November 21, 2013

The Honorable Ben Bernanke
Chairman
Board of Governors of the Federal Reserve
20th Street and Constitution Ave, NW
Washington, DC 20551
Docket No. R1432

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
RIN 3064- AD85

The Honorable Thomas Curry
Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 20219
Docket No. OCC-2011-0014

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
File No. S7-14-11

The Honorable Gary Gensler
Chairman
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581
17 CFR Part 75; RIN 3038-AD05

Re: Finalizing the Volcker Rule & the Recent Letter from the Chamber
(Docket No. R1432; RIN 3064- AD85; Docket No. OCC-2011-0014; File No. S7-14-11; RIN 3038-AD05)

Dear Ladies and Gentlemen:

More than five years after the financial crash and more than three years after the Dodd-Frank financial reform law was passed, you recently received a letter from the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("Chamber")

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seeking re-proposal of the Volcker Rule.[1] Without providing data or backup, again, the Chamber claims that finalizing and implementing the Proposed Volcker Rule would cause or compound serious problems and that re-proposal is the only solution for these alleged harms.

As detailed below, this latest request lacks merit and should be rejected. Better Markets,[2] which has filed five comment letters over the years on the Volcker Rule[3], urges you to proceed with your rulemaking and complete a strong, effective Volcker Rule as set forth in our comment letters and as required by the law.

The Volcker Rule is Narrow in Scope and Limited in Application.

Much has been said about the Volcker Rule and much of it is inaccurate and unsupported by evidence or data, tellingly not provided by industry. Indeed, the Volcker Rule has been distorted almost beyond recognition by the rhetoric of market participants talking their books, and their allies, like the Chamber, making sweeping unfounded assertions about the scope and impact of the rule.

The rule is, in fact, narrow in scope and limited in application. The prohibition itself targets **exactly one specific high-risk activity** that is known to endanger the financial system and taxpayers. This activity, proprietary trading, entails large banks gambling their own money (and enormous amounts of borrowed money[4]) on risky trades in the financial markets. These bets serve no purpose but to boost bank profits and traders' bonuses, and yet they pose grave dangers to the economy when they lose. It's the classic "heads I win, tails you lose" behavior that fueled the financial crash of 2008.

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1 *See* Center for Capital Markets Competitiveness Comment Letter Re: Volcker (Nov. 17, 2013), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-11-7-Chamber-Volcker-Reproposal.pdf ("Letter").

2 Better Markets is an independent, nonprofit, nonpartisan organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

3 *See* Better Markets Comment Letters "Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships With Hedge Funds and Private Equity Funds", (Nov. 5, 2010) *available at* http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-1358; "Prohibition on Proprietary Trading and Certain Relationships With hedge Funds and Private Equity Funds (Feb. 13, 2012) *available at* http://www.sec.gov/comments/s7-41-11/s74111-341.pdf; "Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Covered Funds (Apr. 16, 2012) *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=57403&SearchText=; "Prohibition on Proprietary Trading and Certain Relationships With Hedge Funds and Private Equity Funds (Jun. 19, 2012) *available at* http://www.sec.gov/comments/s7-41-11/s74111-594.pdf; and "Prohibition on Proprietary Trading and Certain Relationships With Hedge Funds and Private Equity Funds (Jan. 8, 2013) *available at* http://www.federalreserve.gov/SECRS/2013/January/20130130/R-1432/R-1432_011013_110940_574944941464_1.pdf.

4 Or, in the case of JP Morgan Chase, other people's money, like when it used more than $150 billion of deposits (some of them federally insured) to fund the "London Whale" proprietary trade. *See* Senate Permanent Subcommittee on Investigations report "Wall Street and the Financial Crisis: Anatomy of a Financial Crisis" (Apr. 13, 2011) *available at* http://www.hsgac.senate.gov/subcommittees/investigations/reports?c=112.

Most importantly, the Volcker Rule prohibits proprietary trading only at firms that have access to the federal safety net or otherwise pose a systemic risk to the financial system. While the number of such firms may seem large, the group of firms that actually engage in any meaningful proprietary trading is quite small, less than a dozen. Thus, the Rule will materially impact just the very largest banks in the U.S., as they are the only banks that engage in any material proprietary trading. Of course, to the extent that proprietary trading serves a greater market function, it will continue robustly by the many other existing and new financial market participants (as specifically addressed in our June 19, 2012 comment letter). Indeed, where there is a demand for a financial product or service, and money to be made in providing it, a market solution will arise.

Therefore, the Chamber's assertion that the proposed Volcker Rule will "impede the ability and increase the cost of non-financial businesses to raise capital and manage risk" lacks merit. First, this claim disregards the fact that the financial crash and crisis did more damage to those concerns than any rule or reform possibly could. In September 2008 and long after, there was **no** capital formation and **no** feasible way to manage the risk of global financial turmoil. Second, the actual limited application of this rule ensures that small and non-commercial businesses – indeed, any firm outside of the few largest federally-backstopped institutions – will not suffer from the effects of the rule. Third, there is no data to support the claims of far reaching second or third order effects from a proper and swift implementation of the Volcker Rule.

The Letter and Spirit of the Law Can Be Relatively Easily Implemented.

The clear intent of the Volcker Rule is to follow a dual mandate: eliminate covered entities' proprietary trading and the risks that arise from that trading, while continuing to allow certain specified, narrow permitted activities like market making and risk-mitigating hedging. But, these permitted activities are not intended to and should not be allowed to subvert the ban on proprietary trading, and a rule that accomplishes both goals equally is required to be passed.

In previous letters, Better Markets has described in detail the provisions that would ensure a straightforward, workable rule that both bans proprietary trading while fully allowing for permitted activities. In summary, by eliminating the revenue and compensation incentives from proprietary trading, requiring strict risk and hedging standards, and levying meaningful penalties on violators, such a rule would ban proprietary trading **and** fully permit market making and risk mitigating hedging.

Such a rule would also be consistent with the law and be a clear, workable, enforceable rule for market participants and regulators. Further, it would be easy to police, as nothing is tracked and monitored more closely than revenue and compensation (including, in particular, the bonus pool).[5]

[5] *See* Better Markets comment letter "Prohibition on Proprietary Trading and Certain Relationships With Hedge Funds and Private Equity Funds (Feb. 13, 2012), *available at* http://www.sec.gov/comments/s7-41-11/s74111-341.pdf.

We urge the Agencies to complete and implement a comprehensive rule that accommodates, permits, and harmonizes the several purposes, as is required by law.[6]

The Financial Industry Has Had Ample Opportunity for Input into the Volcker Rule.

Wall Street's lobbying on financial reform generally, and the Volcker Rule in particular, has been overwhelming. An analysis by Duke Law School professor Kimberly Krawiec revealed that the financial industry and its allies accounted for **93 percent** of all federal agency contact on the Volcker Rule.

> "[T]he powerful interest groups most affected by Dodd-Frank did not waste opportunities provided by the Volcker Rule's pervasive gaps and ambiguities...they actively lobbied agencies to adopt favorable definitions, interpretations, and exemptions," Professor Krawiec wrote.[7]

After the Dodd-Frank Act became law, the industry lobbied the regulatory agencies extensively to shape the proposed rule.[8] Indeed, the industry and its allies, including the Chamber of Commerce, began criticizing the law "[w]ithin minutes of the bill signing."[9]

In the three years since the Volcker Rule was first introduced for comment by the Financial Services Oversight Council ("FSOC"), the Chamber alone has written 20 letters

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6 As we have detailed in our comment letters and meetings, the Proposed Rule does require changes so that it can be strengthened, harmonized, and, thereby, enforceable. That, however, does not require re-proposing the rule. The applicable legal standard allows for significant variation between proposed and final rules, provided the end result is a "logical outgrowth" of the initial proposal, which is what we have advocated. *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 938, 371 U.S. App. D.C. 554 (D.C. Cir. 2006) (quoting *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52, 360 U.S. App. D.C. 129 (D.C. Cir. 2004)).

7 Kimberly D. Krawiec, *Don't "Screw Joe The Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 59 (2013), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3068&context=faculty_scholarship.

8 With respect to the length and complexity of the Proposed Rule, which is claimed by the Chamber as another justification for re-proposal, it is important to note that some significant amount of such claimed complexity is a direct result of lobbying by the financial industry and its allies seeking to change, kill, or weaken the rule. The bank lobbyists further encumbered the rule with provisions affecting others, which were then used as a hook to enlist others to lobby against the rule, as Bloomberg detailed in its report: "Bank Lobby Widened Volcker Rule, Inciting Foreign Outrage." Yalman Onaran, (February 23, 2013) *available at* http://www.bloomberg.com/news/2012-02-23/banks-lobbied-to-widen-volcker-rule-before-inciting-foreigners-against-law.html.

9 The Chamber and other Wall Street Groups were vocal critics of financial reform immediately upon passage of the Dodd-Frank Act: "Within minutes of the bill signing, several Wall Street groups were leveling criticism at the new regulations, reflecting Mr. Obama's increasingly fractious relations with corporate America. The Business Roundtable complained in a statement that the law "takes our country in the wrong direction" and may discourage investment and job growth, echoing concerns made by the United States Chamber of Commerce and other business organizations." Helen Cooper, *Obama Signs Overhaul of Financial System*, NY TIMES (July 21, 2010), *available at* http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=0.

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to regulators and members of Congress to voice their concerns. It should be noted that, following a similar appeal by the Chamber in 2011 to delay the Volcker rule,[10] the Agencies extended the public comment period in an attempt to address these concerns.[11] By any definition of reasonableness, the Chamber and the industry have had ample time to make their views known about the Volcker Rule.

The Chamber's Criticisms Relating to Cost-Benefit Analysis Have No Merit.

The Chamber faults the Agencies for not conducting an adequate cost-benefit analysis of the Proposed Rule, but these claims also have no basis. If and when Congress wants an agency to conduct cost-benefit analysis when promulgating rules, it expressly imposes that obligation in clear statutory language. However, Congress has never done so with respect to any of the five Agencies.[12] In fact, in a case ignored and unmentioned by the Chamber in its letter, the United States Court of Appeals for the District of Columbia Circuit recently affirmed that the CFTC's statutory obligation simply to "consider" certain economic factors—including costs and benefits—does **not** impose a duty to conduct cost-benefit analysis: "Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here."[13]

The reason for Congress's decision is clear: Cost-benefit analysis is **not** appropriate in the context of financial regulation because it is so resource intensive, time-consuming,

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10 *See* Center for Capital Markets Competitiveness Comment Letter Re: Volcker (Nov. 17, 2011), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2011-11.17.-Letter-Requesting-Re-proposal-and-Extension-Notice.pdf.

11 "Due to the complexity of the issues involved and to facilitate coordination of the rulemaking among the responsible agencies as provided in section 619 of the Dodd-Frank Act, the Agencies have determined that an extension of the comment period until February 13, 2012 is appropriate" *See* 77 Fed. Reg. 23-24 (Jan. 3, 2012), *available at* http://www.fdic.gov/regulations/laws/federal/2011/12extensionjan03.pdf.

12 To support the notion that the Agencies were obligated to conduct cost-benefit analysis, the Chamber relies on supposed evidence of "Congressional intent" in the form of comments from Representative Barney Frank at a hearing on the Volcker rule. However, Representative Frank's comments in no way stand for the proposition that the Agencies were duty-bound to provide a cost-benefit analysis for the Rule. First, Mr. Frank aggressively defended the Rule by arguing that "delay" is a stalking horse for those who oppose the Rule; by debunking the notion that the Rule will place U.S. financial institutions at a disadvantage internationally; and by noting the hypocrisy of lobbyists who sought amendments or accommodations in the Rule and then complained that the Rule was too complex. *See* House Committee on Financial Services Committee joint hearing entitled "Examining the Impact of the Volcker Rule on Markets, Businesses, Investors and Job Creation" (Jan. 18, 2012), at 7, *available at* http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=274322. And Representative Frank used the expression "cost-benefit analysis" not to say that it was required of the Agencies, but **to challenge the industry's argument** that greater liquidity in our markets is necessarily desirable. *Id.* at 8.

13 *Investment Company Institute v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. June 25, 2013). Similarly, the SEC has no obligation to conduct cost-benefit analysis, only to consider whether a rule will promote three specified economic factors. *See* BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC, at 39-44 (July 30, 2012), *available at* http://bettermarkets.com/sites/default/files/CBA%20Report.pdf.

and inevitably inaccurate and incomplete.[14] Making matters worse, those like the Chamber arguing for so called "cost benefit analysis" are often seeking little more than a one-sided "industry cost only analysis," ignoring the benefits (in addition to ignoring the difficulty of quantifying them). For example, the Chamber complained that the Agencies have failed "to submit any meaningful empirical or cost-benefit analysis to determine **the adverse effects** to market liquidity" of the Proposed Rule,[15] without making any reference to the benefits of the rule. These concerns are even more compelling where, as here, Congress has already determined that a reform is necessary knowing full well that there would be significant costs imposed on the industry and nonetheless has **mandated** that an Agencies implement the law by rule.

Finally, to the extent any consideration of costs and benefits is relevant in assessing the Proposed Rule, that consideration must recognize the enormous and overriding benefits that the Rule will provide: helping to prevent another financial crisis and the staggering financial losses and human suffering that would again be inflicted on our economy and society.[16] Indeed, against the backdrop of the worst financial and economic crises since the Great Depression, it is inconceivable that Congress would enact sweeping reforms, including the Volcker Rule, and then allow the implementation of those reforms to hinge on the outcome of a one-sided cost-benefit analysis that ignored the overriding purpose of the new regulatory framework—and that gave controlling weight to cost concerns from the very industry that precipitated the crisis and gave rise to the need for the law and the rule.

CONCLUSION

The Volcker Rule, combined with other regulations, is an essential measure to stop large, too-big-to-fail banks from making huge, highly leveraged, swing-for-the-fences bets to inflate their bonuses, while shifting the risk of catastrophic loss to the public. The industry's relentless effort to derail or delay this rule must be rejected.

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14 These points were reflected by Scott Alvarez, General Counsel of the Federal Reserve, in a letter to the Government Accountability Office regarding Dodd-Frank regulations. His letter observes that "conducting benefit-cost analysis on financial regulations is inherently difficult, and, 'the difficulty of reliably estimating the costs of regulations to the financial services industry and the nation has long been recognized, and the benefits of regulation generally are regarded as even more difficult to measure.'" Furthermore, and contrary to the Chamber's assertion, Mr. Alvarez makes very clear that "federal cost-benefit requirements" are "**not a mandate**." *See* Letter from Scott Alvarez, General Counsel of the Federal Reserve, to Nicole Clowers, Director, Financial Markets and Community Investment, Government Accountability Office, Oct. 24, 2011 (cited by the Chamber at page 7 of their letter) (emphasis added).

15 Letter at 5.

16 *See* BETTER MARKETS, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN $12.8 TRILLION (Sept. 15, 2012), *available at* http://bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis.pdf.

The regulatory reforms embodied in the Volcker Rule and financial reform more broadly need to be implemented without delay to establish truly fair, stable, and transparent markets that are less prone to failure, crisis, and bailouts. That is the best way to prevent another financial disaster and ensure that there is adequate market liquidity, capital formation, and credit availability, as well as economic growth and job creation.

Sincerely,

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