
Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

March 21, 1991

The Honorable Patrick Leahy
Chairman
Committee on Agriculture, Nutrition,
and Forestry
United States Senate
Washington, D. C. 20510-6000

Dear Mr. Chairman:

Thank you for your letter of February 21, 1991 requesting comments on S. 207, the "Futures Trading Practices Act of 1991" (Bill). Your letter directs our attention to those provisions of the Bill that might affect financial institutions under the regulatory jurisdiction of the Office of the Comptroller of the Currency. Since receiving your letter, S. 207 underwent a mark-up by the full Committee, and our comments below are based upon the marked-up version.

Specifically, section 302 of the Bill would amend section 4 of the Commodity Exchange Act, 7 U.S.C. § 1 et. seq., (CEA), to add subsections (c) and (d) to provide the CFTC with discretionary authority to exempt from the CEA certain agreements (Exemption Provisions). Included would be authority to exempt individually negotiated interbank contracts, swap agreements and deposits offered by banks, either individually or by classes of these instruments (collectively referred to herein as Bank Contracts), after notice and opportunity for hearing. The CFTC would be required to find that the grant of an exemption would not be "contrary to the public interest." In addition, the CFTC would be authorized to impose conditions on the grant of any exemption.

Our concerns with the Exemption Provisions of the Bill center on the belief that Bank Contracts are not subject to the jurisdiction of the CFTC. Primarily, we are concerned that the exemption authority may imply that the CFTC has regulatory authority over Bank Contracts. We believe this would create confusion as to the regulatory scheme applicable to Bank Contracts, resulting from the creation of the presumption that the CFTC could regulate such instruments, although it would not expressly have this power. In addition, we are concerned that any action which would inject the CFTC into the regulation of Bank Contracts would be nonproductive since banks are currently subject to substantial regulation.

We expressed our position that the CFTC has no power over Bank Contracts when the CFTC issued a proposed regulation concerning hybrid and related instruments (52 Federal Register 47022 (December 11, 1987)) (Proposed Rule). Under the Proposed Rule, the CFTC maintained it had jurisdiction to regulate Bank Contracts on the theory of the “economic equivalence” of these instruments to futures or options. We objected to the proposed rulemaking, and expressed policy concerns over possible disruption of the financial markets and the furnishing of banking products that are well-regulated by banking regulators. The CFTC and its staff addressed the concerns we and other bank regulators raised regarding the proposed rule and the regulatory problems encountered regarding new financial products that combine elements of futures or options contracts with debt or depository obligations. Considerable progress has been made in clarifying regulatory responsibilities since the publication of the Proposed Rule.

It is the OCC’s view that, under existing law, swaps and deposits made within the purview of permissible banking activities are not contracts of sale for future delivery. A contract that does not cover potential future delivery of a commodity is neither a futures nor a forward contract under the CEA, and, therefore, is outside the regulatory scope of the CFTC.

By granting the CFTC exemption authority, the Bill might establish a presumption that a bank’s individually negotiated Bank Contracts are contracts of sale for future delivery, subject to regulation by the CFTC. Confusion regarding the regulatory status of financial instruments could follow since a presumption that the CFTC possessed regulatory authority, created by implication, would not necessarily mean that the CFTC would have jurisdiction over Bank Contracts. Thus, financial markets might be uncertain as to the regulatory scheme to which these instruments would be subject. If this were the case, banks desiring to offer products of this sort would encounter substantial additional legal costs in connection with the development of these products. This result could substantially inhibit incentives for the development of creative bank products.

We note that the Exemption Provisions could have the effect of excluding Bank Contracts from the CEA, if the CFTC so chose. However, it is not certain that any exemptions granted by the CFTC would be unconditional. A conditional exemption could have the effect of subjecting Bank Contracts to the same additional layers of regulation to which they would be subject if they were not exempt from the CEA.

Your letter mentions the concern expressed by some that should the CFTC exempt swaps and the other specified products from the CEA, such action might result in trading in an environment lacking appropriate safeguards, thus posing a threat to financial institutions and the public. As indicated above, we believe that with respect to Bank Contracts, appropriate regulatory authority already exists under banking laws. Moreover, involvement of the CFTC in the regulation of Bank Contracts might inhibit their development, along with the potential benefits they bring to financial institutions and the public.

We recognize the legitimate concerns of the CFTC to examine closely the regulation of products with characteristics of options and futures. Similarly, the CFTC has recognized the legitimacy of the OCC's supervisory responsibility for, and authority over, national banks. Because Bank Contracts are currently subject to extensive supervision, there is no need to subject banks to additional layers of regulation, administered by non-bank regulators. As banks develop new products, other than Bank Contracts, with characteristics that mirror those offered by other financial market participants, however, it will be appropriate to consider how to regulate those products. There must be opportunities for consultation and cooperation. Finally, it will be important to ensure that regulatory authority is allocated in a manner that does not result in unwarranted overlapping regulation, which could cause needless disruption of healthy markets and stifle innovation.

We very much appreciate the opportunity to provide you with our comments. Please let me know if I can provide any additional information.

Sincerely yours,

Robert B. Serino
Acting Chief Counsel