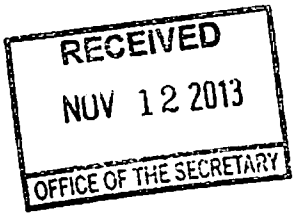
BIPARTISAN POLICY CENTER

October 31, 2013



Mary Jo White, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

SEC (File Number S7-41-11)

Dear Chair White:

The Bipartisan Policy Center's (BPC) Financial Regulatory Reform Initiative[1] has produced a report on the implementation of the Volcker Rule, a copy of which is enclosed. The report, which was written by James Cox, Jonathan Macey, and Annette Nazareth, proposes a path toward implementation of the Volcker Rule that is intended to achieve the intent of the Rule while allowing capital markets to function efficiently.

The report acknowledges that "a well-crafted Volcker Rule will build on other provisions in Dodd-Frank that protect taxpayers, investors, and corporate issuers from the risk of having to pay—directly or indirectly—for speculative bets made by insured depository institutions or their affiliates." At the same time, the report states that a Volcker Rule "that lacks clarity could allow activities that Congress intended to be impermissible to continue to take place" and that a Volcker Rule "that is overly rigid and proscriptive would be inefficient and potentially shut out market activities that Congress intended to be permissible."

[1] The Bipartisan Policy Center's Financial Regulatory Reform Initiative was formed to analyze, assess, and recommend ways to improve financial regulatory policy, including the effects of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Financial Regulatory Reform Initiative's overarching objective is to promote policies that balance financial stability, economic growth, and consumer protection. The Initiative is co-chaired by Martin Baily and Phillip Swagel, and it has Task Forces dedicated to systemic risk, failure resolution, consumer protection, capital markets, and regulatory architecture. For additional detail on the Initiative, including the Initiative's other reports, see http://bipartisanpolicy.org/projects/financial-regulatory-reform-initiative.

impermissible to continue to take place" and that a Volcker Rule "that is overly rigid and proscriptive would be inefficient and potentially shut out market activities that Congress intended to be permissible."

To achieve a workable and effective Volcker Rule, the report recommends that financial regulators take six steps in the implementation of the Rule. Those steps are as follows:

1. Gather relevant data: Financial regulators should gather a robust set of data about trading activities to allow themselves the opportunity to clearly identify relevant patterns. Good judgment about the proper application of the Volcker Rule and how to separate permissible from impermissible activities requires gathering real-world trading data from market participants for each trading activity and asset class.

2. Identify patterns by activity and product, then assign and monitor with key metrics: Regulators should analyze collected data to identify relevant patterns of trading activity to assign one or more metrics that are relevant to defining what constitutes proprietary trading. Examples of metrics that might be considered are day-one profit and loss, spread profit and loss, customer-facing trade ratio, and value at risk.

3. Differentiate among markets, activities, and asset classes: Regulators should identify an appropriate set of metrics holistically in a way that best fits each asset class, product, and market. The usefulness of any given metric will vary depending on asset class, liquidity of financial instruments, and other specific market characteristics. For example, a metric that relies on bid-ask spreads is unlikely to be as effective in relatively illiquid markets where trading is infrequent than in more liquid markets.

4. Implement on a phased-in basis: Financial regulators should sequence compliance with the final regulations to allow agencies time to monitor for unanticipated effects and to make any appropriate modifications based on the metrics and unique characteristics of each individual market and product. It is likely that the agencies can identify some products and markets where the regulations can be implemented with greater ease and speed than for other products and markets due to their differing complexities. Therefore, this new approach would give agencies the option to implement the Rule on a phased-in basis rather than universally at one time.

5. Update iteratively as needed to account for real-world impacts: Financial regulators should adopt a methodology that collects and analyzes data before

proprietary trading is defined and that relies on a phased-in implementation to allow regulators to learn as they go. Moreover, it is important that regulators continually analyze the real-world impacts of the Volcker Rule after it is implemented. Doing so will allow agencies to improve the Rule's effectiveness over time without negative effects on financial markets or the economy.

6. Adopt the Federal Reserve's approach in Regulation K to address extraterritorial reach: Financial regulators should adopt the Federal Reserve's approach in its existing Regulation K to address the extraterritorial problems of the Volcker Rule with respect to foreign banking organizations and what activities occur "solely outside the United States."

Sincerely,

Aaron Klein
Director, Financial Regulatory Reform Initiative

Economic Policy Program

Financial Regulatory Reform Initiative

A Better Path Forward on the Volcker Rule and the Lincoln Amendment

October 2013

BIPARTISAN POLICY CENTER

ABOUT BPC

Founded in 2007 by former Senate Majority Leaders Howard Baker, Tom Daschle, Bob Dole, and George Mitchell, the Bipartisan Policy Center (BPC) is a nonprofit organization that drives principled solutions through rigorous analysis, reasoned negotiation, and respectful dialogue. With projects in multiple issue areas, BPC combines politically balanced policymaking with strong, proactive advocacy and outreach.

ABOUT THE FINANCIAL REGULATORY REFORM INITIATIVE

The Financial Regulatory Reform Initiative (FRRI) is co-chaired by Martin Baily and Phillip Swagel. Composed of five task forces, FRRI's goal is to conduct an analysis of Dodd-Frank to determine what is and what is not working along with recommendations to improve the system.

DISCLAIMER

This white paper is the product of the BPC's Financial Regulatory Reform Initiative. The findings and recommendations expressed herein do not necessarily represent the views or opinions of the Bipartisan Policy Center, its founders, or its board of directors.

AUTHORSHIP

This paper is authored by the co-chairs of the Capital Markets Task Force:

James D. Cox
Jonathan R. Macey
Annette L. Nazareth

The authors appreciate the work and input of the initiative co-chairs, fellow task force members, and BPC staff.

Table of Contents

and chill legitimate market-making and hedging activity on the other, due to uncertainty about its application. A Volcker Rule that is overly rigid and proscriptive would be inefficient and potentially shut out market activities that Congress intended to be permissible. A rigid rule could also, depending on its formulation, technically allow activities that are not within the spirit of the Volcker Rule.

In contrast, a well-crafted Volcker Rule will build on other provisions in Dodd-Frank that protect taxpayers, investors, and corporate issuers from the risk of having to pay—directly or indirectly—for speculative bets made by insured depository institutions or their affiliates. It will be effective in limiting proprietary trading while avoiding limitations on positive and necessary financial activities such as hedging and market-making. And, it will achieve its ends without compromising market integrity, unduly restricting liquidity and capital formation, or harming the U.S. economy or the competitive market position of U.S. firms.

Because of the complexity of this issue, the difficulty regulators have had in producing final regulations, and the significance of the rule's potential impact, BPC's Capital Markets Task Force proposes that the agencies adopt a new and improved approach that will distinguish between permissible market-making and hedging, and impermissible proprietary trading. This approach will allow regulators to move quickly beyond their current gridlock and implement a workable and effective Volcker Rule. Specifically, the task force recommends that regulators take the following six steps to implement Section 619 of Dodd-Frank:

1. **Gather relevant data**: Financial regulators should gather a robust set of data about trading activities to allow themselves the opportunity to clearly identify relevant patterns. Good judgment about the proper application of the Volcker Rule and how to separate permissible from impermissible activities requires gathering real-world trading data from market participants for each trading activity and asset class.

2. **Identify patterns by activity and product, then assign and monitor with key metrics**: Regulators should analyze collected data to identify relevant patterns of trading activity to assign one or more metrics that are relevant to defining what constitutes proprietary trading. Examples of metrics that might be considered are day-one profit and loss, spread profit and loss, customer-facing trade ratio, and value at risk.

3. **Differentiate among markets, activities, and asset classes**: Regulators should identify an appropriate set of metrics holistically in a way that best fits each asset class, product, and market. The usefulness of any given metric will vary depending on asset class, liquidity of financial instruments, and other specific market characteristics. For example, a metric that relies on bid-ask spreads is unlikely to be as effective in relatively illiquid markets where trading is infrequent than in more liquid markets.

4. **Implement on a phased-in basis**: Financial regulators should sequence compliance with the final regulations to allow agencies time to monitor for unanticipated effects and to make any appropriate modifications based on the

metrics and unique characteristics of each individual market and product. It is likely that the agencies can identify some products and markets where regulation can be implemented with greater ease and speed than for other products and markets due to their differing complexities. Therefore, this new approach would give agencies the option to implement the rule on a phased-in basis rather than universally at one time.

5. **Update iteratively as needed to account for real-world impacts**: Financial regulators should adopt a methodology that collects and analyzes data before proprietary trading is defined and that relies on a phased-in implementation to allow regulators to learn as they go. Moreover, it is important that regulators continually analyze the real-world impacts of the Volcker Rule after it is implemented. Doing so will allow agencies to improve the rule's effectiveness over time without negative effects on financial markets or the economy.

6. **Adopt the Federal Reserve's approach in Regulation K to address extraterritorial reach**: Financial regulators should adopt the Federal Reserve's approach in its existing Regulation K to address the extraterritorial problems of the Volcker Rule with respect to foreign banking organizations and what activities occur "solely outside the United States."

The Lincoln Amendment

Section 716 of the Dodd-Frank Act, also known as the Lincoln Amendment, or the "swaps push-out rule," was, like the Volcker Rule, intended to protect taxpayer funds by prohibiting federal assistance from being given to entities engaged in swaps.[13] The effect of this provision is that insured banks must "push out" their swaps business to nonbank affiliates that are not eligible for deposit insurance or access to the Federal Reserve's discount window.

Once the final regulations implementing the Volcker Rule have been issued, policymakers will be in a better position to assess whether the initial rationale for the Lincoln Amendment remains persuasive and, if so, how best to address those concerns. The Volcker Rule may well achieve the goals of Section 716 in a more comprehensive manner. Bank regulators already have permitted delays in complying with the Lincoln Amendment for up to two years past the July 2013 effective date as they continue to determine how it can be implemented while avoiding significant unintended consequences. Indeed, Chairman Volcker, Federal Reserve Chairman Ben Bernanke, and former FDIC Chairman Sheila Bair have all expressed concerns about the Lincoln Amendment.[14]

Thus, the task force recommends a wait-and-see approach regarding the Lincoln Amendment until more experience can be gained from the Volcker Rule in the amended form the task force proposes. If Congress is satisfied with regulators' implementation of the Volcker Rule—as the task force believes they should be under its alternative proposal—then

the Lincoln Amendment could be repealed without any negative effect on the safety and soundness of the U.S. financial system.

Introduction

This white paper offers a new, improved alternative approach to the effective implementation of the Volcker Rule, a provision of the Dodd-Frank Act named for former Federal Reserve Board Chairman Paul Volcker. The Volcker Rule was included in Dodd-Frank because many lawmakers believed that some commercial banks and their affiliates that had access to federal safety-net features such as deposit insurance were engaged in risky, speculative bets to increase their profits. A 2009 report from the Group of Thirty,[15] for which Chairman Volcker chaired the committee on financial reform, stated:

> Recent experience in the United States and elsewhere has demonstrated instances in which unanticipated and unsustainably large losses in proprietary trading, heavy exposure to structured credit products and credit default swaps, and sponsorship of hedge funds have placed at risk the viability of the entire enterprise and its ability to meets its responsibilities to its clients, counterparties, and investors.[16]

However, others have argued that the Volcker Rule was unnecessary because proprietary trading had little if anything to do with the 2007–2008 financial crisis. The original reform proposals by the Obama administration, House, and Senate did not contain any provision similar to the Volcker Rule. Critics also have contended that the rule is needlessly complicated and onerous to market participants. They argue that it does not accurately take into account how financial trading is done in the real world. Some observers say that certain aspects of the proposed Volcker Rule regulations are fundamentally impossible to implement without significant unintended consequences.

Regulators have heard from both sides as they have conducted their rule-writing process. The five agencies responsible for writing the rule have been working on implementing regulations for more than three years, reflecting the difficulty and complexity of clearly defining the differences between permissible activities, such as market-making and hedging, and impermissible proprietary trading. The delay also underscores how important it is that the agencies get the final rule right. A Volcker Rule that is either too rigid or too permissive could be damaging to stakeholders and to the U.S. economy.

Because of the difficulty and delay in finalizing and implementing the Volcker Rule regulations as proposed, the task force proposes an improved alternative approach consisting of five specific recommendations to implement the Volcker Rule in a way that maximizes its benefits to all stakeholders. Instead of a “one-size-fits-most” approach, the agencies should adopt a functional, iterative, and product-based approach to distinguish between permissible and impermissible activities—an approach that not only is informed by data, but also recognizes differences across markets, instruments, and asset classes. Under this functional model, regulators would collect data and develop quantitatively based metrics to develop definitions of which activities in each relevant market and each product

type are permissible for banking organizations. It would distinguish those activities from impermissible proprietary trading. By using metrics and examining individual products and markets, regulators would identify and clearly define impermissible activities. Metrics also would be developed to identify, in appropriate cases, safe harbors for certain trading activities for banking organizations to ensure adequate liquidity and the ability to meet customer needs.

The task force recommends that the regulators adopt its alternative approach—which is both better and easier to implement in the real world without potentially disrupting financial markets or causing unintended consequences for the economy—and modify the proposed Volcker Rule implementing regulations accordingly.

Background on the Development of the Volcker Rule

THE GROUP OF THIRTY REPORT

During the financial crisis, the Group of Thirty report highlighted proprietary trading by a limited number of large banking organizations. The Group of Thirty report recommended that:

> Large, systemically important banking institutions should be restricted in undertaking proprietary activities that present particularly high risks and serious conflicts of interest. Sponsorship and management of commingled private pools of capital (that is, hedge and private equity funds in which the banking institutions own capital is commingled with client funds) should ordinarily be prohibited and large proprietary trading should be limited by strict capital and liquidity requirements.[17]

TREASURY WHITE PAPER AND CONGRESSIONAL FINANCIAL REFORM BILLS

Many of the provisions in Dodd-Frank were originally proposed by the Treasury Department in a white paper titled "Financial Regulatory Reform: A New Foundation."[18] That paper recommended heightened supervision of proprietary trading and investments in hedge funds by banking organizations. Specifically, the paper called for the Federal Reserve Board and other federal banking agencies to "tighten the supervision and regulation of potential conflicts of interest generated by the affiliation of banks and other financial firms, such as proprietary trading units and hedge funds."[19]

The financial reform bill that was subsequently approved by the House of Representatives took Treasury's recommendation a step further. It empowered the Federal Reserve Board to prohibit certain financial companies from engaging in proprietary trading if the Board determined that such activities posed "an existing or foreseeable threat to the safety and soundness of such company or to the financial stability of the United States."[20]

In early 2010, after the House of Representatives passed its version of financial reform and before Senate Banking Chairman Christopher Dodd (D-CT) introduced his version of the legislation, President Obama and former Chairman Volcker called upon Congress to require regulators to ban proprietary trading and investments in hedge funds by banking

organizations. President Obama referred to this proposal as "the Volcker Rule."[21] Chairman Volcker later expanded upon the proposal, explaining that these activities "present virtually insolvable conflicts of interest with customer relationships," as they place "bank capital at risk in the search of speculative profit rather than in response to customer needs."[22]

The merits of the proposed Volcker Rule were debated in hearings before the Senate Banking Committee. At one of those hearings, the Treasury Department explained its endorsement of the Volcker Rule:

> [W]e have come to the conclusion that further steps are needed: that rather than merely authorize regulators to take action, we should impose mandatory limits on proprietary trading by banks and bank holding companies, and related restrictions on owning or sponsoring hedge funds or private equity funds, as well as on the concentration of liabilities in the financial system. These two additional reforms represent a natural—and important—extension of the reforms already proposed.[23]

Chairman Volcker made his case for the rule:

> [The] proposal, if enacted, would restrict commercial banking organizations from certain proprietary and more speculative activities. In itself that would be a significant measure to reduce risk.[24]

However, then–Ranking Member Senator Richard Shelby (R-AL) expressed concerns about the ability of regulators to implement the proposed legislation:

> Unfortunately, the manner in which the Administration's proposals will accomplish that objective remains elusive. With respect to placing limitations on the proprietary trading activities of banks, Chairman Volcker and [Deputy Secretary of the Treasury Neal] Wolin seem conflicted on how regulators could, in practice, distinguish proprietary trades from trades made by banks to help fulfill customer needs.[25]

Senator Bob Corker (R-TN) also questioned the rationale for the provision in the context of the financial crisis:

> [N]ot a single organization that was a bank holding company or a financial holding company that had a commercial bank had any material problems at all with proprietary trading.[26]

During the Senate hearings, Treasury acknowledged that, "regulators will have to deal with some definitional issues as they implement the basic principle if it were to be lodged in statute."[27]

The advocates of the Volcker Rule succeeded in including a version of it in the legislation approved by the Senate Banking Committee. The committee-passed bill prohibited banking organizations from engaging in proprietary trading and investing in hedge funds and private equity funds.[28]

When the committee-passed financial reform bill was considered on the Senate floor, Senators Jeff Merkley (D-OR) and Carl Levin (D-MI) proposed a more comprehensive

version of the rule based upon the PROP Trading Act, which they had co-sponsored.[29] That amendment was never voted upon by the Senate, but subsequently was adopted by the Conference Committee, which produced the final legislation.[30]

The final legislative text in Section 619 of Dodd-Frank differs from the PROP Trading Act in several respects. For instance, the PROP Trading Act would have largely codified its prohibitions in statute, avoiding the need for a heavy reliance on regulatory interpretation by federal agencies. Additionally, a compromise in the final legislation allowed for "de minimis" investments (up to 3 percent of Tier 1 capital) in sponsored hedge funds or private equity funds for financial institutions. Further, the Merkley-Levin provisions were modified to extend the time period for compliance with these new requirements and to increase the number of agencies responsible for writing the rule from two—the FDIC and the FRB—to five, adding the the Commodity Futures Trading Commission (CFTC), the Office of the Comptroller of the Currency (OCC), and the SEC. Dodd-Frank made the FSOC chairman responsible for coordination of the regulations issued by the five agencies and required the FSOC chairman to study and make recommendations on implementing the Volcker Rule. However, it did not require the FSOC to vote on the Volcker Rule, leaving implementation up to the five regulators.

Thus, Senators Merkley and Levin are recognized as key authors of the statutory text of the Volcker Rule.[31] After the adoption of their amendment by the conferees, Senators Merkley and Levin said:

> The inclusion of a ban on proprietary trading is a victory. If implemented effectively, it will significantly reduce systemic risk to our financial system and protect American taxpayers and businesses from Wall Street's risky bets. This is an important step forward from the current system that has placed few limits on speculative trading by either banks or other financial firms. Now banks will be prohibited from doing these trades and other financial giants will have to put aside the capital to back up their bets.[32]

The Implementation of the Volcker Rule

As noted previously, the treasury secretary, in his role as FSOC chair, was given the job of coordinating the promulgation of Volcker Rule regulations by the five agencies.[33] Congress directed the FSOC to conduct a study on the Volcker Rule and to make recommendations to the agencies. That study, which was released in January 2011, proposed some general principles to guide the regulators in drafting regulations and acknowledged the challenge they faced, especially in connection with the prohibition on proprietary trading:

> The challenge inherent in creating a robust implementation framework is that certain classes of permitted activities—in particular, market making, hedging, underwriting, and other transactions on behalf of customers—often evidence outwardly similar characteristics to proprietary trading, even as they pursue different objectives. In addition, characteristics of permitted activities in one market or asset class may not be the same in another market (e.g., permitted activities in a liquid equity securities market may vary significantly from an illiquid over-the-counter derivatives market).[34]

Four of the agencies issued a proposed regulation in October 2011, with the CFTC adopting a nearly identical proposal in January 2012.[35] Consistent with the terms of the statute, the proposed rule had two main components: prohibition of proprietary trading, and restrictions on relationships with private equity and hedge funds, which are summarized below.

Proprietary Trading

The proposed regulation bans "proprietary trading" activities by banking entities, which include not only banks but all of their affiliates and subsidiaries.[36] "Proprietary trading" is prohibited in "covered financial products," which include securities, futures, and derivatives, subject to exceptions for repurchase agreements and certain other contracts. The agencies define proprietary trading as engaging as principal in acquiring or taking financial positions for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging any of these positions.[37] There are a few exemptions from this definition for activities including liquidity management. In addition, under the proposed regulations, a trade would be permissible if it is within the scope of a "permitted activity," which is, in essence, an exemption. Those exemptions include bona fide market-making, securities underwriting, and risk-mitigating hedging activities, among others. To qualify for an exemption, a banking organization would be required to demonstrate that the activity meets certain criteria. Under this "negative presumption," the proposed regulation presumes that a trade is impermissible unless the

criteria are satisfied. For example, a market-making trade would be prohibited under the proposed regulation unless, among other conditions:

- The entity "holds itself out as willing to buy or sell, including through entering into long and short positions in, the covered financial position for its own account on a regular and continuous basis";
- The entity is registered as a dealer for the appropriate instrument (or is exempt from such registration) and has an internal compliance program that addresses the features and risks unique to the particular activity;
- The trade is reasonably designed to meet the near-term demands of customers;
- The trade generates income for the entity primarily through fees, commissions, and spreads and not from the position's increase in value; and
- The compensation of the person performing the trade does not reward proprietary risk-taking.[38]

Additionally, the trade could not represent a conflict of interest, expose the organization to a high-risk asset or trading strategy, or pose a threat to the safety and soundness of the banking entity or to U.S. financial stability.[39]

Private Equity and Hedge Funds

The proposed regulation would also prohibit a banking organization from acquiring or retaining an ownership interest in a "covered fund," which the agencies define to mean a broad set of entities that rely on certain exemptions imported from the registered mutual fund regulatory regime, or that are commodity pools, including private equity and hedge funds.[40] Again, certain exemptions would apply to this prohibition.

The proposed regulation also would prohibit banking organizations from sponsoring covered funds. This includes serving as a general partner, managing member, commodity pool operator, or trustee for the fund; sharing a name with the fund; or selecting or controlling a majority of the fund's management.[41] Under the proposed regulation, a banking organization could sponsor and hold ownership interest in a covered fund if it is partaking in an exempt activity for the fund. Exemptions listed in the proposed regulation include:

- Asset management if the banking organization's interest is a de minimis amount and certain other restrictive conditions are met;
- Hedging, if the bank is hedging an interest in that same fund that arises out of a transaction for a customer or a performance compensation agreement and the trade does not expose the bank to significant risk; and
- Investment in foreign covered funds by foreign banking entities where the activity is solely outside the United States.[42]

Even if a banking organization acting under one of the above exemptions is allowed to sponsor or hold an interest in a covered fund, the activity is only permissible if it could not cause a conflict of interest, expose the entity to a high-risk asset or trading strategy, or pose a threat to the safety and soundness of the banking entity or to U.S. financial stability.[43]

Compliance

In addition to the prohibitions and restrictions outlined above, the agencies proposed a reporting and compliance regime to enforce the Volcker Rule.[44] While the specifics of the compliance program are complex, the agencies proposed that all banking entities have a basic preventative compliance program. Banking entities with $1 billion or more in trading assets and liabilities would be required to establish a comprehensive compliance regime that would include documenting, describing, and monitoring possible violations; making senior and intermediate managers responsible for the compliance plan; and providing periodic reports to regulators containing a wide range of data, in the form of "metrics," including value-at-risk, profit and loss, inventory aging, fee income and expenses, and others. For banking entities with $5 billion or more in trading assets and liabilities, the agencies proposed an even larger suite of reporting and compliance standards.

Reactions to the Proposed Regulation

The proposed regulations generated substantial interest from outside stakeholders. More than 16,000 comments were filed in support of the rule (most were form letters), while 2,200 letters included substantive criticisms. The proposed regulations were criticized by both the proponents and the opponents of the original Volcker Rule.[45] The chief congressional sponsors of the Volcker Rule, Senators Merkley and Levin, called the proposed regulation "too tepid" and stated that it "does not fulfill the law's promise."[46] Likewise, public-interest groups argued that overly broad definitions of permitted activities and the various exemptions ensured that the regulations would not be effective in controlling proprietary trading or limiting systemic risk.[47] Federal Reserve Board Governor Sarah Bloom Raskin, who dissented in the vote to approve the proposed regulations, generally echoed these views, saying that the safeguards they placed to protect the integrity of the banking system were, "insufficient," and, "could be subject to significant abuse—abuse that would be very hard for even the best supervisors to catch."[48] On the other hand, many affected banking organizations, foreign central bankers, and other stakeholders found that the proposal failed to strike the appropriate balance between proscribing proprietary trading while protecting financial markets and market participants and criticized the covered fund provisions as well.[49] As mentioned above, even Chairman Volcker was quoted in the press as saying, in effect, that the proposed regulations were too complex as a result of the various exceptions and exemptions.[50]

A New, Better Alternative for Implementing the Volcker Rule

The critical response to the proposed regulations highlights the difficult task the agencies face in crafting regulations to implement the Volcker Rule. The agencies have a statutory mandate to produce a final rule, and it is imperative that they get final regulations right. However, it is often not easy to distinguish permissible market-making and risk-mitigating hedging from impermissible proprietary trading.

Getting the regulations right requires the agencies to adopt a functional, iterative approach that relies on gathering data for each asset class, identifying trading patterns, and using the knowledge thereby gained to define proprietary trading. This functional, data-driven model would represent a fundamental shift away from the "one-size-fits-most" approach taken in the proposed regulations—in which market-making activities would be determined largely through the lens of highly liquid equity trading despite the significant differences among product categories and asset classes, and negative presumptions would compel a trade-by-trade approach to compliance.

The framework adopted by the agencies in the proposed regulations is that activities are prohibited, unless there is a clear showing that they do not fall into prohibited categories. For example, the proposed regulations ban all short-term principal trading activity unless the activity meets all of the criteria of certain narrowly defined permitted activities, such as market-making-related activities and risk-mitigating hedging.

The negative-presumption approach as proposed is needlessly complex and may well preclude legitimate activity, perhaps on a significant scale. This would occur if banking organizations were to avoid activities with respect to which there is any doubt about the success of rebutting the presumption. For example, a comment letter submitted on the proposed rule by the American Bankers Association, the Clearing House, the Financial Services Roundtable, and the Securities Industry and Financial Markets Association noted that many illiquid markets could fail to meet negative-presumption tests, because they often do not have readily available bid-ask spread data that the agencies listed as a requirement for being designated a permissible market-making activity.[51]

The aggregate impact of banking organizations pulling back from legitimate principal activities could harm financial markets. A decrease in risk-mitigating hedging activity would jeopardize the effectiveness of a banking organization's risk management, which in turn would pose risks for the financial system and broader economy. If legitimate hedging

opportunities were avoided because of an inability to rebut the proposed regulations' negative presumption, large financial firms may hedge less and become inherently more risky. This would reduce or negate a fundamental purpose of the Volcker Rule, which was to reduce taxpayer exposure to risky behavior by financial institutions. In addition, reduced market-making activity would lead to decreased liquidity and, consequently, to higher borrowing costs for corporations and higher trading costs and greater price volatility for investors.

Because of the complexity of this issue, the difficulty regulators have had in producing final regulations, and the significance of the potential impact of the regulations, the task force recommends that the agencies adopt a different approach to distinguish between permissible market-making and hedging and impermissible proprietary trading. This approach will allow regulators to move quickly beyond their current gridlock and implement workable and effective regulations. Specifically, regulators should take the following six actions to implement Section 619 of Dodd-Frank:

1. **Gather relevant data**: Financial regulators should gather a robust set of data about trading activities to allow regulators the opportunity to clearly identify relevant patterns. Good judgment about the proper application of the Volcker Rule and how to separate permissible from impermissible activities requires gathering real-world trading data from market participants for each trading activity and asset class.

2. **Identify patterns by activity and product, then assign and monitor with key metrics**: Regulators should analyze collected data to identify relevant patterns of trading activity to assign one or more metrics that are relevant to defining what constitutes proprietary trading. Examples of metrics that might be considered are day-one profit and loss, spread profit and loss, customer-facing trade ratio, and inventory risk turnover.

3. **Differentiate among markets, activities, and asset classes**: Regulators should identify an appropriate set of metrics holistically in a way that best fits each asset class, product, and market. The usefulness of any given metric will vary depending on asset class, liquidity of financial instruments, and other specific market characteristics. For example, a metric that relies on bid-ask spreads is unlikely to be as effective in relatively illiquid markets where trading is infrequent than in more liquid markets.

4. **Implement on a phased-in basis**: Financial regulators should sequence compliance with the final regulations to allow agencies time to monitor for unanticipated effects on markets and the economy, and to make any appropriate modifications based on the metrics and unique characteristics of each individual market and product. It is likely that the agencies can identify some products and markets where regulation can be implemented with greater ease and speed than for other products and markets due to their differing complexities. Therefore, this new

approach would give agencies the option to implement the rule on a phased-in basis rather than universally at one time.

5. **Update iteratively as needed to account for real-world impacts**: Financial regulators should adopt a methodology that collects and analyzes data before proprietary trading is defined and that relies on a phased-in implementation to allow regulators to learn as they go. Moreover, it is important that regulators continually analyze the real-world impacts of the Volcker Rule after it is implemented. Doing so will allow agencies to improve the rule's effectiveness over time without negative effects on financial markets or the economy.
6. **Adopt the Federal Reserve's approach in Regulation K to address extraterritorial reach**: Financial regulators should adopt the Federal Reserve's approach in its existing Regulation K to address the extraterritorial problems of the Volcker Rule with respect to foreign banking organizations and what activities occur "solely outside the United States."

Recommendation 1: Gather Relevant Data

Under this functional approach, regulators would begin collecting data from market participants before making the regulations effective. The agencies would use these data to better understand and regulate how permitted market-making, risk-mitigating hedging, and other types of permissible activities differ from proprietary trading in each relevant asset class, market, and product type.

It is important that regulators have access to a robust set of data that will allow them to define and detect impermissible proprietary trading, and that they have the resources available to adequately analyze the data collected. Of course, it is also important that regulators only collect what they are able to analyze and is useful for the purposes described.

Recommendation 2: Identify Patterns by Activity and Product, then Assign and Monitor with Key Metrics

The value provided by data-informed metrics has been recognized by the regulators. In the proposed regulation, the agencies indicated that data would help them to better understand and assess the trading activities of banking organizations, including the scope, type, and profile of the activities and the context in which they occur, for purposes of ensuring compliance with the regulations. The task force supports the regulators' use of data to gain such an understanding and to introduce greater certainty into the supervisory process, as well as the regulators' incorporation of quantitative metrics into the regulatory toolbox. However, the agencies can benefit from an even *greater* reliance on the metrics. The agencies should also use metrics to establish the framework for compliance with the Volcker

Rule *before* metrics are used to supervise banking entities and their activities against that framework.

In other words, metrics should be used at the beginning as a sorting mechanism to differentiate the functions of trading units and to identify clear and definitive bands of permissible activity based on the analysis of the data. These quantitative metrics would serve to elucidate what constitutes the statutorily permitted activities in a variety of markets in which institutions engage in market-making-related activities. In a sense, activity that occurs within the band would be treated as within a safe harbor, and activity outside the ban would serve as a signal that further inquiry may be warranted rather than as *prima facie* evidence of a violation.

Thus, the approach the task force envisions is a prohibition of proprietary trading accompanied by data-informed safe harbors. Activity that occurs outside these safe harbors would not necessarily be impermissible, but rather would require further analysis by regulators and their supervised entities. For example, there would be a determination of what would be deemed as market-making for a specific financial product, such as a credit default swap. The proprietary trading prohibition would, in addition to being accompanied by a safe harbor, be informed by criteria and factors that would be used by regulators as a guide for determining whether a given conduct outside of the safe harbor constitutes impermissible proprietary trading. These more relevant and useful metrics should be given greater, although not dispositive, weight as regulators refine the contours of permissible trading activity.

The use of metrics that represent varying levels of aggregation and granularity would help illuminate the different forms that market-making-related activities functionally take with respect to a number of representative markets.

This process would be iterative in many cases, as initial data analyses reveal that some metrics are more relevant and useful than others, depending upon the particular asset class, activity, and market. In addition, over time, regulators will revisit their earlier articulations of safe harbors, and criteria and factors for judging whether conduct constitutes proprietary trading. Thus, the initial and ongoing regulations would be iterative. Based on the patterns that emerge from the analyses of these metrics, regulators could appropriately tailor the parameters for permissible trading activity in particular markets.

Safe harbors are important to the regulatory approach, but they cannot provide all the relief that is needed. The task force's approach would involve rigorous data-driven analysis in order to better interpret whether activity was permissible or not when it is outside of the safe harbor.

Under a functional, metrics-based approach, engaging in trading that falls within the parameters of the permitted activities, as evidenced by their reported metrics, would be presumed to be acting permissibly. Likewise, the metrics would serve as an early warning system of impermissible, non-market-making activity by highlighting potentially problematic patterns of behavior and outlier incidents, thus signaling that further investigation may be

warranted. In addition, the systematic use of metrics in supervision would facilitate an efficient focus on areas of supervisory priority as well as informative comparisons across institutions and markets. Darrell Duffie, in a paper otherwise critical of the initial approach proposed by the regulators, supported the use of metrics, saying:

> The collection and use by regulators of these and other risk measures for supervisory purposes, if done broadly across bank and non-bank financial firms, could improve the ability of regulators to detect and mitigate risks to individual institutions and to the financial system as a whole.[52]

The use of metrics to analyze data can illuminate differences in markets and products—and how these differences can shape the way in which market-making operates in a given market. Market-making involves holding oneself out as willing both to buy and sell financial instruments. Yet, this pattern can have a different appearance from market to market. For example, there are substantial differences in the level of liquidity and the nature of risk among different markets and products, which in turn affect how market-making operates in a particular context. Not only are there divergences among asset classes—equities are far more liquid than corporate bonds, for instance—but even a single asset class can encompass significant variations.

Consider, for example, how metrics could be applied to exchange-traded funds (ETFs). Institutions that create and administer ETFs generally trade actively in the market to ensure that ETF pricing stays close to the value of underlying securities. The use of quantitative metrics, developed and refined through an iterative process, could help regulators to distinguish when such trading activity has a market-making-related function from when it potentially operates as proprietary trading such that further inquiry is warranted. A particular institution's metrics relating to ETFs falling outside the established thresholds would signal to regulators the need to examine the activity more closely and determine whether it is consistent with a permitted activities exemption.

The use of well-defined metrics, both for a safe harbor and for assessing conduct that falls outside a safe harbor, will help banking agencies and outside watchdogs make sure that regulators are continuing to enforce regulations and protect taxpayers. Regulators should publish the metrics they are using and the general guidelines they are applying to track permissible activity. By publishing metrics, financial companies and outside advocates will have the ability to opine on concrete, identifiable factors. Regulators will benefit from this continued public dialogue; while those who believe that the system has built up risk will be able to point to hard data to make their case.

While appropriate metrics are the key to the approach the task force recommends, they will not be sufficient for successful implementation of the Volcker Rule. High-quality, robust supervision will continue to be necessary to ensure that potential impermissible trading activity is identified.

Selected Metrics in the Proposed Regulations

As noted above, the regulations proposed by the agencies described certain metrics that the agencies could use in evaluating particular activities. A number of these metrics would be useful in establishing the framework for the functional, data-driven approach that the task force is proposing. In brief, regulators would use the data they collect to identify patterns of trading activity for all asset classes, products, and markets that fall under the Volcker Rule. These patterns would suggest one or more metrics that would be useful in tracking the kinds of trades in which firms engage for whether or not they are permissible.

For example, most equities are highly liquid and transparent, and it is relatively simple for trading entities to predict the amount of inventory they should hold for their customers. For such products, data collected may suggest that "inventory aging" and "first-day profit and loss" would be effective metrics to determine whether trading activity is being done for market-making or proprietary purposes. These and several other of the metrics identified in the proposed regulation that could be useful in a functional approach are discussed below.

FEE INCOME AND EXPENSE, SPREAD PROFIT AND LOSS

With appropriate modifications, several other metrics proposed by the agencies also could perform a useful role in the functional approach that the task force recommends. The task force supports placing "fee income and expense" as well as "spread profit and loss" (P&L) among the factors that could distinguish permitted activities from prohibited proprietary trading. After all, market-making businesses generally make money on fees, commissions, and spreads; in contrast, these items are expenses for proprietary businesses. Although these two metrics are described separately in the proposed regulation, they could logically be considered together, because they are both measures of customer revenues and, in practice, may function as substitutes for each other. For example, in certain commission-based equity trading businesses, a trading unit often loses money on the price of a customer trade (negative spread P&L), but that loss may be more than offset by direct commissions from customers (positive fee income and expense). In such a case, looking only at spread P&L would not reveal that the trading unit generally makes a profit on customer trades. This example also highlights the need for regulators to be mindful of how certain combinations of metrics may be particularly useful or illuminating, which can be discovered through the functional approach's iterative metric development process.

Calculating a meaningful way to measure spread P&L will be challenging in the absence of a continuous bid-ask spread, which does not exist in many markets. It will be critical for regulators to work with market participants to determine the appropriate proxies for spreads based on different asset classes, trading sizes, and trading units. For example, institutions could report an estimate in the form of an end-of-day spread proxy, historical-data spread proxy, or other appropriate proxy. Regulators could then average these spreads together across the institutions they regulate for the same or nearly identical products.

DAY-ONE PROFIT AND LOSS

"Day-one P&L" may be another helpful indicator, because market-making trades generally make a higher share of their profits up front for the services of trading firms, since they are not seeking to profit from rising or falling asset prices. Viewed over time, not through a transaction-by-transaction analysis, a day-one P&L could indicate whether a trading unit is in general providing liquidity, as reflected by an overall positive day-one P&L, or whether its general orientation is more speculative, as shown by an overall negative day-one P&L. Considering this metric in combination with the spread P&L and fee income and expense metrics would provide a fuller picture of whether activities are market-making or proprietary trading. A trading unit that frequently provides a day-one loss should be quickly flagged and examined for impermissible activity.

CUSTOMER-FACING TRADE RATIO

The "customer-facing trade ratio" compares the number of transactions that includes a trading unit's customers with transactions that do not. As permissible activity is driven by customer demand, the ratio provides insight into whether a trading unit's transactions are driven by its customers. An appropriately defined customer-facing trade ratio metric could also be useful for distinguishing prohibited proprietary trading from market-making since market makers have a mix of customer and dealer flows, whereas other proprietary traders generally do not have "customers" as defined in the proposed regulation.[53] However, the proposed metric as currently formulated places an undue emphasis on the number of transactions with customers versus other counterparties and does not account for the size of transactions or the amount of risk that market makers undertake for customers. For example, a single trade for a customer could be split into multiple, smaller trades for the purposes of hedging that trade even though the trade would have the same aggregate totals on each side. In such cases, the customer-facing trade ratio would overestimate the amount of trading being done for non-customers. Similarly, in the example provided above, a notional-based or risk-based ratio close to one would indicate that the market maker traded approximately as much with non-customers as with customers, because that was the amount of trading that was necessary to lay off the risk from the customer trade. This approach would tell the story of the trading activity more accurately than the number of trades. Finally, regulators should clarify whether interdealer trading done for the purpose of providing market-making liquidity will be considered permitted activity.

INVENTORY AGING

"Inventory aging" is a measure of a trading unit's assets and liabilities, and how long they have been held. In general, assets acquired for speculative trading purposes are held longer than those purchased for market-making. Assets for market-making purposes are purchased in line with expected customer demand and can therefore be expected to be sold relatively quickly, whereas assets bought as proprietary trades will be kept longer to benefit from asset price changes. This metric is more useful for regulators in more liquid markets, because more illiquid financial instruments are by definition held for longer periods. However, even in illiquid markets, inventory aging can be used to some degree to identify trading patterns.

Moreover, swap "inventory" is of a fundamentally different nature than, for example, an inventory of securities. Derivatives traded over-the-counter are ongoing contracts that cannot be simply sold as a securities position can; a dealer is obligated to uphold swaps contracts and cannot trade out of the obligations without counterparty consent. Thus, the metric is much less useful for defining impermissible activity for derivatives.

VALUE AT RISK AND RISK MANAGEMENT

"Value at risk" (VaR) measures the percentage chance that a portfolio will suffer a specified loss of value in a specified time frame. It is one of several metrics in the proposed regulations to help manage portfolio risk and is already used by many financial institutions. VaR should help those institutions, and regulators, to identify when risk is higher than it should be at a trading unit.

However, the financial crisis demonstrated that there is substantial model risk with VaR, as models necessarily involve assumptions about the future, usually relying on historical experience. Static models and assumptions weighted toward recent experience, especially for new asset classes, can be significantly flawed. This highlights the need for regulators to think of risk as differing by asset class, product, and market.

Regulators should work with each other, institutions, and academic experts to develop a robust set of transparent calculations to allow for risk to be calculated in a way that is able to be easily implemented and tracked by both regulators and financial institutions. Regulators should also refine their methodology with the iterative process the task force advocates to most accurately capture the risk present at these institutions.

Finally, regulators should consider the total size of the risk of the trading inventory for each institution. Monitoring the absolute size of risk in a portfolio can give regulators some indication of how much damage could be done by a sudden, unexpected price movement, and provide context on whether observed risk size should be considered a red flag that warrants a more detailed examination.

HEDGING METRICS

An individual or institution hedges trades to reduce the risk to which they are exposed. To oversimplify somewhat, if a position rises or falls by $100, the hedge that was taken out to reduce the risk of the initial position should generally move in the opposite direction by a similar, though not necessarily equal, amount.

This is relevant to the case of the so-called "London Whale," in which a unit within JPMorgan Chase engaged in a series of highly speculative trades that cost the bank more than $6 billion, despite the fact that the unit was not "intended to function as a proprietary trading desk, but as insurance or a 'hedge' against credit risks confronting the bank."[54] A consistent pattern of hedge trades that result in profits for a firm may be a red flag for regulators to determine whether some portion of the trades are actually impermissible proprietary trading. Regulators should also ensure that compensation arrangements are not designed—intentionally or unintentionally—to reward proprietary risk taking.

Regulators should use the data they collect to assess whether one or more metrics, based on such patterns, would be useful for their oversight of the Volcker Rule.

DEFINING SHORT-TERM TRADING AND NEAR-TERM TRANSACTIONS

The Volcker Rule prohibits "short-term" proprietary trading by limiting the definition of "trading account" to "near-term" transactions, or those that involve short-term price movements.[55] In their comment letter, Senators Merkley and Levin wrote that the proposed rule takes "an overly narrow view of the concept of 'short-term,' essentially defining it as a period of 60 days or less." The letter further contends that, "some of the most dangerous proprietary trading positions were held beyond a 60-day window."[56]

Consistent with the theme of this paper, the task force believes that defining "short term" and "near term" for the purposes of Volcker Rule trading should not be a rigid number—like 60 days, which is the amount provided as a rebuttable presumption of short-term trading in the proposal—and should be informed by initial data that is collected. For some asset classes, products, and markets, 60 days may be a good guideline for separating near-term transactions from those that are longer-term. For other, highly liquid assets, a shorter timeframe may be appropriate. Still, for others, such as trades in more illiquid markets, a longer term may be better. Regulators should collect data about trading activities and analyze the data for patterns *before* determining what constitutes near-term transactions or short-term price movements. They should then set holding window parameters to reflect the specific circumstances of each market situation.

Recommendation 3: Differentiate Among Markets, Activities, and Asset Classes

ONE SIZE DOES NOT FIT ALL, OR EVEN MOST

Throughout the proposed regulations, the agencies generally use a "one-size-fits-most" approach to define permitted and prohibited activities. This lack of a nuanced recognition of the critical differences across markets, instruments, and asset classes is most apparent in the definition of market-making-related activities. The market-making-related activity provisions in the proposed regulations consistently refer to certain factors, such as revenue generation primarily through bid-ask spreads and customer fees, to distinguish prohibited from permitted activities. These identified factors, however, do not fully reflect the reality of market-making in most markets and instruments. Applying this single template of market-making to the great variety of financial markets would make it difficult for banking organizations to intermediate in a number of instruments and asset classes, and thus is likely to impair liquidity and capital formation. The FSOC report on proprietary trading recognizes this issue and recommends that: "The regulations and supervision [of the final regulations] should be sufficiently robust to account for differences among asset classes as necessary."[57]

The U.S. corporate bond market is an example of an important market that does not follow the proposal's implicit market-making paradigm and, as such, is jeopardized by the proposed permitted activity framework. Because the structure of this market differs significantly from that of highly liquid equities markets, its market makers function in different ways. The corporate bond market is much more fragmented than the listed equities market, and many individual bonds have little or no trading activity. For example, Oliver Wyman has reported that there were approximately 37,000 corporate bond securities with a total market value of $7 trillion outstanding at the end of 2009 (an average of $189 million per bond), compared with 5,000 listed equity securities with a total market value of $15 trillion (an average of $3 billion per equity security).[58] In addition, average daily trading volume in 2009 for corporate debt was $17 billion, while the daily trading volume for equities was $100 billion.[59]

As these statistics indicate, individual corporate bonds are generally far less liquid than individual listed equities. In serving as a market maker in the corporate bond market, an institution buys a bond from a customer with the knowledge that there may be little chance of rapidly reselling the bond and a high likelihood that it must hold the bond for a significant period of time. The market maker thus becomes exposed, as principal, to the risk of the market value of the bond in a way that a market maker in liquid equity security, who often is able to buy and sell nearly contemporaneously, is not. In many instances, the changes in the bond's market value may constitute a significant portion of the trading unit's profit or loss on the position, even though the institution entered into the position to further the goal of serving customers.

The markets for derivatives, securitized products, and emerging market securities, among many others, are characterized by even less liquidity and less frequent trading than the U.S. corporate bond market. As a result, market-making in these markets almost inevitably involves taking principal positions for longer periods of time. Thus, the market-making approach that prevails in listed equities markets may be the exception. Relying upon it as the general rule would offer a poor reflection of the inherent realities of trading in such markets and would therefore be ill-advised.

In addition, the proposed regulations' reliance upon an equities-oriented market-making model is reflected in the interpretation of the term "block positioner."[60] Although the proposal does not define "block positioner," it seems through reference to Rule 3b-8(c) to require, among other things, that the block positioner determine that the block could not be sold to or purchased from others on equivalent or better terms, and sell the shares comprising the block as rapidly as possible commensurate with the circumstances.[61]

Rule 3b-8(c) applies to equity blocks, so it would need to be revised before it can serve as an effective standard for purposes of the Volcker Rule. For example, block positioners in less liquid markets would likely have difficulty determining that a block could not be sold to or purchased from others on equivalent or better terms. Market makers often do not have access to robust pricing information in less liquid, less transparent markets.

In addition, although the requirement to dispose of a block as quickly as possible given the circumstances is not necessarily inconsistent with a longer unwind of a block position in less liquid instruments, the equity orientation of the block-positioning standard and the lack of explicit recognition of how block-positioning functions in other markets create uncertainty about whether, and under what specific circumstances, a longer unwind would be permissible. Larger dealers are often the only sources of liquidity for block positions, which mutual funds and pension funds buy or sell to meet redemptions and payment obligations or to rebalance their portfolios in response to changing market conditions. Executing a block trade requires market makers to prudently manage their inventory to reflect prevailing market liquidity, avoid disrupting the market, and protect the customers' trading strategies. A requirement or regulatory pressure to sell the instruments comprising the block as rapidly as possible is far more damaging in less liquid markets, as the rapid disposition of assets can lead to fire sales that significantly reduce the price of the assets. If market participants are uncertain about the permissibility of accumulating and disposing of these blocks in a gradual manner, they will provide less favorable size and pricing terms to customers or may even decline to execute certain block trades at all.

In summary, the proposal's block-positioner provision would need to be modified to more adequately reflect the context and constraints on block-positioning in non-equities markets, so that potential block positioners are able to exercise prudent inventory management and so that institutional customers and commercial end users are able to find institutions that are able to facilitate their need to trade in size at a price reasonably related to the market.

In contrast to the proposal's overall approach, there has long been congressional and regulatory recognition of the need for statutory provisions and rules to vary depending on markets, trading structures, and asset classes. For example, there are separate regulatory regimes for securities, futures, and swaps even though these three types of instruments are closely related. Yet, all three are considered together under the Volcker proposed rule framework. Within the securities framework, different rules commonly apply to debt and equity classes. On the swaps side, foreign exchange swaps and forwards have been carved out for distinctive regulatory treatment. The final Volcker Rule regulations should continue this nuanced and flexible approach to financial regulation with appropriate recognition of critical differences among markets and asset classes, particularly in setting the parameters of permitted activities such as market-making, defining key terms and concepts, and establishing relevant metrics for compliance.

ASSESSING TRADING PATTERNS HOLISTICALLY

The proposed regulation evaluates principal trading against the statutorily permitted activities largely according to transaction-by-transaction tests, focusing on the specific action taken for a particular financial position. This approach, however, is not consistent with the intent of Congress, as reflected in the statute's repeated references to "activities" rather than a narrower term such as "transactions." It is also at odds with the realities of modern trading operations and portfolio strategies, where an individual transaction may serve multiple functions or may be a single component that, combined with other positions,

forms a larger strategy. An individual position may not fit squarely within the parameters of a permitted activity as drawn by the proposal, but may be part of a pattern of market-making-related activity that does. Attempting to view such a transaction discretely and in isolation will yield a distorted picture of the activity in a real-world setting.

For example, the proposed regulations' conceptual statement that market makers generally make, rather than take, liquidity holds true when applied at an overall business activity level. That statement, however, may not necessarily be accurate in the context of any particular transaction. As part of bona fide market-making-related activity, market makers must often take liquidity from another market maker in a particular transaction, for purposes such as understanding market pricing, ensuring that prices remain in line, or building inventory. In other words, it appears as though the agencies have lost sight of the fact that the permitted activity established by Congress is for "market-making-*related* activities," rather than just for market-making positions.

An approach that views individual transactions or positions as "market-making" or "non-market-making" involves the implicit, but inaccurate, assumption that an institution enters into a transaction for a single purpose and that market-making activities are severable and separately identifiable. Particularly with the prevalence of portfolio trading based on computational and mathematical models, a position that is entered into as part of market-making-related activities may serve multiple functions. It may, for example, simultaneously be responsive to customer demand, hedge a risk, and build a market maker's inventory.

In light of the inadequacy of a transaction-by-transaction approach, regulators should instead focus on patterns of activity to identify market-making, hedging, or other types of permitted or prohibited activities and do so within distinct asset classes or perhaps activity groups. Regulators should also make comparisons across the industry to allow them to identify areas where the trading patterns of one or more financial institutions differ significantly from others for the same asset class, product, or market. This holistic approach should be explicitly carried through to other parts of the proposal, such as the definition of "trading unit," and to supervisory efforts. For example, compliance should be assessed through metrics that aggregate transactions at an overall business-line activity level rather than at a transaction-by-transaction level. It is important to recognize that the appropriate level of granularity for the metrics may vary depending on the structure of the institution, the type of activity, and particular asset class.

Recommendation 4: Implement on a Phased-In Basis

Under the proposed regulations, universal compliance with the regulations would be required immediately upon the end of the conformance period (or at the end of any extension granted by the FRB). Flipping the switch on a new regulatory regime of this magnitude poses a considerable risk of disruption to the financial markets and the operations of market participants, with potentially negative effects for the economy. Because the Volcker Rule applies to a range of highly complex and variable trading

operations, it will take substantial time for the agencies to develop a full understanding of how to apply its requirements to different asset classes and markets. It will also take time for banking entities to build the necessary compliance infrastructure.

A more prudent approach would involve enforcing immediate global compliance with certain clear statutory provisions and bright-line rules, such as the prohibition on clearly speculative prohibited proprietary trading, while phasing in other segments of the rules based on asset class, line of business, type of market participant, or a combination of these factors. Not only would this sequencing help to minimize market disruptions, but it also would allow regulators and market participants to gain important insights from the early stages of implementation—particularly in terms of identifying and addressing unanticipated consequences—and to incorporate those lessons learned into the later phases when the regulations are applied more comprehensively.

More specifically, a phased-in approach could include stages such as eliminating any remaining dedicated bright-line proprietary trading units; creating policies, procedures, and trading unit mandates; gradually rolling out a subset of metrics across trading units before implementing the full range of metrics that are adopted in the final rule; or implementing metrics for one trading unit at a time. The most efficient and effective means of implementation and supervision may be through a pilot program in which certain designated trading activities come into compliance on a more accelerated schedule than others. This process would still require banking entities to begin developing the necessary infrastructure and to work steadily toward full compliance during the relevant conformance period. It would also allow banking entities and their regulators to obtain valuable experience with the practical workings of the Volcker Rule and to address technological, logistical, interpretive, and other issues that may arise on a smaller and more controlled scale. And, this would afford time for compliance and government-monitoring programs to be introduced in an informed and orderly basis.

Federal agencies have previously used a phased-in approach for large-scale regulatory changes with significant market impacts. For example, Regulation NMS[62] was implemented through five separate, phased-in compliance dates for different stocks over several years in order to allow the SEC and the industry to monitor for unintended consequences on the markets before the rule applied to all stocks and for the SEC to revise the regulations as appropriate.

Another precedent for a gradual and deliberate implementation of a complex new regulatory requirement was the implementation of the trade reporting and compliance engine ("TRACE") for fixed-income trades by the Financial Industry Regulatory Authority. TRACE requires prompt reporting of information about over-the-counter transactions. Before TRACE could become fully effective, market participants had to develop the infrastructure to report trade information and adjust to the effects that the availability of new information would have on trading in fixed-income markets. TRACE was initially implemented in three phases over approximately two and a half years, starting with the most liquid bonds, which represented the "easiest" case for implementation, and subsequently expanding to high-

yield and less liquid instruments. This multistage approach helped to mitigate any harm to liquidity or orderly trading in fixed-income markets before the consequences of the new regulatory regime were fully understood and absorbed by regulators and market participants. The scope and potential effects of the Volcker Rule likewise counsel following this precedent.

COVERED FUNDS

An example of the benefits of a phased-in implementation is the conformance period under the Volcker Rule. When the Federal Reserve issued its Final Rule on the Conformance Period for Entities Engaged in Proprietary Trading or Private Equity Fund or Hedge Fund Activities in February of 2011, few would have predicted that final regulations would not be adopted almost three years later. The Final Rule generally provides that a banking entity must bring its activities and investments into compliance with the Volcker Rule no later than two years after the earlier date of (i) July 21, 2012; or (ii) twelve months after the date on which final Volcker Rule regulations are adopted. The Final Rule also provides that the Federal Reserve may extend the conformance period for not more than three separate one-year periods. There are also provisions for an extended transition period for illiquid funds, subject to certain conditions that make it difficult to qualify for an extension. Among other requirements, any banking entity that seeks approval for an extension of the conformance period must submit a request in writing to the Federal Reserve at least 180 days prior to the expiration of the applicable conformance period, and it must provide a detailed explanation of the reasons why an extension should be granted, as well as a detailed explanation of the banking entity's plan for divesting or conforming the activity or investments.

Given the extensive uncertainty about the scope and content of final regulations and the illiquidity of some of their investments, many banking entities may not be able to divest or conform all of their investments by July 21, 2014, the last day of the initial conformance period. Absent further action by the Federal Reserve, they will need to request an extension of the initial conformance period. However, there are at least two reasons why it may not be possible to submit extension requests by January 22, 2014, the 180th day before the end of the initial conformance period. First, the agencies have not yet issued a final regulation defining the terms proprietary trading or covered fund. One of the most frequent observations made in the comment letters on the proposed rules was that the proposed definitions were overbroad or overly vague, or both. Until the agencies issue final definitions of these terms, banking entities cannot be sure which activities and investments will be permissible and which will need to be divested or conformed. Second, the Federal Reserve has not provided any guidance on what sort of information would be required to satisfy the "detailed explanation" conditions in an extension request. In particular, the Federal Reserve has not clarified whether the "detailed explanations" must be given desk-by-desk or fund-by-fund or whether "detailed explanations" related to the overall activities or investments will do.

The task force urges the Federal Reserve to consider these timing issues and to either extend the initial conformance period by one year or for such period of time as will afford

banking entities sufficient time to apply for relief. This would be an appropriate step in light of the uncertainties with the proposed regulations and the timing of the final regulations.

Recommendation 5: Update Iteratively as Needed to Account for Real-World Impacts

The 2011 FSOC report on proprietary trading stated:

> The regulations and supervision should be dynamic and flexible so Agencies can identify and eliminate proprietary trading as new products and business practices emerge.[63]

The iterative model the task force recommends offers a regular review of the implementation of the Volcker Rule to allow for adjustments as conditions change and more knowledge about covered trading becomes available. It also accounts for inevitable shifts in the landscape of trading—such as changes in liquidity or popularity of markets, asset classes, or products—and financial innovation. Regulators should use the knowledge thereby gained as an opportunity to continually improve their regulations and supervision.

As an additional step toward ensuring that the implementation of the rule remains appropriate under changing circumstances, the task force recommends that the implementing agencies be required to submit every two years a joint report to Congress that assesses the impact of the Volcker Rule on all stakeholders, the U.S. economy, and the financial system as a whole. A mechanism should also be put in place to formally and regularly—perhaps every two or three years—review the impact of the Volcker Rule on all stakeholders affected by it. Such a review will further inform the process of improving the implementation of the Volcker Rule over time.

Recommendation 6: Adopt the Federal Reserve's Approach in Regulation K to Extraterritorial Reach of the Volcker Rule

Much controversy has been generated over how the Volcker Rule will be applied to non-U.S.-based financial institutions. Generally stated, the provision's prohibition on proprietary trading and relationships with private equity and hedge funds applies to all subsidiaries and affiliates, worldwide, of any bank that is established in the U.S. or that has a U.S. branch, agency, or certain commercial lending subsidiaries. While the Volcker Rule provides an exception for proprietary trading that occurs "solely outside the United States," how that term is interpreted in the Volcker Rule regulations is important.

Under the proposed regulations, in order to rely on the "solely outside the United States" exception, a banking entity must satisfy requirements related to both the banking entity

itself and to the specific transaction or investment in question. With respect to the banking entity, the "solely outside the United States" permitted activity is available only if:

- the banking entity is not itself, and is not directly or indirectly controlled by an entity that is, organized under U.S. law;
- where the banking entity is a foreign banking organization (FBO), it is conducting the activity in compliance with subpart B of the Federal Reserve's Regulation K; and
- where the banking entity is not an FBO, it meets tests relating to total assets, revenues, and/or net income held or derived from outside the United States.

In addition, the "solely outside the United States" exception is only available if no party to the transaction is a "resident of the United States," no personnel or affiliate of the banking entity involved in the activity (other than those engaged in purely administrative, clerical, or ministerial functions) is physically located or incorporated in the United States. The definition of "resident of the United States" under the proposed regulations is similar in many ways to the definition of "U.S. person" under the SEC's Regulation S, but it is more expansive.

The manner in which the United States interprets the extraterritorial reach of the Volcker Rule will affect not only foreign banks. U.S. banking entities will be affected as well, since it is likely to impact the reaction of foreign regulators as they interpret the reach of similar provisions to U.S. banking entities operating abroad. These effects may also negatively impact the planning ability of the business and consumer customers of these international financial institutions. Reactions of this type could lead to a negative feedback loop of retaliatory moves by regulators in multiple countries.

Such an outcome has already been hinted at in the case of the Federal Reserve's proposed rules to implement Section 165 of Dodd-Frank.[64] The proposed rule, which addresses enhanced prudential standards and early remediation requirements on foreign banking organizations, includes provisions that have generated consternation among other countries' financial regulators, who believe the proposed rule puts foreign banks at a competitive disadvantage to U.S. banks. Michel Barnier, financial services chief of the European Union, warned Federal Reserve Chairman Ben Bernanke that implementing the proposed FBO rule "could spark a protectionist reaction from other jurisdictions, which could ultimately have a substantial negative impact on the global economic recovery."[65] It is incumbent upon U.S. regulators to fulfill the spirit and letter of the Volcker Rule while avoiding conflicts with international jurisdictions that will negate the benefits of its implementation. And, given the proposal to regulate through FBO, it would be appropriate to implement the Volcker Rule in a way that is consistent with FBO.

In defining what activities are "solely outside of the United States," the task force recommends that the financial regulators adopt an approach similar to what has traditionally been contained in the Federal Reserve's Regulation K. Under that traditional approach, the activities and investments of foreign banks are considered to be solely

outside the United States unless they are conducted or made through an office or subsidiary in the United States. This approach would effectively ring-fence U.S. jurisdiction in a manner that would be consistent with the intent of the Volcker Rule statute—i.e., to protect U.S. banks and the U.S. financial system and to avoid the use of U.S. taxpayer dollars in so doing. The task force also believes that “solely outside of the United States” should not be defined by the location of the execution facility, clearinghouse, or agent, as the location of these entities are likewise not relevant to the statutory intent of the Volcker Rule to restrain the activities of banking entities.

The Lincoln Amendment

Named after its principal proponent, former Senator Blanche Lincoln (D-AR), the Lincoln Amendment to the Dodd-Frank Act prohibits banks that have access to federal deposit insurance or Federal Reserve credit facilities from engaging in specific swap trading activities.[66]

The Lincoln Amendment was not part of either the House-passed version of the financial reform bill[67] or the version introduced in the Senate.[68] The concept was first proposed as part of derivatives legislation introduced in April 2010 by Senator Lincoln (D-AR), who was then chair of the Senate Agriculture Committee. The provision was added to the Senate's version of the financial reform bill before that bill was passed by the Senate. In the House-Senate conference, the language was modified to apply prospectively, the effective date was delayed, and certain exclusions were added.

Proponents of the Lincoln Amendment argue that this provision puts "sensible risk limits on activities in the derivatives markets" and that the provision correctly prohibits public subsidizing of derivatives businesses.[69] In other words, like the Volcker Rule, the Lincoln Amendment was intended to separate certain securities-related activities from traditional banking activities.

On the other hand, current and former federal financial regulators have expressed reservations about the need for the Lincoln Amendment. Former Chairman Volcker stated that the "understandable concerns about commercial bank trading in derivatives are reasonably dealt with in [the Volcker Rule]."[70] Federal Reserve Chairman Ben Bernanke argued that the Lincoln Amendment "would make the U.S. financial system less resilient and more susceptible to systemic risk."[71] Additionally, then–FDIC Chairman Sheila Bair told Congress that the Volcker Rule would accomplish the goals of the Lincoln Amendment.[72]

With the proper implementation of the Volcker Rule—as the task force proposes—the rationale for the Lincoln Amendment may no longer apply. The Volcker Rule is a more comprehensive approach to addressing speculative trading by banking entities, with market-making and hedging exceptions to distinguish permissible from impermissible activity. Also, the Lincoln Amendment would have unintended, negative consequences in bank resolutions. It would complicate resolutions by forcing banks to establish separate subsidiaries to engage in swaps activities, and those subsidiaries would not enjoy the temporary stay on the unwinding of contracts that applies to banks under FDIC resolution procedures. Rapid termination of such contracts in the event of a bank failure would have a disruptive impact on financial markets.

In recognition of these problems, bills have been introduced in the House and Senate to significantly narrow the scope of the Lincoln Amendment.[73] In addition, the agencies have

begun granting transition-period requests from banking institutions to delay compliance with the provision until 2015.

Given the more comprehensive Volcker Rule and the unintended consequences of the Lincoln Amendment in the event of bank failures, the task force recommends that, at a minimum, implementation of the Lincoln Amendment be delayed so that any potential benefits and burdens can be carefully assessed in light of the experience gained from the full implementation of the Volcker Rule, however it is adopted.

Conclusion

It is important that the agencies responsible for implementing the Volcker Rule get it right. The final regulations must protect taxpayers, depositors, and financial institutions. The agencies also need to ensure that the regulations provide clarity to market participants and avoid unnecessarily harming the economy as consumers, workers, investors, savers, and businesses face higher borrowing costs and less liquid markets. To be effective, the regulations must be operationalized in a manner that is practical and achievable.

The task force's recommendations avoid a "one-size-fits-most" approach to implementation that focuses on individual transactions and presumes trading to be proprietary and impermissible. Instead, the task force's recommendations stress the importance of a functional, data-driven model that takes account of the significant differences across asset classes, products, and markets. This approach focuses on tailored, data-driven metrics to help define what constitutes impermissible proprietary trading as well as the use of safe harbors to promote clarity regarding clearly permissible activity. An iterative, phased-in approach with access to a robust set of data maximizes the ability of regulators to fine-tune implementation and to continue to adjust in the future.

In line with the task force's view that regulators should take an informed and nuanced approach to proprietary trading under the Volcker Rule, the agencies should do the same with regard to applying the rule in a multinational context, focusing on protecting U.S. jurisdiction consistent with the intent of the legislation and avoiding an overbroad application of the Volcker Rule regulations to non-U.S. entities.

Finally, the task force believes its model may allow regulators to achieve the goals of the Lincoln Amendment and thus eliminate the need for this provision. The task force therefore recommends a wait-and-see approach on implementing the Lincoln Amendment until more experience can be gained from observing the Volcker Rule in the amended form the task force proposes.

Taken together, the recommendations in this report would achieve the balance necessary to realize positive outcomes for all stakeholders.

Appendix A: Outreach Interview Form

BPC's Financial Regulatory Reform Initiative's Capital Markets Task Force List of Questions

EXTRATERRITORIALITY

Many developed countries have taken steps to reform financial regulation following the nation's most recent crisis. New and evolving regulatory schemes have caused friction as countries struggle to harmonize their approaches and avoid ring-fencing and other practices that could exacerbate future crises.

1. In what areas do you see the most potential for extraterritorial problems? In what areas have you seen successes in harmonizing approaches?
2. What is the proper role for a host regulator vs. a home regulator?
3. People have argued for various approaches to cross-border regulation, including mutual recognition, substituted compliance, or that the United States should insist to some degree that its domestic standards be followed in other countries. What is the best way to address these issues?
4. How should the United States negotiate toward regulatory agreements with other countries? (Examples: delay implementation until agreements are reached, go ahead with implementation and later apply exemptions based on the results of negotiations, create incentives for negotiators to reach agreements.) What should be our primary goal(s)? Is the Bank of England–FDIC agreement on single-point-of-entry resolution a good model?
5. There is risk that two or more U.S. agencies will issue rules or guidance that is at odds with each other regarding their approach to extraterritorial issues. Two examples include the difference in how the CFTC and SEC approach the definition of "U.S. person" and security-based swap rules. Are these major problems and, if so, how should they be addressed?
6. How should regulators handle, and avoid, regulatory arbitrage—on the distinction between branches and subsidiaries of financial institutions in other countries?
7. Should international agreements allow for "gold-plating" rules—that is, that jurisdictions can have "stronger" regulations than those that are mutually agreed upon?

8. What will be the impact of the proposed Basel III rules? How will they impact systemic risk, resolvability of institutions, economic growth, and other factors?

VOLCKER RULE

1. What will be the likely impact of a finished and implemented Volcker Rule on the safety and soundness of the financial system, and on the economy?

2. One suggestion for improving the Volcker Rule is to switch from a negative presumption—where there is rebuttable presumption on a transaction-by-transaction basis that activities are prohibited—to a principles-based model where metrics could identify patterns in aggregate transactions and help regulators define the parameters of permissible activities. What are your views on both of these approaches? Do you prefer one or the other, or a third model?

3. What metrics would be useful in helping regulators to describe prohibited and permissible activities?

4. Should safe harbors be set up that would describe allowable activities? If so, what should they be?

5. How should agencies implement the Volcker Rule? Do you favor rules taking effect immediately, phasing in, or a combination of both?

6. Are there other ways you think the Volcker Rule could be improved?

7. If Basel III, single-point-of-entry, and other recent reforms function well, would that justify any changes to the Volcker Rule?

LINCOLN AMENDMENT

1. What do you consider to be the pros and cons of the Lincoln Amendment? How will it impact systemic risk?

2. Would it be most useful to move toward implementation as the amendment is, repeal it, or make changes to it (for example, equalizing treatment for U.S. branches and agents of foreign banks)?

Finally, are there any other questions we should ask you?

Endnotes

[1] Sheila C. Bair, "A New Regime for Regulating Large, Complex Financial Institutions," Testimony of Sheila C. Bair before the S. Comm. on Banking, Hous., and Urban Affairs, 112th Cong., 2011. Available at: http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=29da74f2-85f9-479e-8c23-836a718fd1e9.

[2] Ibid., p.13.

[3] *The New York Times,* "Volcker Rule, Once Simple, Now Boggles," October 11, 2011. Available at: http://www.nytimes.com/2011/10/22/business/volcker-rule-grows-from-simple-to-complex.html?pagewanted=all&_r=1&.

[4] Barack Obama, "Remarks By the President on Financial Reform," January 21, 2010. Available at: http://www.whitehouse.gov/the-press-office/remarks-president-financial-reform.

[5] Financial Stability Oversight Council, "Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds," January 2011, p.15. Available at: http://www.treasury.gov/initiatives/documents/volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

[6] Ibid., p.1.

[7] The agencies responsible for implementing the Volcker Rule are the Commodity Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board (FRB), Office of the Comptroller of the Currency (OCC), and Securities and Exchange Commission (SEC).

[8] There were two separate proposed rule-makings for the Volcker Rule. On October 11, 2011, the FDIC, FRB, OCC, and SEC jointly issued proposed regulations, while the CFTC issued its proposed regulations on January 11, 2012. The CFTC's proposal largely followed the earlier joint proposal except that it did not include Subpart E of the original proposal, which addressed conformance periods for entities supervised by the Federal Reserve (see http://www.skadden.com/insights/cftc-proposes-regulations-implement-volcker-rule). Throughout this paper, references to the proposal or proposed rule are to the initial, jointly proposed regulations. FDIC release available at: http://www.fdic.gov/news/news/press/2011/pr11160.html. FRB release available at: http://www.federalreserve.gov/newsevents/press/bcreg/20111011a.htm. OCC press release available at: http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-126.html. SEC release available at: http://www.sec.gov/news/press/2011/2011-204.htm.

[9] *The New York Times,* "Volcker Rule, Once Simple, Now Boggles," October 11, 2011. Available at: http://www.nytimes.com/2011/10/22/business/volcker-rule-grows-from-simple-to-complex.html?pagewanted=all&_r=1&. Volcker added that, broadly speaking, managers and boards responsible for compliance with the rule were to blame for its complexity because of the exceptions and nuance they demanded.

[10] Mary Jo White, "Mitigating Systemic Risk in the Financial Markets through Wall Street Reforms," Hearing Before the Senate Banking, Housing, and Urban Affairs Committee, July 30, 2013. Available at: http://www.sec.gov/News/Testimony/Detail/Testimony/1370539733678#.UI_8E1A_tVI.

[11] As of October 17, 2013, the SEC reports having received 15,839 letters urging tough enforcement of the rule; 1,737 urging the agencies to close purported loopholes in the proposed regulation to allow for strict enforcement; and 608 urging agencies to stand firm against attempts by the financial industry to sway them to make the rule more lenient. See: U.S. Securities and Exchange Commission, "Comments on Proposed Rule: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds." Available at: http://www.sec.gov/comments/s7-41-11/s74111.shtml.

[12] *Bloomberg*, "Volcker Rule Costs Tallied as U.S. Regulators Press Deadline," September 30, 2013. Available at: http://www.bloomberg.com/news/2013-09-30/volcker-rule-costs-tallied-as-u-s-regulators-press-deadline.html.

[13] A swap is a kind of derivative where cash flows from one or more financial instruments are traded among parties. For example, an entity may exchange the cash flows from a bond with a variable coupon (interest payment on the bond) for one with a fixed coupon in order to hedge its risks against changes to interest rates.

[14] Letter from Paul A. Volcker to Christopher Dodd, May 6, 2010; letter from Ben Bernanke to Christopher Dodd, May 13, 2010; letter from Sheila C. Bair to Christopher Dodd and Blanche Lincoln, April 30, 2010.

[15] "The Group of Thirty, established in 1978, is a private, nonprofit, international body composed of very senior representatives of the private and public sectors and academia. It aims to deepen understanding of international economic and financial issues, to explore the international repercussions of decisions taken in the public and

private sectors, and to examine the choices available to market practitioners and policymakers." See www.group30.org.

[16] Group of Thirty, "Financial Reform: A Framework for Financial Stability," Working Group on Financial Stability, 2009, p.27. Available at: http://www.group30.org/images/PDF/Financial_Reform-A_Framework_for_Financial_Stability.pdf.

[17] Ibid., p.28.

[18] U.S. Department of the Treasury, "Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation," 2009.

[19] Ibid., p.32.

[20] H.R. 4173, 111th Cong. § 1117(a), as passed by the House, December 12, 2009.

[21] Barack Obama, "Remarks on Financial Reform," January 21, 2010.

[22] Paul A. Volcker, "How to Reform Our Financial System," *The New York Times*, January 30, 2010.

[23] Neal S. Wolin, prepared statement, "Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies," Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 111th Cong., 2010.

[24] Paul A. Volcker, prepared statement, Hearing before the Senate Banking, Housing, and Urban Affairs Committee, February 2, 2010. Available at: http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57709/html/CHRG-111shrg57709.htm.

[25] Richard C. Shelby, prepared statement, "Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies," Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong., February 2, 2010.

[26] Bob Corker, prepared statement, "Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies," Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong., February 2, 2010.

[27] Neal S. Wolin, prepared statement, "Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies," Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong., February 2, 2010.

[28] S. 3217, 111th Cong. § 619 (2010).

[29] S. 3098, 111th Cong. (2010).

[30] Dodd-Frank Wall Street Reform and Consumer Protection Act § 619, 12 U.S.C. § 1851 (2012).

[31] Jeff Merkley and Carl Levin, "Dodd-Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats," *Harvard Journal on Legislation*, Vol. 48, No. 2. 2011.

[32] Jeff Merkley and Carl Levin, "Ban on High Risk Trades Victory for Workers and Businesses," June 25, 2010.

[33] 12 U.S.C. § 1851 (b) (2) (B) (iii) (2010).

[34] Financial Stability Oversight Council, "Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds," 2011.

[35] 76 Fed. Reg. at 68,846 (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pt. 255).

[36] 76 Fed. Reg. at 68,945.

[37] Ibid.

[38] 76 Fed. Reg. at 68,947-48.

[39] 76 Fed. Reg. at 68,949.

[40] 76 Fed. Reg. at 68,950.

[41] Ibid.

[42] 76 Fed. Reg. at 68,951-53.

[43] 76 Fed. Reg. at 68,955.

[44] 76 Fed. Reg. at 68,955-56.

[45] U.S. Securities and Exchange Commission, "Comments on Proposed Rule: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds." Available at: http://www.sec.gov/comments/s7-41-11/s74111.shtml.

[46] Letter from Senators Jeff Merkley and Carl Levin to OCC, FRB, FDIC, SEC, and CFTC, February 13, 2012.

[47] Letter from Americans for Financial Reform, the American Federation of Labor–Congress of Industrial Organizations, and the Federation of State Public Interest Research Groups to OCC, FRB, FDIC, SEC, and CFTC, February 13, 2012.

[48] Sarah Bloom Raskin, "How Well is Our Financial System Service Us? Working Together to Find the High Road," speech at the Graduate School of Banking at Colorado, Boulder, CO, July 23, 2012. Available at: http://www.federalreserve.gov/newsevents/speech/raskin20120723a.htm.

[49] Letter from the Securities Industry and Financial Markets Association, the American Bankers Association, The Financial Services Roundtable, and The Clearing House Association to OCC, FRB, FDIC, SEC, and CFTC, February 13, 2012.

[50] *The New York Times*, "Volcker Rule, Once Simple, Now Boggles," October 11, 2011. Available at: http://www.nytimes.com/2011/10/22/business/volcker-rule-grows-from-simple-to-complex.html?pagewanted=all&_r=1&.

[51] Comment Letter on the Notice of Proposed Rulemaking Implementing the Volcker Rule–Proprietary Trading, ABA, Clearing House, Financial Services Roundtable, and SIFMA, February 13, 2012. Letter available at: http://online.wsj.com/public/resources/documents/SIFMAletter21312.pdf.

[52] Darrell Duffie, "Market Making Under the Proposed Volcker Rule," Stanford University, January 16, 2012, p.26. Available at: http://www.gsb.stanford.edu/news/packages/PDF/Volcker_duffie_011712.pdf.

[53] 76 Fed. Reg. at 68,596, Appendix A. Available at: http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-27184.pdf.

[54] U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, "JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses," Majority and Minority Staff Report, March 15, 2013, hearing, p.4. Available at: http://www.hsgac.senate.gov/download/report-jpmorgan-chase-whale-trades-a-case-history-of-derivatives-risks-and-abuses-march-15-2013.

[55] William J. Sweet Jr., Brian D. Christiansen, and Collin P. Janus, "The Volcker Rule," Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, Newsletter, July 9, 2010. Available at: http://www.skadden.com/newsletters/FSR_The_Volcker_Rule.pdf.

[56] Jeff Merkley and Carl Levin, comment letter to the OCC, Federal Reserve Board of Governors, FDIC, SEC, and CFTC on proposed Volcker Rule regulations, February 13, 2012, p.8. Available at: http://www.federalreserve.gov/SECRS/2012/February/20120216/R-1432/R-1432_021412_104998_542080912901_1.pdf.

[57] Financial Stability Oversight Council, "Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds," January 2011, p.4. Available at: http://www.treasury.gov/initiatives/documents/volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

[58] Oliver Wyman, "The Volcker Rule: Considerations for Implementation of Proprietary Trading Regulations," December 22, 2010, p.6. Available at: http://www.sifma.org/workarea/downloadasset.aspx?id=22888.

[59] Ibid., p.29.

[60] Block positioners are traders willing to take on market-making functions for large blocks of securities. They normally attempt to hedge the significant risk they take on from such large trades in a single direction.

[61] 12 C.F.R. Section 240.3b-8(c)(4)(iii).

[62] Regulation NMS, 17 C.F.R. pts. 200, 201, 230, 240, 242, 249, and 270 (combining the national market system rules, and modernizing and strengthening the regulatory structure of the U.S. equity markets).

[63] Financial Stability Oversight Council, "Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds," January 2011, p.4. Available at: http://www.treasury.gov/initiatives/documents/volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

[64] FRB Proposed Rule, "Enhanced Prudential Standards and Early Remediation Requirements for Foreign Banking Organizations and Foreign Nonbank Financial Companies," December 14, 2012, at 76631. Available at: http://www.gpo.gov/fdsys/pkg/FR-2012-12-28/pdf/2012-30734.pdf. The preamble mentions that some foreign jurisdictions have either modified, or considered proposals to modify, their regulation of foreign banks operating within their jurisdictions.

[65] Letter from Michel Barnier to Ben Bernanke, April 18, 2013. Available at: http://www.federalreserve.gov/SECRS/2013/April/20130422/R-1438/R-1438_041913_111076_515131431183_1.pdf.

[66] Dodd-Frank Wall Street Reform and Consumer Protection Act § 716, 15 U.S.C. § 8305 (2012).

[67] H.R. 4173, 111th Cong. (as passed by House, Dec. 12, 2009).

[68] S. 3217, 111th Cong. (as introduced in the Senate, Apr. 15, 2010).

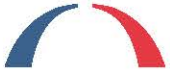
[69] Wallace C. Turbeville, prepared statement on behalf of Americans for Financial Reform, "Examining Legislative Improvements to Title VII of the Dodd-Frank Act," Hearing Before the H. Comm. on Agric., 113th Cong., 2013.

[70] Letter from Paul A. Volcker to Christopher Dodd, May 6, 2010.

[71] Letter from Ben Bernanke to Christopher Dodd, May 13, 2010.

[72] Letter from Sheila C. Bair to Christopher Dodd and Blanche Lincoln, April 30, 2010: “To be sure, there are certain activities, such as speculative derivatives trading, that should have no place in banks or bank holding companies. We believe the Volcker rule addresses that issue.”

[73] See, e.g., Swaps Regulatory Improvement Act, H.R. 922, 113th Cong. (2013); Swaps Regulatory Improvement Act, S. 474, 113th Cong. (2013).



BIPARTISAN POLICY CENTER

1225 Eye Street NW, Suite 1000
Washington, DC 20005
(202) 204-2400

WWW.BIPARTISANPOLICY.ORG