer default, BOK's potential exposure is mitigated by and to the extent of the customer's hedges.
[8] BOK is willing to share certain supporting information with the Commission, upon its request, confidentially.
[9] This is true whether such hedging services are discontinued in whole or in part.

commodity price fluctuations.[10] A number of customers, particularly smaller farmers and energy producers, do not have the balance sheet or the financial sophistication to seek out and transact with large-market-based swap dealers; if they cannot transact with a regional bank such as BOK, they will in many instances simply not transact. Second, BOK would not make certain loans to customers in the absence of credit and collateral assurances arising via hedging services.[11] The net effect of the foregoing consequences is an overall increase in systemic risk, particularly within our region, resulting from the increased risk of non-repayment faced by the creditors of our current end-user customers, some of which are also our customers, and their respective creditors, including BOK.

***De Minimis* Exception and Threshold Considerations**

- The Commission should recognize that when notional principal is a function of commodity prices and subject to the risk management transactions of customer, institutions such as BOK must set our maximum aggregate book of trades at a level substantially below the regulatory *de minimis* maximum. Given how gross notional of dealing activity is currently calculated for purposes of the *de minimis* threshold, changes in commodity pricing can cause a trade booked in one month to represent a higher notional than a trade with the same underlying commodity and volume booked in a month with lower prices. Given the potentially large swings in commodity pricing, an oil producer, for example, with steady proven volumes that regularly hedges proven reserves as they come online could hedge the same volume each month while oil prices rise and the notional amount of each month's trade likewise increase.[12] As a result, to ensure that we stay below the regulatory *de minimis* threshold, we must impose a limitation on our actual book that is substantially below the regulatory threshold amount – whether that threshold is the current $8 billion, $3 billion, or any other number – and curtail our hedging business well below that threshold amount to account for commodity price fluctuations.

- Non-financial commodity swap participants, such as BOK, would be disproportionately hit by reducing the threshold amount or narrowing the exception.

  - Over the last three years, the gross notional amount of BOK's swap dealing activities has been at least $1 billion and less than $3 billion. Our gross notional is relatively sensitive to commodity price fluctuations due to the number of our customers hedging commodity price risk. Any reduction of the current *de minimis* threshold of $8 billion or any narrowing of the *de minimis* exception would either restrict BOK's ability to continue providing risk

[10] Futures are, however, a non-starter for some customers because of the cash margin requirements, minimum contract/volume requirements set by an exchange, or the imprecise hedges resulting from standardized contract terms.

[11] Because the costs of swap dealer registration and compliance are disproportionately felt by mid-size and regional banks, many of those banks will be forced to dramatically reduce their hedging services or exit the business entirely. Therefore, reducing the current *de minimis* threshold would stifle competition by channeling business to current swap dealers.

[12] Of course, the effect on a bank's portfolio of increased commodity prices is amplified by the number of the bank's hedge customers.

management services to its customers or cause BOK to exit the hedging business altogether. Industry estimates for the cost to register as a swap dealer are in excess of $2 million, with annual compliance costs approaching $1 million per year. A gross notional threshold of $3 billion, and even $5 billion, makes swap dealer registration and compliance costs difficult to justify. Accordingly, such gross notional threshold amounts would result in BOK (i) entering into fewer trades with customers in order to remain below the threshold; (ii) passing on to customers the costs of registration and compliance in the form of higher fees, in the event BOK registered as a swap dealer; or (iii) exiting the customer hedging business altogether. In all situations, increased credit and systemic risk will result.[13]

- We believe that a threshold based on counterparty counts, transaction counts, or both,[14] does not appropriately consider why and when our commodity customers and other commercial end-users decide to enter swaps. Counterparty counts and number of transactions may lead to 'false positives.' We continue to emphasize $8 billion or higher as the appropriate metric due to the immense costs of registration and compliance (the "death knell"). The standards the Commission and the National Futures Association have established for swap dealers over the past several years set a high bar for operations and compliance. We presume that bar is necessary for the Commission and NFA to oversee and manage the systemic risk of the swaps markets, but is unnecessary for swap participants that do not add to systemic risk. The depth and thoroughness of the registration and compliance obligations for swap dealers should be reflected in any decision regarding the *de minimis* exception. Therefore, the Commission's choices for that regime justify a commensurately high *de minimis* threshold.

- As a result, a narrower *de minimis* exception, lower threshold, or both, would stifle competition, channeling swaps to the relatively few large dealers, unless smaller firms chose to bear the cost of becoming a dealer, which we believe is unlikely. And as to the institutions that do choose to register, the CFTC would have to dilute scarce regulatory resources by dedicating some of those resources to entities that pose no systemic risk, have little incentive to deceive customers and do not contribute to price transparency.[15]

<u>IDI Exclusion</u>

We believe that the IDI exclusion should extend to all customer-driven trades that hedge or mitigate commodity price risks incidental to such customer's business. The IDI exclusion for commodity customers should not be strictly tied to loan terms.

- Current regulation requires a bank, among other things, to have a categorical policy requiring all commodity customer borrowers to hedge in order for the bank to avail itself of the IDI exclusion

[13] *See supra* final bullet under "Hedging Services Protect Our Customers and Promote Financial Stability".
[14] We are also opposed to a threshold that looks to gross notional amount of dealing activity and counterparty counts, transaction counts, or both.
[15] The policy reasons behind the registration and regulation of swap dealers are not advanced by such institutions, including BOK, becoming registered swap dealers. *See* Preliminary Report at 35-36 (stating as the policies reduction in systemic risk, counterparty protections, and swap market transparency, orderliness and efficiency).

with respect to swaps entered into with those customers.[16] Our experience shows this is unworkable, particularly in light of how and when producers, farmers and other commodity customers hedge.[17] In other words, flexibility is needed in the IDI exclusion that reflects reality (i.e., untie customer commodity hedges from loan terms) to make meaningful a regulatory exclusion that is currently worthless to banks.

- It is important to note in this regard that loan-related swaps, especially in a matched book like BOK's, ***transfer*** risk. They do not create risk. Once the transfer enters the dealing market, systemic risk begins. Extending the IDI exclusion in this way would, combined with maintaining the *de minimis* threshold at $8 billion notional, greatly alleviate BOK's concerns.

Conclusion

BOK urges the Commission to take action to maintain the *de minimis* threshold amount of $8 billion and to continue using gross notional amount of dealing activity as the sole metric by which the threshold is measured. Those measures, in conjunction with a meaningful IDI exclusion for commodity hedges with customers, will ensure that family-owned oil companies, ranchers and farmers – the lifeblood of our region's economy – continue to have local access to credit and hedging services, while at the same time avoiding an unnecessary introduction of systemic risk to our region.

Respectfully,

Stacy Kymes

cc: Mr. Don Parker
Mr. Scott Grauer
Mr. Tally Ferguson
Mr. Steve Walton, Esq.

Mr. Michael Hedin, Esq.

[16] *See* 17 C.F.R. § 1.3(ggg)(5)(i)(B)(2) (requiring that a commodity hedge, to be excluded from a bank's dealing activity, is required as a condition to the customer's loan under the bank's underwriting criteria).

[17] For example, an oil producer will draw on its line of credit to drill new wells but will not hedge production until several months later (i.e., outside of the 90/180 day window requirement) at which time the producer may have no need or desire to make an additional draw on its line of credit.