# 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