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Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEE ON
FINANCIAL SERVICES
FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT
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SMALL BUSINESS
VICE CHAIRMAN
AGRICULTURE,
ENERGY AND TRADE
HEALTH AND TECHNOLOGY

December 21, 2018

The Honorable Jerome Powell
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

The Honorable Joseph Otting
Comptroller
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

The Honorable Jay Clayton
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

The Honorable J. Christopher Giancarlo
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

The Honorable Steven Mnuchin, Chair
Financial Stability Oversight Council
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20500

Dear Chairs Powell, McWilliams, Giancarlo, Clayton, Comptroller Otting, and Secretary Mnuchin:

As Chairman of the Subcommittee on Financial Institutions and Consumer Credit, I am writing to comment on the notice of proposed rulemaking ("NPR")[1] issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency, the Securities and Exchange Commission, and the Commodity Futures Trading Commission (collectively, the "agencies") regarding the agencies' proposed amendments ("Proposed Rule") to the current rule ("Final Rule") implementing Section 13 of the Bank Holding Company Act, commonly referred to as the "Volcker Rule."[2]

The Proposed Rule, if adopted by the agencies, would exclude from the definition of "banking entity," and thereby exempt from the Volcker Rule, "an insured depository if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets."[3] The agencies sought comment on all aspects of the Proposed Rule,

[1] The NPR is available at: https://www.fdic.gov/news/board/2018/2018-12-18-notice-sum-b-fr.pdf.
[2] Pub. L. No. 111-203, § 619, 124 Stat. 1620 (2010) (codified at 12 U.S.C. § 1851).
[3] See §_.2(r)(2) of the Proposed Rule.

including whether the Proposed Rule provides sufficient clarity for firms to determine whether they qualify for the exclusion from the "banking entity" definition.

I am writing to clarify an apparent misunderstanding of the agencies that the intent of the 115th Congress in enacting the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA") earlier this year was to free only banks with less than $10 billion in total consolidated assets from the burdensome requirements of the Volcker Rule. To the contrary, the text of the statute, as duly enacted by both Houses of Congress and signed by the President, states that both banking organizations with less than $10 billion in total consolidated assets, as well as banking organizations with above $10 billion in assets but with limited trading activity (i.e., banking organizations whose trading assets and liabilities are less than 5% of their total consolidated assets) are exempt from the requirements of the Volcker Rule.

The agencies' Proposed Rule directly contradicts the statute. Although the NPR's preamble properly restates the statutory language of the EGRRCPA, the agencies, without explanation or legal justification, proposed amendatory text that deviates from the statute by only exempting small banking organizations with limited trading activity. Rather than implementing the exclusion from the Volcker Rule by simply cross-referencing the statute in the Proposed Rule, which is how the agencies have previously implemented Volcker Rule exclusions,[4] instead the agencies chose to rephrase the statutory language in a manner that completely changed the meaning of the law that was enacted by Congress and signed by the President.

The agencies do not have the authority to rewrite the law and override the express statutory text of the EGRRCPA. Therefore, the Proposed Rule should be revised to exclude from the definition of "banking entity" an insured depository if it has, and if every company that controls it has, total consolidated assets of $10 billion or less or total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

As you may know, I have been a proponent for a total repeal of the Volcker Rule. In 2016, in the 114th Congress, the House Financial Services Committee ("Committee") adopted H.R. 5983, the Financial CHOICE Act of 2016, that repealed the Volcker Rule entirely. When the 115th Congress convened, the Committee again adopted H.R. 10, the Financial CHOICE Act of 2017 ("CHOICE Act"), which was subsequently passed by the House on June 8, 2017. This version of the CHOICE Act, as well, contained a complete repeal of the Volcker Rule.

After the passage of the CHOICE Act by the full House in June 2017, the U.S. Department of Treasury released the Administration's proposal for rolling back the burdens of the Dodd Frank Act, pursuant to Executive Order 13772. In *A Financial System That Creates Economic Opportunities: Banks and Credit Unions*, the Administration proposed that banks under $10 billion in assets, as well as banks over $10 billion in assets with limited trading assets and liabilities, be exempt from requirements of the Volcker Rule.[5]

As the Senate took up consideration of its version of financial regulatory reform in 2017, the Administration (as well as some of the banking agencies) advocated for a broader repeal of

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[4] See §_.2(r) of the Final Rule.

[5] U.S. Dep't of the Treasury, *A Financial System that Creates Opportunities: Banks and Credit Unions*, page 8 (June 2017).

the Volcker Rule – i.e., that it should exempt banks under $10 billion in assets, as well as banks over $10 billion in assets with limited trading assets and liabilities. For instance, Chairman Powell noted that in prepared remarks that "[w]e also believe it would be constructive for Congress to consider focusing the Volcker rule on entities with significant trading books and eliminating the requirement that smaller firms be subject to the rule. In the meantime, we believe that it is worthwhile for the agencies to consider further tailoring of the implementing rule as it applies to smaller firms and firms with small trading books, and to consider ways to streamline or reduce the paperwork and reporting burden associated with the rule."[6] Chairman Powell noted further in oral testimony that "I think we would support a significant tailoring of the application of Volcker so that really it falls on the banks that have big trading books, and it falls much more lightly as you go down. It is very important that, you know, the intensity of regulation be tailored appropriately for the risks that the institutions present."[7]

Similarly, Keith Noreika, the Acting Comptroller of the Currency, reported to Congress that "[a] bipartisan consensus is emerging that the Volcker rule needs clarification and recalibration to eliminate burden on banks that do not engage in covered activities and do not present systemic risks."[8] Acting Comptroller Noreika further noted that "[t]his proposal would revise the Volcker Rule to limit its scope and focus on banking entities that are materially engaged in risky trading activities that have the potential to trigger systemic consequences. Community banks, given the nature and scope of their activities, would be exempted altogether. Other institutions would be exempted if they qualify for an 'offramp.' While asset size could be a factor in designing the off-ramp, qualification for the offramp would also depend on whether an institution engages in the type of activities, or in activities that present the type of risk, that the Volcker Rule was designed to restrict."[9]

The adopted language of Sec. 203 of the EGRRCPA represents a legislative compromise between the initial versions of reform of the Volcker Rule passed by the House and introduced into the Senate. This compromise reflects, for the most part, the position advocated by the Administration during the process.

It has been recently asserted by FDIC Director Martin Gruenberg that it was not the intent of the EGRRCPA to exempt banks with over $10 billion in assets and limited trading assets and liabilities from the Volcker Rule, and that this assertion is supported by the fact that heading to Sec. 203 of the EGRRCPA is "Community Bank Relief." This is incorrect. If one wishes to deduce the "intent of EGRRCPA," one should read the EGRRCPA. Sec. 203 of the EGRRCPA clearly exempts from the Volcker Rule both banking organizations with less than $10 billion in total consolidated assets, as well as banking organizations with above $10 billion in assets but with limited trading activity.

FDIC Director Gruenberg also asserts that his misreading of the statute must be correct because otherwise the plain language of the statute would exclude one or more banks designated as Global Systemically Important Banks (so-called "G-SIBs") from the Volcker Rule. Director

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[6] Fostering Economic Growth: Regulator Perspective: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 115th Cong. 38 (2017).

[7] *Id.*

[8] *Id.*

[9] *Id.*

Gruenberg misunderstands the underlying policy goals of both the Volcker Rule and the EGRRCPA. As explained in the original Senate Report accompanying the Volcker Rule, the rule was intended "to reduce the scale, complexity, and interconnectedness of those banking entities and nonbank financial companies that are now actively engaged in proprietary trading, or have hedge fund or private equity exposure..."[10] It is entirely consistent with this underlying purpose to exclude from the Volcker Rule banking organizations, regardless of their size, that are not susceptible to material risks arising from their relatively immaterial trading activities. There are countless other regulations imposed on G-SIBs and other banking organizations to ensure their safety and soundness. With the EGRRCPA, Congress made a clear determination to tailor the Volcker Rule to only apply to those firms with greater than $10 billion in assets with a relatively significant portion of their business comprised of trading activities.

In short, the statutory text of Sec. 203 of the EGRRCPA, including its use of a "negative conjunction" to describe which banking entities are exempt from the requirements of the Volcker Rule, clearly embodies our legislative compromise. To be crystal clear, Section 203 unambiguously amended the Volcker Rule to exclude two types of institutions: (i) an institutions that does not have, and is not controlled by a company that has, $10 billion or more in total consolidated assets, and (ii) an institution that does not have, and is not controlled by a company that has, trading assets and liabilities representing more than 5% of its total consolidated assets (regardless of the size of the institution's consolidated assets).

I urge you to respect this hard-fought legislative agreement through the use of our precise and carefully considered statutory text as you proceed to implement the EGRRCPA.

It had been my pleasure to work with all of your agencies during my tenure as Chairman of the Subcommittee on Financial Institutions and Consumer Credit during the 115th Congress. I look forward to continuing our work together next year.

Sincerely,

[redacted]

Blaine Luetkemeyer
Chairman
Subcommittee on Financial Institutions and Consumer Credit
House Financial Services Committee

[10] S. Rep. No. 111-176, p. 9.