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Re: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds – Docket No. OCC-2018-0010 (OCC); Docket No. R-1608 (Federal Reserve); RIN 3064-AE67 (FDIC); File Number S7-14-18 (SEC); RIN 3038-AE72 (CFTC)

The U.S. Chamber of Commerce ("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 a 21st Century economy. We appreciate the opportunity to respond to the interagency "Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds" (the "Proposed Revisions").

Section 619 of The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") amended the Bank Holding Company Act ("BHCA") and instituted a ban on short-term, speculative proprietary trading by covered banking entities. This statute grants rulemaking authority to five separate federal agencies: the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading Commission ("CFTC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Deposit Insurance Corporation ("FDIC") (collectively the "Agencies"). The statute instructs these five agencies to collaborate and coordinate among themselves with respect to rulemaking, supervision and coordinated examination of banking entities.[1]

The regulation implementing Section 619, commonly referred to as the Volcker Rule ("the Rule") was finalized on December 10, 2013 and was over 900 pages long.[2] The Proposed Revisions seek to address some of the adverse consequences and complexities of the Volcker Rule as implemented by the Agencies.

The Chamber opposed the addition of Section 619 to the Dodd-Frank Act. Instead, the Chamber had proposed higher capital standards as a pro-growth alternative to achieve the intent of financial stability. The Chamber has commented 15 times on the Volcker Rule, including its response to the Office of the Comptroller of the Currency's 2017 Request for Public Input.[3] The Chamber was specifically concerned that the Volcker Rule would restrict the ability of businesses to enter the debt and equity markets, and would raise their costs if they did so.

Many of these concerns came to fruition and we have seen unexplained periods of stress in the corporate bonds markets. Additionally, the process in promulgating the

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[1] Section 619 notes, "In developing and issuing regulations pursuant to this section, the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall consult and coordinate with each other, as appropriate, for the purposes of assuring, to the extent possible, that such regulations are comparable and provide for consistent application and implementation of the applicable provisions of this section to avoid providing advantages or imposing disadvantages to the companies affected by this subsection and to protect the safety and soundness of banking entities and nonbank financial companies supervised by the Board."

[2] 79 Fed. Reg. 5536 (Jan. 31, 2014).

[3] Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Volcker Rule); Request for Public Input. August 7, 2017. Available at https://www.federalregister.gov/documents/2017/08/07/2017-16556/proprietary-trading-and-certain-interests-in-and-relationships-with-covered-funds-volcker-rule

Volcker Rule was flawed as the administrative requirements for an economic analysis were largely ignored.

The Chamber encourages the Agencies to provide serious consideration to all recommendations that will allay the worst effects of the Rule, such as its damage to liquidity in the U.S. financial markets. The Treasury Department's June 2017 Report to President Trump, "A Financial System That Creates Economic Opportunities: Banks and Credit Unions," notes that "The Volcker Rule requires substantial amendment" and that the proprietary trading prohibition has "far overshot the mark" and has "hindered both market-making functions necessary to ensure a healthy level of market liquidity and hedging necessary to mitigate risk." The Chamber agrees with this assessment.

The Chamber believes that the Proposed Revisions failed to address some of the outstanding issues sufficiently. The Chamber believes that the Agencies should resolve the following issues:

1. **The Agencies Must Reduce Compliance Burden.**
2. **The Agencies Should Improve Coordination for Rulemaking and Compliance.**
3. **The Covered Funds Prohibition Should be Substantially Amended.**
4. **The Volcker Rule Must Be Considered Within Context of the Entire Post-Crisis Regulatory Regime.**
5. **The Agencies Must Undertake a Rigorous Cost-Benefit Analysis of the Volcker Rule.**

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1. <u>Agencies Must Reduce Compliance Burden.</u>

In general, the Chamber supports the Agencies' efforts to reduce the compliance burden within the confines of the statute. The summary of the Proposed Revisions notes, *"The Proposed amendments are intended to provide banking entities with clarity about what activities are prohibited and to improve supervision and implementation of section 13."* However, the Agencies must be mindful of the unintended consequences of new approaches that could unintentionally increase compliance costs.

a. Tailoring

The Chamber appreciates steps taken by the Agencies to tailor the application of the Rule and streamline compliance so that it is appropriate for the activities of supervised banks. As the Chamber stated in its Financing Main Street Agenda, "To balance growth and financial stability, the CCMC strongly supports replacing a one-size-fits-all approach with tailored bank regulation – sophisticated rules that are properly calibrated to the risk profile of an activity or institution. Tailoring is essential to effectuate a core principle of good government: regulation should impose the least burden necessary on society."[4]

The Proposal would establish three categories of banking entities based on their level of trading activity. Banking entities with "significant assets" are those with $10 billion or more in trading assets and liabilities and would not receive a tailored compliance regime. Banking entities with "moderate assets" are those that have at least $1 billion but less than $10 billion in trading assets and liabilities, and would have some requirements tailored to reflect their limited activities. Banking entities with "limited trading assets and liabilities," are those that have less than $1 billion in trading assets and liabilities, and these banks would be presumed to be in compliance with the Rule.

The Chamber appreciates efforts to tailor compliance based on the activities of banking entities.

b. Accounting Prong

The Rule currently expands on the statutory definition of "trading account" through the implementation of three different prongs. These include the "market risk capital prong," the "dealer prong" and the "short-term intent" prong. The last of those three has posed significant compliance challenges due to its subjective nature and overbroad application. The Proposed Revisions would revise the term "trading account" in the Rule by replacing the short-term intent-based prong with a new, even more expansive "accounting prong." The accounting prong would generally capture any purchase or sale of a financial instrument that is recorded at fair value on a recurring basis under applicable accounting standards. The Agencies note that this

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[4] U.S. Chamber of Commerce Center for Capital Markets Competiveness. Financing Main Street Agenda: Unlocking Capital for Job Creators (Fall 2017). Available at https://www.uschamber.com/sites/default/files/023348_ccmc_mainst._lendingreformagendafinal.pdf

would include, among other financial instruments, derivatives, trading securities and available-for-sale securities. For the reasons described below, the accounting prong should be eliminated in its entirety.

In theory, the accounting prong could provide clarity to banking entities through the submission of certain information to the Agencies regarding their trading activities. However, as currently proposed, the "accounting prong" covers far more financial instruments and trading activities, than necessary to achieve its stated objective - including long-term investment. It has the unintended consequence of increasing the compliance costs on covered banking entities and prohibiting activities that are currently permissible. Moreover, accounting standards have no bearing on whether an instrument is held for short-term purposes.

The proposed accounting prong is also inappropriate in the context of identifying impermissible trading activity and may have serious adverse effects on banking entities' established accounting and risk management practices. By incentivizing banking entities to classify debt securities as Held to Maturity (HTM)—and therefore not account for such debt securities at fair value—the accounting prong can be expected to reduce the liquidity of such securities. This impact would be especially detrimental during periods of market stress and volatility and could have an adverse impact on safety and soundness.

The Agencies must be able to demonstrate that the benefits of the accounting prong exceed the costs before using it as the basis for a change to the definition of a trading account. Federal Reserve Board Governor Powell has stated, "What the current law and rule do is effectively force you to look into the mind and heart of every trader on every trade to see what the intent is…If that is the test you set yourself, you are going to wind up with tremendous expense and burden."[5]

The accounting prong would create tremendous expensive and burden. The Agencies should either eliminate the accounting prong as proposed or consider alternatives to ensure that the scope of activity captured by the Volcker Rule is narrowly tailored to the short-term activity that the statute was intended to address, rather than the long-term investments and institutional structural risk management that the Accounting Prong currently captures. This decision should be guided by the principle of reducing the compliance burden on regulated institutions.

[5] https://www.bloomberg.com/news/articles/2017-01-07/fed-s-powell-urges-congress-to-take-another-look-at-volcker-rule

c. RENTD Prompt Limit Reporting

The Proposed Revisions introduce a requirement to inform "promptly" "the appropriate Agency" when a trading desk exceeds its internal risk limits relating to the presumption of compliance with RENTD, both in the underwriting exemption and the market making exemption. A banking entity is also required to report "promptly" to "the appropriate Agency" any temporary or permanent increase in an internal risk limit.[6]

This proposal to notify "promptly" the Agencies upon the occurrence of a risk limit breach or a temporary or permanent limit increase is contrary to both the Agencies' goals in amending the Volcker Rule, as stated in the Proposed Revisions, as well as the presumption of compliance that the Agencies describe in the preamble text. It is also impractical and administratively burdensome for both banking entities and regulators. The multiple existing information flows that provide information on risk limit breaches and increases in the context of supervisory oversight of covered banking entities make this proposal superfluous.

For example, the Agencies already receive this information from the banking entities under the risk metric called "Risk and Position Limits and Usage" that banking entities calculate daily for each trading desk. The "usage" column makes clear when a trading desk has exceeded their risk limits. We strongly believe that the prompt notification requirement will not yield any meaningful improvement in the ability of banking entities or Agencies to prevent or identify impermissible proprietary trading and would significantly increase burdens and costs.

Finally, the "prompt" reporting requirement may have a chilling effect on traders' willingness to request changes to limits where otherwise appropriate to accommodate customer demand. This could impair the liquidity provision function of market making and underwriting desks, especially during periods of market stress when the risk limits that apply to the relevant trading desk during normal market conditions may need to be adjusted to accommodate customer demand and ensure continued functioning of liquid markets.

In light of these considerations, we believe that the Agencies should not adopt the Proposed Rule's requirement that a banking entity must notify promptly the relevant Agency in relation to each temporary or permanent limit increase, or each occurrence

[6] Proposed Rule §§ _.4(a)(8)(iii) and _.4(b)(6)(iii). *See* NPR at 33456 (reporting requirement with respect to the underwriting exemption) and NPR at 33460 (reporting requirement with respect to the market making exemption).

of a trading desk exceeding its internal risk limits. Instead, banking entities should be permitted to leverage and rely on their existing risk management frameworks, including independent review, escalation and recordkeeping , whether Volcker-Rule specific (i.e., the Risk and Position Limits metric) or for prudential purposes. These frameworks are and would continue to be subject to supervisory examination and oversight and to the Agencies' anti-evasion authority under the Volcker Rule.

d. Metrics

The Agencies must not adopt any of the Proposed Revisions' approach to the metrics-reporting regime. The proposed additional metrics requirements significantly increase the complexity and burden of the required compliance program without any commensurate benefit to safety and soundness. In fact, the new metrics proposals result in a significant net increase in metrics data that would need to be produced by covered banking entities and that the Agencies would need to review, contrary to the objectives of reducing duplicative and unnecessary compliance burdens. Although the Notice of Proposed Rulemaking (NPR) states that it is eliminating certain existing metrics, the NPR has replaced these metrics with new requirements that vastly expand the data required to be calculated and reported by banking entities. The new reporting requirements would also require fundamental changes to the existing systems and technical logic underlying the firm's infrastructure for collecting and reporting quantitative data.

Specifically, we believe that the following additions in the Proposed Revisions would require significant amendment to specific features of the firm's reporting systems:

- Banking entities would be required to identify the "main booking entity" without a clear definition of how that should be determined, even though under the Volcker Rule it was acknowledged that trading desks could span multiple legal entities, and they do in practice.
- Banking entities would be required to create five separate schedules for reported information, including detailed risk factor sensitivity and cross-references between certain metrics. Not only is the mathematical relationship between the various metrics difficult, if not impossible, to establish – the additional data will not assist the Agencies in identifying proprietary trading or excessive risk activities
- The "holiday logic" for metrics reporting would need to be modified to reflect the expansion of the metrics-reporting requirement to include trading days

when U.S. locations are closed for trading but a non-U.S. location may be open.

e. Trading Desk Granularity

We believe that the Agencies should adopt the multi-factor approach in the Proposed Revisions to align the definition of that term with banking entities' existing operations and functional activities.

The Proposed Revisions leave unchanged the Volcker Rule's definition of "trading desk" but request comment on potential alternatives to that definition. We agree with the Agencies' observation that the current definition of trading desk has led to uncertainty, and we believe that defining the term to mean the "smallest discrete unit of organization" of the banking entity increases the administrative burden on banking entities without increasing effectiveness in detecting and preventing impermissible activity.[7] Critically, the Volcker Rule's definition has increased the level of inefficiency as well as the complexity for the firm when acting as a market intermediary.

If the Agencies' concern underlying the "trading desk" definition is the detection and prevention of impermissible activities (as indicated in the Volcker Rule)[8], the Agencies could better achieve that goal could be better achieved through a reasonably designed and comprehensive compliance program and examination and supervision in the ordinary course. We do not believe that achieving these goals requires creating new structures and introducing additional complexity and uncertainty into the way in which banking entities organize their internal operations and provide regulators with visibility into that organization.

The Proposed Revisions seek input on whether the Agencies should adopt a multi-factor definition of a "trading desk" for Volcker Rule purposes "based on the same

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[7] NPR at 82 ("Some banking entities have indicated that, in practice, this definition has led to uncertainty regarding the meaning of "smallest discrete unit." Some banking entities have also communicated that this definition has caused confusion and duplicative compliance and reporting efforts for banking entities that also define trading desks for purposes not related to the 2013 final rule, including for internal risk management and reporting and calculating regulatory capital requirements"); Proposed Rule § _.4(b)(2)(i).

[8] *See* 2013 Supplementary Information at 5591 ("The Agencies believe that establishing a defined organizational level at which many of the market-making exemption's requirements apply will address potential evasion concerns. Applying certain requirements of the market-making exemption at the trading desk level will strengthen their effectiveness and prevent evasion of the exemption by ensuring that the aggregate trading activities of a relatively limited group of traders on a single desk are conducted in a manner that is consistent with the exemption's standards.").

criteria typically used to establish trading desks for other operational, management, and compliance purposes."[9] If the Agencies believe that the "trading desk" definition must be retained, we would strongly support a multi-factor definition that aligns with banking entities' existing operations and functional activities.

In particular, we believe that the Agencies should clarify that a banking entity may designate as a "trading desk" any identifiable and operationally functional business unit or division of a banking entity that buys and sells financial instruments aligned to product lines or asset classes for clients, customers and counterparties. Further, the Agencies should clarify that a trading desk may be identified by one or more factors, such as a defined or documented business strategy, a management oversight structure, an annual budget, regular management information reports, a risk management structure or prudential trading limits.[10]

f. Liquidity Management Program

The Volcker Rule limits the liquidity management exclusion to "securities,"[11] which does not recognize that financial instruments that are not "securities" (*e.g.*, FX forwards and swaps) may be used for *bona fide* liquidity management purposes. The Proposed Revisions' expansion of this exclusion to include FX forwards, FX swaps and physically settled cross-currency swaps[12] is a welcome change. However, the liquidity management exclusion remains unnecessarily prescriptive and constraining in two respects.

First, the Agencies should expand the scope of financial instruments that may be transacted in reliance on the liquidity management exclusion to include all cleared derivatives and interest rate derivatives on both domestic and foreign government obligations. The use of cleared derivatives is a safe and transparent tool for banking

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[9] NPR at 33453.

[10] We would support defining "trading desk" as proposed in the Proposed Revisions "as a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is: (i) structured by the banking entity to establish efficient trading for a market sector; (ii) organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, strategies, and compensation incentives; and (ii) characterized by a clearly-defined unit of personnel that typically: engages in coordinated trading activity with a unified approach to its key elements; operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits; submits compliance reports and other information as a unit for monitoring by management; and books its trades together."]

[11] 2013 Rule § _.3(e)(3).

[12] Proposed Rule § _.3(e)(3).

entities to manage liquidity and interest rate risk. Purchases and sales of foreign government obligations facilitate effective and prudent management of exposures to foreign operations.

Second, the Agencies should make the prescriptive requirement to maintain a documented liquidity management plan with certain enumerated elements more practical in light of the risk management and control infrastructure that already applies to liquidity management activities. The Agencies should either eliminate the prescriptive requirements of a documented liquidity management plan, or clarify that the enumerated features of the liquidity management plan are non-exhaustive examples of appropriate elements of a plan to manage a firm's structural interest rate and liquidity risks. This amendment would facilitate the use of this critical exclusion and help to achieve the safety and soundness objectives of the Volcker Rule.

g. Market Making – Clients, Customers or Counterparties

The Agencies should facilitate liquidity by eliminating the limitations on treating other banking entities as clients, customers and counterparties.[13] This limitation artificially constrains the ability of banking entities to engage in trading activities that help increase liquidity and syndicate risk between market participants.

The plain meaning of the phrase "client, customers and counterparties" means all market participants. The statute does not indicate that different types of market participants should be treated differently for purposes of determining compliance with the market making exemption's conditions. Distinguishing between segments of the market in order to detect impermissible trading—for example, calculating RENTD—adds unnecessary complexity with no identifiable benefit. Moreover, for at least one banking entity, identifying counterparties as customers or non-customers for purposes of calculating RENTD has been a costly and burdensome exercise resulting in dozens of employees spending thousands of hours in initial implementation and ongoing compliance without a corresponding benefit.

[13] Proposed Rule § _.4(b)(3)(i) (providing that a trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty if that other entity has trading assets and liabilities of $50 billion, unless certain conditions are satisfied).

h. Risk Mitigating Hedging Exemption

We welcome the Agencies' proposals to simplify the risk-mitigating hedging exemption, and we believe they should be adopted.[14] In order to encourage efficient, sound risk management practices, we believe that the Agencies should further modify the requirements for this exemption by eliminating the conditions that are not expressly required by the statutory language describing permitted risk-mitigating hedging activities.[15]

Banking entities are subject to considerable internal and external risk management requirements, apart from those imposed by the Volcker Rule, that generally entail monitoring, independent audit and escalation procedures, documentation of risk exposures and risk management measures and lines of internal and external oversight that significantly mitigate the risk that risk-mitigating hedging activity would be used to conceal prohibited proprietary trading. The requirements of the Proposed Revisions' risk-mitigating hedging exemption unnecessarily duplicate aspects of this existing risk management and oversight framework.

i. Exclude Registered Investment Companies (RICs) from the definition of "banking entity."

Finally, the Agencies should use the opportunity to provide clarity for U.S. registered investment companies (RICs) and similar funds organized outside of the U.S. Such funds would be subject to the trading and investment restrictions of the Rule if considered an affiliate of a banking entity. It is highly unlikely that banks would use highly regulated pooled vehicles like RICs to engage in the type of proprietary trading that the Volcker Rule was originally designed to prevent. The Agencies have the authority to take action where there is "reasonable cause to believe that a banking entity" has engaged in an activity that "functions as an evasion of the

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[14] The Proposed Rule reduces the restrictions on the eligibility of an activity to qualify as a permitted risk-mitigating hedging activity by (i) eliminating the current requirement that the hedging activity "demonstrably reduces" or otherwise "significantly mitigates" risks; (ii) reducing the documentation requirements associated with risk-mitigating hedging transactions that are conducted by one desk to hedge positions at another desk with pre-approved types of instruments within pre-set hedging limits; and (iii) eliminating the currently existing requirement that banking entities conduct correlation analyses regarding their hedges. Proposed Rule §§ _.5(b), (c)(4).

[15] BHC Act § 13d(d)(1)(C) (providing that the proprietary trading and covered fund prohibition will not prohibit "[r]isk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings").

requirements of this [Section 13 of the BHC Act] (including through an abuse of any permitted activity)."

In addition, RICs are subject to extensive oversight by an independent board of directors, examination and inspection by the SEC, strong conflict of interest protections through prohibitions on affiliated transactions, and strict restrictions on leverage. Just as importantly, the SEC has a strong regulatory presence and has taken additional steps since the enactment of Dodd-Frank to address concerns with any perceived risks with RICs.

2. The Agencies Should Improve Coordination for Rulemaking and Compliance.

Experience shows that rulemaking and enforcement of the Volcker Rule would benefit from improved coordination among the five Agencies. In remarks before his departure from the Federal Reserve Board of Governors, Daniel Tarullo noted that the "Volcker rule is too complicated" and noted that providing five different agencies with authority contributes to such problems.[16]

We agree with the observation in the June 2017 Treasury Report that "banks have had difficulty obtaining clear, consistent guidance," which has contributed to inefficiencies for both the Agencies and the banking entities.

The substantive complexity and uncertainties of the 2013 Rule have been exacerbated by the fact that five regulatory agencies have joint implementation and enforcement authority. In addition, each Agency has its own interpretative approach, body of historical guidance, internal decision-making process and an effective veto over formal regulatory simplification or interpretation. Since the issuance of the 2013 Rule, the Agencies have acted jointly (via their "Frequently Asked Questions," or "FAQs") to provide interpretive guidance on only a small subset of the many important topics on which guidance has been requested, and many of the topics addressed by the FAQs relate to primarily administrative matters such as metrics reporting dates. The Agencies issued the most recent FAQ more than two and a half years ago.[17]

The Agencies should improve their coordination throughout rulemaking and consider opportunities to streamline the interagency rulemaking process. The

[16] Fed. Governor Tarullo ("Departing Thoughts," April 4, 2017), available at https://www.federalreserve.gov/newsevents/speech/tarullo20170404a.htm
[17] Frequently Asked Question #21 was jointly issued by the Agencies on March 4, 2016.

Proposed Revisions are a positive first step. A complicated rulemaking from five different Agencies requires a well-established understanding of the expectations for each Agency and how they will contribute to the stated goals for improvements to the Rule. The original rulemaking process may have been overly complex, partly because of ambiguities in the statute, but the collective action problem of competing and conflicting forces among the Agencies exacerbated this. The Agencies should not let their work on the Proposed Revisions be sidetracked, especially given their shared objectives.

The Agencies should simplify compliance with the Volcker Rule through improved coordination. As the Chamber wrote in a letter to Congress on April 12, 2018, "Experience has proved this regime to be overly complex and rulemaking has been disjointed and inconsistent. The inconsistency among regulators has made it more difficult for businesses to enter the debt and equity markets." This could be remedied through coordination of supervision and enforcement activities by regulators such as deference to the onsite examination team and the establishment of information sharing agreements and memorandums of understanding (MOUs) among the Agencies.

3. The Covered Funds Prohibition Should be Substantially Amended.

The Volcker Rule also prohibits any banking entity from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a covered fund, subject to certain exemptions. The "covered fund" definition was established to prevent indirect evasion of the proprietary trading prohibition. The Proposed Revisions would not change the definition of "covered fund," but instead request comment on whether the Agencies should reconsider the definition.

The Rule's definition of "covered fund" casts far too wide of a net for the types of investment that should be prohibited. The Chamber is disappointed by the absence of changes to the definition of "covered fund" in the Proposed Revisions, and we believe there is ample opportunity for changes that will engender capital formation.

The Agencies should undertake a holistic review of the covered funds prohibition. In general, banking entities should not be prohibited from participating in safe and sound investments. However, the Agencies must consider the substantial investment that firms have sunk into compliance with the current covered fund definition.

The Agencies should create additional exclusions from the current definition of covered fund and should ensure that the existing exclusions are appropriately

amended. In general, the Agencies should consider exclusions for long-term lending and investment. Currently, the Volcker Rule is pushing such activities out of regulated banking entities and may put U.S. capital markets at a comparative disadvantage.

The Rule blurs the definitions of "private equity fund" and "hedge fund," which has unnecessarily contributed to confusion for what includes permissible investment. For example, venture capital was never intended to be treated as an impermissible investment; however, it was caught up in the overly broad definition of "covered fund" in the Volcker Rule. This is clearly demonstrated by the Congressional Record. In a colloquy with Senator Boxer, then Chairman Dodd noted,

> "[Senator Boxer's] understanding is correct. ... I expect the regulators to use the broad authority in the Volcker Rule wisely and clarify that funds that invest in technology startup companies, such as venture capital funds, are not captured under the Volcker Rule and fall outside the definition of 'private equity funds.'"

Moreover, if a banking entity can engage in an activity directly through its balance sheet, then it should be appropriate for the firm to participate indirectly in the activity through a fund. Clearly, further additions to the list of exclusions of covered funds merit the consideration of the Agencies. The agencies should amend existing exclusions, such as the exclusion for foreign registered funds and align it with the exclusion for U.S. retail funds, which do not contain the same restrictions as the foreign public fund exclusion.

The Rule provides a narrow seeding exception for RICs, but even welcome follow-up guidance, such as FAQ 16, has provided an incomplete solution for accommodating industry practices, such as longer seeding periods) that would not bypass the stated goals of the covered funds prohibition. The Agencies should consider an express exclusion for RICs from the definition of banking entity to realize additional clarity. Furthermore, additional requirements for foreign public funds are inconsistent with the Agencies' objective to "treat foreign public funds consistently with similar U.S. funds and to limit the extraterritorial application of section 13 of the BHC Act." The agencies should amend existing exclusions, such as the exclusion for foreign registered funds, and align it with the exclusion for U.S. retail funds, which do not contain the same restrictions as the foreign public fund exclusion.

Finally, the Agencies should consider how the covered funds prohibition interacts with other aspects of the law. For example, the Volcker Rule may limit de novo bank charter applications from firms that have received funding from third party private

equity funds because the fund and fund manager could be subject to the covered funds prohibition. Neither Congress nor the Agencies appear to have contemplated this scenario, and it does not have a bearing on safety and soundness of the de novo charter.

4. **The Volcker Rule Must Be Considered Within Context of the Entire Post-Crisis Regulatory Regime.**

The Agencies must consider the Volcker Rule in light of new requirements on banking entities and their overall impact on capital markets. This is because a myriad of additional rules have been finalized since the Volcker Rule's implementation.

In 2016, The Chamber surveyed more than 300 corporate finance professionals about their core financial services needs and the indirect regulatory impact of all the newly adopted financial regulations. In this survey, nearly four in every five businesses said that financial industry regulation has directly affected their financing activities. The Volcker Rule, in addition to Basel III, the regulations for systemically important financial institutions, the SEC Money Market Fund Reforms, and the Liquidity Coverage Ratio, were viewed as having a negative effect on the surveyed businesses.

Each of these rules has a unique detrimental effect on our capital markets. In fact, the combination and overlap of these rules may mean the sum of the costs is more than their individual parts – this could be true given the increased risk of negative liquidity events and a comparative disadvantage our capital markets face compared to foreign economies.

5. **Agencies Must Undertake a Rigorous Cost-Benefit Analysis of the Volcker Rule.**

The Agencies must undertake a rigorous cost-benefit analysis of the Volcker Rule. The statutorily required analysis never took place when the Rule was originally promulgated. Additionally, the Agencies are now in possession of real-world data that may not have been available when the Rule was originally enacted. For example, a Federal Reserve study found that "Dealers regulated by the Rule have decreased their market-making activities while non-Volcker-affected dealers have stepped into provide some additional liquidity . . . Since Volcker-affected dealers have been the main liquidity providers, the net effect is that bonds are less liquid during times of stress due to the Volcker Rule."[18] While the Proposed Revisions contain more than

[18] Bao, J., Ohara, M., & Zhou, X. (. (2016). The Volcker Rule and Market-Making in Times of Stress.

the original rule proposed in terms of a cost-benefit analysis, none was provided by the SEC despite court rulings than an analysis be provided to the public during the comment process.[19]

a. Administrative Procedure Act and Executive Orders

CCMC strongly believes that the federal regulators should conduct a rigorous economic analysis as they develop rules, as required under the Administrative Procedure Act (APA) and Executive Orders. The Federal Reserve, FDIC, OCC, SEC, and CFTC each have differing legal standards and internal practices for economic analyses when promulgating a rule.[20]

The Federal Reserve is an independent agency, but it has avowed that it follows policies consistent with Executive Order 13563.[21] Consistent with this approach, the Federal Reserve has stated that it "continues to believe that [its] regulatory efforts should be designed to minimize regulatory burden consistent with the effective implementation of [its] statutory responsibilities."[22]

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[19] Business Roundtable and Chamber of Commerce of the United States of America v. United States Securities and Exchange Commission (United States Court of Appeals for the District of Columbia Circuit 2010), and Chamber of Commerce of the United States of America v. Securities and Exchange Commission (United States Court of Appeals for the District of Columbia Circuit 2006).
[20] *See* generally Paul Rose and Christopher J. Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation*
(March 2013), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBAReport-3.10.13.pdf. *See also* Comm. on Capital Mkts. Regulation, *A Balanced Approach to Cost-Benefit Analysis Reform* (Oct. 2013), *available at* http://www.capmktsreg.org/wp-content/uploads/2013/10/A-Balanced-Approach-to-Cost-Benefit-Analysis-Reform.pdf.
[21] Letter from Scott G. Alvarez, Gen. Counsel, Bd. of Governors of the Fed. Reserve Sys., to A. Nicole Clowers,
Dir., Fin. Mkts. and Cmty. Inv., Gov't Accountability Office (Oct. 24, 2011), *reprinted in* GAO-12-151, Dodd-
Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination 39 (Nov.
2011).
[22] Letter from Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., to Cass Sunstein,
Administrator, Office of Info. And Regulatory Affairs, Office of Mgmt. and Budget (Nov. 8, 2011), *available at*
https://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf.

The SEC is also an independent agency, but when promulgating rules, it must consider specific issues designated by the Securities Act and the Securities Exchange Act. For example, under Section 3(f) of the Exchange Act, the SEC is required to consider or determine whether an action is necessary or appropriate to advance the public interest in protecting investors and if a regulatory action will promote efficiency, competition and capital formation.[23] Also, Section 23(a)(2) of the Exchange Act requires the SEC, when adopting a rule, to take into consideration the impacts of proposed rule upon competition.[24] In addition to these considerations, the SEC is attempting to follow Executive Orders 13563 and 13579 by requesting comment on retrospective analysis of the costs and benefits of its regulations while soliciting comments on means of improving rulemaking.[25]

The CFTC must take several factors into consideration when it analyzes the costs and benefits of proposing a rule. These include considerations related to protecting market participants and the public. The CFTC must also consider whether a rule promotes the considerations of the efficiency, competitiveness, and the financial integrity of futures markets. The CFTC is also obliged to ensure that its rules do not impair the price discovery functions of the markets, and that they are consistent with considerations of sound risk-management practices and other public interest considerations.[26]

Executive Order 13563 requires agencies, when promulgating rules, to:

1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to justify);

2) Tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;

3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts; and equity);

4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and

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[23] 15 U.S.C. § 78c(f).
[24] 15 U.S.C. § 78w(a)(2).
[25] See SEC Press Release 2011-178, September 6, 2011.
[26] 7 U.S.C. § 19.

5) Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made to the public.[27]

Additionally, Executive Order 13563 states that "[i]n applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[28]

More recently, Executive Order 13772 specifically identified "foster[ing] economic growth and vibrant financial markets through more rigorous regulatory impact analysis" as a "core principle" for regulating the U.S. financial system.[29]

The Agencies failed to conduct a rigorous economic analysis as the Volcker Rule was being promulgated, and no information was made available to public for comment.[30] CCMC believes that many of the rule's widely-recognized failings can be directly traced to the Agencies' explicit decision to forgo a rigorous cost-benefit analysis.[31]

CCMC urges the Agencies to undertake a rigorous and methodologically sound economic analysis of Volcker Rule, and to make this analysis available for public review and comment. This analysis should consider both the administrative compliance burden as well as the broader impacts on market liquidity, access to capital, and economic growth. Finally, the analysis should strictly conform to standards of the APA and Executive Order 13563.

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[27] Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (incorporating by reference the requirement of the
Executive Order 12866). Executive Order 13579 requests that independent agencies comply with Executive
Order 13563.

[28] Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

[29] Exec. Order. 13,772, 82 Fed. Reg. 9,965 (Feb. 8, 2017).

[30] The CCMC recognizes that OCC later published an estimate of the compliance costs for 46 OCC-supervised banking institutions, under an assessment pursuant to the Unfunded Mandates Reform Act (UMRA).

[31] *See infra* note 32.

b. Riegle-Neal Community Development and Regulatory Improvement Act of 1944

The federal banking agencies – the Federal Reserve, FDIC, OCC – are subject to regulatory impact analysis requirements under the Riegle Community Development and Regulatory Improvement Act of 1994 (the Riegle Act). Section 302(a) of the Riegle Act states:

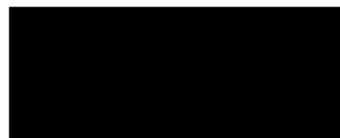
> "In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest — (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations."

The requirements of the statute are clear: the banking agencies must weigh the administrative burdens of a regulation against its benefits – *i.e.*, they must conduct a cost-benefit analysis.[32]

Conclusion

We appreciate the Agencies' willingness to propose changes to the Volcker Rule. From its inception, it has been clear that the Rule has been a solution in search of a problem. We urge the Agencies to make robust changes to the Rule that would improve capital formation without adding new regulatory or compliance costs for individual firms. Finally, we encourage the Agencies to work with Congress to provide clarification or feedback in instances where the statute may be overly ambiguous or vague. We are ready to work with the Agencies in this effort.

Sincerely,



Tom Quaadman

[32] 12 U.S.C. § 4802.