Meeting Between Staff of the Federal Reserve Bank of Kansas City
and Representatives of BOK Financial Corporation ("BOK FC")
September 13, 2010

Participants: President & Chief Executive Officer Tom Hoenig, Esther George, Kevin Moore, Jim Wilkinson and David Johnson (Federal Reserve Bank of Kansas City)

Chuck Cotter, Stacy Kymes and Tally Ferguson (BOK FC)

Summary: Representatives of BOK Financial Corporation met with officials and staff of the Federal Reserve Bank of Kansas City (the "Reserve Bank") to discuss certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

BOK FC is a $24 billion regional banking organization, with a significant volume of its lending business extended to energy and agricultural production and wholesale businesses. Through Bank of Oklahoma, N.A., BOK FC's lead bank subsidiary, the organization makes credit available for certain customers to utilize commodities derivatives to hedge risk against future price movements related to the customer's production of and/or wholesaling activities involving crude oil, natural gas and agricultural crops. This business line is provided only in relation to credit extensions to bank customers. BOK FC represents that, while it conducts two trades in relation to each customer purchase of a commodity derivative, the organization does not engage in trading derivatives for its own account, as the position taken in each customer transaction is immediately off-set by a mirrored transaction with an established third-party swap dealer offering commodity contracts.

BOK FC's interest in meeting with the Reserve Bank was to express concern regarding certain ambiguities contained within the Dodd-Frank Act, which may result in discontinued authority for the organization to transact such business through its lead bank subsidiary. BOK FC management represented the financial impact to move such transactions to a nonbank subsidiary of BOK FC would not be economical and likely would result in less credit being made available to its banking customers.

The meeting between BOK FC and Reserve Bank representatives encompassed less than one hour. The discussion provided specifics of BOK FC's business model associated with commodities trading and the organization's concerns regarding possible ambiguity within the Dodd-Frank Act. Management characterized their current business model, while structured to reduce credit risk for the banking organization and its customers, to be at risk and subject to regulatory agencies' rule writing process required to promulgate provisions of the Dodd-Frank Act. In concluding the meeting the Reserve Bank encouraged BOK FC officials to provide specific comment during the rule making process and share their views with the CFTC, which will have principal rule writing responsibility over the provisions of interest.

In advance of the meeting, BOK FC provided documents presenting the company's current involvement in commodities derivatives trading as well as a brief developed by external council focusing on certain provisions of Dodd-Frank. The documents provided to the Reserve Bank are attached and incorporated herein.

BOK FINANCIAL
RISK MANAGEMENT

MEMORANDUM

to: Stacy Kymes and Chuck Cotter

from: Tally Ferguson and Lindsey Madden

subject: Financial Derivatives activity at BOK Financial

date: September 9, 2010

Overview; this memorandum addresses your request for an overview of the traded financial derivative activity at BOK Financial ("BOK"). These activities are performed at Bank of Oklahoma, N.A. for customers of all bank subsidiaries of BOK Financial. As you know, BOK has a core competency in energy lending and, to a lesser extent, agribusiness lending. Since January of 2001, BOK has built onto this core lending competency by offering our lending customers the opportunity the hedge the value of the collateral pledged to the bank under an associated lending arrangement. Our core model was to offer legitimate hedging transactions to borrowing customers where the assets they were protecting were pledged as collateral to BOK. We found that our commercial end user energy producers had been reluctant to hedge their production because of the liquidity demands placed by exchanges and by the basis risk observed between the reference price of futures and the cash price realized from sale of their production. There were no financial intermediaries that allowed our commercial end user energy producers access to over-the-counter financial derivatives that reduced the liquidity demands and managed the basis risk.

In contrast, BOK was in a position to offer affordable access to commodity price protection. We knew our customer's production history and capability. We had the production mortgaged to us as collateral. Further, while national banks are not permitted to take positions in commodities, we had solid trading relationships with dealer counterparties with whom we could offset the commodity risk of energy and agribusiness hedge transactions.

Value to BOK; While we recognized an opportunity to generate revenue from our financial derivative hedge program, this was secondary to the credit risk management tool the service provided. After mismanagement, the greatest risk our energy and agribusiness customers face is a drop in commodity prices below their break-even costs. The ability to hedge this risk significantly reduces credit risk from these borrowers. Historically, if our customers hedged, they would hedge on an exchange or with a non-financial company. Any gains from hedging would be held at these third party companies. Any losses would be funded via borrowings by BOK. In this way, we had no control over the gains, and bore the full risk of losses.

By bringing the financial derivative hedge program in house, BOK had custody of the gains. BOK did not need to fund the losses, because they were fully offset by increases in production value mortgaged to us. Further, we knew the positions and did not have to rely on delivery of third party statements or assignment of hedge positions from same. Finally, we could assess the appropriateness of the hedges, knowing the characteristics and limits of the customers' production. This kept our customers from advertently or inadvertently over-hedging. We had no such control if our customers hedge with third parties.

Value to Commercial End Users; this product was of great value to our customer base. We initially thought the product would be used by less than ten customers and could be handled with a part time staff to trade and provide operations. Within two years, however, we had over 100 customers. The product was so successful because of the economic benefits to our commercial end user energy producers. Consider the typical example.

> A natural gas producer has a diversified set of wells generating proven and developed production of 20,000 mmbtu per month delivered in Western Oklahoma. To protect 50% of one years' production without OTC derivatives, the customer would have to post $75,000 in initial margin and $12,000 for every ten cent increase in natural gas prices in excess of 62 cents. They would bear the full risk of the

basis between Panhandle Eastern and Nymex – the index upon which futures are based. The customer would likely borrow these margin requirements. This would reduce the customers' borrowing base, limiting the funds available for them to drill additional wells. Only when the hedged gas is sold do the increase prices provide liquidity to the borrower.

Were the customer to tie in their loan to the derivative product offered by BOK, they could protect 50% of their production at no funding cost using the same collateral borrowing base as with the loan. As the hedge position goes against the customer (natural gas prices increase) their borrowing base increases twice as much, providing increased liquidity to the customer through a higher borrowing base tied directly to the hedge transaction. Further, the customer can hedge using an index tied to Panhandle Eastern, eliminating the basis risk. This transaction reduces the volatility of borrower cash flows and, hence, risk to BOK, at no liquidity cost or erosion of borrowing base.

Note that the above model shifts liquidity risk from the commercial end user energy producer to the Bank of Oklahoma. From a macro economic standpoint this shift appears appropriate since commercial banks are better suited to manage liquidity than are commercial end users of derivatives.

<u>Evolution of the Product</u>; Between 2001 and 2003, the rapid growth of our product led us to hire a dedicated trading staff, purchased support systems and segregated operational and risk control support. Importantly, this product was offered exclusively to third party customers. The product is not offered to any commonly controlled entity. In particular, we do not enter into energy or agricultural derivatives with any entity controlled by George Kaiser, our principal shareholder. From its inception, the product was tied closely to lending relationships. Volume limits are set at a percentage of proven and developed production. Lines are approved to alert underwriters of potential exposure. Credit and collateral agreements are cross referenced with documents governing derivatives trades. Positions are reviewed daily, warnings are sent to lenders as customers approach their limits. Trading is suspended if limits are exceeded, and trades are unwound at BOK's expense if volume limits are exceeded. Further, we restrict the derivative products traded to traditional hedging instruments, comprising swaps, collars, and purchased puts or spreads, provided premium is not collected at transaction date.

<u>Implications of the Lincoln Amendment</u>;

Liquidity shift from commercial banks to non-financial corporations and drain on potential lending resources; If regulators determine that derivatives indexed to energy and agricultural products must be pushed out of insured depository institutions, BOK will be unable to offer prudent risk management services to borrowers in our core competency businesses. The potential liquidity and capital demands are too great for a non-bank financial holding company subsidiary. *We* acknowledge that the Act, as written, permits the "push out" of derivatives to non-insured special purpose affiliates of insured depository institutions. This is not an affordable option for BOK nor, we think, for financial institutions in general. If BOK were forced to push out derivative transactions to a non-insured subsidiary, we would lose the ability to manage liquidity and be forced to push liquidity management back to the end users. Even with our current book of business, an 80 percent increase or decrease in energy prices adds $40 million in capital requirements. The increase would also add roughly $63 million to our liquidity needs. These are small and manageable numbers for a $16.6 billion commercial bank, but would be prohibitive changes for a special purpose affiliate – particularly in light of the likely increased restrictions on transactions with affiliates. We suspect these same constraints would apply to other financial institutions.

Increased instability in banking; Though the primary force behind offering the customer financial derivative product is customer demand, BOK has also reaped the benefits of the customer risk management tools it provides. If customer cash flows are more secure, lenders have greater confidence in their assessments and are more willing to lend. In some cases, BOK has required customers to hedge (with some entity, not necessarily BOK) in order to lend to them because management feels so strongly that hedging brings stability. Required hedging has also helped mitigate risk of problem credits. Pushing this business out to a non-insured special purpose affiliate, effectively removing BOK's ability to provide this service, forces lenders to choose between lending to a customer who cannot affordably execute sound risk management practices, or not to lend at all. Fewer loans, or more, less secure loans, would thwart existing efforts to increase loan availability and strengthen the safety and soundness of banks.

Increased cost of risk management at non-financial corporations; In many cases, BOK cannot alone provide for all of the financial needs of a firm with which it has a relationship. These lead to our participation in syndicate deals. Interestingly, we have found that the margin threshold limit controls difficult to impose on syndicate transactions. Since our *sine qua non* for the transaction is a pledge of collateral, transacting derivatives can shift the proportion of collateral claim from non-swap lenders to swap lenders as prices increase. This is fair, and generally not objected to by syndicate members because as the derivative exposure increases, the value of collateral also increases. However, the concept of calling for margin at any level, even above a certain threshold, is not generally palatable to non-swap lenders in syndicates because such calls drain liquid assets to protect the swap lenders at the expense of non-swap lenders. Consider that, if all commodity based derivatives are pushed out of banks or required to be executed on an exchange, large syndicated deals will have a great deal of difficulty funding their risk management businesses. Imagine the large agribusiness and energy companies having to divert their cash from operations and research to margin calls because banks cannot intermediate their liquidity.

Conclusion; when managed correctly, derivatives transactions allow commercial end users to reduce the commodity risk inherent in their businesses. Financial institutions play a critical role in this risk management chain by providing liquidity and credit intermediation. The Lincoln amendment codified in Title VII of the Dodd Frank Financial Reform Act would effectively take financial institutions out of the key intermediation causing: (i) banks to choose between providing risk management services to corporations and lending to corporations; (ii) banks to either restrict lending, or lend to corporations with riskier cash flows, thus endangering their own safety and soundness, (iii) and corporations to choose between managing their risk and producing goods and services or performing research and development. We believe these choices do not need to be made if regulators make prudent decisions regarding how banks may continue to offer risk management credit and liquidity intermediation.

Authorization of National Banks to Engage in Riskless Principal Derivatives Transactions with Customers under the Dodd-Frank Wall Street Reform and Consumer Protection Act

September 9, 2010

Introduction

The Bank of Oklahoma, National Association (*"BOK"*), a subsidiary of BOK Financial Corporation, a financial holding company (*"BOKF"*), currently regularly engages in derivatives transactions with its customers on a "riskless principal" basis. These transactions involve two related trades. In the first trade, BOK transacts as a counterparty with its customer; in the second trade, BOK places a trade through an established channel (an exchange, board of trade or over-the-counter) that "mirrors" the trade with the customer. When the trades are combined they represent a transaction in which BOK has taken no incremental market or commodity risk. To the extent its trade with its customer creates a gain for the customer, it has a corresponding gain on the "mirror" trade it placed with the market.

For example, say a BOK farming customer needs to hedge its risk regarding the pricing of wheat. It enters into a derivatives trade with BOK, which in turn effects a corresponding trade as principal on the Chicago Board of Trade or another agricultural commodities exchange. The net result of the two trades is that (a) the client has achieved its objective of hedging its risk, without the need to establish a trading account on a Chicago or New York exchange or board of trade, and (b) BOK has facilitated its customer's need with no net exposure to the bank.

BOK's riskless principal derivatives transactions are currently permitted under long-standing powers granted to banks and banking holding companies under federal banking statutes and regulations. Pursuant to the authority granted under the National Bank Act, 12 U.S.C. 24 (Seventh), the United States Office of the Comptroller of the Currency (the "*OCC*") has for decades permitted national banks to:

> "… advise, structure, arrange, and execute transactions, as agent or principal, in connection with interest rate, basis rate, currency, currency coupon, and cash-settled commodity, commodity price index, equity and equity index swaps, and other related derivative products, such as caps, collars, floors, swaptions, forward rate agreements, and other similar products commonly known as derivatives. National banks may arrange matched swaps or enter into unmatched swaps on an individual or portfolio basis and may offset unmatched positions with exchange-traded futures and options contracts or over-the-counter cash-settled options."

OCC Publication, *Permissible Activities for National Banks* at 54 (April 2010); *See also* OCC Interpretive Letter No. 725, *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,040 (May 10, 1996); *See also* OCC Interpretive Letter 1026, 2005 WL 1939863 (April 27, 2005).

Likewise, the United States Federal Reserve Board (the "*Federal Reserve*") has long permitted bank and financial holding companies to provide—

"customers as agent transactional services with respect to swaps and similar transactions, … and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange)."

12 C.F.R. §225.28(b)(7)(v)("Regulation Y").

Regulation Y goes on specifically to authorize bank and financial holding companies to provide agency transactional services to customers for, among other things, derivative transactions (Regulation Y, 12 C.F.R. §225.28(b)(7)(i)), and to engage in riskless principal transactions with customers—i.e., "*to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer.* (Regulation Y, 12 C.F.R. §225.28(b)(7)(ii))(emphasis added).

The rationale for this long-standing authority of banks and banking holding companies to engage in riskless principal derivatives transactions with customers is clear:

(1) These transactions facilitate banking customers' reducing their market risk, which reduces the bank's risk with respect to loan performance by these customers.

(2) These transactions are incidental to the provision of core banking services.

(3) These transactions provide customers a needed mechanism for effecting trades without the necessity of creating relationships with a futures commodities merchants or brokers on boards of trade or exchanges located far from the customer.

(4) These transactions do not create incremental risk for the bank placing the trades as a result of the bank's contemporaneous offsetting trade.

See Board of Governors of the Federal Reserve System, *Bank Holding Company Supervision Manual* §3230.4.4.3 (July 2010); and OCC Interpretive Letter 992, 2004 WL 1687010 (May 10, 2004).

The last of these reasons is strengthened by the adoption of the various provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the *"Dodd-Frank Act"*), as that Act establishes a comprehensive program for exchange-based trading and clearing of derivatives transactions.

BOK believes that the purposes and legislative history associated with the recent adoption of the Dodd-Frank Act support the continued authorization of national banks to engage in riskless principal derivative transactions for bank customers. Unfortunately under certain provisions of the Dodd-Frank Act, the authority of banks to engage in these transactions is not clear. Accordingly, we believe regulators should use the rulemaking authority granted them under the Act expressly to authorize these transactions by national banks.

The Dodd-Frank Act: The Volcker Rule

The so-called "Volcker Rule," named after former Federal Reserve Board Chairman Paul Volcker, appears at Section 619 of the Dodd-Frank Act. The Rule provides that, "unless otherwise provided by this section, a banking entity [a bank, or bank or financial holding company] shall not . . . engage in proprietary trading." *Dodd-Frank Act,* §619(a)(1).

Proprietary Trading is defined in the Act as engaging as a principal for the trading account of a banking entity in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, derivative, contract of sale of a commodity for future delivery, option on any such security, derivative, or contract or other security or financial instrument that the appropriate federal banking agencies, the SEC and the CFTC may, by rule determine. *Dodd-Frank Act,* §619(h)(4).

Based on the foregoing provision and definition, BOK's entering into a derivative trade with a customer may constitute "proprietary trading" prohibited by the Volcker Rule, regardless of the fact that the trade is entered into on a riskless principal basis, unless the transaction is specifically exempted from the application of the Rule by another provision of the Act. Exceptions to the general prohibition of the Volcker Rule are contained in Section 619(d)(1) of the Dodd-Frank Act. Three exceptions are relevant here:

> "(C) Risk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity that are designed to reduce the specific risks to a banking entity in connection with and related to such positions, contracts or other holdings."
>
> "(D) The purchase, sale, acquisition, or disposition of securities and other instruments described in subsection (h)(4) [the definition of proprietary trading] on behalf of customers."
>
> "(J) Such other activity as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodities Futures Trading Commission determine, by rule, as provided in subsection (b)(2), would promote and protect the safety and soundness of the banking entity and the financial stability of the United States."

Note that each of the foregoing permitted activities is expressly made subject to rulemaking by the applicable regulators (the OCC, the Federal Reserve, the SEC and the CFTC). In particular, under Section 619(b)(2)(B)(I), the OCC, as the principal regulator of BOK, has the authority to adopt rules that would be applicable to BOK interpreting or applying the foregoing exceptions.

Considering each of these potential exceptions in turn—

(C) Risk-Mitigating Hedging Activities. As noted above, one of the reasons BOK and other banks enter into riskless principal derivative transactions with customers is to reduce the bank's risk relative to that customer. The bank's loan to, for instance, a farming customer is at greater risk of non-performance if that customer does not have in place adequate hedges regarding the price of the commodities it is producing. This is part of the reason the OCC and the Federal Reserve have long permitted banks and bank holding companies to engage in these

transactions. We believe the proper interpretation of subpart (C) above would therefore encompass BOK's riskless principal derivative transactions.

There is, however, a risk that subpart (C) may be narrowly construed to apply only to trades in which BOK purchases a hedge under which it is directly compensated by its counterparty should the hedged-against risk occur. This would be the case, for instance, if BOK's trade with the market (the second leg of a riskless principal derivative transaction) was *not* matched with a 'mirror' trade with its customer. ***We therefore request that banking regulators use their rulemaking power under Section 619(b)(2)(B)(I) to make it clear that riskless principal derivative transactions with bank customers remain permissible.***

(D) Trading on Behalf of Customers. BOK riskless principal derivative transactions are undertaken for the benefit of our customers. However, the specific tenor of the customer-facing leg of the two trades that collectively represent a riskless principal transaction is not an agency trade. The bank, in that leg of the transaction, is the customer's counterparty, not its agent. We believe the proper interpretation of subpart (D) is to look at the two trades that together constitute a riskless principal transaction on a combined basis; in which case the clear conclusion would be that the trade is conducted on behalf of a customer and therefore exempt from the Volcker Rule.

As with subpart (C), however, there is a risk that this subpart may be construed such that each leg of a riskless principal transaction considered in isolation. Under that approach there is a risk that a regulator might conclude that the bank's trade with its customer does not qualify as trading "on behalf of" the customer. ***Accordingly, we request that banking regulators use their rulemaking power under Section 619(b)(2)(B)(I) of the Dodd-Frank Act to make it clear that riskless principal derivate transactions with bank customers remain permissible.***

(J) Other Permissible Activities. It is clear from the legislative history of the Dodd-Frank Act that the Volcker Rule was not designed to bar banks from engaging in riskless principal derivative transactions with bank customers. Chairman Volcker, in his testimony to Senate Banking Committee, indicated that the Rule was intended to prevent banks engaging in trading that was "unrelated to customer needs and continuing banking relationships." *Statement of Paul A. Volcker Before the Committee on Banking, Housing and Urban Affairs of the United States Senate*, February 2, 2010, http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ec787c56-dbd2-4498-bbbd-ddd23b58c1c4. Senator Dodd, the Chairman of the Senate Banking Committee and co-sponsor of the Dodd-Frank Act, indicated that the core purpose of the Volcker Rule is "to eliminate excessive risk taking activities by banks and their affiliates while at the same time preserving safe, sound investment activities that serve the public interest." *156 Cong. Rec. S5902-01 (July 15, 2010).*

Riskless principal derivative transactions serve a specific banking customer need; they maintain and further continuous banking relationships with customers; they represent safe, sound activities by national banks; and they reduce rather than increase risk to the banking system and bank customers. As a result, we request that, if banking regulators conclude that they may not or will not authorize riskless principal derivative transactions under subparts (C) or (D) of Section 619(d)(1) of the Dodd-Frank Act, that they use their rulemaking authority under subpart (J) explicitly to permit these activities.

The Dodd-Frank Act: Pushout Rule

Section 716 of the Dodd-Frank Act, the so-called "pushout rule," prohibits the provision of certain "Federal assistance" to any "swaps entity". For these purposes, "Federal assistance" includes participating in any Federal Reserve credit facility or receiving advances at the discount window. *Dodd-Frank Act,* §716(b)(1). The ability to participate in such programs is essential to BOK, as they are to any bank. It is critical, therefore, that BOK not be characterized as a "swap entity" for purposes of the pushout rule.

A "swap entity" is defined as any "swap dealer, security-based swap dealer, major swap participant, major security-based swap participant" that is registered under either the Commodities Exchange Act or the Securities Exchange Act of 1934. *Dodd-Frank Act,* §716(b)(2)(A). Subpart (B) of Section 716(b)(2) excludes an insured depositary institution from being characterized as a "major swap participant" or "major security-based swap participant." Accordingly, as BOK is an insured depositary institution, it could be or become a "swap entity" subject to the pushout rule if it becomes a "swap dealer." So in order to avoid becoming a "swap entity", BOK must avoid being a "swap dealer."

Unfortunately, BOK's riskless principal derivatives transactions with its customers create a risk that it might be characterized as a "swap dealer". The Dodd-Frank Act defines a "swap dealer" as follows:

> "(A) In General. The term 'swap dealer' means any person who—
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> (i) holds itself out as a dealer in swaps;
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> (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 a dealer or market maker in swaps,
>
> provided, however, in no event shall an insured depositary 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.
>
> ...
>
> (D) *De Minimis* Exception. The Commission [CFTC] shall exempt from designation as a swap dealer an entity that engages in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt."

Dodd-Frank Act, §721(a)(49).

BOK's riskless principal derivative transactions could place it at risk of being characterized as a "swap dealer" under subpart (iii) of the foregoing definition. It enters into these transactions with its customers regularly, and it does so in the ordinary course of business.

There are, however, three different reasons BOK's riskless principal derivatives transactions should not result in its being characterized as a "swap dealer":

(1) BOK Does Not Enter Into Riskless Principal Derivatives Transactions "For Its Own Account."

As noted above, riskless principal transactions should be viewed in terms of the net effect of both legs of the transaction. That is the approach that the OCC and the Federal Reserve have long taken, and the reason these transactions have been authorized; when looked at on a combined basis, riskless principal trades do not create incremental risk for the bank engaging in them. Viewed in this way, a riskless principal transaction is not for the bank's own account. Rather, the net of effect of the transaction is to move risk of the trade to the market, the same result that would obtain if BOK placed the trade on an exchange as the customer's agent. Nonetheless, BOK perceives a risk that a regulator may ignore the actual effect of the combined trades that make up each transaction and conclude, from looking at a single leg of the trade in isolation, that the bank is engaged in trading with its customers "for its own account."

Accordingly, we believe that federal regulators should, by rule, make it clear that riskless principal transactions constitute trades effected not for a bank's own account, and therefore engaging in such trades will not constitute a bank a "swap dealer."

(2) BOK's Transactions Are Often Entered Into In Connection With Loans.

The proviso at the end of part (A) of the definition of "swap dealer" was included in the Act to create an exemption from "swap dealer" characterization for banks that enter into derivatives trades with customers as a part of the bank's lending activities. BOK enters into riskless principal transactions solely with bank customers, typically with customers who have borrowed from the bank. So the majority of BOK's riskless principal transactions are effected in connection with a lending relationship.

There is, however, considerable definitional uncertainty regarding the scope of the proviso. Would, for instance, a trading facility created in connection with a new loan qualify under the proviso, regardless of when trades under it are placed, as the facility was created when the loan was originated? If not, when must a trade be placed to qualify? At the same time loan documents are signed? When the first borrowing under the loan facility occurs? Would a trade placed one week, one month, or one year, after the loan was initially made be considered made "in connection with" the origination of that loan? Would a trade placed in connection with an amendment to an existing credit facility qualify as a trade placed in connection with the "origination" of a loan? If so, how material must the amendment be to so qualify? Given the impact to BOK of being characterized as a "swaps dealer"--ineligibility for Federal assistance or participation in Federal Reserve credit facilities or trading at the discount window—it and other banks need clarity as to what is permitted under this proviso.

Accordingly we believe that federal regulators should, by rule, clearly define the circumstances in which a derivative trade between a bank and a customer qualify as being

made "in connection with originating a loan," and that the definitions should exempt the creation of riskless principal derivatives trading facilities to the extent such facilities are established with a bank's borrowing customers.

(3) BOK's Transactions Are De Minimis.

The *de minimis* exception of subpart (D) could protect BOK's riskless principal transaction activities, but this of course depends on the regulations the CFTC and SEC ultimately promulgate to define "*de minimis* quantity." In light of the purpose and benefits of riskless principal derivatives trading for bank customers, we believe this definition should be set based not on the quantity of trades placed, but on the quantum of risk that the entity is taking with respect to these trades, measured in relationship to its size and capital. This would be entirely consistent with the purpose of the pushout rule, which was to reduce systemic risk to financial companies associated with derivatives trading.

The legislative history makes it clear that the reduction of systemic risk to banks from their engaging in derivatives trading was the purpose behind Congress' adoption of the rule. For example:

> "Section 716 [the pushout rule] appropriately allows banks to hedge their own portfolios with swaps or to offer them to customers in combination with traditional banking products. However, it prohibits them from being a swaps broker or dealer, or conducting proprietary trading in derivatives. The risks related to these latter activities are generally inconsistent with the funding subsidy afforded institutions backed by a public safety net."

Letter of Mr. Thomas M. Hoenig, President, Federal Reserve Bank of Kansas City, to Senator Blanche Lincoln, June 10, 2010. http://online.wsj.com/public/resources/documents/Hoenig_letter061110.pdf).

Accordingly, we believe that federal regulators should, by rule, establish standards for de minimis trading activity based on the quantum of resulting risk to the financial institution from the non-exempt trades that it places relative to the bank's size and capital and, by doing so, continue to permit banks to engage in riskless principal derivatives transactions with customers.

Section 712(a) directs the CFTC and the SEC to engage in rulemaking to implement the swaps related provisions of Subtitle A of the Dodd-Frank Act generally, including specifically rulemaking regarding the permissible activities of swaps dealers and security-based swaps dealers. Section 721(a)(49)(D) direct the CFTC to adopt rules defining the *de minimis* exception to the swap dealer definition. Section 712(a) requires the CFTC and the SEC to consult with the OCC and the Federal Reserve, among others, in exercising their regulatory powers under Subtitle A "for purposes of assuring regulatory consistency and comparability, to the extent possible."

BOK requests that banking regulators, as part of these consultations, use their best efforts to obtain rulemaking that would clearly exempt a bank's riskless principal derivative transaction activities from potentially leading to the characterization of that bank as a "swap dealer." This result would be consistent with the purposes and intents of the Dodd-Frank Act generally, and of Subtitle A (Regulation of Swaps Markets) of the Act specifically, would reduce risk both to banks and to bank customers, and would be consistent with the trading activity rules that we urge the OCC to adopt regarding the application of the Volcker Rule, ensuring the consistency and comparability" of regulation that Section 712(a) directs the regulators to achieve.