May 30, 2012

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

Re: **Effective Date Amendments;**
77 Federal Register 28819 (May 16, 2012)

Dear Mr. Stawick:

The Commodity Futures Trading Commission ("CFTC") is proposing to adopt a second amendment to the exemptive order that it originally issued on July 14, 2011 ("Exemptive Order"). Notice of the proposed amendment was published at 77 Federal Register 28819 (May 16, 2012) ("Release"). Fifth Third Bank ("Fifth Third") is pleased to submit these comments relating to the proposed terms and conditions of the Exemptive Order.

Background of Exemptive Order and Proposed Amendment

Many of the provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA") cannot be implemented until rules have been adopted by the CFTC, the Securities and Exchange Commission ("SEC"), and other regulators. In particular, the DFA required the CFTC and SEC jointly to adopt rules to further define certain terms used in the DFA, including the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant" ("ECP").

The CFTC recognized that many of the regulatory requirements under the DFA refer to one or more of the above terms. Certain DFA regulatory requirements, absent exemptive relief, would have become effective on July 16, 2011. The Exemptive Order adopted by the CFTC provided that persons need not comply with those DFA requirements, to the extent that such requirements specifically relate to one of the above terms that needed to be further defined, until the earlier of (1) the effective date of the applicable final rule further defining the relevant term or (2) December 31, 2011

When it became apparent that the CFTC and SEC would not adopt final rules by December 31, 2011, the CFTC adopted the first amendment to the Exemptive Order. The first amendment extended the exemptive relief until the earlier of (1) the effective date of the applicable final rule further defining the relevant term or (2) July 16, 2012.

On April 18, 2012, the CFTC and SEC jointly adopted final rules to further define the terms "swap dealer," "major swap participant," and "ECP." As of the date of this letter, the CFTC and SEC have not yet adopted final rules to further define the term "swap." The CFTC now proposes to adopt a second amendment to the Exemptive Order that would make a number of changes to its terms.

Two of those changes are relevant to Fifth Third's concerns. First, the proposed amendment would extend the exemptive relief until the earlier of (1) the effective date of the applicable final rule further defining the relevant term or (2) December 31, 2012. Fifth Third supports this aspect of the proposed amendment.

Second, the proposed amendment would remove references to the entity terms (*i.e*, "swap dealer," "major swap participant," and "ECP") from the Exemptive Order. In other words, the CFTC is taking the position that compliance with the DFA requirements that refer to the terms noted above can be made mandatory, as soon as the further definition of "swap" is adopted, because final rules further defining those terms were adopted on April 18, 2012. (*See* Release at 28820.) Fifth Third strongly objects to this aspect of the proposed amendment. For the reasons discussed below, we believe that compliance with the DFA requirements should not become mandatory until the CFTC and SEC provide further guidance as to the meaning of the revised definition of ECP.

Importance of ECP Definition

Fifth Third enters into commercial lending transactions with borrowers of all sizes. Many of those transactions include an OTC interest rate swap to enable the borrower to hedge the interest rate risk associated with its loan. Not all commercial borrowers qualify as ECPs. However, such an entity is permitted to enter into an OTC interest rate swap by virtue of the CFTC's 1989 Policy Statement Concerning Swap Transactions.[1] The Policy Statement provides that individually negotiated swaps are not subject to regulation as futures contracts under the Commodity Exchange Act ("CEA") – or voidable as illegal off-exchange futures contracts – if a commercial end-user entered into the swap related to its line of business and also satisfied other requirements.

The DFA makes it unlawful for a person who is not an ECP to enter into a swap other than on or subject to the rules of a designated contract market. When compliance with that requirement becomes mandatory, a commercial borrower that does not qualify as an ECP will not be able to use an OTC interest rate swap in order to hedge its interest rate risk exposure. Moreover, since the DFA requirement will supersede the Policy Statement, the flexibility that has allowed commercial end-users to engage in swap transactions regardless of their ECP status

[1] *See* Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30694 (July 21, 1989) ("Policy Statement").

will be lost. That means that a bank wishing to enter into a swap transaction with an end-user must ensure that the end-user is an ECP under a strict definition of that term or else find itself in violation of the CEA.

Revised ECP Definition – Unanswered Questions

The DFA amended the definition of ECP by: (i) providing that, for purposes of retail forex transactions, the term ECP does not include a commodity pool in which any participant is not itself an ECP; (ii) raising the monetary threshold that governmental entities may use to qualify as ECPs from $25 million to $50 million in investments owned and invested on a discretionary basis; and (iii) replacing the "total asset" standard for individuals to qualify as ECPs with an "amounts invested on a discretionary basis" standard.

In December 2010, the CFTC and SEC proposed rules and interpretations to further define the meaning of certain entity-related terms, including "eligible contract participant."[2] Numerous comment letters were submitted by interested parties. On April 18, 2012, the CFTC and SEC adopted final rules to further define the entity-related terms.[3] In the Entity Release, the CFTC and SEC addressed many of the questions that had been raised in comment letters concerning the revised definition of ECP. However, the CFTC and SEC expressly recognized that they did not address a number of interpretive issues related to the ECP definition that had been raised in the comment letters; they noted that they "may consider" those issues in the future.[4]

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[2] *See* Joint CFTC and SEC Notice of Proposed Joint Rulemaking: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant," 75 Federal Register 80174 (December 21, 2010).

[3] *See* Joint CFTC and SEC Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant," not yet published in the Federal Register ("Entity Release").

[4] These issues include: (i) the ECP status of jointly and severally liable borrowers and counterparties, non-ECPs guaranteed by ECPS, and non-ECP swap collateral providers; (ii) whether bond proceeds count toward the "owns and invests on a discretionary basis $50,000,000 or more in investments" element of the governmental ECP prong (CEA section 1a(18)(A)(vii), 7 U.S.C. 1a(18)(A)(vii)); (iii) the relationship between the ECP and eligible commercial entity definitions for purposes of CEA section 1a(18)(A)(vii), 7 U.S.C. 1(18)(A)(vii); (iv) the scope of the "proprietorship" element of the entity prong of the ECP definition in CEA section 1a(18)(A)(v), 7 U.S.C. 1a(18)(A)(v); (v) the meaning of the new "amounts invested on a discretionary basis" element of the individual prong of the ECP definition (CEA section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi)); (vi) whether persons can be ECPs in anticipation of

Answers Needed Before DFA Requirements Become Mandatory

Hundreds of comment letters were submitted in the proposed rulemaking relating to the entities definitions.[5] One of those comment letters was submitted by Fifth Third and Union Bank, N.A.[6] In that comment letter, we urged the CFTC and SEC to provide interpretive guidance to answer questions that will arise frequently in determining whether an individual qualifies as an ECP.

A brief summary of some of our comments will help to illustrate our concern. Under the revised definition of ECP, for an individual to qualify as an ECP, he or she must have "amounts invested on a discretionary basis," the aggregate of which is in excess of (i) $10 million or (ii) $5 million in connection with a transaction that is entered into in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual. There is nothing in the text of the DFA or its legislative history that explains the phrase "amounts invested on a discretionary basis" or how that phrase is to be interpreted.

Section 413(a) of DFA made an analogous change to the net worth standard for an "accredited investor" under SEC rules. In response, the SEC amended the net worth standard for individuals under its Rules 215 and 501 to exclude the value of an individual's primary residence from his or her net worth. The value of the primary residence would be calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property.[7] Because the amended definition of ECP and the amended net worth standard for accredited investors are contained in the same legislation and appear to have a similar purpose, we believe that it is appropriate to construe them in a consistent manner.

We believe that the phrase "amounts invested on a discretionary basis" should be interpreted to mean "amounts available for investment" (*i.e.*, an individual's net worth excluding the value of his or her primary residence.). Under this approach, the methodology for determining whether an individual qualifies as an ECP would be the same as determining

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receiving, but before they have, the necessary assets; and (vii) that swap dealers are not among the entities listed in CEA section 2(c)(2)(B)(i)(II), 7 U.S.C. 2(c)(2)(B)(i)(II), as acceptable counterparties to non-ECPs engaging in retail forex transactions. (Entity Release at 199, n. 596.)

[5] According to the Entity Release, the CFTC and SEC received approximately 968 written comments. (Entity Release at 10.)

[6] *See* Comment Letter on Further Definition of "Eligible Contract Participant" submitted by Fifth Third Bank and Union Bank, N.A. dated June 15, 2011.

[7] *See* Net Worth Standard for Accredited Investors, SEC Release No. 33-9287, 76 Federal Register 81793 (December 29, 2011).

whether the individual meets the net worth standard to qualify as an accredited investor, except that the dollar amounts would be different. Using the same methodology for both standards would be consistent with the purposes of the DFA and would enable firms and investors to use the interpretive guidance available under the SEC's accredited investor rules to help determine whether an individual qualifies as an ECP.

Whether or not our suggested approach is adopted, banks and other swap counterparties need interpretive guidance to help answer questions that will arise frequently in determining whether an individual qualifies as an ECP, such as the following:

- Should spousal assets be included? Should this include assets held by couples in a civil union?
- Assuming that the net equity in a person's primary residence should not be included, how should the value of a person's primary residence be determined?
- Should amounts invested in retirement accounts be included?
- Should amounts invested in a closely-held business be included? If so, how should such value be determined?
- If an individual was an ECP when he entered into a swap, can he and the swap counterparty later modify the terms of the swap if the individual is no longer an ECP at the time of the proposed modification?

Conclusion

Banks such as Fifth Third want to comply with the law. The provision of the DFA that makes it unlawful for non-ECPs to enter into OTC swaps, together with the rescission of the Policy Statement, represent a major change in the rules under which banks have been operating for many years. Banks (and other swap counterparties) will need to know how to determine whether or not a person is an ECP with a considerable degree of certainty well before the mandatory compliance date for the DFA provision noted above so that they can (i) prepare compliance procedures, questionnaires, and other forms, and (ii) train their personnel how to determine whether a person is or is not an ECP.

For these reasons, we believe that the proposed amendment to the Exemptive Order should not assume that the term "ECP" has been adequately defined. In our view, compliance with the DFA provision noted above should not become mandatory until at least 60 days after the CFTC and SEC have provided further guidance to answer the questions that were raised in the comment letters regarding the meaning of the revised definition of ECP.

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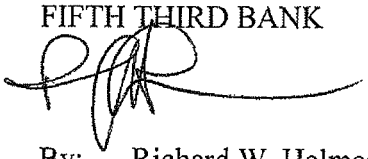
Fifth Third appreciates this opportunity to comment on the proposed second amendment to the Exemptive Order. If you have any questions regarding these comments, please contact Carl A. Royal, Schiff Hardin LLP, at (312) 258-5707.

Respectfully submitted,

FIFTH THIRD BANK



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