



## CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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September 21, 2017

Mr. Keith Noreika  
Acting Comptroller of the Currency  
Office of the Comptroller of the Currency  
400 7<sup>th</sup> Street NW  
Washington, DC 20219

**Re: Volcker Rule, Notice; request for comment, 12 CFR Part 44, Docket ID  
OCC-2017-0014**

Dear Acting Comptroller Noreika,

The U.S. Chamber of Commerce created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21<sup>st</sup> century economy.<sup>1</sup> CCMC appreciates the opportunity to comment on possible revisions to the final regulations implementing section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Volcker Rule.<sup>2</sup>

CCMC believes that the ambiguities of the Volcker Rule, particularly in the areas of market making and underwriting, create inefficiencies in the ability of businesses to raise capital, access the debt and equity markets, and manage cash. These issues should have been addressed in the rule-writing process, yet the Agencies ignored statutory requirements and Presidential directives on the use economic analysis in rulemaking. Many of the problems that are coming to light, including the

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<sup>1</sup> The U.S. Chamber of Commerce is the world’s largest business federation, and represents the interests of more than three million businesses and organizations of every size, sector, and region.

<sup>2</sup> 12 U.S.C. § 1851. The request for comment is timely as the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Federal Reserve”), the Federal Deposit Insurance Corporation (“FDIC”), the Securities and Exchange Commission (“SEC”), and the Commodity Futures Trading Commission (“CFTC”) (together, “the Agencies”) are currently considering substantial revisions to the Volcker Rule. *See, e.g.*, Press Release, U.S. Dep’t of the Treasury, Readout of the Financial Stability Oversight Council Meeting (July 28, 2017). *See also* Jerome H. Powell, Member, Bd. of Governors of the Fed. Reserve Sys., Remarks at Salzburg Global Seminar (June 26, 2017), *available at* <https://www.federalreserve.gov/newsevents/speech/files/powell20170626a.pdf>.

periods of unexplained stress in the corporate bond markets, could have been avoided had smart regulatory tools been used, empirical evidence collected, and decisions made through the use of facts.

Accordingly, CCMC offers the following recommendations:

1. The Agencies should conduct a rigorous economic analysis of the Volcker Rule. This analysis should consider direct impacts on financial institutions, and indirect impacts on market liquidity, access to capital, U.S. businesses, and economic growth.
2. Any negative impacts of the Volcker Rule are potentially exacerbated by concurrent regulatory initiatives. Accordingly, the Agencies should conduct a cumulative impact assessment of major regulatory initiatives undertaken since the financial crisis. This assessment should include, but not be limited to: the Volcker Rule, risk retention rules, money market fund regulations, Liquidity Coverage Ratio Rule, Net Stable Funding Ratio, Total Loss Absorbing Capacity Rule, the Foreign Bank Operations Rule, and rules promulgated under section 165 of the Dodd-Frank Act.
3. Following these studies, the regulators should report to Congress if the Volcker Rule should be repealed outright or amended and if so how.
4. Congress and the Administration should take steps to ensure that the federal banking agencies conduct an economic analysis with all rulemakings, as required under the Riegle Act and the Administrative Procedures Act.

These matters are discussed in further detail below.

## Discussion

For over seven years, through fourteen comment letters and testimony in four congressional hearings, CCMC has taken the position that the Volcker Rule is a solution in search of a problem, is conceptually unworkable, and negatively impacts market liquidity and access to capital.<sup>3</sup> Indeed, CCMC has advocated for higher

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<sup>3</sup> *Examining the Impact of the Volcker Rule on Markets, Businesses, Investors, and Job Creation: Joint Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit and the Subcomm. on Capital Mkts., Sec., and Inv. of the H. Comm. On Fin. Serv.*, 112th Cong. 83 (2012) (prepared statement of Anthony Carfang, Partner, Treasury Strategies, Inc., on behalf of the U.S. Chamber of Commerce); *Is Simpler Better? Limiting Federal Support for Financial Institutions:*

capital requirements for proprietary trading activities as a pro-growth alternative to the Volcker Rule.

Today, we have the Volcker Rule, with its vagueness regarding market making and underwriting, as well as higher capital requirements, which have their own set of opaque rules. This has made our business financing system inefficient and unable to provide the resources needed for a growing economy.

Accordingly, CCMC continues to support the repeal of section 619 by Congress. However, absent such repeal, we believe that it is incumbent on the Agencies to make significant revisions to the Volcker Rule.

Many of the rule's fundamental deficiencies and negatives impacts can be traced to its origins, both legislative and regulatory. In Congress, the provision never received the thorough examination or debate appropriate and necessary for such a substantial and far-reaching policy. The Agencies' rulemaking process was also considerably flawed. The Agencies did not sufficiently coordinate the rulemaking and failed to conduct meaningful, transparent, and rigorous regulatory impact analyses.

In light of the forward-looking nature of the OCC request, we will concentrate our present comments to two key issues: the impact of the Volcker Rule on capital markets and the business community, and the need for a comprehensive and rigorous economic analysis.

## **I. The Volcker Rule Has Reduced Market Liquidity and Hurt Main Street Businesses**

While the Volcker Rule is directed at financial firms, CCMC has consistently noted the rule's negative impacts on the broader business community and overall American economy. U.S. businesses are critically dependent on liquid and accessible

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*Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 91 (2012) (prepared statement of Anthony Carfang, Partner, Treasury Strategies, Inc., on behalf of the U.S. Chamber of Commerce); *The Impact of the Volcker Rule on Job Creators, Part I: Hearing Before the H. Comm. on Fin. Serv.*, 113th Cong. 111 (2014) (prepared statement of David Robertson, Partner, Treasury Strategies, Inc., on behalf of the U.S. Chamber of Commerce); *Examining the Impact of the Volcker Rule on Markets, Businesses, Investors, and Job Creators: Hearing Before the Subcomm. on Capital Mkts., Sec., and Inv. of the H. Comm. On Fin. Serv.*, 115th Cong. (2017) (prepared statement of Tom Quaadman, Ctr. for Capital Mkts. Competitiveness, U.S. Chamber of Commerce). See also comments letters to the Agencies and the Financial Stability Oversight Council dated October 11, 2011, November 17, 2011, December 15, 2011, January 17, 2012, February 13, 2012, February 14, 2012, April 16, 2012, November 16, 2012, September 25, 2013, November 7, 2013, November 25, 2013, December 4, 2013, January 14, 2014 and March 4, 2014.

debt and equity markets to sustain their operations and finance long-term growth. In comparison, the private sectors in other nations are generally more dependent on bank lending. Liquid and accessible markets, in turn, are dependent on the market making activities of banks. The fundamental failure of the Volcker Rule is that it is very difficult to distinguish between market making and proprietary trading without imposing an arbitrary and imprudent demarcation.

Former Federal Reserve Governor Daniel Tarullo recently conceded this point, noting that “because almost any effort to distinguish market making from proprietary trading, for example, is impossible to sensibly reduce to a formula or precise rule across all traded instruments, there is ongoing and substantial need for context-specific, data-heavy judgment.”<sup>4</sup>

CCMC has long warned of the Volcker Rule’s impact on market liquidity and businesses’ access to capital. In December 2011, CCMC sent a letter to the Agencies regarding cost-benefit analysis of the Volcker Rule. This letter included a confidential survey of member companies (attached herein as Appendix A). The survey uses 2010-2011 historic data of select U.S. financing companies that service non-financial businesses. Based on credible assessments that the Volcker Rule will impose a 5 basis point increase in bid-ask spreads, for just the 5 companies selected, the increased lending costs total nearly \$150 million. The survey also includes an analysis of switching transactions—the process whereby a financial institution buys-back some of an issuer’s older bonds as part of the process for a new issuance. A 10 basis point increase caused by the Volcker Rule would increase the costs of switching transactions by \$2.8 million per billion while a 50 basis point increase would drive up costs by nearly \$14 million per billion.

In 2012, during the Agencies’ initial consideration of regulations implementing section 619, CCMC commissioned an economic analysis of the Volcker Rule by Professor Anjan Thakor of the Olin School of Business, Washington University in St. Louis (the Thakor Study).<sup>5</sup> The study had four major findings:

- **The Volcker Rule will have a negative effect on market making and liquidity provision for many securities.** The rule will induce banks to retrench more from market making in smaller and riskier

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<sup>4</sup> Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Reserve Sys., Address at The Woodrow Wilson School, Princeton University: Departing Thoughts (Apr. 4, 2017)

<sup>5</sup> Anjan V. Thakor, The Economic Consequences of the Volcker Rule (Summer 2012), *available at* [https://www.uschamber.com/sites/default/files/legacy/reports/17612\\_CCMC%20Volcker%20Rule2.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/17612_CCMC%20Volcker%20Rule2.pdf).

securities where large and unexpected supply-demand shocks are more likely, thereby reducing market making in the very securities where it is most valuable. The securities issuers and the investors will feel the effects. There will also be other adverse consequences for bank customers. They will experience a lowered value of financial services provided by banks, less liquidity for the securities that banks issue, and more distorted prices of bank securities that remain distorted for longer than before. Moreover, bank customers are also likely to be forced to record mark-to-market losses on the securities that they hold.

- **The Volcker Rule will reduce network benefits of market making for financial institutions and businesses.** Market makers in securities operate in networks, and the retrenchment of banks in market making will reduce the value of the network even if unregulated (non-bank) entities move in to fill the vacuum created by the exit of banks. This will eventually hurt bank customers.
- **The Volcker Rule is likely to lead to higher costs of capital for businesses and potentially lower capital investments by these borrowers, along with a possibly greater focus on riskier or more short-term oriented investments.** Due to reduced liquidity and greater perceived regulatory uncertainty, borrowers will be confronted with higher costs of capital. This is likely to reduce aggregate investment and also make riskier investments more attractive. Moreover, firms will find it more attractive to invest in projects that pay off faster. The reduction in aggregate capital investment may also cause significant job losses.
- **The Volcker Rule will make bank risk management less efficient, and will more broadly adversely impact the structure of financial institutions, harming the ability of businesses to raise capital.** By artificially constraining the security holdings that banks can have in their inventories for market making or proprietary trading purposes, the Volcker Rule will make bank risk management less efficient, forcing banks to either accept more risk or operate with more cash. Moreover, it may adversely impact the diversified-financial-services business model of banks, and therefore affect the extent to which banks and capital markets co-evolve in a mutually beneficial manner.

Experience appears to have confirmed the Thakor Study's predictions. The Agencies published the final rule on January 31, 2014, and its implementation has provided empirical data through which researchers can assess the rule's real-world impacts. In September 2016, the Federal Reserve Divisions of Research & Statistics and Monetary Affairs published a comprehensive study of the Volcker's Rule impact on market-making during stressed conditions, observing that such conditions are "exactly when liquidity is needed most."<sup>6</sup> Critical findings include:

- Bond liquidity in stressed conditions worsened following implementation of the Volcker Rule, and that deterioration "is as high during the post-Volcker period as during the Financial Crisis."<sup>7</sup>
- Volcker-affected dealers significantly reduce their capital commitment in market-making.<sup>8</sup>
- These impacts can be specifically attributed to the Volcker Rule, and are unlikely to be driven by other regulations on dealer bond market behavior, including Basel III capital requirements and Comprehensive Capital Analysis and Review (CCAR) requirements.<sup>9</sup>

The analytical predictions of the Thakor Study and the data-based conclusions of the Federal Reserve study are overwhelmingly supported by anecdotal evidence and surveys of market participants. In September 2016, in response to a public consultation by the International Organization of Securities Commissions, the CFA Institute surveyed its members on bond market liquidity trends over the last five years.<sup>10</sup> Respondents reported:

- A decrease in the liquidity of high-yielding and investment-grade corporate bonds and no change in the liquidity of government bonds.
- A decrease in the number of active dealers making markets.

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<sup>6</sup> Jack Bao, Maureen O'Hara, and Alex Zhou, Finance and Economics Discussion Series 2016-102: The Volcker Rule and Market-Making in Times of Stress (2016) at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 4-5.

<sup>10</sup> CFA Institute, Secondary Corporate Bond Market Liquidity Survey Report (Sept. 2016), *available at* [https://www.cfainstitute.org/Survey/bond\\_market\\_liquidity\\_survey\\_report.pdf](https://www.cfainstitute.org/Survey/bond_market_liquidity_survey_report.pdf).

- An increase in the time taken to execute trades and a lower proportion of bonds being actively traded.
- A higher proportion of unfilled orders.<sup>11</sup>

Particularly noteworthy are the regional comparisons between the Americas region, (AMER), the Europe, Middle East, and Africa region (EMEA), and Asia-Pacific region (APAC). On a number of different measures, a significantly higher percentage of respondents from the Americas region reported indications of liquidity deterioration. Specifically:

- 67% reported a moderate or significant decrease in the number of dealers making markets in corporate bonds (compared to 53% for EMEA and 29% for APAC).<sup>12</sup>
- 72% reported that a lower proportion of bonds are now being actively traded (compared to 67% for EMEA and 32% for APAC).<sup>13</sup>
- 59% reported there is now a higher proportion of unfilled orders (compared to 57% for EMEA and 33% for APAC).

The Volcker Rule is directly affecting U.S. businesses. Last year, CCMC surveyed more than 300 corporate treasurers and chief financial officers on the impact of financial sector regulations on their companies.<sup>14</sup> Approximately 4 in 5 respondents reported that financial services regulations had affected their business. The regulations most commonly cited as having a significant negative impact on companies' operations were Basel III capital and liquidity standards, regulations related to systemically important financial institutions, SEC money market fund reforms, and the Volcker Rule.<sup>15</sup>

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<sup>11</sup> *Id.* at 2. Results are specific to respondents from the Americas region and the Europe, Middle East, and Africa region. Respondents from the Asia-Pacific region generally reported no change or positive improvements in liquidity.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> Ctr. for Capital Mkts. Competitiveness, U.S. Chamber of Commerce, *Financing Growth: The Impact of Financial Regulation* (June 16, 2016), available at [https://www.uschamber.com/sites/default/files/documents/files/financing\\_growth\\_report\\_16\\_june\\_16.pdf](https://www.uschamber.com/sites/default/files/documents/files/financing_growth_report_16_june_16.pdf).

<sup>15</sup> *Id.* at 13.

Furthermore, corporate treasurers and CFOs believe that current and pending regulations will make their cash flow and liquidity operations more challenging. One-third of these companies are being forced to take unanticipated steps in response to regulatory challenges. Businesses are being forced to pass the impact of those costs on to their customers, and many have dramatically reduced the number of financial institutions on which they rely.

## **II. The Agencies Should Undertake a Comprehensive and Rigorous Economic Analysis of the Volcker Rule**

CCMC strongly believes that the federal regulators should conduct a rigorous economic analysis as they develop rules, as required under the Administrative Procedures Act (APA) and Executive Orders.<sup>16</sup> The Federal Reserve, FDIC, OCC, SEC, and CFTC each have differing legal standards and internal practices for economic analysis when promulgating a rule.

The Federal Reserve is an independent agency, but it has avowed that it follows policies consistent with Executive Order 13563.<sup>17</sup> Consistent with this approach, the Federal Reserve has stated that it “continues to believe that [its] regulatory efforts should be designed to minimize regulatory burden consistent with the effective implementation of [its] statutory responsibilities.”<sup>18</sup>

The SEC is also an independent agency, but when promulgating rules, it must consider specific issues designated by the Securities Act and the Securities Exchange Act. For example, under Section 3(f) of the Exchange Act, the SEC is required to consider or determine whether an action is necessary or appropriate to advance the public interest in protecting investors and if a regulatory action will promote efficiency, competition and capital formation.<sup>19</sup> Also, Section 23(a)(2) of the Exchange Act requires the SEC, when adopting a rule, to take into consideration the

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<sup>16</sup> See generally Paul Rose and Christopher J. Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation* (March 2013), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf>. See also Comm. on Capital Mkts. Regulation, *A Balanced Approach to Cost-Benefit Analysis Reform* (Oct. 2013), available at <http://www.capmktstreg.org/wp-content/uploads/2013/10/A-Balanced-Approach-to-Cost-Benefit-Analysis-Reform.pdf>.

<sup>17</sup> Letter from Scott G. Alvarez, Gen. Counsel, Bd. of Governors of the Fed. Reserve Sys., to A. Nicole Clowers, Dir., Fin. Mkts. and Cmty. Inv., Gov’t Accountability Office (Oct. 24, 2011), reprinted in GAO-12-151, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination* 39 (Nov. 2011).

<sup>18</sup> Letter from Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., to Cass Sunstein, Administrator, Office of Info. And Regulatory Affairs, Office of Mgmt. and Budget (Nov. 8, 2011), available at <https://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf>.

<sup>19</sup> 15 U.S.C. § 78c(f).



impacts of proposed rule upon competition.<sup>20</sup> In addition to these considerations, the SEC is attempting to follow Executive Orders 13563 and 13579 by requesting comment on retrospective analysis of the costs and benefits of its regulations while soliciting comments on means of improving rulemaking.<sup>21</sup>

The CFTC must take several factors into consideration when it analyzes the costs and benefits of proposing a rule. These include considerations related to protecting market participants and the public. The CFTC must also consider whether a rule promotes the considerations of the efficiency, competitiveness, and the financial integrity of futures markets. The CFTC is also obliged to ensure that its rules do not impair the price discovery functions of the markets, and that they are consistent with considerations of sound risk management practices and other public interest considerations.<sup>22</sup>

Executive Order 13563 requires agencies, when promulgating rules, to:

- 1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to justify);
- 2) Tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- 3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts; and equity);
- 4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and

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<sup>20</sup> 15 U.S.C. § 78w(a)(2).

<sup>21</sup> See SEC Press Release 2011-178, September 6, 2011.

<sup>22</sup> 7 U.S.C. § 19.

- 5) Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made to the public.<sup>23</sup>

Additionally, Executive Order 13563 states that “[i]n applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”<sup>24</sup>

More recently, Executive Order 13772 specifically identified “foster[ing] economic growth and vibrant financial markets through more rigorous regulatory impact analysis” as a “core principle” for regulating the U.S. financial system.<sup>25</sup>

The Agencies failed to conduct a rigorous economic analysis as the Volcker Rule was being promulgated, and no information was made available to public for comment.<sup>26</sup> CCMC believes that many of the rule’s widely-recognized failings can be directly traced to the Agencies’ explicit decision to forgo a rigorous cost-benefit analysis.<sup>27</sup>

CCMC urges the Agencies to undertake a rigorous and methodologically sound economic analysis of Volcker Rule, and to make this analysis available for public review and comment. This analysis should consider both the administrative compliance burden as well as the broader impacts on market liquidity, access to capital, and economic growth. Finally, the analysis should strictly conform to standards of the APA and Executive Order 13563.

### **A. Rigorous Economic Analysis is Required by Law**

The APA established the basic process for notice-and-comment rulemaking, and implicitly mandated that agency regulation be the product of “reasoned decision-making.”<sup>28</sup> Section 706 of the APA allows federal courts to invalidate agency rules

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<sup>23</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (incorporating by reference the requirement of the Executive Order 12866). Executive Order 13579 requests that independent agencies comply with Executive Order 13563.

<sup>24</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

<sup>25</sup> Exec. Order. 13,772, 82 Fed. Reg. 9,965 (Feb. 8, 2017).

<sup>26</sup> The CCMC recognizes that OCC later published an estimate of the compliance costs for 46 OCC-supervised banking institutions, under an assessment pursuant to the Unfunded Mandates Reform Act (UMRA).

<sup>27</sup> See *infra* note 32.

<sup>28</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-52 (1983).

found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>29</sup>

Over the past decade, the U.S. Court of Appeals for the D.C. Circuit has repeatedly addressed the implications of section 706 on agencies’ use of economic analysis in rulemaking. Specifically, in *Chamber of Commerce v. SEC* and *Business Roundtable v. SEC*, the D.C. Circuit held that section 106 of the National Securities Markets Improvement Act of 1996, operating in conjunction with section 706, require the SEC to rigorously analyze the costs and benefits of its regulations.<sup>30</sup>

Just as the SEC is subject to cost-benefit analysis requirements under the Securities Act, the federal banking agencies – the Federal Reserve, FDIC, OCC – are subject to regulatory impact analysis requirements under the Riegle Community Development and Regulatory Improvement Act of 1994 (the Riegle Act). Section 302(a) of the Riegle Act states:

In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest — (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.<sup>31</sup>

The requirements of the statute are clear: the banking agencies must weigh the administrative burdens of a regulation against its benefits – *i.e.*, they must conduct a cost-benefit analysis.

During the Volcker rulemaking process, CCMC repeatedly requested that the banking agencies comply with this statutory requirement and publish their Riegle Act analyses for public review and comment. Nonetheless, the banking agencies refused to comply with this statutory requirement.

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<sup>29</sup> 5 U.S.C. § 706(2)(A).

<sup>30</sup> *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). *But cf. Inv. Co. Inst. v. CFTC* (D.C. Cir. 2013) (upholding a CFTC rule challenged on the sufficiency of its economic analysis. However, the court explicitly recognized the *Business Roundtable* decision as controlling precedent).

<sup>31</sup> 12 U.S.C. § 4802.

## **B. Rigorous Economic Analysis is Supported by Best Practices**

In the final rule implementing section 619, the Agencies asserted that they were not legally required to conduct a cost benefit analysis because the rule was promulgated under the Bank Holding Company Act, as opposed to a statute with explicit cost-benefit analysis requirements.<sup>32</sup>

While this argument could possibly apply to cost-analysis requirements imposed on SEC by the Securities Act and CFTC by the Commodity Exchange Act, section 302 of the Riegle Act applies to all rulemakings by the federal banking agencies, regardless of the statutes under which they are promulgated.

More importantly, even if not legally required, the Agencies *should* conduct a rigorous economic analysis as a matter of best practices and good governance. This principle is explicitly restated in Executive Order 13579, and is noted as a “core principle” for financial regulation in Executive Order 13772.<sup>33</sup>

Furthermore, both GAO and the Administrative Conference of the United States (ACUS) – the independent federal agency dedicated to improving the administrative process and providing nonpartisan expert advice – have strongly recommended that regulatory agencies rigorously analyze costs and benefits, notwithstanding the lack of legal requirements. In a 2011 assessment of the implementation of the Dodd-Frank Act, GAO recommended that the “federal financial regulators take steps to better ensure that the specific practices in OMB’s regulatory analysis guidance are more fully incorporated into their rulemaking policies and consistently applied.”<sup>34</sup>

ACUS, in turn, has identified OMB Circular A-4 as the most appropriate model for rigorous regulatory impact analysis, characterizing it as a “compendium of best

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<sup>32</sup> Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Fund, 79 Fed. Reg. 5,536, 5,541 n.35 (Jan. 31, 2014).

<sup>33</sup> Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (referencing the cost-benefit analysis requirements of Executive order 13563, and stating that “independent regulatory agencies should comply with these provisions as well.”)

<sup>34</sup> Gov’t Accountability Office, GAO-12-151, Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination 39 (Nov. 2011).

practices.”<sup>35</sup> ACUS recommended that independent agencies adopt Circular A-4’s principles and policies:

- Independent regulatory agencies should voluntarily adopt the general principles for economic analysis contained in OMB Circular A-4 to structure their analyses: (1) identify the need for the regulation, (2) examine plausible alternative regulatory approaches, and (3) estimate the benefits and costs of those alternatives;
- Consistent with applicable laws, independent regulatory agencies’ analyses should generally include both statutorily mandated requirements and those resulting from the agency’s discretion. Showing both types of effects separately can improve transparency and allow the public to understand whether Congress or the agency is responsible for regulatory burden;
- Independent regulatory agencies should quantify and monetize regulatory costs and benefits whenever possible. If costs or benefits cannot be quantified or monetized, agencies should explain why and take other actions to promote understanding of regulatory decision making (*e.g.*, cost-effectiveness analysis or breakeven analysis);
- Independent regulatory agencies’ regulatory analyses should be as transparent and reproducible as possible. In particular, agencies should disclose how the analyses were conducted, post the analyses on the internet, and summarize the methods and results in the notice of proposed rulemaking;
- Independent regulatory agencies should include in the notice of proposed rulemaking and in the final rule a summary statement or table concisely showing the agencies’ overall estimates of costs, benefits, and transfer payments.<sup>36</sup>

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<sup>35</sup> Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* (Apr. 30, 2013), *available at* <https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

<sup>36</sup> *Id.* at 116-17, 119-20.

### **C. A Rigorous Economic Analysis Would Provide Critical Information to Congress**

CCMC recognizes that the request for comment is limited to regulatory actions that may be undertaken by the Agencies, and that OCC is not requesting comment on the underlying statute.

However, a rigorous economic analysis of the regulations required by section 619 would provide critical information to Congress as it contemplates the repeal or amendment of section 619. There is a broad, long-standing consensus that credible regulatory economic analysis requires a “no-action” baseline – *i.e.*, the status quo prior to the congressional mandate.<sup>37</sup>

CCMC strongly believes that such an analysis would demonstrate that certain requirements of section 619 undermine both its explicit intentions (*e.g.*, promotion of safety and soundness, enhancement of financial stability, *etc.*), as well as other important goals Congress may wish to prioritize (*e.g.*, maintenance of market liquidity and access to capital, promotion of U.S. competitiveness, *etc.*).<sup>38</sup> Accordingly, this analysis would provide critical information to Congress as it evaluates potential changes to section 619.

### **Conclusion**

CCMC commends the Agencies and the Financial Stability Oversight Council for undertaking a serious re-examination of the Volcker Rule. While well-intentioned, the Volcker Rule has harmed the ability of non-financial businesses to operate and grow. With this in mind, CCMC offers the following recommendations:

1. The Agencies should conduct a rigorous economic analysis of the Volcker Rule. This analysis should consider direct impacts on financial institutions, and indirect impacts on market liquidity, access to capital, U.S. businesses, and economic growth.

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<sup>37</sup> See, *e.g.*, Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* 17 (Apr. 30, 2013).  
<sup>38</sup> Congressional intent underlying section 619 may be inferred from subsection (b)(1) of amended section 13 of the Banking Holding Company Act. See 12 U.S.C. 1851(b)(1) (directing the Financial Stability Oversight Council to study and make recommendation on the implementing the provisions of section 619), with consideration of certain specific goals).

2. Any negative impacts of the Volcker Rule are potentially exacerbated by concurrent regulatory initiatives. Accordingly, the Agencies should conduct a cumulative impact assessment of major regulatory initiatives undertaken since the financial crisis. This assessment should include, but not be limited to: the Volcker Rule, risk retention rules, money market fund regulations, Liquidity Coverage Ratio Rule, Net Stable Funding Ratio, Total Loss Absorbing Capacity Rule, the Foreign Bank Operations Rule, and rules promulgated under section 165 of the Dodd-Frank Act.
3. Following these studies, the regulators should report to Congress if the Volcker Rule should be repealed outright or amended and if so how.
4. Congress and the Administration should take steps to ensure that the federal banking agencies conduct an economic analysis with all rulemakings, as required under the Riegle Act and the Administrative Procedures Act.

CCMC appreciates OCC's invitation to offer comments on the Volcker Rule. We believe these common-sense recommendations will allow the Agencies to promote safety and soundness and financial stability, while preserving the market liquidity and access to capital so critical to Main Street success. We look forward to further engagement with the Agencies and Congress on this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'TK' followed by a long, sweeping horizontal stroke.

Tom Quaadman