CENTER FOR CAPITAL MARKETS COMPETITIVENESS
OF THE
UNITED STATES CHAMBER OF COMMERCE

DAVID T. HIRSCHMANN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062-2000
202/463-5609 • 202/955-1152 FAX
david.hirschmann@uschamber.com

February 13, 2012

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve
20th Street and Constitution Avenue
Washington, DC 20551

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

Mr. David Stanwick
Secretary
Commodities and Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships With, Hedge Funds and Private Equity Funds. Docket ID OCC-2011-0014, RIN 1557-AD44; Docket No. R-1432, RIN 7100 AD 82; RIN 3064-AD85; Release No. 34, RIN 3235-AL07; File Number S7-41-11.

Dear Ms. Johnson, Mr. Feldman, Ms. Murphy, Mr. Stanwick and To Whom It May Concern:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation representing the interests of over three million companies of every size, sector and region. The Chamber created the Center for Capital Markets

Competitiveness ("CCMC") to promote a modern and effective regulatory structure for the capital markets to fully function in a 21st century economy. The CCMC welcomes the opportunity to provide input and comment on the proposed rule, ***Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships With, Hedge Funds and Private Equity Funds*** ("the Volcker Rule Proposal") issued by the Board of Governors of the Federal Reserve ("Federal Reserve"), Federal Deposit Insurance Corporation ("FDIC"), Securities and Exchange Commission ("SEC") and Office of the Comptroller of the Currency ("OCC"). As of this date, the Commodities and Futures Trading Commission ("CFTC") (also collectively "the regulators") has voted to release a Volcker Rule Proposal, but it has not been published in the *Federal Register*.

The CCMC believes that the Volcker Rule Proposal should be re-proposed for the following reasons:

1) The CCMC is concerned about how the Volcker Rule proposals were released and believe that comment process has been compromised as a result;[1]

2) The CCMC also believes that serious issues and deficiencies exist with the economic and cost benefit analysis used by the regulators;[2]

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[1] *See* October 11, 2011 letter from the CCMC to Treasury Secretary Timothy Geithner requesting that the Financial Stability Oversight Council use its authority to reconcile differences in the various Volcker Rule Proposals issued by the regulators; November 17, 2011 letter from CCMC to the regulators requesting a withdrawal and re-proposal of the Volcker Rule because of the failure of the CFTC to issue its proposed rule.
[2] *See* December 15, 2011 letter from the CCMC to the regulators citing flaws with the cost benefit and economic analysis of the Volcker Rule Proposal, and and requesting that the proposal be submitted for enhanced economic analysis under OIRA review, that it be considered an economically significant rulemaking and that the regulators coordinate these efforts under Executive Orders 13563 and 13579. This letter also requested that the cumulative impact of other initiatives, such as Basel III, be taken into account when determining the economic impacts of the Volcker Rule Proposal.

3) In releasing the proposed Volcker Rule, regulators have failed to take into consideration the adverse impacts the proposal will have on the ability of companies to raise capital;

4) The Volcker Rule Proposal will force commercial companies that own banks to build and maintain compliance programs though they have never engaged in proprietary trading;

5) The Volcker Rule Proposal creates ambiguity as to permissible market making and underwriting, thereby increasing risk and reducing liquidity for companies;

6) The Volcker Rule Proposal places the American economy at a competitive disadvantage and may in fact violate existing trade agreements; and

7) The Volcker Rule Proposal may endanger infrastructure projects and the businesses that work on them by impacting the ability of State and Municipal governments and agencies to raise capital.

Additionally, because of the staggered release of the Volcker Rule Proposal, the CCMC believes that the comment periods of the various regulators involved in this rulemaking should be extended and reconciled to one date. This will allow commenters to review the proposals in a holistic manner and provide regulators with more informed and thoughtful comments needed to address deficiencies in the Volcker Rule Proposal.[3]

The CCMC's concerns are addressed in greater detail below.

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[3] *See* letter from the CCMC to regulators on January 17, 2012 requesting that the regulators reconcile all of the comment periods to end with the conclusion of the CFTC comment period.

Discussion

On January 21, 2010, President Barack Obama proposed a ban on proprietary trading and named it after former Federal Reserve Chairman Paul Volcker, its chief architect. The Obama Administration requested other nations to follow suit, which was universally rejected.[4] The Volcker Rule was eventually made a part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") through the passage of the Merkley-Levin Amendment.

While much of the focus of the legislative language and regulatory implementation of the Volcker Rule has been concentrated on the financial sector, little attention has been paid to the impact that this proposal will have on capital formation for companies. Indeed, for the full impacts of the Volcker Rule to be understood, one must consider the proposal in conjunction with proposed derivatives regulation and their impact upon end-users, the potential disappearance of money market funds with the impending proposals that are being discussed within the SEC, and new lending and liquidity requirements that are being negotiated as part of the Basel III capital accords.

For companies, the cost of capital will rise, many firms (particularly smaller ones) will be shut out of capital markets and inhibited from accessing available bank lending, and companies may not be able to hedge risk in certain circumstances. This will make the overall economy less stable and less conducive to growth.

In short, the American engine of economic growth will be deprived of the fuel needed to operate.

1. Process

[4] *See* E.U. Ministers to Resist Obama's Proposal for Banking Overhaul, *Bloomberg News*, Feb. 16, 2010.

The CCMC has been concerned with the process and release of the Volcker Rule Proposal. On October 11, 2011, the Federal Reserve, FDIC, SEC, and OCC voted to release a joint Volcker Rule Proposal. This joint rulemaking, encompassing 298 pages and over 1,000 questions, was published in the *Federal Register* on November 7, 2011. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pt. 44). First, the CCMC wrote to Secretary Geithner requesting the Financial Stability Oversight Council ("FSOC") to reconcile differences amongst the regulators and harmonize the release of the proposed Volcker Rule. Later, the CCMC wrote to the regulators requesting that the Volcker Rule Proposal be withdrawn and re-proposed at such a time that the CFTC could engage in the joint-rulemaking. As part of this request, the CCMC also noted other less complex and less economically significant rulemakings that had a 150 day comment period and that the Volcker Rule Proposal should have a comment period of that length.

The CFTC voted to release its version of the Volcker Rule Proposal on January 11, 2012, almost 90 days after similar action by the Federal Reserve, FDIC, SEC, and OCC; however, the CFTC portion of the Volcker Rule Proposal has still not been published in the *Federal Register*.

This staggered release of the Volcker Rule Proposal does not allow a company to view the proposal across its entire spectrum of business activities to ascertain the full impact upon the company.

Consider the not uncommon example of a public company that issues debt and equity instruments, owns a bank, and uses derivatives to mitigate risk. Such a company must determine how its treasury department will be impacted by the Volcker Rule through the SEC and Federal Reserve; it must assess how to build out a Volcker Rule compliance program that will pass muster with the appropriate banking regulator; and it must also analyze its ability to use derivatives in compliance with the relevant CFTC regulations. Furthermore, the company must understand how each discrete regulatory piece functions individually and collectively.

This staggered release will force companies to view these matters in a piecemeal fashion and over a compressed time line, constraining the ability to form a comprehensive analysis needed to provide the regulators with informed comments.

2. Cost Benefit and Economic Analysis Deficiencies

On December 15, 2011, the CCMC filed a letter with the Federal Reserve, FDIC, SEC, and OCC regarding deficiencies about the cost benefit analysis in the Volcker Rule Proposal. These concerns include fundamental differences in legal standards and practices amongst the regulators. Accordingly, the CCMC recommended and still recommends that the Volcker Rule Proposal should:

- Be considered under the requirements of Executive Orders 13563 and 13579 in order to coordinate different requirements for economic analysis and finalization of rules;

- Be considered an economically significant rulemaking and the public provided with a qualitative and quantitative analysis of the impacts upon the economy as required by the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Reform Act");

- Be subject to an enhanced Office of Information and Regulatory Affairs ("OIRA") regulatory review process; and

- Be considered in the context of other initiatives, such as Basel III, and other pertinent Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") rulemakings, when determining the economic impacts.

We provide additional feedback on these important cost benefit issues in this letter as well. The agencies have failed to submit for public analysis and comment any meaningful empirical or cost benefit analysis to determine the adverse effects to market liquidity of the proposed regulations. This defies congressional intent: Congressman Frank, in fact, recently stated in a congressional hearing on the Volcker Rule that cost benefit analysis "has to be applied" to the Volcker Rule Proposal.[5] The Volcker Rule Proposal's shortcoming in this regard would appear to violate several applicable legal requirements and underscores the concern that the proposed regulations will have a dramatic negative effect on the financial markets.

Among other requirements, the SEC is statutorily required to consider the effects of certain rules on "efficiency, competition, and capital formation." These required considerations—particularly the effects on "capital formation"—are critical in connection with this rulemaking given the fundamental role that market making and related activities have on market liquidity and the efficiency of the capital markets. In discharging these responsibilities, the SEC must "determine as best it can the economic implications of the rule it has proposed," *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005), and subject that analysis to public comment, *see Chamber of Commerce v. SEC (Chamber II)*, 443 F.3d 890, 905 (D.C. Cir. 2006).

In the Volcker Rule Proposal, the SEC has undertaken an impermissibly limited analysis, claiming that the requirement to consider "efficiency, competition, and capital formation" applies only to the rule's documentation and recordkeeping requirements. Given the fundamental importance of this rule and its obvious economic significance, the SEC and other agencies should conduct a thorough economic analysis of *all* the regulatory provisions and submit this analysis for public comment to prevent impairing market liquidity in ways contrary to congressional

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[5] *Joint Hearing on the Volcker Rule Before the House Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises and the Subcomm. on Financial Institutions and Consumer Credit* (Jan. 18, 2012) (opening statement of Rep. Frank).

intent and harmful to commercial business activities. These effects on capital formation and market liquidity must be examined with more exacting review to better inform the agencies' analysis and to help minimize unnecessary regulatory burdens to companies.[6]

Even in the areas of the Volcker Rule Proposal, where the SEC purported to consider the effects on "efficiency, competition, and capital formation," the SEC failed to provide any estimates of the expected costs resulting from the regulations. As recently confirmed by the D.C. Circuit, this fails to satisfy the applicable legal standard. *See Business Roundtable and U.S. Chamber of Commerce v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (vacating SEC regulation because the SEC "did nothing to estimate and quantify the costs it expected companies to incur" under that regulation). In *Business Roundtable* and *U.S. Chamber of Commerce* the court determined that the SEC "failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; . . . and failed to respond to substantial problems raised by commenters." *Id.* at 1148-49. Those same deficiencies are present with this rulemaking.

Instead of engaging in the required, detailed analysis, the SEC only provides generalities about the anticipated effects of the proposed rule—yet even these nondescript statements suggest that the regulations will have a significant adverse effect on market liquidity. For example, the SEC's comments on the costs and benefits of its compliance regime is wholly lacking in content or conclusions. *See, e.g.*, 76 Fed. Reg. at 68,941-42 (covered banking entities "may reduce the size or scope of their market making activities," entities may "pass *some* of the costs along to customers and clients," and certain banking entities may provide "fewer market making-related

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[6] *See Joint Hearing on the Volcker Rule Before the House Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises and the Subcomm. on Financial Institutions and Consumer Credit* (Jan. 18, 2012) testimony of Anthony Carfang that non-financial businesses may have to increase cash reserves by $1 trillion to manage the impacts of the Volcker Rule Proposal. An increase in cash reserves of this magnitude would have adverse consequences upon business operations and economic growth.

services"). The SEC has afforded the public no explanation whatsoever of its assessment of the economic effects of this rule nor, in light of those effects, the regulatory choices the agency believes are appropriate.

The SEC's analysis is deficient in other ways as well. For example, the SEC proposes to impose the compliance program requirements immediately, which will entail significant costs. *E.g.*, 76 Fed. Reg. at 68,941 ("[i]ncurring these costs may marginally reduce the ability of covered banking entities . . . to compete with their non-banking entity counterparts"); *id.* (banking entities could "pass some of the costs along to customers and clients of their services"); *id.* ("the overall reduction in market making activities would likely have a negative impact on market efficiency and liquidity"); *id.* at 68,942 (the proposal "could cause the covered banking entity to redirect resources from other business activities that are generally beneficial to market efficiency"). However, the only benefit of the compliance program mentioned in the Volcker Rule Proposal is that it "could have positive efficiency effects because these measures generally may improve compliance within covered banking entities and thereby reduce the potential consequences associated with noncompliance." *Id.* at 68,941.

Such vague and circular reasoning would justify any recordkeeping requirement and is not a permissible substitute for a more detailed and nuanced assessment. Moreover, it ignores the fact that the statute provides for a two year conformance period, subject to further extension by the Federal Reserve, for banking entities to comply with the Volcker Rule requirements. Dodd-Frank Act § 619(c); 76 Fed. Reg. at 68,941. Therefore, the sole benefit of the compliance program asserted by the Volcker Rule Proposal —that it will reduce noncompliance—will not be realized in any respect until the Volcker Rule requirements are fully operative years into the future. The Commission provides no explanation for requiring regulated entities to incur the significant costs of the compliance program requirements well in advance of any benefits that may be derived from them. In sum, this regulatory approach is fundamentally flawed.

Because this economic assessment is deficient as a matter of law, the SEC may not finalize the rule without first re-proposing it for public comment after performing a legally-required, proper economic analysis. The *Chamber II* litigation is instructive on this point. In that case, the SEC readopted a rule without notice and comment after remand from the Court of Appeals. In so doing, the SEC relied on a handful of materials that had not been exposed to public comment, but argued that re-proposal was unnecessary because the new materials merely confirmed the agency's initial analysis. The court, finding that additional notice and comment was required, disagreed and vacated the rule. *Chamber II*, 443 F.3d at 903-05.

Those principles apply here as well. As noted above, the agencies have provided no analysis of costs and benefits that would result from the proposed regulations. Instead, they have asked the public to provide this analysis. *See, e.g.*, 76 Fed. Reg. at 68,869-70 (asking for comments on the costs and benefits of proposed market making definition without providing any indication of the agencies' views); *id.* at 68,926 ("We seek comment on whether, in order to comply with the statutory prohibition on proprietary trading, some banking entities may be inclined to abstain from some market making activities [and] this could result in reduced liquidity for certain types of trades or for certain less liquid instruments.").[7]

The agencies cannot rely on the cost benefit analyses submitted by commenters in promulgating a final rule because they have not been subject to public comment. *See Chamber II*, 443 F.3d at 899-901. The opportunity for the public to review, comment upon, and inform the analysis underlying an agency's action is, of course, the essence of notice and comment rulemaking under the Administrative Procedure Act. *See id.* (public was entitled to notice of and an opportunity to comment on certain materials underlying the agency's analysis); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d

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[7] Ibid; *Joint Hearing* at 46-47 (Chairman Schapiro and Mr. Turner, in response to question by Rep. Gutierrez, asserting that agencies have requested commenters to provide pertinent economic analysis).

1177, 1182 (D.C. Cir. 1994) (invalidating rule because materials provided to public were too "opaque" and "[t]here [was] no way to know the agency's methodology from what little it reveal[ed] in the cost analysis"); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 447-53 (3d Cir. 2011) (vacating and remanding an FCC rule because the FCC released "several additional peer review comments, 'revised' versions of four of the studies, and new peer review studies" on the last day for comments). Whether the agencies develop a more robust economic analysis on their own to inform their regulatory determinations, or through submissions by commenters, they must re-propose the rule with that additional analysis. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

The Volcker Rule Proposal also fails to satisfy other cost benefit requirements that apply to the rulemaking. For example, the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* ("RFA"), "imposes procedural requirements on agency rulemaking, in particular the preparation of a 'final regulatory flexibility analysis' regarding the effect of the rule on small businesses," *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) (quoting 5 U.S.C. § 604), unless the agency certifies (accurately) that "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities," 5 U.S.C. § 605(b). In the Volcker Rule Proposal, the agencies state that a RFA analysis is not required because "[t]he proposed rule would not appear to have a significant economic impact on small entities." 76 Fed. Reg. at 68,938.

Yet even a rudimentary analysis that involves consultation with the business sector would show that the Volcker Rule Proposal will have a significant impact on numerous small non-banking entities, including many of the Chamber's members, by applying Volcker Rule restrictions to "affiliates" of banking entities and by impeding access of all companies to beneficial market-making and underwriting services.

As described in further detail below, the Volcker Rule Proposal would extend its reach to many commercial companies that own or control banks, as well as many entities that invest in companies that own or control banks. Accordingly, companies, including small businesses, with such direct or indirect affiliation with banking entities themselves could be subject to the requirements of the Volcker Rule. And to the extent that small entities become burdened with Volcker Rule requirements and are required to purge their corporate structures of all legal entities that rely on sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, the costs would be exceedingly high and affect numerous business arrangements.

In addition, small businesses across all sectors will be affected by the restrictions on market making and underwriting services. Commercial businesses, by virtue of these proposed regulations, will be unable to obtain financing and borrowing to meet their business needs, or at minimum will face higher costs to complete these basic financial activities. This will extend to the many small businesses that will have to forego business opportunities altogether due to the increased capital costs and diminished access that will result under the proposed regulations. Consequently, small entities will be "directly affected and therefore regulated," even though they are not the express "targets" of the Volcker Rule Proposal. *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007). Therefore, it was plain error for the agencies to fail to analyze these effects and to omit an RFA analysis from the Volcker Rule Proposal.

Similarly, the Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et seq.* , requires agencies to prepare a budgetary impact statement for any rule likely to result in expenditures by state and local governments and private actors of $100 million or more annually. *Id.* § 1532. The OCC determined that these cost thresholds would not be exceeded under the proposed regulations, 76 Fed. Reg. at 68,939, even though the agencies calculated that the recordkeeping and compliance requirements alone will require over 6.5 million man-hours, *id.* at 68,938. Coupled with the significant effects to market liquidity and to the business activities of all companies, the OCC's determination is clearly erroneous and an Unfunded Mandates Reform Act analysis is required.

Finally, Executive Order 13,563 applies to rulemakings by executive agencies and requires, among other things, that an executive agency "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs," "tailor its regulations to impose the least burden on society," and "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits." Executive Order 13,563—Improving Regulation and Regulatory Review, 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011). Executive Order 13,579 requests that independent agencies follow the requirements of Executive Order 13,563. Executive Order 13,579—Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41,587 (July 11, 2011). The agencies have ignored these considerations, failing to mention them at all in the Volcker Rule Proposal.

In short, the agencies have not conducted an adequate analysis of how the Volcker Rule Proposal would affect access to capital markets. They also have not properly considered the costs to liquidity in this regard. The agencies cannot issue a final rule with these fundamental deficiencies. Rather, the agencies must perform this required analysis and use these findings to inform their revised regulations and then reissue the proposed rule for public comment.

3. Failure to Consider Impacts of Capital Formation Upon Businesses

Generally speaking, proprietary trading is when a financial firm uses its own funds, rather than its customer funds, to purchase debt instruments, securities, derivatives, etc. for potential profits. From reports it appears that the covered actors who engaged in proprietary trading have already spun off those soon to be prohibited operations.

Through market making and underwriting, financial institutions act as a conveyance to provide, through debt, equity or derivatives, businesses with capital, liquidity or the means to manage risk. Recognizing the importance of market making and underwriting, Congress created exceptions for these activities. However, the regulators have fully acknowledged that they are not sure of the differences between market making, underwriting and proprietary trading, or what constitutes accepted practices of market making and underwriting.[8]

Companies use the debt and equity markets to raise capital for short-term cash management or long-term needs. Capital formation is directly tied to the ability of financial counterparties to sell and make a market for these debt and equity instruments. A rise in the cost of the sale of these instruments will deprive companies of capital, or in some cases shut them out of markets.

Similarly, regulatory scrutiny of trades to divine their intent—as to a permissible market making function, or a proprietary trade in disguise—will slow down the markets and raise costs. Indeed some companies may not be able to raise capital through permissible activities allowed under the market making and underwriting exception simply because a financial institution may want to avoid a subjective and burdensome regulatory review. Some companies will be able to adapt, spend the extra money or enjoy an advantage of economy of scale if they are large enough. However, others may be shut out of markets and deprived of bank lending opportunities by Basel III.

Ironically, while Congress is considering potential legislation to liberate capital formation for smaller companies and spur activity for initial public offerings, the proposed Volcker Rule may clamp down the capital pipeline for mature companies or those emerging companies.

[8] *See Joint Hearing on the Volcker Rule Before the House Financial Services Subcommittee. on Capital Markets and Government Sponsored Enterprises and the Subcommittee. on Financial Institutions and Consumer Credit* 11 (January 18, 2012). There is an extensive discussion by the regulators on the need to use the conformance period to create a better understanding of market making and underwriting and how to develop implementation and enforcement policies to allow for the appropriate application of these exceptions. This testimony is also instructive as the regulators also state that proprietary trading was not a cause of the 2008 financial crisis.

These impacts upon the ability of a business to raise capital were never contemplated by Congress in the passage of the Merkley-Levin amendment, nor by the regulators in the release of the Volcker Rule Proposal. To ignore these ramifications for businesses is an abdication of the statutory framework and the cost benefit analysis requirements in promulgating the Volcker Rule Proposals.

At a minimum, the CCMC believes that the regulators need to submit for public comment a cost benefit analysis regarding the cost of capital formation and impediments caused by the proposed Volcker Rule upon businesses. Public roundtables of companies will be an important tool for regulators to obtain this feedback.

4. **The Volcker Rule Proposal Will Force Some Commercial Companies That Never Engaged in Proprietary Trading to Build Compliance Programs**

The Volcker Rule Proposal would impose a compliance program that applies broadly to banking entities and commercial owners and affiliates of banks. Many commercial companies own banks or financing arms in order to finance the purchase or sale of goods and services, or reduce costs. While these banks and companies do not engage in proprietary trading, they will now have to build out Volcker Rule compliance programs and face increased regulatory scrutiny. This will impose start-up costs as well as ongoing compliance costs. Alternatively, in order to avoid these compliance costs, commercial companies may have to sell off these banks, reducing their ability to provide financing to prospective customers or driving up costs.

The proposed compliance requirements are set forth at Part D of the Volcker Rule Proposal, _.20, Apps. A-C, 76 Fed. Reg. at 68,955-67, and include, among other things, "internal written policies," "internal controls," "a management framework," "independent testing," "training," and "making and keeping records sufficient to demonstrate compliance." _.20 (b) (1)-(6), 76 Fed. Reg. at 68,955-56.

The proposed requirements are overbroad and would be extremely burdensome. For example, the Volcker Rule Proposal requires the calculation of various quantitative measurements each trading day. Because most regulated entities do not currently calculate all of these measurements on a daily basis (at least not in the format the Volcker Rule Proposal would require), this would impose a significant burden on covered entities. In addition, these measurements would have to be reported on a monthly basis to the agencies, further adding to the immense regulatory burden. Indeed, the agencies themselves estimate that the recordkeeping requirements alone would require over 6.5 million hours of work by regulated entities. 76 Fed. Reg. at 68,938.

These costly recordkeeping and reporting requirements would require companies to devote millions of man-hours and expend millions of dollars in regulatory compliance costs, thereby increasing the cost of capital and decreasing liquidity overall for the financial markets. As discussed above, the agencies have failed to examine adequately the costs and benefits of these burdensome requirements, or give any consideration to lesser burdensome alternatives. This fails to comply with applicable rulemaking requirements.

Many commercial companies and affiliates will be burdened by the Volcker Rule. That is because the Rule applies to all companies that own or control a bank,[9] including commercial companies, even if that bank is a "nonbank" bank such as a

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[9] The BHCA provides that a company "has control over a bank or over any company if—
(A) the company directly or indirectly or acting through one or more other persons, owns controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
(C) the [Federal Reserve] determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company."
12 U.S.C. § 1841(a)(2); *see id.* 1813(w) (adopting section 1841 definition).

savings bank or an industrial loan company. Numerous companies will be affected in this way, ranging from John Deere and Target to General Electric and Toyota.

There are two types of effects. First, companies that own or control banks, and their affiliates, will be subject to the Volcker Rule. The Rule imposes both restrictions and compliance costs. Second, entities that invest heavily in companies that own or control banks may themselves become subject to the Volcker Rule. The desire to avoid that onerous regulatory burden may cause investing entities to avoid investing in the numerous companies that own or control banks.

Many of the requirements of the Volcker Rule are inappropriate for commercial companies that do not directly participate in the underlying activities of the regulated banking entity. In particular, below, we highlight arbitrary restrictions on the beneficial funds related activities of banking entities that, when applied to commercial owners, increases the severity of the regulatory consequences. The effect of these overbroad requirements would be to chill investment needlessly in entities that own banks. These restrictions would prevent important stability and support—*e.g.*, "source of strength" funding—that commercial owners provide to banking entities

Similarly, mid-size and regional banks that are a large reservoir of capital for commercial companies will also have to build Volcker Rule compliance programs, even though those financial institutions do not engage in proprietary trading. This will drive up costs and subject everyday transactions to Volcker Rule scrutiny though the parties on both sides of the transaction are not engaged in proprietary trading.

5. The Volcker Rule Proposal Creates Ambiguity as to Appropriate Market Making and Underwriting Activities and Produces Other Adverse Effects

A. The benefits of market making and underwriting activities to market liquidity are well-established.

Market making and underwriting activities are widely acknowledged to achieve benefits in enhancing liquidity, including secondary market liquidity. These beneficial activities decrease the cost of capital and increase access to capital and credit markets for U.S. companies.

Specifically, widespread market making activities reduce the bid-ask spread for securities, that is, the difference between what sellers receive and buyers pay for securities. Michael A. Goldstein & Edward F. Nelling, *Market Making and Trading in Nasdaq Stock*, 34 Fin. Rev. 27, 27 (1999); Sunil Wahal, *Entry, Exit, Market Makers and the Bid-ask Spread*, 10 Rev. of Fin. Studies 871, 872 (1997). Reduced spreads, in turn, benefit all buyers and sellers who choose to participate in the secondary markets. John Rust & George Hall, *Middlemen Versus Market Makers: A Theory of Competitive Exchange*, 111 J. of Political Econ. 353, 353 (2003).

Widespread underwriting activities, analogously, reduce underwriting spreads, that is, the difference between the amount underwriters receive and issuers receive from a public offering. Dongcheol Kim et al., *The Impact of Commercial Banks on Underwriting Spreads: Evidence from Three Decades*, 43 J. of Fin. & Quantitative Analysis 975, 975 (2008). Reduced spreads, in turn, make it easier for companies to raise capital by reducing the costs of doing so. *Id.* at 976.

The decades long movement towards reduced bid-ask spreads and faster execution times have made the United States the destination of choice for capital in an increasing global financial marketplace.

Therefore, in enacting the Dodd-Frank Act, it is not surprising that Congress expressly exempted from the Volcker Rule restrictions "underwriting or market making-related activities." Dodd-Frank Act, § 619(d) (1) (B), 124 Stat. at 1624. The inclusion of this exemption and its breadth was no stray phrase. Quite the contrary, Senator Merkley emphasized that the term "market making-related" stood in contrast to a prior bill's use of the term market making. 156 Cong. Rec. S5896 (daily ed. July 15, 2010). By including the broader market making related formulation, Senator

Merkley confirmed that Congress intended to exempt and allow additional activities to meet client liquidity needs. *Id.*

In the Volcker Rule Proposal, the agencies themselves describe the importance of market makers and underwriters to market liquidity. *E.g.*, 76 Fed. Reg. at 68,869 (discussing "the important liquidity and intermediation services that market makers provide to their customers and to the capital markets at large"); *id.* at 68,925-26 ("Permitting legitimate market making in its different forms should promote market liquidity and efficiency . . ."); *id.* at 68,941. But, as described below, the Volcker Rule Proposal imposes onerous limitations on these activities that are in conflict with the statute and will bring harm to the markets.

B. Several provisions of the Volcker Rule Proposal are harmful and contrary to law.

In several areas, the Volcker Rule Proposal, by limiting the scope of the statutory underwriting and market making exemptions, does not effectuate Congress's clear intent to preserve these liquidity-enhancing activities. The agencies themselves recognize that several provisions of the Volcker Rule Proposal likely will negatively affect liquidity. For example, the regulators state that the compliance requirements of the Volcker Rule Proposal may cause banking entities to "reduce the size or scope of their market making activities," which would "likely have a negative impact on market efficiency and liquidity and, as a related matter, capital formation." 76 Fed. Reg. at 68,941; *see id.* at 68,926 ("We seek comment on whether, in order to comply with the statutory prohibition on proprietary trading, some banking entities may be inclined to abstain from some market making activities [and] this could result in reduced liquidity for certain types of trades or for certain less liquid instruments."); *id.* at 68,931 (the Volcker Rule Proposal may "result in fewer potential investors and reduced liquidity in the market for ownership interests in these covered funds.").

Below, we describe particular aspects of the Volcker Rule Proposal that conflict with the broad statutory exemption for underwriting and market making activities and that will cause significant harm to market participants if adopted as part of the final rule.

i. The Volcker Rule Proposal takes an unduly narrow view of market making as reactive and mechanical.

The statutory exemption for market making is broad, consistent with the underlying legislative intent that all beneficial "market making-related" activities be exempt from Volcker Rule prohibitions. Specifically, the Dodd-Frank Act exempts transactions "in connection with . . . market making activities, to the extent that any such activities permitted by this subparagraph are designed not to exceed the *reasonably expected near term demands* of clients, customers, or counterparties." Dodd-Frank Act, § 619(d) (1) (B) (emphasis added).

This statutory definition appropriately reflects the real-world practices of market making in two fundamental ways. First, the use of the word "expected" correctly understands that market making is not solely a reactive activity, that is, market makers do not perform their roles by merely responding reflexively to customer or client requests. Rather, market makers must anticipate customer or client requests and accumulate sufficient inventories to meet those *reasonably expected* client demands. Second, the use of the word "designed" correctly captures the reality of financial markets that moves made to anticipate customer demand are not always accurate; that is, customer demand is not always accurately predicted. Rather, market makers must act on the best information they have, even though in hindsight their projections may have proven inaccurate.

But the Volcker Rule Proposal fails to acknowledge these accepted practices in expounding on the definition of market making. The Volcker Rule Proposal provides that market making activity may include taking positions in anticipation of customer demand but only "so long as any anticipatory buying or selling activity is reasonable and related to clear, demonstrable trading interest of clients, customers, or counterparties." 76 Fed. Reg. at 68,871. This formulation is both impermissibly vague and not consistent with the ways in which financial institutions ensure that markets are able to function smoothly, with sufficient liquidity provided to market participants, both financial and non-financial. At a minimum, the agencies should clarify in the final rule that market makers may make individualized assessments of anticipated consumer demand based on their expertise and experience dealing in the markets and make trades according to those assessments. Indeed, an interpretation that limits market making to trading activities in *response* to "clear demonstrable trading interests" would conflict with the essential role of market makers to *predict* client demand and accumulate sufficient inventory to meet those demands.

Similarly, the Volcker Rule Proposal would further curtail legitimate market making activities by specifying that "absent explanatory facts and circumstances, particular trading activity in which a trading unit retains risk in excess of the size and type required to provide intermediation services to customers will be considered to be prohibited proprietary trading, and not permitted market making-related activity." 76 Fed. Reg. at 68,961. This limitation could prevent market makers from warehousing positions in anticipation of predictable but unrealized client demands. It could also create a severe penalty for market makers who misestimate expected demand, taking positions in anticipation of a demand that never fully materializes. These limitations on market making are contrary to the statute and would harm market liquidity, with no corresponding mitigation of market risk, if adopted in the final rule.

ii. The Volcker Rule Proposal takes a one-size-fits-all approach that is inconsistent with differences among markets.

The agency proposes the same restrictions on market making for all types of asset classes regardless of the characteristics of the particular market. This is inappropriate, because the markets for different securities vary significantly in their levels of trading and liquidity such that market making activities often have to be tailored to reflect these fundamental differences.

For example, there are some markets that are highly liquid (*e.g.*, trading in common securities). Buyers and sellers are plentiful, and client demands for trades (buying or selling) are continuous. Consequently, there is little need in these markets for significant activity by the market maker in order to determine prices or anticipate demand, at least absent market shocks that temporarily reduce the number of buyers or sellers or both. In contrast, there are also more illiquid markets that require market makers to be more active. Market makers must engage in price discovery related trades and activities in order to help determine where to set their bid and ask prices. In the absence of these price discovery activities, a market maker could set the price at which it will buy securities too high, even above the price at which it could sell them, thereby committing to buy securities at a price that exposes it to significant risk. Needless to say, market makers would either refrain from participating in those markets or would impose a larger bid-ask spread in order to offset the risk. Accordingly, trading that leads to price discovery helps improve market liquidity and reduce capital costs for market participants.

Many markets are illiquid to some degree and therefore require active participation and price discovery by market makers. The corporate bond market, for example, which is thought of as well-developed, is actually fairly illiquid. There are roughly 37,000 unique corporate bonds instruments outstanding in the U.S. market alone. The market is highly fragmented due to the credit quality of issuers, the maturity of the instrument, the currency in which the security is issued, and a variety of other factors. Indeed, even equities markets are more illiquid than commonly perceived because of the high frequency of large, or block, trades. In total, block trades accounted for 14% of shares traded (103BN) and 9% of traded volume ($1.6TN) on the New York Stock Exchange ("NYSE") in 2009.[10] Block trades frequently exceed $5MM in total value—nearly 1000 times the size of the standard trade ($6,400) on the NYSE. Market makers play a critical role in facilitating and

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[10] *See* Oliver Wyman Study, Exhibit 3.1

executing block trades, thereby providing critical liquidity even to these relatively liquid markets.

The agencies acknowledge that the regulations must distinguish between different markets to ensure that market making activities are robust across all types of markets. In the Volcker Rule Proposal, the agencies "recognize[e] that there are differences in market making activities between different types of asset classes (e.g., liquid and illiquid instruments) and market structures (e.g., organized trading facilities and the over-the-counter markets)." 76 Fed. Reg. at 68,925. In particular, they state that "market making related activities in the over-the-counter markets or activities involving less liquid instruments are sometimes less transparent than similar activities on organized trading facilities or in liquid markets." *Id.* at 68,925-26. The agencies also claim that they have implemented the market making exemption in a way that accounts for these distinctions. *Id.*

But the proposed regulations do not accomplish this goal. The same restrictions apply to all market makers. There are no distinctions for market or asset characteristics. For example, section _.4 (b) (2) of the proposed regulations specifies that for the market making exemption to apply, "[t]he trading desk or other organizational unit that conducts the purchase or sale [must] hold [] itself out as being willing to buy and sell . . . for its account on a regular or continuous basis." These requirements presuppose a liquid market; indeed, market makers in illiquid markets may not trade continuously or offer to sell or buy under all circumstances, yet they are still performing market making activities "designed" to meet "reasonably expected" client demands in accordance with the statute. The same is true of the rule's restrictions on inventory: market makers in less-liquid markets may have to maintain greater inventory than market-markets in highly-liquid markets. The agencies should reject applying these artificial limits on market making that are inapplicable to markets with less than full liquidity and that conflict with the statutory framework.

iii. The Volcker Rule Proposal takes an unduly narrow view of market making as a passive activity, involving interactions only with customers.

As discussed above, the statute exempts "market making-*related* activities," as opposed to market making activities, because Congress intended that the market making exception be applied broadly. 156 Cong. Rec. S5896 (statement of Sen. Merkley). The Volcker Rule Proposal, however, impermissibly restricts the market making exemption to customer transactions, even though legitimate and beneficial market making often includes transactions involving non-customers.

Appendix B, which provides explanatory commentary on the market making exception, states that market makers "typically only engage in transactions with non-customers to the extent that these transactions *directly facilitate or support* customer transactions." 76 Fed. Reg. 68,961 (emphasis added); *see id.* ("In particular, a market maker generally only transacts with non-customers to the extent necessary to hedge or otherwise manage the risks of its market making-related activities, including managing its risk with respect to movements of the price of retained principal positions and risks, to acquire positions in amounts consistent with reasonably expected near term demand of its customers, or to sell positions acquired from its customers."). Indeed, the Volcker Rule Proposal goes so far as to proclaim that "[a]bsent explanatory facts and circumstances particular trading will be considered prohibited proprietary trading . . . if the trading unit: does not transact through a trading system that interacts with orders of others or primarily with customers of the banking entity's market making desk to provide liquidity services." *Id.* at 68,962.

This restriction is inconsistent with the reality of market making and assumes that market makers play a passive role in establishing and sustaining markets. Market makers often must actively create markets and accordingly participate in transactions not directly involving their customers, for at least two reasons. First, as explained above, market makers must trade for price discovery (particularly in illiquid markets). Second, market makers often will engage in trades with other parties in order to accumulate positions necessary to create and sustain a market. For example, in the corporate bond, interest rate derivative, and natural gas derivative markets, dealers frequently trade with other dealers in order to work down a concentrated position originating with a customer trade. In other circumstances, when there are more buyers than sellers for a particular security at a particular time for a market maker, only trades with other institutions can guarantee that market makers will be able to sell.

In short, the Volcker Rule Proposal misunderstands market making as solely customer-related transactions, contrary to the reality of the markets and the breadth of the statutory exemption for market making related activities. The agencies should revise the proposed regulations and remove these arbitrary limits to assure that effective market making remains possible.

iv. The rebuttable 60-day presumption is inappropriate for all but highly liquid securities.

The Volcker Rule Proposal impermissibly establishes a "rebuttable presumption" that a position taken for 60 days or less is a prohibited transaction. *See* 3(b) (2) (ii), 76 Fed. Reg. at 68,945-46. This presumption is based on the faulty and unsupported claim that "it appears likely that most positions held for sixty days or less would have been acquired with short-term trading intent." 76 Fed. Reg. 68,860. The agencies' unreasoned and arbitrary selection of a 60-day presumption is flawed for several reasons. First, as described above, Congress broadly exempted market making activities, and in so doing, did not establish a requirement that positions must be held for a certain period of time in order to qualify as legitimate market making. Therefore, the agencies' proposed 60-day presumption is counter to the statutory framework, and would impermissibly classify bona fide market-activities as unlawful proprietary trading.

Second, the agencies have utterly failed to justify this position with any supporting data, facts, or analysis—a necessary prerequisite for agency rulemaking.

See Motor. Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding agency action is "arbitrary and capricious" if it fails to "examine the relevant data and articulate a satisfactory explanation for its action[;] including a 'rational connection between the facts found and the choice made.'"). Because the agencies' proposal of a 60-day presumption is completely devoid of any supporting analysis or evidence, it fails to satisfy these requirements of reasoned decision making.

The consequences to the 60-day presumption will be significant. For example, it may discourage market making in illiquid markets. Trading in those markets is less predictable, such that market makers in their ordinary course of trading may sell positions after holding them for a short period of time, but will be impeded from doing so under the Volcker Rule Proposal. The presumption will adversely affect market making in other ways by forcing market makers to modify their bona fide activities simply to conform to the 60-day requirement.

Moreover, market participants often engage in derivatives transactions in order to hedge other positions. These positions may well be taken for fewer than 60 days, yet, under the proposed rule, this hedging activity would be presumed to constitute proprietary trading. Again, it is apparent that, as a result of the proposed rule, market making activity would be curtailed in a manner contrary to the provisions of and intent underlying the Dodd-Frank Act. As such, the rule should be modified to ensure that market making is not impeded as a result of the arbitrary presumption established in the proposed rule.

v. **The veritable inclusion of many hedging activities will increase risks in the market, contrary to congressional intent.**

The Dodd-Frank Act broadly exempts hedging activities from the ban on proprietary trading. Congress expressly permitted all "[r]isk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings." Dodd-Frank Act § 619(d) (1) (C).

A broad exemption for hedging is appropriate, because, as the FSOC stated, "[h]edging is also an important tool of firm-wide risk management." Financial Stability Oversight Council, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds 20 (2011). Indeed, "[p]rudent risk management is at the core of institution-specific safety and soundness, as well as macroprudential and financial stability." *Id.* at 21. Accordingly, the FSOC recommended that "[t]he Volcker Rule should not be applied in a way that interferes with a banking entity's ability to use risk-mitigating hedging." *Id.*

The agencies have not taken that advice. Instead, they have proposed an elaborate six-prong test for determining whether an activity is exempted, _.5(b)(1) & (2) (i)-(v), 76 Fed. Reg. at 68,948, as well as onerous documentation requirements, _.5(c), 76 Fed. Reg. at 68,948. This test is as difficult to apply as it is misguided.

Among other things, the Volcker Rule Proposal arguably requires omniscient hedging. It translates the statute's "*designed*" requirement into a requirement that an activity actually "*is* reasonably correlated, based upon the facts and circumstances of the underlying hedging positions and the risks and liquidity of those positions, to the risk or risks the purchase or sale is intended to hedge or otherwise mitigate." _.5 (b) (2) (iii), 76 Fed. Reg. at 68,948. Yet it may be difficult, if not, impossible, to determine the precise correlation of the hedging activity until after the transaction is complete on a retrospective basis. The agencies should clarify that assessment of hedging will not occur on an ex post basis.

Even if it were possible to determine the precise correlation, the agencies have failed to provide adequate guidance on what is a "reasonable" correlation. Although the agencies have helpfully explained that "reasonable" correlation is not "full" correlation, the agencies have waffled even on this key point, stating that "[t]he degree of correlation that may be reasonable will vary depending on the underlying risks and the availability of alternative hedging options." 76 Fed. Reg. 68,875. The suggestion that the meaning of reasonable correlation "will vary" based on a number of factors—without any specification as to how those factors will be applied—renders the regulatory provision impermissibly vague. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (under the APA "[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations'"). Without greater specificity, regulated parties will face significant uncertainty as to whether their *bona fide* hedging activities meet the standard for "reasonabl[e] correlation," or instead will be vulnerable to second-guessing by the agencies. This is not proper agency rulemaking and will impair the market making activities that Congress sought to preserve with the statutory exemption for hedging.

vi. The negative liquidity effects will especially harm markets in commercial paper, thereby threatening capital markets accessed by commercial businesses.

The Volcker Rule Proposal does specify that underwriting for commercial paper falls under the exemption for market making related activities. *See* _.4 (b) (2) (IV) (A), 76 Fed. Reg. at 68,947. And it does exempt market making for commercial paper from some of the Volcker Rule Proposal's requirements. *Id.* But that exemption is insufficient.

Banking entities still must meet the other requirements described above that unduly limit market making activities. These requirements are particularly burdensome in the commercial paper markets, which are less liquid than those envisioned by the Volcker Rule Proposal. As discussed above, there are roughly 37,000 unique corporate bonds instruments in the U.S. commercial paper markets. These instruments differ on a variety of levels, including the quality of issuers, the time to maturity, and the currency of issuance.

The illiquidity of the commercial paper markets makes the Volcker Rule Proposal's arbitrary requirements particularly harmful. In a market of 37,000 instruments, it may be difficult, if not impossible, for a market maker to merely react to customer demand, to interact only with customers, and to hold all inventory for more than 60 days, all the while still "hold[ing] itself out as being willing to buy and sell . . . for its own account on a regular or continuous basis," as required by the Volcker Rule Proposal, *see* _.4(b)(2)(ii), 76 Fed. Reg. at 68,947.

Accordingly, due to these arbitrary requirements, the proposed exemption for commercial paper is ineffective and fails to preserve needed market liquidity. The application of these requirements to trading in commercial paper will negatively affect the ability of U.S. firms to raise funds. The reduction of market making and underwriting services with respect to commercial paper caused by the proposed regulations will reduce liquidity in those markets, thereby raising the costs of capital in already-tight credit markets.

vii. The Volcker Rule Proposal fails to justify its intent on eliminating all remnants of what regulators deem to be proprietary trading.

Overbroad regulations will not only encompass proprietary trading activities but also legitimate and beneficial market making activities. In the agencies' efforts to balance the twin statutory goals of eliminating proprietary trading but also preserving market making, the underlying statutory intent may be effectuated as long as the vast majority of proprietary trading is eliminated. Banking entities will be sufficiently insulated from any risks posed by excessive proprietary trading and will be free of any actual or appearance of conflicts in their role as market makers. Indeed, achieving these ends does not require elimination of the last ounce of proprietary trading, especially when doing so has the negative consequences to market making that the agencies recognize. *See* Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 11 (1993) (society should not expend disproportionate resources trying to reduce or eliminate "'the last 10 percent'" of the risks of a certain problem). Accordingly, when regulating at the margin, the agencies should carefully weigh the adverse consequences to market making and avoid exacerbating any harm that may result from a singular focus on eliminating *all* activities that are even arguably proprietary trading.

C. Empirical analysis underscores that the Volcker Rule Proposal will inflict substantial damage on liquidity in the financial markets.

The various concerns discussed in this comment letter—and by other commenters—are not merely abstract points; indeed recent surveys and studies by the CCMC and others illustrate that the Volcker Rule Proposal will reduce market liquidity and inflict significant economic costs. Companies that rely on corporate bonds to raise capital will be particularly affected. They could face increased borrowing costs and transaction costs totaling in the billions of dollars.[11] Issuers could face increased costs because of the "clear relationship between decreasing liquidity and increasing transaction costs."[12] These effects of reduced liquidity and increased capital costs will be particularly severe for smaller companies and other borrowers that are not AAA-rated.

Given the substantial economic impact that the proposed regulations would have on the U.S. economy, it is imperative that the agencies perform a full economic analysis that weighs the costs of each regulatory provision and identifies less burdensome alternatives that will not impose tens, if not hundreds, of billions of dollars of additional costs on market participants.

D. The Volcker Rule Proposal discourages beneficial investments in public welfare and credit funds.

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[11] See December 15, 2011 letter from the CCMC to the regulators on cost benefit analysis that included a survey of different Chamber members on increased costs of borrowing. See also the Oliver Wyman study released by SIFMA.

[12] Oliver Wyman Study at 27

In addition to the adverse effects from the restrictions on market making and hedging, the funds-related restrictions in the Volcker Rule Proposal are also overbroad and will impose significant harm. For example, the proposed rule exempts from its reach investment in certain covered funds. *See* _.13 (a), 76 Fed. Reg. at 68,953. These exemptions, however, are too narrow. This includes, for example, the public welfare exception. *See* _.13 (a) (2), 76 Fed. Reg. at 68,953. The statutory text states that the exempted investments are those "of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24)." § 619(d) (1) (E) (emphasis added). The statutory phrasing, "of the type," conveys that this exemption should be broadly interpreted and that 12 U.S.C. § 24 merely provides an example of a permitted investment. Indeed, the underlying legislative history confirms that Congress intended for this language to be interpreted broadly. 156 Cong. Rec. S5896 (statements of Senators Merkley and Levin). But the Volcker Rule Proposal appears to specify that 12 U.S.C. § 24 is not merely an example but rather constitutes the entire scope of the exemption. As a result, the Volcker Rule Proposal excludes investments in underserved economic areas, affordable rental housing, and renewable energy resources, even though all of these investments are "of the type" that promote the public welfare.

The Volcker Rule Proposal also potentially limits the ability of banking entities to engage in beneficial lending activities by investing in certain types of credit funds. The Volcker Rule Proposal does exempt from covered fund status those funds that issue "asset-backed securities, the assets or holdings of which are solely comprised of loans." __.13 (d) 9, 76 Fed. Reg. at 68954. But the term "loan" is defined as "loan, lease, extension or credit, or secured or unsecured receivable." _.2 (q), 76 Fed Reg. at 68,945. This definition of "loan" is not entirely clear, and it leaves open to interpretation whether or not it includes notes and bonds. Because credit funds that involve these types of lending instruments provide critical financing for companies and their commercial business activities, the final rule should remove any doubt that these funds are exempt from the Volcker Rule requirements.

Indeed, the final rule should expand the covered fund exemptions to clearly permit investments by banking entities in a broad variety of credit funds. Nothing in Dodd-Frank or its legislative history suggests that Congress intended to disrupt bank lending or the credit markets. Quite the contrary, the Dodd-Frank Act states that "[n]othing in [the Volcker Rule] section shall be construed to limit or restrict the ability of a banking entity or nonbank financial company supervised by the Board to sell or securitize loans in a manner otherwise permitted by law." Dodd-Frank Act, § 619(g) (2).

E. The Volcker Rule Proposal imposes harmful restrictions on joint ventures and wholly-owned subsidiaries by failing to properly exempt them from the Volcker Rule.

Congress intended the agencies to exempt joint ventures and wholly-owned subsidiaries from Volcker Rule prohibitions. *See* 156 Cong. Rec. H5226 (daily ed. June 30, 2010) (statements of Reps. Jim Himes and Barney Frank); 156 Cong. Rec. S5905 (daily ed. July 15, 2010) (statement of Sens. Barbara Boxer and Chris Dodd). The Financial Stability Oversight Council similarly recommended that the agencies "consider whether it is appropriate to narrow the statutory definition by rule in some cases" regarding joint ventures and similar entities. Financial Stability Oversight Council, Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds 62 (2011) [hereinafter FSOC Study].

Accordingly, to give effect to this legislative intent and to avoid the harms that Congress sought to prevent, the term "covered fund" should exclude from its scope joint ventures, wholly-owned subsidiaries, and other similar entities. The statute was intended to apply to hedge funds, private equity funds, and similar funds, not ordinary corporate structures such as joint ventures and wholly-owned subsidiaries that bear little resemblance to hedge funds or private equity funds.

But the agencies failed to exclude joint ventures and wholly-owned subsidiaries from the term "covered fund." Rather, the agencies exercised their exemptive authority under section 619(d) (1) (J) to specify that *certain* joint ventures and similar entities are "permitted activities." _.14 (a) (2) (i), (ii), (IV), 76 Fed. Reg. at 68,954; *see id.* at 68,913 (citing Himes-Frank colloquy). This exemption is inadequate for the reasons specified below.

As the agencies recognize, the exemption is necessary and important to banking entities and their commercial owners because joint ventures are "often part of corporate structures," 76 Fed. Reg. at 68,913, serve important investment and business related purposes, and "do not raise the type of concerns which section 13 of the BHC Act [the Volcker Rule] was intended to address," *id.* Specifically, these types of funds "would not usually be thought of as a 'hedge fund' or private equity fund'" and forbidding them would require "alter[ing] [companies'] corporate structure without achieving any reduction in risk." *Id.* That is because these types of funds do not pose the same risk to the financial system as managed funds. *See* FSOC Study at 62.

But the exemption in the Volcker Rule Proposal is potentially limited by the fact that it applies only to those "joint venture[s]" that are "operating compan[ies]." _.14 (a) (2) (i) (A), 76 Fed. Reg. at 68,954. The term "operating company" is not defined in the Volcker Rule Proposal. It can be understood to exclude entities that are "holding companies." Yet such a narrow definition of the term is inconsistent with congressional intent to exempt all joint ventures, including those that make investments. *See* 156 Cong. Rec. H5226 (daily ed. June 30, 2010) (Himes-Frank colloquy confirming that the bill does not apply to "joint ventures that are used to hold other investments."); 156 Cong. Rec. S5905 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd affirming that the bill would not "harm venture capital investment"). The agencies should confirm this broader understanding of the joint venture exemption in the final rule.

In addition, the exemption is potentially limited with respect to "wholly-owned subsidiar[ies]" in that it includes numerous requirements that limit its scope and increase the cost of compliance. _.14 (a) (2) (IV) (A)-(C), 76 Fed. Reg. at 68,954. The Volcker Rule Proposal exempts only subsidiaries engaged in certain "liquidity management activities." _.14 (a) (2) (iv) (A), 76 Fed. Reg. at 68,954—a term that is defined narrowly and vaguely in the Proposal. _.3 (b) (2) (iii) (C), 76 Fed. Reg. at 68,946. For example, the term is defined narrowly in that it appears to exclude transactions intended to achieve a higher yield, _.3(b)(2)(iii)(C)(2) & (3), 76 Fed. Reg. at 68,946, even though a higher yield is the very purpose of a liquidity management program. The term is defined vaguely in that it uses uncertain and undefined standards, such as "near-term funding needs," _.3 (b)(2)(iii)(C)(4), 76 Fed. Reg. at 68,946, "highly" liquid, and "appreciable" profits, _.3(b)(2)(iii)(C)(3), 76 Fed. Reg. at 68,946. Those requirements largely undermine the effectiveness of the exemption, contrary to general congressional intent that the bill categorically does not apply at all "when firms own or control subsidiaries." 156 Cong. Rec. H5226 (Himes-Frank colloquy).

F. The Volcker Rule Proposal imposes harmful restrictions on joint ventures and loan securitizations by misinterpreting section 23A of the Federal Reserve Act.

Section 619(f) (1) of the Dodd-Frank Act generally prohibits banking entities from entering into "covered transactions" with covered funds. It defines "covered transaction" by incorporating the definition of that term in section 23A of the Federal Reserve Act. Section 23A defines a covered transaction to include, among other things, extending credit, purchasing or investing in securities, and purchasing assets. 12 U.S.C. § 371c (b) (7).

The agencies have correctly recognized that an overly broad interpretation of section 619(f)(1) and its incorporation of the definition in section 23A would render other specific subsections of section 619 "mere surplusage." 76 Fed. Reg. at 68,916. That is because a full incorporation of the definition of "covered transaction" in section 23A into section 619(f)(1) would forbid banking entities or their affiliates from engaging in transactions expressly allowed by other section 619 provisions. In other words, a broad interpretation would impermissibly result in Congress giving an explicit exemption with one hand and yet irrationally taking it back with the other.

For example, as the agencies point out, an overly broad interpretation would forbid "a banking entity from acquiring or retaining an interest in securities issued by a related covered fund . . . since the purchase of securities of . . . would be a covered transaction as defined by section 23A," even though section 619(d)(4) expressly allows a banking entity to make a "de minimus investment" in a covered fund. 76 Fed. Reg. at 68,916 (citing Dodd-Frank Act, § 619(d)(4)). Similarly, the various activities expressly permitted by section 619(d)(1)(g) with respect to "organizing or offering" a covered fund might count as "covered transactions" under section 23A, and therefore could be prohibited. *See id.* (citing Dodd-Frank Act, § 619(d)(1)(g)).

To avoid this result, the Volcker Rule Proposals proposes an exemption to the covered transaction prohibition for certain activities expressly allowed by other statutory provisions—namely the acquiring or retaining of ownership interest in a covered fund. _.16(a)(2)(i), 76 Fed. Reg. at 68,954 ("[A] covered banking entity may . . . [a]cquire and retain any ownership interest in a covered fund in accordance with the requirements of this subpart [on covered funds].").

This exemption, however, is too narrow and creates inconsistency that renders the rule unpredictable and unduly restrictive of constructive economic activity. Specifically, the exemption does not apply to other "covered fund" transactions such as those involving joint ventures. That means that, although the Volcker Rule Proposal purports to exempt joint ventures from Volcker Rule requirements, the covered transaction prohibition under section 619(f) (1) could effectively take back that exemption. Therefore, in order to allow joint ventures to continue to be formed unimpeded, the agencies must also exempt them from the reach of section of 619(f)(1). Otherwise, joint ventures will be needlessly restricted, impairing the ability of commercial owners of banks, and the banking entities themselves, to engage in these commercially beneficial activities. That needless restriction also would render the Volcker Rule Proposal internally inconsistent, because the Volcker Rule Proposal expressly recognizes the value of joint ventures. *E.g.*, 76 Fed. Reg. at 68,913 (joint ventures "do not engage in the type and scope of activities to which Congress intended [section 619] to apply . . .); *id.* (prohibiting joint ventures would force inefficiencies "without achieving any reduction in risk").

Similarly, under the Volcker Rule Proposal's narrow exemption, banking entities would not be able to engage in the purchase of assets from a loan securitization (because the purchase of assets is not "acquiring or retaining an ownership interest"), even though section 619(g)(2) expressly exempts from prohibition any sale or securitization of loans. Dodd-Frank Act, § 619(g) (2). Therefore, the final rule should broaden the exemption to accommodate them.[13]

Notably, the agency could avoid many of these inconsistences in a much simpler and more effective way by defining "covered fund" to exclude these entities in the first place. For example, as described above, excluding joint ventures and wholly-owned subsidiaries from term "covered fund" would effectuate congressional intent, and would eliminate the need for an exception from the covered transaction prohibition for joint ventures and wholly-owned subsidiaries discussed in this section.

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[13] There are other beneficial investments and activities that would be off-limits to banking entities and their commercial owners under the covered transaction prohibition. For example, subsections 619(d) (1) (E) and (I) of the Dodd-Frank Act expressly exempt "small business investment companies and public welfare investments" and certain "foreign funds" from the prohibition on relationships with banking entities. Yet the Volcker Rule Proposal fails to exempt these activities from the covered transaction prohibition. Similarly, bank-owned life insurance and funds held in satisfaction of debts previously contracted are not included in the exemption notwithstanding the Volcker Rule Proposal's express recognition of their benefits. *E.g.*, 76 Fed. Reg. at 68,913 (bank-owned life insurance does not involve the "speculative risks intended to be addressed by section [619]"); *id.* at 68,914 (funds held in satisfaction of debts previously contracted do not create risk but rather "promote and protect the safety and soundness of a banking entity"). The final rule should exempt these activities as well from section 619(f) (1)'s reach.

G. Section 619 unambiguously exempts insurance companies from the restrictions on proprietary trading and hedge fund or private equity fund investment or sponsorship.

The Dodd-Frank Act prohibits proprietary trading and certain relationships with hedge funds and private equity funds by way of the following text in section 619(a):

(a) In General—

(1) Prohibition—Unless otherwise provided in this section, a banking entity shall not- (A) engage in proprietary trading; or

(B) acquire or retain any equity, partnership, or other ownership interest or sponsor a hedge fund or a private equity fund.

Thus, Section 619(a) sets forth the prohibitions on both proprietary trading and investment in or sponsorship of a hedge fund or private equity fund (collectively "Covered Funds").

Section 619(d) (1) of the Dodd-Frank Act sets forth introductory language that specifies a list of "permitted activities" that are exempted from the general restrictions of section 619(a). Section 619(d) (1) provides as follows:

(d) Permitted Activities—

(1) In General—*Notwithstanding the restrictions under subsection (a)*, to the extent permitted by any other provision of Federal or State law, and subject to the limitations under paragraph (2) and any restrictions or limitations that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, may determine, *the following activities (in this section referred to as 'permitted activities.') are permitted.* (emphasis added.)

This provision does not distinguish between the prohibitions or restrictions set forth in (a) with respect to proprietary trading or investment in or sponsorship of Covered Funds. Rather, the provision specifically applies "[n]otwithstanding the restrictions under subsection (a)." Accordingly, it is clear that the "following activities" are exempted from the restrictions on both proprietary trading and investment in and sponsorship of Covered Funds.

Sections 13(d)(1)(B), (D), and (F) list the "following" permitted activities of underwriting and market making, activities on behalf of customers, and activities by a regulated insurance company directly engaged in the business of insurance for the general account of the company and by any affiliate, respectively. In light of the introductory clause in (a), therefore, those activities are exempt from both the proprietary trading and covered funds restrictions.

The scope of these exempted activities involves: "the purchase, sale, acquisition, or disposition of *securities and other instruments described in subsection (h)(4)*," (emphasis added), and Section 13(h)(4) defines the term "proprietary trading." But that definition, as indicated by the emphasized text, is referenced only for the purpose of providing a list of the "securities and other instruments." The cross-reference to the list of "securities and other instruments" contained in the definition of "proprietary trading" in no way limits the scope of permissible activity to proprietary trading. The reference was merely intended to provide meaning to a term—"securities and other instruments"—which would otherwise be undefined under the Bank Holding Company Act.

This type of cross-reference is common in the Dodd-Frank Act. For example, Section 13(h) (1) in like manner references the definition of "insured depository institution" in Section 3 of the Federal Deposit Insurance Act. While doing so, the Act conveniently references a section of law for specific definitional purposes, without adopting operative provisions or other aspects of the section *in toto*.

In addition, construing the reference to subsection (h) (4) as limiting the exemptions in (d) (1) (B), (D), and (F) only to proprietary trading activities would run afoul of the well-established principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see Lopez v. Gonzales*, 549 U.S. 47 (2006) (same). In Section 619, when Congress intended to incorporate proprietary trading or covered fund investment or sponsorship activities, it so stated explicitly by name. Thus Section 13(d) (1) (H) specifically exempts only "*[p]roprietary trading* conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c), provided that the trading occurs solely outside of the United States…" [emphasis added.]. The permissible activity by its express scope would not encompass Covered Funds.

In like manner, Sections 13(d) (1) (G) and (I) explicitly apply "[o]rganizing and offering *a private equity or hedge fund*" and "[t]he acquisition or retention of any equity, partnership, or other ownership interest in, or the sponsorship of, a *hedge fund or a private equity fund* by a banking entity pursuant to paragraph (9) or (13) of section 4(c) solely outside of the United States." (emphasis added). The scope of the permissible activities would not include proprietary trading.

Finally, to aid in understanding the scope of the permitted insurance activity as set forth in Section 13(d)(1)(F), it is noteworthy that Congress expressly recognized the need to "appropriately accommodate the business of insurance within an insurance company subject to regulation in accordance with the relevant state insurance company investment laws…" Section 13(b) (1) (F). The specific reference to insurance company *investment* laws makes it clear that the accommodation required under the Volcker Rule relates both to the proprietary trading restrictions and the private equity and hedge fund *investment* restrictions. The basis for this accommodation flows from the fact that insurance companies are subject to comprehensive state investment laws that are specifically designed to promote the safety and soundness of the regulated insurance company through such measures as investment limits and diversification requirements. The accommodation also flows from the fact that the insurance company model is different from virtually all other financial institution models in its predominant focus on long-term liabilities and on supporting these long-term liabilities with long-term assets and investments.

Because of the unique nature of insurance company operations, recognition and preservation of state investment law authority is essential to the safe and sound conduct of the insurance business. This applies as much to state investment law authority to invest in private equity or hedge funds as it does to the state investment law authority to engage in putative proprietary trading. Furthermore, an essential part of the business of insurance is that both the insurer general account and separate accounts invest in a broad range of investments, including private equity and hedge funds, as permitted under applicable insurance law. Recognition of these fundamental points is essential to any exercise in accommodating the business of insurance in the context of the Volcker Rule. Thus insurance permitted activities should include within the rule:

- General account and separate account investing in any investment allowed under applicable insurance law, including a Covered Fund.

- An insurance company establishing any separate account in compliance with applicable insurance law; and

- An insurance company establishing a subsidiary under applicable insurance law that makes investments.

In summary, when Congress intended to limit the scope of a permitted activity, it did so expressly by limiting the activity to either proprietary trading or covered funds in express language. Congress did not so limit the scope of the permitted activity in connection with market making, activity on behalf of customers, or insurance activities. From the plain language of the statute, it is clear that Congress designed the scope of the permitted activity to include both proprietary trading and investment in or sponsorship of Covered Funds, i.e., *notwithstanding all* the restrictive prohibitions set forth in subsection (a).

H. The Offshore Exemption

Another important provision included within the Volcker Rule Proposal is the "Offshore Exemption," which permits certain covered fund activities and investments as long as the activity meets certain requirements, including that it occur solely outside the United States. Because of the expansive nature of the Proposed Rule and the way in which the Offshore Exemption is drafted, U.S. asset managers completely unaffiliated with any banking entity (i.e., U.S. non-bank managers) that are not otherwise subject to the Volcker Rule are materially impacted.

The Offshore Exemption sets forth the conditions pursuant to which foreign banking entities can invest in offshore (i.e., non-U.S.) covered funds sponsored or advised by U.S. non-bank managers. As drafted, the Proposed Rule could make it difficult, if not impossible, for a foreign banking entity to invest in these offshore funds. From a policy perspective, this result is anomalous and, we believe, unintended. We believe the intent behind the conditions of the Offshore Exemption was to prohibit foreign banks from offering sponsored hedge fund and private equity fund services to U.S. persons given that U.S. banks could not themselves provide such offerings in the United States under the Volcker Rule.[14] For reasons we describe in more detail below, we do not believe the rule should preclude U.S. non-bank managers from accepting foreign banks as investors in their offshore funds, or potentially eliminate investment options for U.S. tax-exempt investors.

The Offshore Exemption requires the satisfaction of several conditions, but our comments address issues with, and propose modifications to, the conditions that:

[14] *See, e.g.*, Statement of Sen. Merkley, 156 Cong. Rec. S5897 (daily ed. July 15, 2010).

(1) no ownership interest[15] in such covered fund be offered for sale or sold to a resident of the United States;[16] and (2) no subsidiary, affiliate, or employee of the banking entity that is involved in the offer or sale of an ownership interest in the covered fund be incorporated or physically located in the United States or in one or more States.

The first condition creates several issues as a result of the presence of U.S. residents in a typical managed fund structure. A US non-bank manager, or its affiliate, may hold an ownership stake through a U.S. entity, for example, as a general partner to manage a fund, which, to the extent the interest represents anything more than a vehicle to receive a management fee or obtain the carried interest,[17] could be considered a prohibited sale of an interest to a resident of the United States.[18] Additionally, many offshore funds include U.S. tax-exempt residents, such as pension plans and endowments. Under the Proposed Rule, a foreign banking entity would be precluded from investing in the same fund that contains U.S. tax exempt investors.[19]

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[15] The Proposed Rule defines "ownership interest" in relevant part as "any equity, partnership, or other similar interest (including, without limitation, a . . . general partnership interest, limited partnership interest, membership interest. . . .) in a covered fund. . . ." but does not include a carried interest. §__.10 (b) (3).

[16] In addition to including, *inter alia*, any business entity organized or incorporated under the laws of the United States or any State, a "resident of the United States" is defined to include "any person organized or incorporated under the laws of any foreign jurisdiction ***formed by or for a resident of the United States*** principally for the purpose of engaging in one or more transactions described in §__.6 (d) (1) or §__.13(c) (1)." §__.2 (t). (emphasis added)

[17] Carried interests are excluded from the definition of "ownership interest." See note 15.

[18] We note that a U.S. non-bank manager may form a non-U.S. entity to hold the general partner interest in an offshore fund. Although we do not believe that the non-U.S. general partner entity should be considered a resident of the United States because it is not being formed "principally for the purpose of engaging in" (see note 16) transactions otherwise prohibited by the Volcker Rule, we believe the final rule should confirm this.

[19] Excluding the U.S. tax-exempt residents by creating a separate offshore fund with only these investors may not be a practical solution under the Employee Retirement Income Security Act of 1974, as amended, or the "prohibited transaction" rules of Section 4975 of the Internal Revenue Code of 1986, as amended, because of the so-called "25% limit". Generally, to fit within the 25% limit, "benefit plan investors", in the aggregate, must hold less than 25% of the value of each "class" of equity interests issued by the hedge fund, excluding

We believe it would be consistent with the policy underlying the prohibition on offers and sales to U.S. residents to change the Offshore Exemption to explicitly state that foreign banks may invest in a fund that the foreign bank does not sponsor or advise even if that fund has residents of the U.S. as owners..[20]

The second condition clearly appears to relate to the foreign banking entity and not a U.S. non-bank manager, however, the final rule should at least state unambiguously that, with respect to a US non-bank manager, none of (x) performing investment advisory services for an offshore fund from within the United States; (y) performing investment advisory services for other funds within the United States; or (z) running strategies of onshore and offshore funds in parallel, would preclude satisfaction of the Offshore Exemption.[21]

6. The Volcker Rule Proposal Places the American Economy at a Competitive Disadvantage and May Violate Existing Trade Agreements

As stated earlier, in proposing the Volcker Rule, the Obama Administration requested other nations to follow suit, which was universally rejected.[22] This universal

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interests held by certain persons, including managers or investment advisers to the hedge fund and their affiliates.

[20] We would note, too, that foreign banking entities address some of these concerns, as well. *See, e.g.*, Volcker Rule Comment Letter, Japanese Banker Association, 15-16 (Jan. 13, 2012), noting in part that "even acquiring ownership interest in Japanese acquisition fund that invests in Japanese companies and is comprised of Japanese general partners (GP) could be subject to the rule if there are US residents among other investors. However, this would constitute application of the rule outside the US to an excessive degree and would not be the intention of the Volcker Rule."

[21] The breadth of the proposed rule is also in tension with the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted); *see id.* at 2877-78 (collecting cases).

[22] *See* E.U. Ministers to Resist Obama's Proposal for Banking Overhaul, *Bloomberg News*, February 16, 2010.

international rejection of the Volcker Rule continued after the passage of the Dodd-Frank Act. Therefore, our financial services sector will not be able to engage in certain types of activities, adversely impacting capital formation activities in which our competitors can engage in. This causes a competitive disadvantage for the American financial services sector and its customers in a global economy.

Indeed, many nations including Canada, Japan, the United Kingdom and Singapore have objected to the Volcker Rule Proposal, citing adverse consequences to *their* ability to issue sovereign debt.[23] Canada and the United States are both signatories to the North American Free Trade Agreement ("NAFTA"). The goal of NAFTA was to eliminate barriers to trade and investment between the U.S., Canada and Mexico. Placing the United States financial services sector and capital formation tools on a different plane than the signatories to NAFTA could constitute a trade violation. It is incumbent on the regulators to determine the impacts upon NAFTA and other trade agreements, which have the force of law and if the Volcker Rule proposal impairs the ability of the United States to fulfill these important treaty obligations. As a part of this review, regulators must also determine what retaliatory actions and costs the American economy and businesses could face if other nations treat the Volcker Rule Proposal as a trade violation.

Such retaliatory actions would adversely impact American businesses and impair their ability to competitively sell goods and services overseas.

7. The Volcker Rule Proposal May Adversely Impact the Ability of State and Municipal Governments to Issue Debt

[23] *See* Japan and Canada Warn on Volcker Rule Impact, *Financial Times*, January 11, 2012; Canada Regulator, Banks Take Aim at U.S. Volcker Rule, *Reuters*, January 6, 2012; U.K.'s Osborne Lodges 'Volcker Rule' Complaint, *The Wall Street Journal*, February 1, 2012;

While the sale of United States Treasury Securities is exempt from the Volcker Rule Proposal, certain State and Municipal bonds are not exempt because of differences of definitions between the Dodd-Frank Act and the Exchange Act. Because certain State and Municipal bonds are not exempt, the costs for issuing these instruments will be higher, or may delay the issuance of such debt.[24] These State and Municipal bonds are used for important services including critical capital and infrastructure projects. These projects are important businesses opportunities for companies and employ thousands of workers. Many of these projects- bridge and road construction or repair, or school construction, have widespread indirect benefits for businesses and the overall economy besides those that may have an direct role in building that infrastructure.

Raising the costs of or delaying the issuance of debt for State and Municipal debt will reduce the number of infrastructure projects, harming businesses and endangering jobs.

Conclusion

The CCMC believes that the Volcker Rule Proposal suffers from serious defects because of process flaws, a defective means of assessing cost benefit analysis, failure to take into consideration impacts upon capital formation for commercial companies, additional costs upon entities that never engage in proprietary trading, reduced liquidity for commercial companies, the creation of a competitive disadvantage for the United States, and harm to infrastructure projects that employ American businesses and workers.

If these issues are not addressed by regulators, businesses will have a harder time raising capital, thereby restraining growth and job creation.

[24] *See* MSRB Urges Regulators to Exempt Munis from Volcker Rule, *The Bond Buyer*, and January 31, 2012.

Therefore, the CCMC believes that the Volcker Rule Proposal not only needs to be re-proposed, but it should go through an OIRA review as well as increased public outreach by regulators to hear from all stakeholders in the marketplace. By doing so, regulators can insure that the Congressional intent underlying the Volcker Rule is realized, while avoiding harmful , unintended consequences to economic growth and job creation.

The CCMC stands ready to work with you to achieve these goals.

Sincerely,

David Hirschmann