CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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May 25, 2012

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Supplemental Notice of Proposed Rulemaking Regarding Definition of "Predominantly Engaged in Financial Activities"; RIN 7100-AD64

Dear Ms. Johnson:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in the 21st Century economy. The CCMC previously submitted comments on the Notice of Proposed Rulemaking ("NPRM") issued February 11, 2011, concerning the definitions of "predominantly engaged in financial activities" and "significant nonbank financial company and bank holding company" to which this April 10, 2012 supplemental proposed rulemaking[1] relates.

The comments we are submitting today are in addition to the CCMC's previously submitted comments. Our earlier comments address many issues that were not addressed by the supplemental proposed rulemaking. We urge the Federal Reserve to review and respond to all of the serious legal and public policy issues we have raised with both the initial NPRM and the supplement in any final rulemaking.

We are concerned that the supplemental NPRM is devoted to clarifying the Board of Governors of the Federal Reserve System's (the "Board") view that it may disregard the clear and unambiguous definition Congress provided in the Dodd-Frank Wall Street

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[1] Definition of "Predominantly Engaged in Financial Activities," Supplemental Notice of Proposed Rulemaking and Request for Comment, 77 Fed. Reg. 21494 (proposed April 10, 2012).

Reform and Consumer Protection Act (the "Act") for "activities that are financial in nature" under section 102(a)(6). Congress imposed this restrictive definition to prevent the Board from overreaching its regulatory authority over the economy by broadly defining financial activities. [2] We request that the list of financial transactions included in the Appendix to Subpart N be revised to reflect only the exact activities bank holding companies may engage in pursuant to section 4(k) and Regulation Y, as required by the Act.

The Board Exceeds the Legal Authority the Act Grants it by Insisting that "Financial Activities" for Nonbanks Under Title I Extend Beyond Those Activities Bank Holding Companies are Permitted to Engage in Under Section 4(k) and Regulation Y

As explained in our earlier comments, section 102(a)(6) of the Act expressly limits the revenues and assets that can be considered in calculating whether a company is predominantly engaged in financial activities to only those that are from "activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956." This language makes clear and unambiguous that the activities that may be considered financial activities by a nonbank under Title I of the Act are coextensive with, and identical to, the very same specifically-conditioned activities bank holding companies are permitted to engage in under section 4(k) and Regulation Y. Despite this, the Board claims that it not only has the authority to define activities that are financial in nature by regulation, but it arrogates to itself authority to mandate a definition that divorces this phrase as used in section 102(a)(6) of the Act from the specific activities that a bank holding company may engage in consistent with section 4(k) and Regulation Y. The Board claims that the Act merely limits it to defining financial activities consistent with what it unilaterally determines to be the broad categories of activities enumerated in section 4(k) and Regulation Y. It asserts that it may dispense with any limitations or conditions delimiting the activities in which bank holding companies may engage if it considers them non-definitional. This interpretation is manifestly contrary to the Act and beyond the Board's lawful authority.

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[2] Press Release, Senator David Vitter, Senators Vitter and Pryor Secure Bipartisan Amendment to Limit Reach of Federal Regulators (May 20, 2010) (available at http://www.vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=b6ae7b7b-d9a9-a93d-9634-70fcdc661f07) (defining "financial activities" under section 102(a)(6) of the Act as those activities "defined in section 4(k) of the Bank Holding Company Act of 1956." This amendment and its definition were included in the final version of the Act that was subsequently signed into law.).

As a matter of law, it is well settled that "[i]f the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (internal citations omitted). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (*quoting* Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).

The Act Does Not Permit the Board to Define "Activities that are Financial in Nature" for Purposes of Section 102(a)(6)

In section 102(b) of the Act, Congress gave the Board the authority to "establish by regulation, the requirements for determining if a company is predominantly engaged in financial activities, *as defined in subsection (a)(6)*," which refers to "activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956)." The Act did not give the Board the authority to establish criteria for determining if a company is predominantly engaged in financial activities of the same general type as those set forth in section 4(k). Nor did it authorize the Board to establish by regulation the requirements for determining whether a company is predominantly engaged in financial activities as the Board may choose to define that term. It said "as defined in section 4(k)" without limitation, qualification, or any other reservation that permits the Board to create a list of activities that are financial in nature for nonbanks that differs in any way from the activities bank holding companies are authorized to conduct consistent with section 4(k) and Regulation Y.

Section 102(b) of the Act merely permits the Board to establish criteria as to aspects of the predominantly engaged standard that Congress did not already clearly and unambiguously define. For example, the Board may issue regulations concerning the accounting concepts applicable to calculating whether a company meets the statutory definition of predominantly engaged. The Board's limited authority under section 102(b) does not, however, empower it to re-define the activities that are financial in nature under section 102(a)(6) any more than it allows the Board to reduce the threshold for predominantly engaged from 85 percent to 75 percent.

In Addition to the Plain, Unambiguous Statutory Language of the Act, the Legislative History Reinforces that the Board's Interpretation is Manifestly Contrary to the Act

The Board relies on its view of the over-arching purpose and structure of the Act to support its authority to disregard conditions applicable to bank holding companies under section 4(k) and Regulation Y that it deems non-definitional. Conditions meet this implied standard if the Board feels they were imposed "to prevent circumvention of the Glass-Steagall Act's limitations on underwriting and dealing activities and for safety and soundness reasons."[3] Even if the text of section 102(a)(6) did not clearly and unambiguously define activities that are financial in nature, the actual legislative history, purpose, and structure of the Act undermine, rather than support, the existence of any such implied authority.

Absent from the Board's selective analysis of the legislative history and purpose of the Act is the critical change made to the provisions concerning designation of nonbank financial companies as systemically important financial institutions ("SIFIs") during Senate consideration of the Act. Senator David Vitter—a member of the Senate Banking Committee—paired with Senator Mark Pryor to propose a bipartisan amendment ("the Amendment") to resolve a fundamental problem with the Act as initially proposed. Congress wanted the legislation to "force risky financial companies such as Bear Stearns and Lehman Brothers that have operated the shadow banking system to be subject to proper supervision."[4] But the provisions giving regulators such authority over so-called "shadow banks" raised "concerns on both sides of the aisle" that the Act empowered regulators to require "virtually any large company engaged in broadly defined 'financial activities' to be designated . . . for enhanced supervision by the Federal Reserve."[5] The Amendment took a belt-and-suspenders approach to limit clearly and unambiguously the power of financial regulators to designate nonbank companies as SIFIs and to ensure that they would "leave manufacturing companies, retailers and other non-financial companies alone."[6]

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[3] *Supra* note 1, at 21499.

[4] 156 Cong. Rec. S2453 (daily ed. April 20, 2010) (statement of Senate Banking Committee Chairman Christopher J. Dodd).

[5] *Supra* note 2.

[6] Press Release, Senator Mark Pryor, Pryor Strengthens Financial Protections for Consumers and Small Businesses (May 21, 2010)(available at http://pryor.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=a6aeda38-103d-491e-8d24-930837c25949&ContentType_id=bc7e67ca-fd50-428e-8894-0e7779e63f05&Group_id=e07e4eaf-f7e9-46ef-94d4-6037533cdee9&MonthDisplay=5&YearDisplay=2010).

The Amendment fulfilled its purpose by imposing both quantitative and qualitative limitations on *the authority of the Board* to classify a company as a nonbank financial company predominantly engaged in financial activities such that the Financial Stability Oversight Council ("FSOC") could consider designating it a SIFI under either section 113(a) or 113(b) of the Act. The Amendment quantitatively limited the Board's authority by raising the "substantially engaged" in financial activities standard in the original Senate bill to the higher standard of "predominately engaged" in financial activities. And it deprived the Board of discretion to set the height of this higher threshold by defining predominantly engaged to require that 85% of a nonbank company's revenues or assets arise from activities that are financial in nature. Furthermore, the Amendment qualitatively precluded regulators from devising a broad, novel definition of activities that are financial in nature by expressly requiring that the Board give this phrase the well-understood meaning "as defined in section 4(k) of the Bank Holding Company Act of 1956."[7]

The legislative intent to deny the Board the authority to define activities that are financial in nature to be in any way different from the activities permissible under section 4(k) and Regulation Y is further illustrated by the Senate's handling of the Amendment. The Senate deleted from the Amendment's definition of predominantly engaged a clause granting the Board the additional discretion to consider activities "incidental to a financial activity" as defined in section 4(k). The Amendment's section 102(a)(6) language, with its quantitative and qualitative constraints on the Board, remained in the final Conference Report on the Act as signed into law by the President.[8] Both Houses of Congress understood that the Vitter-Pryor Amendment narrowly limited activities that are financial in nature to exactly those activities bank holding companies may engage in under section 4(k). Some feared that "shadow banks" would structure themselves to evade the requirement that 85 percent of their assets or revenues arise from such financial activities. These fears about creative corporate restructuring prompted Chairman Dodd to insert the anti-evasion language in section 113(c) when he requested and received unanimous consent to add the Amendment to the Act.

The anti-evasion language empowers the FSOC to determine on "its own initiative or at the request of the Board" that a company that is neither a "U.S. Nonbank Financial

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[7] 156 Cong. Rec. S4030 (daily ed. May 20, 2010)(statement of Senate Banking Committee Chairman Christopher J. Dodd).

[8] The House bill allowed for designation of a nonbank entity that "in whole or in part, directly or indirectly, engaged in financial activities."

Company" or a "Foreign Nonbank Financial Company" predominantly engaged in financial activities should nevertheless be designated a SIFI.[9] It requires, however, that two conditions must be satisfied:

(1) The company must be one that "is organized or operates in such a manner as to evade the application of [Title I];"[10] and

(2) "[M]aterial financial distress related to, or the nature, scope, size, scale, concentration, interconnectedness, or mix of, the financial activities, conducted directly or indirectly by [the] company . . . would pose a threat to the financial stability of the United States."[11]

Section 113(c) reflects concerns about shadow banks structuring around the 85 percent threshold by abandoning the clearly-defined predominantly engaged standard of section 102(a)(6) and by permitting consideration of a company's "ownership or control of one or more insured depository institutions" in defining "covered financial activities."[12] Nevertheless, even under section 113(c) "covered financial activities" "means activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956)."[13] Thus, the Board overreaches in asserting that the anti-evasion clause of section 113(c) supports interpreting section 102(a)(6) as allowing it to disregard the limitation in section 102(a)(6) that "activities that are financial in nature" are the same as those that a bank holding company may undertake consistent with section 4(k).

In fact, instead of evincing "Congress's intent to broadly define 'nonbank financial companies,'"[14] section 113(c) confirms just how narrowly and tightly Congress defined the term by explicit reference to the exact activities a bank holding company may undertake consistent with section 4(k) and Regulation Y. Recognition of this is what prompted Congress to provide a third alternative route to designate an entity that does not meet section 102(a)(6)'s narrow definition of predominantly engaged required to designate under sections 113(a) or (b). Utilizing this third way, however, obliges the FSOC to not only discern the intent to evade under section 113(c)(1)(B). It must also

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[9] Section 113(c).
[10] Section 113(c)(1)(B).
[11] Section 113(c)(1)(A).
[12] Section 113(c)(5)(B).
[13] Section 113(c)(5)(A).
[14] *Supra* note 1, at 21496.

submit a written notice and justification to Congress each time it relies on section 113(c)'s anti-evasion language.[15] No such report is required when an entity is designated under sections 113(a) or 113(b). This is exactly because these routes are so clearly, unambiguously, and narrowly circumscribed that Congress did not deem it necessary to include additional safeguards to prevent a regulatory overreach by the Board and the other financial regulators that compose the FSOC.

The Board's argument that section 167 of the Act supports disregarding requirements applicable to bank holding companies is just as strained and unpersuasive as its reliance on the anti-evasion language of section 113. Section 167 addresses the *authority of the FSOC*—not the Board—over a company *after* it has been designated. It has nothing to do with the Board's authority to establish criteria for determining if a nonbank company is predominantly engaged in financial activities, as defined in subsection (a)(6) such that FSOC can consider it for designation under sections 113(a) or 113(b).

In its attempt to free itself of the tight limits on its authority to propose entities for designation pursuant to section 113(a) or 113(b) without triggering the burdens associated with pursuing designation under section 113(c), the Board points to the purpose of the Act. To establish the Act's purpose it refers to the Senate Committee on Banking, Housing, and Urban Affairs' April 15, 2010 report citing Secretary of the Treasury Timothy Geithner's testimony before the Committee on June 18, 2009. This testimony dates to almost a full-year before the final Senate debate on the Act that incorporated the Vitter-Pryor Amendment, which prevailed over the broader, more permissive language in both the initial Senate version of the Act, as well as the House-passed version of it. Whatever authority Secretary Geithner hoped regulators would receive when he testified in 2009, and whatever powers they were initially granted in the bill as proposed in the House and Senate in 2010, the power they actually got under the Act as signed into law is clearly and unambiguously delimited by the Vitter-Pryor Amendment.[16]

Perhaps recognizing the weakness of relying on legislative history pre-dating the Vitter-Pryor Amendment, the Board reinforces its version of events with reference to

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[15] Section 113(c)(2).

[16] Note too that the very same April 2010 Committee Report's discussion of section 102 makes clear that even under the more permissive "substantially engaged" standard that the Vitter-Pryor Amendment replaced the Committee "intended that commercial companies, such as manufacturers, retailers, and others, would not be considered to be nonbank financial companies generally." S. Rep. No. 111-176, at 46 (2010).

remarks inserted into the Congressional Record by Senators Kerry and Cardin during Senate consideration of the Conference Report on the Act. As noted in our prior comments, Senator Kerry simply sought reassurance that large companies providing financial services would not be designated based solely on their size, but only after an additional analysis of mandated risk factors. Similarly, in referring to the "unlikely event"[17] of the designation of nonbank financial companies sponsoring or advising mutual funds, Senator Cardin simply sought assurances that they would not be subject to "unworkable standards" under section 115. Neither of these statements supports disregarding the clear limits of section 102(a)(6) pegged to the activities bank holding companies may undertake consistent with section 4(k) and Regulation Y. A bank holding company may, in fact, sponsor and advise mutual funds subject to specific conditions concerning their control over companies in which the fund invests and the percentage of the bank's ownership of the equity in the fund one year after sponsoring it.[18]

One need not debate whether certain conditions that make financial activities permissible for bank holding companies under section 4(k) and Regulation Y are non-definitional to establish that the removal of such conditions extend the authority of the Board and the FSOC to exactly the kinds of nonfinancial activities and enterprises that Congress removed from their regulatory purview. For example, section 4(k) and Regulation Y permit bank holding companies to engage in certain forwards and options activity so long as they are settled in cash instead of by physical delivery of the underlying commodities. In its clarification of Title I's predominantly engaged standard, however, the Board directs that nonbanks must deem even futures and options activity intended to be settled by physical delivery to be financial activity included in the calculation of whether or not they are predominantly engaged in financial activities. This is exactly the kind of regulatory overreach the Vitter-Pryor Amendment foreclosed. Accepting the Board's view requires accepting that Congress' clearly-stated language fails to fulfill its clearly-stated intention to ensure the Board and the FSOC would "leave manufacturing companies, retailers and other non-financial companies alone."[19]

Furthermore, the Board's expanded definition of activity that is financial in nature beyond the specifically conditioned activities bank holding companies may undertake consistent with section 4(k) and Regulation Y raises issues under the Paperwork Reduction Act (PWRA). We disagree with the Board's assertion in the supplemental

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[17] 156 Cong. Rec. S5873 (daily ed. July 15, 2010) (statement of Senator Ben Cardin).
[18] 12 C.F.R. §225.86(b)(3).
[19] *Supra* note 6.

NPRM that "by amending specific portions of the regulation for clarity, it does not affect the collections of information that are proposed by the February 2011 NPR."[20] Expanding the activities that must be included in calculating whether a company is predominantly engaged in financial activities requires companies to gather and assess data on matters that they would not otherwise have to consider in assessing whether they meet the eighty-five percent threshold for being predominantly engaged in financial activity.

Expanding the scope of what constitutes activity that is financial in nature will also inevitably result in more companies meeting the standard for being a nonbank financial company. This in turn will expand the number of companies evaluated for designation by the FSOC under sections 113(a) and 113(b) of the Act. Some number of these additional companies may certainly reach the third stage of the analysis and be compelled to comply with onerous company-specific information requests even if they are never actually designated. This inevitably results in a further increase in the data collected due to the supplemental MPRM and affects the PWRA analysis.

We did not read the initial PWRA analysis in the February 11, 2011 proposed rule as making such a broad swath of companies subject to being considered for designation as a SIFI. This is probably because the initial proposal did not provide fair notice that the Board would decouple the definition of activities that are financial in nature for purposes of the predominantly engaged standard from the specifically conditioned activities permissible for bank holding companies under section 4(k) of the BHA. Thus we deem the Board's failure to make the necessary adjustments to its PWRA analysis as presenting, at best, an incomplete analysis of the information collections resulting from the substantive changes made by the supplemental NPRM.

Conclusion

We appreciate that the Board is determined to safeguard the nation and its economy from potential future shocks and distortions. In doing so, it is seeking maximum authority and flexibility to respond to potentially unforeseen events and circumstances as well as the inexorable evolution of the financial markets. During the Congressional deliberations of the Act, the Board and other regulators that are members of the FSOC fought to get the broad authority and discretion they felt

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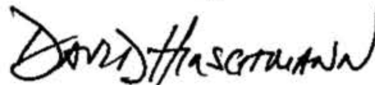
[20] *Supra* note 1, at 21502.

they needed to accomplish this complex and inchoate mission. But Congress did not enact legislation giving regulators the degree of flexibility, power, and discretion that they had hoped to obtain.

In our system of limited government and the rule of law the legal authority of regulators is not measured by the perceived utility or the implicit virtue of the alleged purpose towards which power will be directed. Instead it is measured by the authority delineated in the words of a statute passed by two Houses of Congress and signed into law by the President. The NPRM as supplemented simply posits an authority for the Board to define activities that are financial in nature in a manner that is manifestly contrary to the clear and unambiguous text of the Act. Furthermore, the actual legislative history, Congressional intent, and the overall structure of the Act do not support—much less favor—the Board's expansive interpretation of its authority to dissociate financial activities for nonbanks from the specific activities regulated financial institutions may engage in consistent with section 4(k). We urge the Board to reconsider its proposed interpretation and to accept the Act's clear limitations on the scope of its legal authority in any final rule it promulgates.

Sincerely,



David Hirschmann

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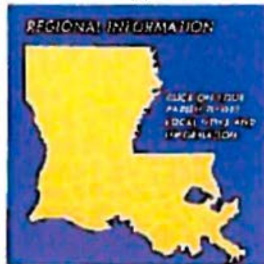

Press Releases

May 20, 2010

Vitter, Pryor Secure Bipartisan Amendment to Limit Reach of Federal Regulators

(Washington, D.C.) – U.S. Sens. David Vitter and Mark Pryor yesterday secured Senate passage of a bipartisan amendment to limit the reach of a new federal financial regulatory council to only those companies engaged in financial services.

"There have been concerns on both sides of the aisle that the new systemic risk council created by the pending financial reform bill could sweep all kinds of non-financial companies - such as Target and Google – under the broad regulatory power of the Federal Reserve, treating all companies as if they are banks.

"The Fed should not be regulating firms outside of its area of expertise, which is a practice that would only weaken our financial system. Sen. Pryor shared my concerns that previous language of the bill gave the federal government far too much power to grab control of the economy, and we're pleased that our Senate colleagues agreed to adopt our amendment to focus this legislation on truly financial companies," said Vitter.

Before the bipartisan Vitter-Pryor amendment, the language of the financial reform bill would have allowed virtually any large company engaged in broadly defined "financial activities" to be designated by the council for enhanced supervision by the Federal Reserve. That language would create an opening for the council to designate non-bank financial companies for enhanced supervision so they could be charged assessments to pay for future banking crises. The Vitter-Pryor amendment restricts regulation to those companies "predominantly engaged" in financial services, defined as those that receive at least 85 percent of their revenue from financial activities.

The Federal Reserve would retain authority to prevent "arbitrage," or attempts by companies with financial-service subsidiaries to restructure in order to avoid regulation.

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- 7th - Vitter Calls on Coast Guard to Increase Boom Quantities for Louisiana Coastal Parishes
- 10th - Vitter Issues Statement on Kagan Nomination
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United States Senate
WASHINGTON, DC 20510

May 16, 2012

The Honorable Ben Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Dear Mr. Chairman:

On April 2nd the Board of Governors requested comment on a proposed amendment to the Board's Notice of Proposed Rulemaking (NPR) issued February 11, 2011, to establish requirements for determining whether a company is "predominantly engaged in financial activities." We believe that your proposed rule attempts to circumvent our amendment and we urge you and the Board to reconsider the rule.

As you are aware under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act, a company can be designated for Board supervision by the Financial Stability Oversight Council if 85 percent or more of the company's revenues or assets are related to activities that are financial in nature under the Bank Holding Company Act. The requirement that a company be "predominantly engaged in financial activities" before it may be subject to bank-like regulation was the result of an amendment we offered during Senate consideration of legislation which ultimately became Dodd-Frank. You will recall that prior to this amendment the legislation gave financial regulators authority to regulate nonbank financial companies based on less precise criteria, such as whether the company is "in whole or in part, directly or indirectly, engaged in financial activities," (House version) or "substantially engaged in financial activities," (the Senate version), in the latter case as defined by the Federal Reserve.

Because of our shared concern that the original House or Senate language was too vague, and could potentially open many commercial enterprises to inappropriate bank-style regulation, the amendment we offered tied the definition back to the familiar standard of "predominantly engaged" as defined in section 4(k) of the Bank Holding Company Act. It was our belief that this definition of "financial activity" was well defined and properly circumspect, and that combined with the 85 percent predominance test would ensure that manufacturers, retailers and natural resources businesses would be able to operate free of the fear that they would be ensnared in regulations designed to address a financial crisis which they did not create, and indeed, of which they were in many cases the victim.

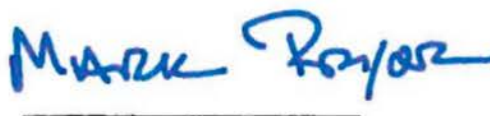
Unfortunately, despite the clarity provided in the overwhelming adoption by the Senate of our amendment, and the conference committee's defense of the amendment despite attempts to alter the amendment or remove it completely, the Board's latest proposed rulemaking once again potentially extends financial regulations to businesses that were clearly intended by Congress to be excluded by the law. Specifically the proposed rule would include as financial activity "Engaging as principal in...forward contracts, options,...and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset...nonfinancial asset, or group of assets."

In the text accompanying the release the Board notes that this broad expansion is beyond what is strictly provided under either section 4(k) or existing Regulation Y. Unfortunately the Board's proposed expansion is precisely the type of overreach that our amendment was intended to address. Under the proposed rule the Board has significantly deviated from the plain language of Dodd Frank, which provides in section 102(b) that "the Board of Governors shall establish, by regulation, the requirements for determining if a company is predominantly engaged in financial activities, as defined in subsection (a)(6)." As the Board is aware, (a)(6) of Section 101 of Dodd Frank clearly states that the predominance test applies with respect to assets and revenues derived "from activities that are financial in nature (as defined in section 4(k) of the Bank Holding Act of 1956)..." Section 102(b) does not state that the Federal Reserve is to define "financial activities" for purposes of Dodd Frank. Instead it directs the Board to establish the requirements "for determining if a company is engaged in financial activities" as defined in the Bank Holding Company Act.

The inclusion of forwards and options in determining whether a company is "predominantly engaged in financial activities" is contrary to both the spirit and plain language of Dodd Frank. In order to ensure that commercial enterprises are not dragged into inappropriate financial regulatory schemes, and to provide certainty to businesses that seek to expand and create jobs, we request that you amend the proposed rule by deleting the reference to forwards and options, or, at a minimum, clarifying that forwards and options which are intended to be physically settled are not included in the list of financial transactions included in paragraph 13(ii)(B) and (C) of the Appendix to Subpart N. Additionally we request that the Board clarify that under no circumstances should the transactions described in paragraph 13(ii) be considered "financial" with respect to a commercial manufacturer, producer, shipper, energy or commodity firm, or similar nonfinancial enterprise when they are incidental or ancillary to a party's activities as such.

Thank you and please do not hesitate to contact us with any questions.

Sincerely,



David Vitter
United States Senator

Mark Pryor
United States Senator