July 10, 2018

Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
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Board of Governors of the Federal Reserve System
Ann E. Misback, Secretary
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Washington, D.C. 20551

Federal Deposit Insurance Corporation
Robert E. Feldman, Secretary
Attention: Comments/Legal ESS
550 17th Street, N.W.
Washington, D.C. 20429

Securities and Exchange Commission
Secretary
100 F Street, N.E.
Washington, DC 20549-1090

Commodity Futures Trading Commission
Christopher Kirkpatrick, Secretary
1155 21st Street, N.W.
Washington, DC 20581

Re: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds; Petition for Extension of Public Comment Period

Ladies and gentlemen,

Better Markets, Americans for Financial Reform, Public Citizen, and the Center for American Progress ("Petitioners") write to request an extension of the agencies' public comment period for the above noted proposal ("New Volcker Rule Proposal").[1] Meaningful public input cannot be provided within the current 60-day public comment period, and the Petitioners therefore request that the agencies extend the

[1] Office of the Comptroller of the Currency, Docket ID OCC-2018-0010, RIN 1557-AE27; Board of Governors of Federal Reserve System, Docket ID R-1608, RIN 7100-AF 06; Federal Deposit Insurance Corporation, RIN 3064-AE67; Securities and Exchange Commission, Release No. BHCA-3, File Number S7-14-18, RIN 3235-AM10; Commodity Futures Trading Commission, RIN 3038-AE72.

public comment period for 90 additional calendar days from publication of the proposal in the Federal Register.

I. The New Volcker Rule Proposal's 60-day public comment period is inadequate given the rulemaking's length, complexity, and importance and is inconsistent with the Administrative Procedure Act.

The New Volcker Rule Proposal's public comment period must be commensurate with its length, complexity, and importance to provide a meaningful opportunity for public participation in the rulemaking process. The proposal presents a host of issues, over hundreds of pages, having the potential to affect the stability of the U.S. financial system and systemically important financial institutions subject to the current prohibitions and restrictions on speculative trading.[2] Meaningful public participation in a proposed rulemaking of that length, complexity, and importance requires more than a 60-day public comment period as a matter of administrative law.

A. The New Volcker Rule Proposal is too long, complex, and important to permit meaningful public participation in a 60-day public comment period.

The agencies' New Volcker Rule Proposal is 689 pages long and sets forth 342 enumerated questions, dozens of additional questions on the costs or benefits of aspects of the proposal, and "invitations" to comment on numerous technical concepts and provisions.[3] The resources required to meaningfully comment on a proposal of this length, complexity, and import are considerable. For example, if the Petitioners were to allocate just a single hour to consider each enumerated question, and a single hour to draft an appropriately informative response, that exercise alone would take 85 working days, or approximately four months, to complete. Remarkably, that would still leave critical issues raised by the proposal unaddressed, including cost-benefit analyses and issues for which the agencies explicitly requested public input.

In addition, a cursory examination of the New Volcker Rule Proposal reveals that the agencies failed to address a number of public policy issues warranting regulatory consideration in connection with the proposal. The Petitioners require some amount of additional time to provide meaningful comment on these critically important issues. The New Volcker Rule Proposal's effects, moreover, depend on the interaction of the proposed provisions with existing regulatory provisions under the banking, securities, and derivatives laws, making informed public comment a complex analytical undertaking not limited to consideration of the New Volcker Rule Proposal in isolation.

For these reasons, and others, final regulations adopted as an outgrowth of the New Volcker Rule Proposal, without a meaningful 90-day extension of the public comment period, would be inappropriate, procedurally unsound, and inconsistent with the letter, spirit, and intent of the Administrative Procedure Act and applicable case law, as discussed below. In addition, as a matter of public policy and procedural fairness, a proposed rulemaking giving rise to issues that have the potential to affect the safety and

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[2] See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536 (January 31, 2014), available at https://www.federalregister.gov/d/2013-31511; Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5808, 5812 (January 31, 2014), available at https://www.gpo.gov/fdsys/pkg/FR-2014-01-31/pdf/2013-31476.pdf.

[3] The U.S. Securities and Exchange Commission ("SEC") approved publication of the New Volcker Rule Proposal on June 5, 2018. The Petitioners based the analysis in this letter on a cursory review of the Microsoft word version of the document on the SEC's website, available at https://www.sec.gov/rules/proposed/2018/bhca-3.pdf.

soundness of taxpayer-backed financial institutions, and the magnitude and nature of risks arising from their trading activities, must benefit from the type of considered public input that arises only from an open, deliberative rulemaking process.

B. The New Volcker Rule Proposal does not provide fair and sufficient notice under the Administrative Procedure Act.

The Administrative Procedure Act ("APA") requires federal agencies to provide to the public notice and an opportunity to comment on regulatory proposals.[4] In interpreting the APA's notice-and-comment requirements, the courts have repeatedly affirmed that "[t]he opportunity for comment must be a meaningful opportunity,"[5] meaning that agencies must provide "enough time with enough information to comment and for the agency to consider and respond to the comments."[6] The legislative history makes clear, too, that the APA's minimum statutory notice requirements are not sufficient as to "[matters] of great import, or those where public submission of facts will be either useful to the agency or a protection to the public," in which case rulemakings must "naturally be accorded more elaborate public procedures."[7] The courts and Congress agree, in other words, that public comment periods must be commensurate with the length, complexity, and significance of rulemakings.

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[4] 5 U.S.C. § 553(b). The APA directs federal agencies to give interested persons an opportunity to participate in rulemakings through the submission of written data, views, or arguments to be considered in the agency's deliberative process. 5 U.S.C. § 553(c). Rulemakings must provide sufficient factual detail on the legal basis, rationale, and supporting evidence for regulatory provisions such that interested parties are "fairly apprised" of content, the reasoning of the agency implementing them, and the manner in which such regulations foreseeably may affect their interests. See, e.g., Mid Continent Nail Corporation v. United States, 846 F.3d 1364, 1373-1374 (Jan. 27, 2017); U.S. Telecom Ass'n v. F.C.C., 825 F.3d 674, 700 (June 14, 2016), citing Honeywell Int'l, Inc. v. E.P.A., 372 F.3d 441, 445 (June 29, 2004); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259-1260 (May 24, 2005); Am. Medical Ass'n v. Reno, 57 F.3d 1129, 1132-1133 (June 27, 1995); Florida Power & Light Co. v. U.S., 846 F.2d 765, 771 (May 13, 1988). The Petitioners intend to separately file public comments addressing the substance of the New Volcker Rule Proposal; however, the current length of the public comment period prejudices their ability to meaningfully do so.

[5] Rural Cellular Ass'n v. F.C.C., 588 F.3d 1095, 1101 (Dec. 11, 2009); see also, e.g., Am. Medical Ass'n v. Reno, 57 F.3d 1129, 1132-133 (June 27, 1995) (stating that the APA's notice-and-comment requirements "serve important purposes of agency accountability and reasoned decisionmaking" and "impose a significant duty on the agency" to "allow for meaningful and informed comment").

[6] Prometheus Radio Project v. F.C.C., 652 F.3d 431, 450 (July 7, 2011); see also, e.g., Florida Power & Light Co. v. U.S., 846 F.2d 765, 771 (May 13, 1988) (affirming that the APA's notice provisions require agencies "not only [to] give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"). In Prometheus, the Third Circuit Court of Appeals held that the Federal Communications Commission ("FCC") did not provide adequate notice of a rulemaking under the APA and noted that the FCC failed, in relevant part, to provide "sufficient time" for interested parties to submit responsive information to a request for comment by the agency's chairman. Although the court's holding turned on other grounds, its concern about the length of the public comment period is instructive in light of the procedural steps taken by the FCC. The FCC initially permitted a 90-day comment period and extended that period for an additional 60 days. In addition, the FCC commissioned 10 economic studies and held six public hearings before the FCC's chairman published a New York Times Op-Ed bringing attention to the proposal and setting an additional 28-day deadline for responses. See Prometheus, 652 F.3d at 453 (affirming that "[t]he APA requires that the public have a meaningful opportunity to submit data and written analyses regarding a proposed rulemaking" and stating "commenters did not have sufficient time to do so" though there was not a challengeable agency action on elements of the rulemaking's procedural history).

[7] H.R. Rep. No. 1980, 233, 259, Administrative Procedure Act, Report of the Committee on the Judiciary House of Representatives (May 3, 1946). Executive Order 12866, as amended, though not specifically applicable to the agencies, also includes a presumptive 60-day minimum public comment period and suggests further that formal rulemaking may be appropriate for "complex determinations." See Executive Order ("E.O.") 12866, Sec. 6. Centralized Review of Regulations, 58 Fed. Reg. 190 (Oct. 4, 1993), as amended by E.O. 13258 and E.O. 13422 (2017).

In addition, the courts have held that the sufficiency of the notice-and-comment process must be informed by the APA's purposes: (1) to ensure regulations are tested via exposure to diverse public comment; (2) to ensure fairness to affected parties; and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.[8] Noting that good process can affect the quality of rulemaking outcomes, the courts also have been guided by the principle that a fair opportunity to comment requires agencies to maintain "a flexible and open-minded attitude towards [their] own rules"[9] and seek requisite information for informed administrative decision-making.

The New Volcker Rule Proposal's short public comment period prejudices meaningful participation in the rulemaking process. First, the public comment period does not afford the Petitioners or the public at large a fair opportunity to give due consideration to the complexities and substantive merits of the 689-page proposal and respond to the agencies' legal, economic, and other analyses in a thoughtful and informative manner. It is noteworthy, moreover, that the agencies themselves do not provide a rationale for the brevity of the public comment period. Absent a rationale, much less a compelling one, informed administrative decision-making should not depend on the ability or willingness of the public to undertake a Herculean task, particularly for a discretionary rulemaking in which a single paragraph could have systemic risk implications for the U.S. financial system.[10]

In addition, the Petitioners would like to provide meaningful responses to a significant number of the hundreds of questions and "invitations" to comment presented by the agencies. The opportunity for notice and comment must mean something more than merely letting the public know that there are important policy questions under consideration; as a matter of administrative law, there must be a meaningful opportunity for the public to respond to the noticed questions in a considered manner. Contrast the short public comment period for the New Volcker Rule Proposal with the time required by the agencies to develop regulations conforming to the U.S. Department of the Treasury's recommendations in June 2017:[11] the agencies—having thousands of employees, significant knowledge of the Volcker Rule and related issues, and administrative expertise—nevertheless deliberated on the proposal for approximately 12 months. The Petitioners request that the public be given less than half of that time, 150 calendar days, to permit meaningful public input on the same set of financial stability issues, and alternatives, considered by

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[8] Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (May 24, 2005); see also, e.g., American Coke and Coal Chemicals Institute v. E.P.A., 452 F.3d 930, 938 (July 11, 2006); Environmental Integrity Project v. E.P.A., 425 F.3d 992, 996 (Oct. 7, 2005); Prometheus Radio Project v. F.C.C., 652 F.3d 431, 449 (July 7, 2011); Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35 (Mar. 25, 1977) (stating that the APA's procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule").

[9] Federal Express Corp. v. Mineta, 373 F.3d 112, 120 (July 2, 2004); McLouth Steel Products. Corp. v. Thomas, 838 F.2d 1317, 1325 (Feb. 5, 1988); see also, e.g., Rural Cellular Ass'n v. F.C.C., 588 F.3d 1095, 1101 (Dec. 11, 2009) (stating that "[t]he opportunity for comment must be a meaningful opportunity" and that "to satisfy this requirement, an agency must . . . remain sufficiently open-minded").

[10] A public comment period of sufficient length would be especially critical to the public's ability to submit data, studies, and other information essential to the "exchange of views, information, and criticism between interested persons and the agency" and to support or challenge the "range of alternatives" included in the administrative record. Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35-36 (Mar. 25, 1977). Denying a meaningful opportunity to develop such studies, data, and other information for the administrative record deprives the public of meaningful participation in the rulemaking process. The Petitioners discuss this further in text below.

[11] U.S. Department of the Treasury, A Financial System that Creates Economic Opportunities: Banks and Credit Unions, Findings and Recommendations: Improving the Volcker Rule, 71-78 (June 2017), available at https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf; see also U.S. Department of the Treasury, A Financial System that Creates Economic Opportunities, Capital Markets (October 2017), available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

the agencies, and the interaction of proposed provisions with existing provisions of banking, securities, and derivatives laws.

The Petitioners note that public participation in the rulemaking process not only ensures a meaningful exchange of information but also a meaningful balance of information that is necessary to informed administrative decision-making and public discourse. The Petitioners intend to submit separate comments on substantive provisions of the proposal; however, maximizing the value of such comments frequently means compiling new data and addressing data and analyses that are hidden from public view, especially given the confidential treatment of much of the supervisory and trading information that is germane to the New Volcker Rule Proposal.

The current 60-day public comment period is simply too short for that kind of analysis and denies the public a meaningful opportunity to provide useful context, commentary, data, and other information that serves the purposes of the APA's notice-and-comment requirements. It also interferes with the development of an administrative record, diminishing the quality of public participation and availability of judicial review in a manner that is statutorily suspect. In short, it is inconsistent with the letter, spirit, and intent of the APA.

II. The 40-month effort to implement the Final Volcker Rule provided a meaningful opportunity for public participation; a meaningful opportunity should be afforded in connection with the New Volcker Rule Proposal as well.

The Petitioners' request for a 90-day extension of the public comment period for the New Volcker Rule Proposal is informed by substantial previous experience participating in the agencies' rulemakings, including the Volcker Rule itself. In this regard, the Petitioners note the remarkable difference between the agencies' 40 months of public engagement prior to publication of the Final Volcker Rule in 2014 and the agencies' relatively limited public engagement prior to issuance of the New Volcker Rule Proposal. Consider the agencies' rulemaking process from October 2010 through publication of the Final Volcker Rule in January 2014:

- In October 2010, the Financial Stability Oversight Council ("FSOC") issued a notice and request for information on issues relating to implementation of the Volcker Rule,[12] receiving more than 7,000 comments. It later published a study and recommendations on the Volcker Rule in January 2011.[13]

- Ten months later, in November 2011, four of the agencies published the Volcker Rule proposal, with one agency proposing its Volcker Rule proposal in February 2012.[14] The public comment

[12] See Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds, 75 FR 61758 (Oct. 6, 2010), available at https://www.gpo.gov/fdsys/pkg/FR-2010-10-06/pdf/2010-25320.pdf. FSOC included a 30-day public comment period for this notice, which preceded any substantive proposals for implementing the Dodd-Frank statutory language.

[13] Financial Stability Oversight Council, Study and Recommendations on Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds (Jan. 18, 2011), available at https://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

[14] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68846 (proposed Nov. 7, 2011), available at https://www.federalregister.gov/d/2011-27184; Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 77 Fed. Reg. 8332 (proposed Feb. 14, 2012), available at https://www.federalregister.gov/d/2012-935.

period for the initial four-agency proposal was 67 calendar days.[15] The public comment period for the CFTC's later proposal was 62 calendar days.[16] More than 600 unique public comment letters were submitted in response to the proposals.

- In January 2012, the four agencies extended the public comment period for the proposed Volcker Rule, permitting 30 additional calendar days for interested parties to provide information and comments for the administrative record, until February 13, 2012.[17] The agencies reasoned that the extension was appropriate due to "the complexities of the issues involved and the variety of considerations involved in its impact and implementation."[18] The agencies also stated that the extended public comment period was appropriate to "allow interested persons additional time to analyze the proposed rules and prepare their comments," including their responses to "numerous questions."[19]

- In May 2012, the CFTC staff held a Volcker Rule roundtable on a number of topics addressed in public comment letters; the CFTC invited members of the public.[20]

- The agencies' final Volcker Rule was published on January 31, 2014.[21] The agencies noted that they considered public comment letters submitted after the end of the published public comment period.[22]

The public engagement that shaped the Final Volcker Rule demonstrates that the agencies were dedicated for more than three years to understanding and considering the various interests affected by the rulemaking. Notably, the combined public comment periods during this three-year period totaled approximately 190 calendar days, materially more than the requested public comment period for the New Volcker Rule Proposal.

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[15] The comment period opened with the proposed rule's publication in the Federal Register on November 7, 2011. The initial public comment period closed on January 13, 2012.

[16] The comment period opened with the proposed rule's publication in the Federal Register on February 14, 2012. The initial public comment period closed on April 16, 2012.

[17] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 77 Fed. Reg. 23 (proposed Jan. 3, 2012), available at https://www.federalregister.gov/d/2011-33623.

[18] Id.

[19] Id.

[20] See Commodity Futures Trading Commission, CFTC Staff to Host a Public Roundtable to Discuss the Proposed Volcker Rule (May 24, 2012), available at http://www.cftc.gov/PressRoom/PressReleases/pr6263-12; transcript available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/transcript053112.pdf.

[21] See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536 (January 31, 2014), available at https://www.federalregister.gov/d/2013-31511; Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5808, 5812 (January 31, 2014), available at https://www.gpo.gov/fdsys/pkg/FR-2014-01-31/pdf/2013-31476.pdf.

[22] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536, 5540 (January 31, 2014); Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5808 (January 31, 2014).

The public engagement in connection with the New Volcker Rule Proposal, on the other hand, appears to have been limited to a single agency's six-page release issued in August 2017, which requested public input to "assist in determining how the final [Volcker] rule should be revised."[23] Even then, language in the six-page release suggests that revisions in the New Volcker Rule Proposal were a fait accompli, soliciting, for example, recommendations for "improvements in the ways in which the final rule has been applied and administered" in light of "broad recognition that the final rule should be improved both in design and application."[24] That language is not suggestive of the "flexible and open-minded" posture for rulemaking contemplated by the APA and applicable case law.[25]

It is noteworthy that a 45-day public comment period was determined appropriate for that six-page release presenting 25 high-level questions and no new substantive content.[26] The New Volcker Rule Proposal, as noted, stands in stark contrast, providing hundreds of pages of substantive content and 342 enumerated questions, along with dozens of additional questions and solicitations for public comment. Especially in the absence of other public engagement—as occurred, for example, in the course of the 40-month rulemaking process leading to the Final Volcker Rule—the New Volcker Rule Proposal merits far more than 15 additional calendar days for public comment beyond the time period provided for a skeletal six-page release.

In short, separate and apart from the substantive merits of the Final Volcker Rule or the New Volcker Rule Proposal, the two rulemaking processes—touching upon the same supervisory, compliance, and other issues—logically should permit a commensurate degree of public participation. Moreover, public comment periods, to provide meaningful opportunities for public input, must have some logical connection to the rulemakings in question; a 689-page release of specifics and complexities rationally cannot be provided a public comment period that is only 15 calendar days longer than a six-page release asking for ideas.

III. Conclusion

The Volcker Rule is a cornerstone of the financial reforms implemented in the aftermath of the 2008 banking crisis intended to constrain speculative risk-taking in depository institutions. Thus, the public comment period for the New Volcker Rule Proposal, in particular, should not be reduced to a formalistic exercise that gives the appearance, but not the reality, of meaningful public input into the rulemaking process.

If the agencies decline to extend the public comment period as the Petitioners request, then they should, at the very least, provide for a 90-day reply comment period—in addition to the initial 60-day public comment period—to provide the public a meaningful opportunity to address information submitted into the

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[23] See Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule); Request for Public Input, 82 Fed. Reg. 36692 (August 8, 2017), available at https://www.federalregister.gov/d/2017-16556. Id. at 36692.

[24] Id. The public comment period ended on September 21, 2017. The Petitioners are fully supportive of the agencies' making adjustments to the Final Volcker Rule to address complexities or ambiguities that might be used to avoid restrictions on trading activities or facilitate more effective supervision and regulatory oversight. Even if the New Volcker Rule Proposal were intended primarily to address the interpretative and supervisory concerns, however, the agencies should continue to follow their own precedents in seeking meaningful public input into the rulemaking process. It is the public, after all, that has the most at stake from inadequate supervision and oversight of financial institutions and trading activities subject to the Volcker Rule's prohibitions and restrictions.

[25] See, e.g., Federal Express Corp. v. Mineta, 373 F.3d 112, 120 (July 2, 2004); McLouth Steel Products. Corp. v. Thomas, 838 F.2d 1317, 1325 (Feb. 5, 1988); Rural Cellular Ass'n v. F.C.C., 588 F.3d 1095, 1101 (Dec. 11, 2009).

[26] Id.

administrative record. The reply comment period would further the APA's recognized purposes, namely ensuring regulations are tested via exposure to diverse public comment, ensuring fairness to affected parties, and ensuring that affected parties have an opportunity to develop evidence in the record to enhance the quality of judicial review.

Sincerely,

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