

THE VOLCKER RULE IN PRACTICE: ITS IMPACT, RECEPTION, AND EVOLVING PROFILE

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Established as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Volcker Rule's restriction of banks and financial companies from participating in proprietary trading was conceived of as a response to the systemic institutional failures that are commonly noted to be partially responsible for the financial crisis of 2008. Over its short and contentious lifetime, the Rule has been widely praised by some as a necessary step toward limiting unsustainably risky corporate investment practices, and widely vilified by others as being poorly drafted, impracticably restrictive, and only tenuously connected to the crisis precipitating its enactment. The conspicuous disunity among participants in this discussion reflects, in part, the difficulty of measuring the direct impact that the Volcker Rule has had since its enactment, particularly given the complexity of the investment activities the Rule attempts to regulate and the dearth of conclusive statistics indicating which phenomena are accurately attributable to the Rule's interference.

Through a survey and analysis of the public's input and assessment of the Volcker Rule and its more recent development, this Note explores how administrative processes have fared in giving an adequate voice to the various viewpoints of affected private citizens, businesses, and public entities. Ultimately,

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this Note argues that the Volcker Rule’s surprisingly modest evolution to date is overshadowed by charged rhetoric, vast information gaps, and unbalanced regulatory feedback rather than substantive bilateral exchange—a phenomenon frustratingly typical of the democratic processes in the context of complex financial reform. This Note concludes by offering reflections on the Volcker Rule’s evolution to date and what the data examined has to say about the successes and shortcomings of the lawmaking processes driving that evolution forward.

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I. INTRODUCTION

One of the most controversial provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “the Dodd-Frank Act”) is the so-called “Volcker Rule.”¹ The Volcker Rule largely prohibits banks and certain non-bank financial companies from participating in proprietary trading and retaining ownership interests in hedge funds or private equity funds, thereby curbing these entities’ engagement in high-risk speculative trading and limiting the comingling of commercial and investment banking activity generally.² Named after its original proponent, former Chairman of the Federal Reserve Paul Volcker, the Rule represents a significant shift away from the hands-off, free market approach of the 1990s and early 2000s³ back toward the Glass-Steagall Act’s cautious, hands-on approach to financial regulation.⁴

¹ See Pub. L. No. 111–203, § 619, 124 Stat. 1376, 1620–31 (2010) (codified at 12 U.S.C. § 1851 (2018)).

² See 12 U.S.C. § 1851(a)(1)–(2). See also Ryan K. Brissette, *The Volcker Rule’s Unintended Consequences*, 15 N.C. BANKING INST. 231, 232–34 (2011) (describing the statutory mechanics of the Volcker Rule); Michael L. Nester, *Reconciling the Volcker Rule with the Dodd-Frank Act’s Objectives: How to Best Combat Systematic Risk*, 86 FORDHAM L. REV. 3059, 3070–73 (2018) (describing the same); Gregory Butz, Comment, *Treating Apples Like Oranges: The Benefits of Exempting Community Banks from the Volcker Rule*, 6 TEX. A&M L. REV. 453, 459 (2019) (noting that “[p]roprietary trading” refers to the practice of financial institutions engaging in investment activities with its own capital—rather than customer capital—for the purposes of generating additional profit for themselves, rather than their customers”).

³ See Gramm-Leach-Bliley Act, Pub. L. No. 106–102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 15 U.S.C.). See also Jonathan R. Macey, *The Business of Banking: Before and after Gramm-Leach-Bliley*, 25 J. CORP. L. 691, 709 (2000) (explaining generally that the Gramm-Leach-Bliley Act “repeal[ed] the Glass-Steagall Act . . . permit[ed] affiliations between banks and securities firms . . . [and] expand[ed] the scope of activities in which bank holding companies may engage pursuant to the Bank Holding Company Act”).

⁴ See Banking Act of 1933 (“Glass-Steagall Act”), Pub. L. No. 73–66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.). See also DAVID A. SKEEL, JR., *THE NEW FINANCIAL DEAL: UNDERSTANDING THE*

The Volcker Rule has been praised and criticized from a variety of angles during its short lifetime. Supporters of the Rule emphasize the role overreliance on leveraged financing and risk-laden hedging played in creating the 2008 economic crisis,⁵ arguing that the Rule's broad regulatory mandate and sweeping compliance requirements constitute a necessary step toward limiting dangerous corporate investment practices, eliminating conflicts of interest in the handling of consumer assets, and generally shoring up the stability of the U.S. banking industry.⁶ Opponents of the Rule note that there are mixed opinions as to the extent of the role that proprietary trading and hedging played in causing the financial collapse of 2008;⁷ highlight the broad ambiguities in the Rule's statutory and regulatory schema, which threaten to both undercut and overreach the Rule's intended impact;⁸ and point to the

DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 10 (2010) (characterizing the Volcker Rule as "a throwback to New Deal legislation that made it illegal to conduct commercial and investment banking under the same umbrella"); S. Burcu Avci et al., *Eliminating Conflicts of Interests in Banks: The Significance of the Volcker Rule*, 35 YALE J. REG. 343, 363–68 (2018) (presenting data in support of the thesis that "enforcing the Volcker Rule would . . . help contain some of the current conflicts of interest in the banking system resulting from the elimination of Glass-Steagall restrictions").

⁵ See, e.g., FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xix (2011) (concluding that "a combination of excessive borrowing, risky investments, and lack of transparency put the financial system on a collision course with crisis").

⁶ See Avci et al., *supra* note 4, at 363–68; Nester, *supra* note 2, at 3062 ("Those in favor of the Rule cite concern for the dangers associated with a further deregulated banking industry, given the risks associated with proprietary trading.").

⁷ See, e.g., John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1073–74 (2012) (finding "almost no evidence that proprietary trading was responsible for the failure of any financial institution in the 2008 crisis").

⁸ See, e.g., Eugene A. Ludwig, *Assessment of Dodd-Frank Financial Regulatory Reform: Strengths, Challenges, and Opportunities for a Stronger Regulatory System*, 29 YALE J. REG. 181, 188–95 (2012) (observing that "[t]he Volcker Rule . . . suggest[s] a misunderstanding of the importance of trading activities in modern finance in several ways," and "risk[s] making banks less safe . . . by using wide-ranging prohibitions and convoluted

undesired, unintended effects the Rule has ostensibly already begun to generate, including massive compliance costs, decreased U.S. market liquidity, and the handicapped productivity of U.S. banks on the international stage.⁹

The conspicuous disunity among participants in this discussion reflects, above all, a shocking scarcity of data as to the Rule's effectiveness. As noted by Professor Kimberly Krawiec, measuring the direct impact of the Volcker Rule is difficult given the complexity of the investment activities it attempts to regulate.¹⁰ This complexity, Professor Krawiec argues, results in widespread confusion as to which phenomena are accurately attributable to the Rule's interference.¹¹ Thus, in conducting her own study of the Volcker Rule, Professor Krawiec opted to perform an analysis of the Rule's inputs rather than its output, focusing especially on the original promulgation of the regulations implementing the Rule.¹² While Krawiec's piece offers an acute portrayal of the construction of the original Volcker Rule, her research and analysis was carried out before the original promulgation of the Rule in January 2014,

'solutions' where the supervisor's targeted interventions are more appropriate").

⁹ See, e.g., Arthur S. Long et al., *The Final Volcker Rule: Highlights and Principal Differences from the Proposal*, 42 SEC. REG. L.J. 161, 162–64 (2014) (predicting that “[t]he substantial compliance costs necessary to ensure that permissible market-making activities do not become prohibited proprietary trading will likely reduce the breadth of U.S. market-making activities . . . [and] result in reduced liquidity . . . and higher costs for customers”); Ryan Bubb & Marcel Kahan, *Regulating Motivation: A New Perspective on the Volcker Rule*, 96 TEX. L. REV. 1019, 1020–22 (2018) (noting that the Volcker Rule's “define-and-ban approach both entails high compliance costs and creates the risk of under- and over-deterrence”).

¹⁰ See Kimberly D. Krawiec, *Don't 'Screw Joe the Plummer': The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 56 (2013).

¹¹ See *id.* See also SEC. & EXCH. COMM'N, ACCESS TO CAPITAL AND MARKET LIQUIDITY 8 (2017), <https://www.sec.gov/files/access-to-capital-and-market-liquidity-study-dera-2017.pdf> [<https://perma.cc/2XS5-F5MS>] (highlighting reasonable alternative causes for data suggesting lowered market liquidity, including the “crisis-induced changes in dealer assessment of risks” as well as “the effects of a low interest rate environment”).

¹² See generally Krawiec, *supra* note 10; Kimberly D. Krawiec & Guangya Liu, *The Volcker Rule: A Brief Political History*, 10 CAPITAL MKTS. L.J. 507 (2015).

and thus fails to capture any of the Rule's subsequent regulatory modification and development. Without engaging in an immersive study of the same scale, this Note endeavors to emulate Krawiec's basic research methodology, reapply it to establish a deeper understanding of the Volcker Rule's recent development, and contribute to an ongoing conversation about the systemic shortcomings of administratively crafted financial regulation in general.¹³

Through surveying the public's input and assessment of the Volcker Rule as originally presented, this Note investigates the roots of today's partisan dialogue about the Rule, considers which aspects of the Rule are most important to affected private citizens and public entities, and explores how available administrative processes succeed or fail in giving a voice to participants and onlookers alike. Ultimately, this Note contends that the Volcker Rule's relatively moderate evolution is overshadowed by the politicized response of the general public, which has exposed the insufficiency of the democratic processes driving it. Due to its dependence on regulatory implementation, the complexity of its subject matter, and the various inferences that may be reasonably drawn as to its effectiveness, the Volcker Rule tends to function as a

¹³ See, e.g., Coffee, Jr., *supra* note 7, at 1028–29 (noting that because “[f]inancial regulation is inherently opaque[] and the public lacks . . . visceral identification with the key values in play,” reform legislation with heavy dependence on administrative execution is especially vulnerable to curtailment once “the public’s attention turns elsewhere and business interest groups reestablish their usual dominance over the technical policy implementation process”); Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 56 (2014) (arguing that in light of “the stickiness of the status quo in the U.S. political framework” as contrasted with the dynamism of the financial industry, procedural reform is necessary to prevent reactionary financial regulation with unintended consequences which cannot easily be undone); Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short* 1 (European Corp. Governance Inst., Law Working Paper No. 494/202, 2020), https://scholarship.law.columbia.edu/faculty_scholarship/2604 [<https://perma.cc/DP3P-92QY>] (asserting “the need for a new approach to financial regulation . . . that acknowledges the limits of what can be known given the realities of today’s complex and constantly evolving financial ecosystem”).

lightning rod for charged rhetoric and unbalanced regulatory feedback, rather than a conductor of bilateral substantive exchange.

This Note will proceed as follows: Part II provides context as to the Volcker Rule's origins and design, including an overview of the Rule's legislative history, statutory and regulatory makeup, and evolution over the past three years. Part III reviews various perspectives on the Volcker Rule's merits, outlines what are generally viewed as the pros and cons of the Rule, and summarizes the viewpoints of commentators as to the impact of the recent changes made to the Rule. Part IV examines the political polarization that has influenced the Volcker Rule's development by surveying the statements of congresspeople involved in the Rule's statutory revision and reviewing the responses of public commenters to agency notices of proposed rulemakings. Part V concludes by offering reflections on the Volcker Rule's evolution and the lawmaking processes that have driven that evolution forward.

II. BACKGROUND TO THE VOLCKER RULE: WHERE DID IT COME FROM, AND WHAT DOES IT DO

Our analysis begins with an overview of the Volcker Rule's origin, design, and development. Section II.A surveys the historical context that led to the Rule's adoption; Section II.B discusses the Rule's structure and content; and Section II.C reviews the substantive updates that have been made to the Rule since its enactment.

A. Brief Theoretical and Legislative History

While the Volcker Rule's origins are most directly interwoven with the history of the financial crisis of 2008 and the Dodd-Frank Act,¹⁴ the Rule's underlying conceptual framework and attendant controversiality date as far back as the

¹⁴ Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See also* SKEEL JR., *supra* note 4 (tracing the legislative development of Dodd-Frank to the financial crisis of 2008 and contextualizing the introduction of the Volcker Rule as part of that process).

New Deal economic reforms that were enacted after the stock market collapse of 1929.¹⁵ The legislative ancestry of the Volcker Rule is specifically traceable to the Glass-Steagall Act of 1933 (“Glass-Steagall”),¹⁶ a law intended to combat the structural weaknesses in the U.S. banking industry that were exposed during the Great Depression¹⁷ by “provid[ing] for safer and more effective use of bank assets . . . [and] prevent[ing] self-dealing and conflicts of interest.”¹⁸ To this end, Glass-Steagall introduced reforms calculated to stake out a division between commercial and investment banking activities¹⁹ and deter conflicts of interest between banks and consumers²⁰—both essential goals that the Volcker Rule would later be designed to achieve.²¹ Taken together, these reforms prohibited investment banks from taking consumer deposits while banning commercial banks backed by newly offered federal deposit insurance from investing in the securities market.²²

Despite causing a near-immediate impact in the U.S. banking industry, Glass-Steagall was never as effective as it was designed to be.²³ The failure of Glass-Steagall is partially attributable to a loophole in the statute that exempted bank

¹⁵ See, e.g., Avci et al., *supra* note 4, at 344–63 (offering a thorough background of the legislative history and context of the Volcker Rule).

¹⁶ See Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.). See also Matthias Lehmann, *Volcker Rule, Ring-Fencing or Separation of Bank Activities—Comparison of Structural Reforms Across the World*, 17 J. BANKING REG. 176, 179 (2016) (noting that “banking reorganisation measures” such as the Volcker Rule “find historical precedence in the US Glass-Steagall Act”).

¹⁷ See Avci et al., *supra* note 4, at 348 (“Following the stock market crash in 1929 and through 1933, U.S. GDP fell by 30%, unemployment soared to 25%, the stock market dropped 80%, and over 7,000 banks failed. Bank depositors lost almost \$400 million, the equivalent of over \$5.6 billion in 2017 dollars.”).

¹⁸ *Id.* at 350.

¹⁹ See *id.* at 348–49.

²⁰ See Lehmann, *supra* note 16, at 179.

²¹ See Avci et al., *supra* note 4, at 349.

²² See Lehmann, *supra* note 16, at 179.

²³ See Avci et al., *supra* note 4, at 352–57 (discussing the reasons why Glass-Steagall ultimately “erode[d]”).

holding companies from the Act's restrictions on permitted institutional relationships between commercial depository and investment banks, which was quickly exploited through the structural proliferation of holding companies designed to circumvent the Act's limitations.²⁴ Additionally, administrative "turf battles" fueled by foreign and domestic market competition in the decades following World War II also dampened the Act's effectiveness.²⁵ After suffering gradual rollbacks between the 1960s and 1990s, Glass-Steagall's death knell finally sounded in 1999 when the Gramm-Leach-Bliley Act²⁶ expanded the permitted affiliations between depository and investment institutions and introduced allowances for commercial banking and securities trading activities within the same corporate structure.²⁷

The debate surrounding Glass-Steagall's division of investment and commercial banking activities was revived when the financial crisis of 2008 sent shockwaves through the U.S. economy.²⁸ In reaction to the catastrophic domino effect observed in the securities markets in 2008, many blamed banking organizations and U.S. financial regulatory organizations

²⁴ See *id.* at 353 ("By incorporating under a [bank holding company], banks could enjoy much of the benefits of being an investment bank without running afoul of Glass Steagall while also creating the relationships and conflicts the Act aimed to remedy."). See also Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States*, 31 REV. BANKING & FIN. L. 113, 121 (2011) ("The Glass-Steagall Act of 1933 . . . did not impose any specific legal restrictions on the activities of business entities that owned or controlled commercial banks.").

²⁵ See Avci et al., *supra* note 4, at 354–56.

²⁶ Pub. L. No. 106–102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 15 U.S.C.).

²⁷ See *id.* at 1341–51. See also *Glass-Steagall Act*, Practical Law Glossary, Item 5-507-8468 (West 2019); *Gramm-Leach-Bliley Act (GLBA)*, Practical Law Glossary, Item 7-501-3428 (West 2019) (explaining that the Gramm-Leach-Bliley Act "created a new type of bank holding company, the financial holding company (FHCs), which can engage in a broader range of business activities so long as they are financial in nature").

²⁸ See Lehmann, *supra* note 16, at 179 ("In the eyes of some observers, [the lifting of Glass-Steagall's primary restrictions by Gramm-Leach-Bliley] was one of the major factors that ultimately led to the financial crisis.").

for failing to curb systemic risk and ensure that responsible investment practices were adhered to by market participants. Specifically, critics contended that “proprietary trading had distracted banks from their fiduciary obligations to clients, as well as from their core function of ‘safe[ly] and sound[ly providing] long-term credit to families and business enterprises.’”²⁹ The federal government’s legislative response to the 2008 crisis attempted to strike a balance between aid and reform, cobbling together a plan that both jumpstarted the struggling financial services industry and held it accountable by introducing major changes to the regulations that govern market actors. The Volcker Rule emerged in the post-crisis legislative debate as both “a modern-day Glass-Steagall Act”³⁰ and “a major concession to populist criticism,”³¹ built upon the hypothesis that “systemically important banking institutions should be restricted in undertaking proprietary activities that present particularly high risks and serious conflicts of interest.”³²

²⁹ Charles K. Whitehead, *The Volcker Rule and Evolving Financial Markets*, 1 HARV. BUS. L. REV. 39, 43 (2011) (quoting 156 CONG. REC. S5894 (daily ed. July 15, 2010) (statement of Sen. Jeffrey Merkley)).

³⁰ Letter from Sen. Jeffrey Merkley to Joseph M. Otting, Comptroller, Office of the Comptroller of the Currency (July 30, 2018), <https://www.merkley.senate.gov/download/volcker-metrics-letter> [<https://perma.cc/B86R-ET7M>] (observing that like Glass-Steagall, “Congress intended for the Volcker Rule to function as . . . a firewall to safeguard traditional loan-making and deposit-taking at banks from high-risk bets that put customers and the financial system at risk”).

³¹ SKEEL JR., *supra* note 4, at 3.

³² GRP. OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY 59 (2009), https://group30.org/images/uploads/publications/G30_FinancialReformFrameworkFinStability.pdf [<https://perma.cc/JP5Q-GJY9>]. See also DEP’T OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 16 (2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [<https://perma.cc/2455-XL9L>].

B. Statutory and Regulatory Design

Introduced at section 619 of the Dodd-Frank Act,³³ the statutory Volcker Rule is codified as an amendment adding a new thirteenth section to the Bank Holding Company Act of 1956 (“the BHCA”).³⁴ Cumulatively, the Rule prohibits “banking entities” from engaging in proprietary trading³⁵ as well as sponsoring or owning hedge funds and/or private equity funds.³⁶ The Rule subjects “nonbank financial companies”³⁷ that engage in either proprietary trading or sponsor or own interest in hedge funds and/or private equity funds to specified capital requirements,³⁸ and authorizes various administrative agencies to implement these requirements through promulgating regulations.³⁹ The broad legislative goals Congress envisioned in passing the Volcker Rule included

³³ Dodd-Frank Act, Pub. L. No. 111–203, § 619, 124 Stat. 1376, 1620–1631 (2010).

³⁴ Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841–52 (2018)).

³⁵ See 12 U.S.C. § 1851(h)(1) (2018) (defining “banking entity” to mean “any insured depository institution[,] . . . any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978, and any affiliate or subsidiary of any such entity”); § 1851(h)(4) (defining “proprietary trading” to mean “engaging as a principal for the trading account of [a] banking entity or nonbank financial company supervised by the Board in any transaction to . . . acquire or dispose of[] any security, . . . derivative, . . . [or] contract of sale of a commodity for future delivery, any option on any such [instrument], or any other security or financial instrument that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may . . . determine”).

³⁶ See § 1851(a)(1).

³⁷ See § 5311(a)(4)(A)–(C) (defining “nonbank financial company” to mean any domestic or foreign company “other than a bank holding company, a Farm Credit System Institution[,] . . . a national securities exchange[,] . . . [a] clearing agency[,] . . . [a] security-based swap execution facility, . . . [a] security-based swap data repository[,] . . . a board of trade designated as a contract market, . . . a derivatives clearing organization[,] [a] swap execution facility or a swap data repository” which is “predominantly engaged in financial activities”).

³⁸ See § 1851(a)(2).

³⁹ See § 1851(b)(2).

“promot[ing] and enhanc[ing] the safety and soundness of banking entities;” “protect[ing] taxpayers and consumers and enhanc[ing] financial stability;” “reduc[ing] conflicts of interest between the self-interest of [applicable] entities . . . and the interests of the[ir] customers;” and “limit[ing] activities that have caused . . . undue risk or loss in [such] entities.”⁴⁰

The first of the Rule’s eight subsections introduces a general prohibition on banking entities’ engaging in proprietary trading as well as limitations on nonbank financial companies that engage in such trading.⁴¹ Next, the second and third subsections authorize administrative agencies to implement the Rule’s restrictions through rulemakings, and identify the deadlines by which these regulations were initially scheduled to be released.⁴² In turn, the following three subsections set forth the contours of the Rule’s restrictions and procedural requirements in greater detail by (1) delineating investment activities permitted to be engaged in by banking entities, such as the trade of government-issued securities,⁴³ and the exchange of securities instruments “in connection with underwriting or market-making-related activities,”⁴⁴ (2) directing the issuance of compliance and “anti-evasion” measures designed to ensure that the Rule is appropriately and uniformly carried out,⁴⁵ and (3) discussing restrictions on lawful business relationships between banking entities and applicable

⁴⁰ § 1851(b)(1).

⁴¹ See § 1851(a)(1)–(2) (“Unless otherwise provided in this section, a banking entity shall not . . . engage in proprietary trading; or . . . acquire or retain any . . . ownership interest in[,] or sponsor[,] a hedge fund or a private equity fund. [Additionally,] [a]ny nonbank financial company supervised by the Board of Governors of the Federal Reserve System] that engages in proprietary trading or takes or retains any equity, partnership, or other ownership interest in[,] or sponsors[,] a hedge fund or a private equity fund shall be subject . . . to additional capital requirements for and additional quantitative limits with regards to such [activity] . . .”).

⁴² See § 1851(b)–(c). These agencies include the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission.

⁴³ See § 1851(d).

⁴⁴ § 1851(d)(1)(B).

⁴⁵ See § 1851(e).

funds.⁴⁶ Finally, the last two subsections provide a disclaimer as to how Congress intended the Rule to be interpretatively constructed⁴⁷ and define important terms within the Rule's statutory text.⁴⁸

The Volcker Rule was immediately controversial. While some saw the Rule as a victory against big business and an important safeguard against the recurrence of future financial crises such as the one that had just occurred,⁴⁹ many from within the business community feared the broadness of the Volcker Rule's statutory language and how it may be construed by regulatory agencies.⁵⁰ In addition to questioning the underlying wisdom of the Rule's policy and the tenuous theoretical connection between the 2008 financial crisis and the Rule's restricted investment activities,⁵¹ opponents noted that the statutory text of the Volcker Rule contains a number of ambiguities susceptible to harmful interpretation and application.⁵² Subsequent to the passage of Dodd-Frank in July

⁴⁶ See § 1851(f) (prohibiting banking entities which sponsor, advise, manage, organize, or offer hedge or private equity funds from entering into "covered transactions" with that fund or any subsidiary hedge fund or private equity fund).

⁴⁷ See § 1851(g) ("[T]he prohibitions and restrictions under this section shall apply . . . even if such activities are [otherwise] authorized for a banking entity or nonbank financial company supervised by the Board.").

⁴⁸ See § 1851(h).

⁴⁹ See, e.g., Jeff Merkley & Carl Levin, *The Dodd-Frank Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 HARV. J. LEGIS. 515, 538–39 (2011).

⁵⁰ See, e.g., Brissette, *supra* note 2, at 241 (noting that "the [Volcker] Rule takes away a significant type of investor for hedge and private equity funds, and for funds that rely in large part on banking entities, the Rule may be a death sentence"); Ludwig, *supra* note 8, at 194 ("While bank deposit taking and lending activity is important to the U.S. economy, in today's marketplace, financial institutions' business customers must utilize capital markets to meet their financial needs By restricting trading activities, the Volcker Rule risks inhibiting U.S. competitiveness in global financial markets and banks' ability to innovate and stay relevant.").

⁵¹ See, e.g., Avci et al., *supra* note 4, at 358–59; Nester, *supra* note 2, at 3076–84.

⁵² See, e.g., Brissette, *supra* note 2, at 246 (noting that the Volcker Rule's "vague [statutory] language may . . . allow banks to make minimal adjustments to their proprietary trading groups in order to comply with the

2010, lobbyists and concerned citizens across the political spectrum petitioned the administrative agencies tasked with implementing the Volcker Rule in an attempt to influence how the final Rule would look and operate.⁵³ After a series of delays, many requests for public comment, and over 18,000 comment submissions,⁵⁴ the original regulatory version of the Volcker Rule was published in the Federal Register in January 2014 and went into effect the following year.⁵⁵

Notwithstanding the complexity of the activities they govern, the joint agency regulations that implement the Volcker Rule take up a relatively formidable 271 pages in the Federal Register.⁵⁶ Comprised of six sections, these regulations delineate the Rule's prohibitions against banking entities' ownership and sponsorship of hedge funds and/or private equity funds, as well as their engagement in short-term proprietary trading of securities instruments and options on behalf of

Rule," thereby exploiting "potential loopholes . . . to engage in alleged speculative activity").

⁵³ See Krawiec, *supra* note 10, at 55.

⁵⁴ See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5,536, 5,539 (Jan. 31, 2014) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pt. 255).

⁵⁵ See *id.*

⁵⁶ See *id.* By comparison, the CFTC's final Sarbanes-Oxley whistleblower rule takes up a mere fifty-two pages in the Federal Register, see Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172 (Aug. 25, 2011) (to be codified at 17 C.F.R. pt. 165); the OCC and Federal Reserve System's final rule on risk-based capital guidelines takes up fifty-seven pages, see Risk-Based Capital Guidelines: Market Risk, 77 Fed. Reg. 53,060 (Aug. 30, 2012) (to be codified at 12 C.F.R. pts. 3, 208, 225, and 325); the OCC, FDIC, and SEC's 2014 final rule on credit risk retention takes up 166 pages, see Credit Risk Retention, 79 Fed. Reg. 77,601 (Dec. 24, 2014) (to be codified at 12 C.F.R. pts. 43, 244, 373, 1234, 17 C.F.R. pt. 246, and 24 C.F.R. pt. 267); and the OCC and Federal Reserve System's final regulatory capital rules implementing Basel III takes up 275 pages, see Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 Fed. Reg. 62,017 (Oct. 11, 2013) (to be codified at 12 C.F.R. pts. 2, 5, 6, 208, 217, and 225).

their own corporate accounts.⁵⁷ Additionally, the regulations specify the activities of banking entities that are exempted from the Rule's prohibitions and limitations, including "market making, underwriting, hedging, trading in certain government obligations, and organizing and offering a hedge fund or private equity fund."⁵⁸ The first section of the regulations as published in the Federal Register defines important terms, reviews the Volcker Rule's statutory authority, and presents a joint agency statement of the Rule's scope and purpose.⁵⁹ Next, the second section of the regulations itemizes the Rule's restrictions on proprietary trading activity and lays out a framework that requires certain banking entities to produce a quantitative accounting of their trading affairs.⁶⁰ The third component of the regulations details the Rule's restrictions of ownership interests in "covered funds," such as hedge and private equity funds, and delimits exemptions and exceptions to those restrictions.⁶¹ The fourth component describes the substantial compliance programs banking entities must maintain to ensure the proper functioning of the Rule and its restrictions, including "written policies and procedures, internal controls, a management framework, independent testing of the compliance program, training, and recordkeeping."⁶²

⁵⁷ See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. at 5,538–39, 5,541–45 (providing introductory background to the purpose and structure of the administrative regulations enacting the Volcker Rule).

⁵⁸ Press Release, Bd. of Governors of the Fed. Reserve Sys. et al., Final Rules to Implement the "Volcker Rule" 1 (Dec. 10, 2013), <https://www.fdic.gov/news/news/press/2013/volckerfactsheet.pdf> [<https://perma.cc/HS7P-LELV>]. See also Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. at 5,542–44 (providing an overview and summary of the Rule's restrictions on proprietary trading and covered fund investment activities).

⁵⁹ See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. at 5,779–81.

⁶⁰ See *id.* at 5,781–87.

⁶¹ See *id.* at 5,787–96.

⁶² *Id.* at 5,542. See also *id.* at 5,796–97.

Finally, Appendices A and B of the regulations complement and reinforce sections two through four by specifying both the quantitative trading statistics that banking entities must report externally and the minimum programmatic standards that banks must maintain internally.⁶³

C. Statutory and Regulatory Development

Despite President Trump's forceful promise to "do a number on Dodd-Frank,"⁶⁴ relatively few substantial changes have been made so far to the Volcker Rule during the current presidential administration. However, a 2018 law entitled the Economic Growth, Regulatory Relief and Consumer Protection Act ("the EGRRCPA")⁶⁵ effectively amended the statutory text of the Volcker Rule at section 13 of the BHCA and directed administrative agencies to update their Volcker-related regulations accordingly.⁶⁶ As a result of this law, a number of mechanical updates to the Volcker Rule have been promulgated through the formal notice-and-comment procedure. These updates were approved in their final form in July 2019.⁶⁷

The EGRRCPA was the culmination of a broader effort spearheaded by the Trump Administration to amend the Dodd-Frank Act writ large. In response to a February 2017

⁶³ See *id.* at 5,797–800, 5,800–04.

⁶⁴ See, e.g., Pete Schroder, *Trump: We Will Do A 'Big Number' to Dodd-Frank*, HILL (Jan. 30, 2017), <https://thehill.com/policy/finance/316879-trump-we-will-do-a-big-number-to-dodd-frank> [https://perma.cc/X4VM-7UA6].

⁶⁵ Pub. L. No. 115–174, 132 Stat. 1296 (2018).

⁶⁶ See *id.* at 1309–10. See also Erica Werner, *Trump Signs Law Rolling Back Post-Financial Crisis Banking Rules*, WASH. POST (May 24, 2018), https://www.washingtonpost.com/business/economy/trump-signs-law-rolling-back-post-financial-crisis-banking-rules/2018/05/24/077e3aa8-5f6c-11e8-a4a4-c070ef53f315_story.html?utm_term=.9aaafee9ffe4 [https://perma.cc/JA4F-2A8N] (noting and discussing the implications of the EGRRCPA for the Volcker Rule).

⁶⁷ See Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432 (July 17, 2018) (to be codified at 12 C.F.R. pts. 44, 248, 351 and 17 C.F.R. pts. 75, 255).

executive order,⁶⁸ the Department of the Treasury under Secretary Steven Mnuchin issued a series of reports on the state of the national economy,⁶⁹ including one installment addressing banks and credit unions in particular.⁷⁰ There, in a subsection titled “Improving the Volcker Rule,” the Treasury Department proposed that Congress introduce an exclusion for small institutions “whose failure would not pose risks to financial stability,” refine the Rule’s proprietary trading prohibition and market-making exemption, simplify the Rule’s overly broad restrictions on covered funds, and generally downscale the extensive requirements of the Rule’s mandatory compliance program.⁷¹ The EGRRCPA, passed the year after the Treasury reports were issued, has instituted several of these recommendations.⁷² Namely, the law raised the asset threshold at which banks trigger increased regulation under the Volcker Rule in the form of mandatory internal “stress tests” from \$50 billion to \$250 billion;⁷³ carved out an

⁶⁸ See Exec. Order No. 13772, 82 Fed. Reg. 9,965 (Feb. 3, 2017).

⁶⁹ See, e.g., STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, U.S. DEP’T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS (2017), <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf> [<https://perma.cc/5FXU-7DW4>]; STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, U.S. DEP’T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: ASSET MANAGEMENT AND INSURANCE (2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf [<https://perma.cc/4KWQ-3D4Y>].

⁷⁰ See STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, U.S. DEP’T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS (2017), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf> [<https://perma.cc/ER3L-2F7C>].

⁷¹ *Id.* at 71–77.

⁷² See DAVID W. PERKINS ET AL., CONG. RESEARCH SERV., R45073, ECONOMIC GROWTH, REGULATORY RELIEF, AND CONSUMER PROTECTION ACT (P.L. 115-174) AND SELECTED POLICY ISSUES 1–2 (2018) (observing the causal relationship between several provisions of the EGRRCPA and the Treasury Department’s reports in response to Executive Order 13772).

⁷³ See Company-Run Stress Testing Requirements for FDIC-Supervised State Nonmember Banks and State Savings Associations, 84 Fed. Reg. 56,929 (Oct. 24, 2019) (to be codified at 12 C.F.R. pt. 325).

exemption for banks with less than \$10 billion in total assets; narrowed the scope of applicable “banking entities” subject to the Rule’s prohibitions;⁷⁴ and loosened the restrictions on name-sharing between banking entities and associated hedge and private equity funds.⁷⁵

The rulemakings made in the wake of the EGRCCPA have gradually weakened the Volcker Rule’s restrictions and eased the standards for how the Rule is to be implemented. A notice of proposed rulemaking published to the Federal Register in July 2018 described the planned amendments as intending “to provide banking entities with clarity about what activities are prohibited and to improve supervision and implementation of section 13 [of the BHCA].”⁷⁶ In support of this goal, the first of these joint agency revisions exempts “community banks”—i.e., commercial banking companies with holdings consisting of no more than \$10 billion in total assets and trading assets amounting to no more than five percent of total assets⁷⁷—from the Rule’s restrictions over proprietary trading and relationships with private equity and hedge funds.⁷⁸ These modified rules additionally specify that qualifying investment advisers may share names with associated funds so long as “the investment adviser is not, and does not share the same name [as] . . . an insured depository institution, a company that controls an insured depository institution, or a company that is treated

⁷⁴ See Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 35,008 (July 22, 2019) (to be codified at 12 C.F.R. pts. 44, 248, 351 and 17 C.F.R. pts. 75, 255).

⁷⁵ See Pub. L. No. 115–174, 132 Stat. 1296, 1309–10 (2018).

⁷⁶ Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432, 33,432 (July 17, 2018) (to be codified at 12 C.F.R. pts. 44, 248, 351 and 17 C.F.R. pts. 75, 255) (requesting input on over 340 discrete questions).

⁷⁷ Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. at 35,009–11.

⁷⁸ *Id.* at 35,019–22.

as a bank holding company . . . [and] the investment adviser's name does not contain the word 'bank.'"⁷⁹

Even more recently, as of August 2019, additional joint agency revisions were approved that implement even more changes to the regulatory application of the Volcker Rule's provisions.⁸⁰ Taking effect in January 2020, these amendments have implemented numerous changes to the Rule's mechanics. Namely, the amendments have "[t]ailor[ed] the [R]ule's compliance requirements based on the size of a firm's trading assets and liabilities"⁸¹ by establishing a multi-tiered system of compliance obligations.⁸² Additional major changes implemented by these revisions include: (1) shaving down the applicability of "the short-term intent prong of the [Rule's] 'trading account' definition,"⁸³ rendering it relevant only to banking entities that choose not to be subject to the Rule's market risk capital rule prong;⁸⁴ (2) instituting a rebuttable presumption under which financial instruments held by applicable entities for a minimum of sixty days are assumed to forfeit categorization under the Rule's short-term intent

⁷⁹ *Id.* at 35,011. *See also id.* at 35,019–22.

⁸⁰ Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61,974 (Nov. 14, 2019) (to be codified at 12 C.F.R. pts. 44, 248, 351 and 17 C.F.R. pts. 75, 255).

⁸¹ Press Release, Fed. Deposit Ins. Corp., FDIC Approves Interagency Final Rule to Simplify and Tailor the "Volcker Rule" (Aug. 20, 2019), <https://www.fdic.gov/news/news/press/2019/pr19073.html> [<https://perma.cc/J5Z4-AUKG>]. *See also* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. at 61,976–77.

⁸² *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. at 61,976–77, 62,022–25. *See also* GIBSON, DUNN & CRUTCHER LLP, DODD-FRANK 2.0: U.S. AGENCIES REVISE THE VOLCKER RULE ON PROPRIETARY TRADING 1 (2019), <https://www.gibsondunn.com/dodd-frank-2-0-us-agencies-revise-the-volcker-rule-on-proprietary-trading/> [<https://perma.cc/Y3QH-MSEX>].

⁸³ Press Release, Fed. Deposit Ins. Corp., *supra* note 81.

⁸⁴ *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. at 62,204–05.

prong;⁸⁵ (3) expanding the circumstances under which banks may rely on the Rule's hedging exemption from its general prohibition on proprietary trading;⁸⁶ and (4) streamlining the data reporting requirements to which banking entities are subject in an attempt to reduce compliance costs.⁸⁷ Although some warn that these changes "limit[] the scope of the Volcker [R]ule so significantly that it no longer will provide meaningful constraints on speculative proprietary trading by banks,"⁸⁸ the revisions themselves are not nearly as dramatic as initially advertised, and "largely leav[e] intact the most controversial provision that bans big banks from making risky trades with federally-insured deposits."⁸⁹

III. PERFORMANCE AND REASSESSMENT: PUBLIC PERCEPTION OF THE VOLCKER RULE

This Part pivots from a review of the Volcker Rule's content to discuss the perceived impact the Rule has had since going into effect. Section III.A begins by highlighting the perspectives of various commentators as to whether the Rule has achieved its desired ends. Section III.B then reviews the arguments in favor of a strong Volcker Rule, while Section III.C discusses the arguments in favor of rolling back its statutory and regulatory mandate.

⁸⁵ *Id.* at 62,206–07.

⁸⁶ *Id.* at 62,207–08

⁸⁷ *Id.* at 62,209–12.

⁸⁸ Press Release, Rostin Behnam, Comm'r, Commodity Futures Trading Comm'n, Dissenting Statement of Commissioner Rostin Behnam Regarding Amendments to the Volcker Rule (Sept. 16, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behname-statement091619> [<https://perma.cc/59ND-53UC>].

⁸⁹ Francine McKenna, *Wall Street Spent Years Fighting the Volcker Rule, But Small Banks Win the Most Relief in Trump Regulatory Rewrite*, MARKET WATCH (Aug. 22, 2019), <https://www.marketwatch.com/st-ory/wall-street-spent-years-fighting-the-volcker-rule-but-small-banks-win-the-most-relief-in-trump-regulatory-rewrite-2019-08-22> [<https://perma.cc/RG59-M5UC>].

A. Perceived Effects and Public Reception

Many studies reach conflicting conclusions as to the impact the Volcker Rule has had on the U.S. banking industry and the national economy at large. Research has not yet conclusively demonstrated whether the Volcker Rule actually “works,” and reports as to the Rule’s consequences remain mixed.⁹⁰ Short of isolating the Volcker Rule’s direct impact, however, much can still be said about the indirect or second-order effects that the Rule has caused in the years since its enactment. Both the public’s reception of the final Volcker Rule and the general perception of its performance over the past four years have been decidedly contentious and have weighed toward partisan pronouncements rather than nuanced assessments.

Part of what has muddied the public’s perception of the Volcker Rule is the absence of uncontroversial data as to its performance. Indeed, “[s]pecifics on how much Dodd-Frank cost the banking industry in general . . . are inconsistent and difficult to quantify.”⁹¹ For example, one article argues that while “[i]ncreasing the safety and soundness of banking entities and the U.S. financial system is an important goal[,]” evidence suggests that the Volcker Rule merely “imposes substantial costs on U.S. financial stability while doing little to account for this goal.”⁹² Similarly, another more recent study “find[s] no evidence of the [R]ule’s intended reduction in the riskiness of covered firms’ trading in corporate bonds[,]” and instead presents empirical evidence in support of the conclusion that the Rule has “increased the cost of the liquidity provided by covered firms[,] . . . has not decreased the liquidity risk exposure of covered firms[,] . . . [and] has decreased the

⁹⁰ See Awrey & Judge, *supra* note 13, at 6 (observing that despite administrative processes which “implicitly assume that policymakers . . . understand the system they are regulating and how that system will respond to a given intervention,” the sheer complexity and dynamism of modern finance results in “policymakers inevitably operat[ing] with an incomplete understanding of how the financial system works and how it will respond to regulatory intervention”).

⁹¹ Butz, *supra* note 2, at 465.

⁹² Brissette, *supra* note 2, at 257.

market share of covered firms.”⁹³ Conversely, a press release put out by the Securities and Exchange Commission (“the SEC”) in 2019 noted that “[c]ontrary to lobbyists’ alarmist predictions, our Staff found no evidence to support the claim that the Volcker Rule reduced the depth of primary or secondary markets.”⁹⁴ Likewise, a statement released by the Board of Governors of the Federal Reserve System in mid-2018 observed that “in reviewing [relevant] research, it is hard to see compelling evidence that the Volcker [R]ule has materially disrupted liquidity provision in key markets.”⁹⁵ Still, a contemporaneous news article reported that “[banks] have successfully argued that the [Volcker R]ule has restricted liquidity[] and choked their ability to trade in complex products,” and that trading revenue data indicates that “there seem[s] to be more than adequate liquidity available.”⁹⁶ Another article

⁹³ Meraj Allahrakha et al., *The Effects of the Volcker Rule on Corporate Bond Trading: Evidence from the Underwriting Exemption* 1 (Office of Fin. Research, Working Paper No. 19-02, 2019), <https://ssrn.com/abstract=3440712> [<https://perma.cc/6XHN-RREE>]. See also Jack Bao et al., *The Volcker Rule and Market-Making in Times of Stress* 4 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Paper No. 2016-102, 2016), <https://doi.org/10.17016/FEDS.2016.102> [<https://perma.cc/3W2P-MEJ3>] (“Our results show that bond liquidity deterioration around rating downgrades has worsened following the implementation of the Volcker Rule . . . [and] that the relative deterioration in liquidity around these stress events is as high during the post-Volcker period as during the Financial Crisis. Given how badly liquidity deteriorated during the Financial Crisis, this finding suggests that the Volcker Rule may have serious consequences for corporate bond market functioning in stress times.”).

⁹⁴ Press Release, Robert J. Jackson, Jr., Comm’r, Sec. & Exch. Comm’n, Statement on Volcker Rule Amendments (Sept. 19, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-091919> [<https://perma.cc/RH2W-N9N9>].

⁹⁵ Press Release, Lael Brainard, Governor, Bd. of Governors of the Fed. Reserve Sys., Statement on the Volcker Rule Proposal (May 30, 2018), <https://www.federalreserve.gov/news-events/press-releases/-brainard-statement-20180530.htm> [<https://perma.cc/T9J4-WB7M>] (further noting that “[s]ince the Volcker rule was enacted, banks have . . . substantially reduced the overall market and liquidity risk profile of their trading books”).

⁹⁶ Editorial Board, *Fed Makes a Risky Bet on Banks*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/volcker-rule-banks-fed.html> [<https://perma.cc/6GNZ-H25F>] (citing a report from a financial

similarly noted that despite critics' claims that the Volcker Rule is crippling businesses in the industries it regulates, the Federal Deposit Insurance Corporation has confirmed that banks reported record profits as recently as 2018, including "\$56 billion in profits during the first quarter of 2018, up 27.7 percent compared with the same period [the previous] year."⁹⁷

With respect to the public's reception of the Volcker Rule, one need only survey media coverage of the Rule's development and concurrent agency press releases to observe that even detailed assessments of the Rule tend to be one-sided. One commentator summarizes this phenomenon in noting that "[b]eyond simply the media, political rhetoric often—through what are perhaps mischaracterizations calculated to achieve political ends—sensationalizes or caricaturizes key points surrounding financial reform."⁹⁸ Predictably, observes another article, many left-leaning politicians, financial regulatory agencies, and members of the general public "typically employ pro-Volcker Rule arguments, which generally focus on proprietary trading's role in the financial crisis and its inherent risk," whereas "many economists and law professors have voiced displeasure with the Rule[s] . . . ambiguity[,] . . . off-the-rack promulgation, and . . . creation of illiquidity in bond markets."⁹⁹

The polarized nature of public opinion concerning the Volcker Rule is perhaps most effectively illustrated by surveying agency commissioners' statements weighing proposed changes to the Rule. On the one hand, statements arguing against rollbacks to the Volcker Rule often make sweeping claims. For example, one recent statement issued by CFTC Commissioner Rostin Behnam declared that "[w]hat remains [after rollbacks] is so watered down that it leaves one questioning whether it should be called the Volcker rule at all."¹⁰⁰

services firm claiming that "[t]otal revenue for the U.S. banks [in the first quarter of 2018] was the highest since 2009").

⁹⁷ Werner, *supra* note 66.

⁹⁸ Douglas Landy et al., *Things the Media Believe the Volcker Rule Says . . . But It Actually Doesn't*, 132 BANKING L.J. 255, 260 (2015).

⁹⁹ Nester, *supra* note 2, at 3073.

¹⁰⁰ Press Release, Rostin Behnam, *supra* note 88.

Additionally, pro-Volcker statements often resort to emotional appeals when characterizing the Rule's importance by emphasizing "the families and businesses whose wellbeing would be threatened by another financial crisis"¹⁰¹ and the "ordinary American investors" who are "kept up at night . . . wondering why they should trust a financial system that upended their lives a decade ago."¹⁰² Still others explicitly characterize the Rule as a success without citing supporting evidence, warning that proposed changes to the Rule "would help undo the framework that has helped avoid another financial crisis."¹⁰³ On the other hand, statements arguing on behalf of proposed roll-backs to the Volcker Rule hardly display more attention to detail, describing the Rule as "among the most well-intentioned but poorly designed regulations in the history of American finance,"¹⁰⁴ denouncing it for "detering critically important economic activities[.]"¹⁰⁵ and characterizing changes to the Rule as "simplify[ing] [it] in a common sense way that preserves the safety and soundness of the federal banking system and eliminates [the] unintended negative consequences of the

¹⁰¹ Press Release, Allison Herren Lee, Comm'r, Sec. & Exch. Comm'n, Statement of Commissioner Allison Herren Lee on Amendments to the Volcker Rule (Sept. 18, 2019), <https://www.sec.gov/news/public-statement/statement-lee-091919> [<https://perma.cc/SX82-D59J>].

¹⁰² Press Release, Robert J. Jackson, Jr., *supra* note 94.

¹⁰³ Press Release, Kara M. Stein, Comm'r, Sec. & Exch. Comm'n, Statement on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (June 5, 2018), <https://www.sec.gov/news/public-statement/statement-stein-060518-2> [<https://perma.cc/95TR-9GD6>].

¹⁰⁴ Press Release, Heath P. Tarbert, Chairman, Commodity Futures Trading Comm'n, Statement of Chairman Heath P. Tarbert in Support of Revisions to the Volcker Rule (Sept. 16, 2019), <https://www.cftc.gov/Press-Room/SpeechesTestimony/tarbertstatement091619> [<https://perma.cc/RD99-LRRZ>].

¹⁰⁵ Press Release, Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting on Amendments to the Volcker Rule (June 5, 2018), <https://www.sec.gov/news/public-statement/statement-peirce-060518-2> [<https://perma.cc/GS3T-9Q58>].

prior rule.”¹⁰⁶ Specifics aside, reports like these leave readers wondering whether they all refer to the same rule.

B. Perspectives in Favor of the Rule and Its Strong Enforcement

Many organizations, journalists, scholars, and private citizens have expressed their approval of the Volcker Rule and have vocally opposed proposed rollbacks of its mandate. Broadly, these arguments generally agree on several premises: first, that the Rule curtails problematic investment practices; second, that the way in which the Rule affects those practices is reasonable and mostly effective; and third, that the negative effects of the Rule are either inconsequential or necessary. In practice, these arguments adopt one of two general stances: either (1) that the investment practices restricted by the Volcker Rule are in fact among those which caused the financial crisis of 2008; or (2) that the investment practices restricted by the Volcker Rule are sufficiently related to those which contributed to the financial crisis of 2008 to justify their restriction.

Arguments of the first sort—articulated by proponents of the Volcker Rule in Congress, administrative agencies, the media, government watchdog organizations, and the general public¹⁰⁷—take a strong stance and generally contend that the

¹⁰⁶ Press Release, Office of the Comptroller of the Currency, Comptroller of the Currency Approves Volcker Rule Reforms (Aug. 20, 2019), <https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-occ-2019-94.html> [<https://perma.cc/G4DZ-GJ5U>].

¹⁰⁷ See, e.g., Press Release, Sen. Jeff Merkley, Merkley Urges Financial Regulators to Reject Gutting of Volcker Rule (Sept. 12, 2019), <https://www.merkley.senate.gov/news/press-releases/merkley-urges-financial-regulators-to-reject-gutting-of-volcker-rule-2019> [<https://perma.cc/4G22-R2QU>]; Greg Gelzimis, *Hollowing Out the Volcker Rule: How Regulators Plan to Undermine a Pillar of Financial Reform*, CTR. AM. PROGRESS (Oct. 3, 2018), <https://www.americanprogress.org/issues/economy/reports/2018/10/03/458638/hollowing-volcker-rule/> [<https://perma.cc/SAU4-3R6N>]; Bill Saporito, *Is Congress Getting Nostalgic for Bank Failure?*, N.Y. TIMES (May 23, 2018), <https://www.ny-times.com/2018/05/23/opinion/congress-dodd-frank-banks.html> [<https://perma.cc/BB63-GLTL>].

Rule is necessary to correct the specific flaws exposed by the Great Recession. While conclusive data as to the causes of these failures remains sparse,¹⁰⁸ several studies have highlighted irresponsible and unrestricted proprietary trading as among the factors that led to the 2008 financial crisis.¹⁰⁹ These studies have been widely cited by proponents of the Rule's enactment and enforcement. In Congress, Senators Jeff Merkley and Carl Levin, both early proponents of the Volcker Rule,¹¹⁰ expressed this viewpoint in 2011, arguing that proprietary trading by banks and bank holding companies "played a critical role in the recent global financial crisis and subsequent recession."¹¹¹ Administrative officials have echoed the stance. For instance, former SEC Commissioner Luis Aguilar wrote that although "several factors combined to cause the financial crisis, proprietary trading by major financial institutions was a key contributor to that crisis."¹¹² More recently, Commodity Futures Trading Commission Commissioner Rostin Behnam objected to regulatory revisions to the Volcker Rule in part because the proposed changes would "encourage a return to the risky activities that led to the financial crisis, and perhaps further consolidate trading activity into a few institutions."¹¹³ Perhaps unsurprisingly, Paul Volcker himself adopted this argument in expressing his concerns about revisions to the

¹⁰⁸ See *supra* note 90 and accompanying text.

¹⁰⁹ See FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xvii-xxiii (2011); GRP. OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY 27-28 (2009), https://group30.org/images/uploads/publications/G30_FinancialReformFrameworkFinStability.pdf [<https://perma.cc/7DAE-RRZA>].

¹¹⁰ See Press Release, Sen. Jeff Merkley, Merkley-Levin Amendment to Crack Down on High-Risk Proprietary Trading (May 10, 2010), <https://www.merkley.senate.gov/news/press-releases/merkley-levin-amendment-to-crack-down-on-high-risk-proprietary-trading> [<https://perma.cc/AD4K-6R3R>].

¹¹¹ Merkley & Levin, *supra* note 49, at 515-16.

¹¹² Press Release, Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Statement on the Volcker Rule: Reducing Systemic Risk by Banning Excessive Proprietary Trading with Depositors' Money (Dec. 10, 2013), <https://www.sec.gov/news/public-statement/2013-spch121013laa> [<https://perma.cc/VZ6K-8VMH>].

¹¹³ Press Release, Rostin Behnam, *supra* note 88.

Volcker Rule, claiming that “the new [R]ule amplifies risk in the financial system, increases moral hazard[,] and erodes protections against conflicts of interest that were so glaringly on display during the last crisis.”¹¹⁴

Members of the media and pro-Volcker political action groups also regularly employ this line of argument. In a 2017 comment letter, the nonprofit organization Public Citizen wrote a scathing review of the EGRRCPA-inspired rollbacks to the Rule, noting specifically that “[p]roprietary trading figured at the center of the financial crisis.”¹¹⁵ Market watchdog Better Markets likewise premised its comments on the assertion that “[t]he Volcker Rule[s] ban on proprietary trading by banking entities was included to address one of the root causes of the 2008 financial crisis.”¹¹⁶ Better Markets’ comment letter went on to opine on this basis that “[w]eakening the Volcker Rule threatens to neutralize one of the single most important financial reforms incorporated in the Dodd-Frank Act to ensure our largest banks remain stable and our entire economy is protected from another financial crisis.”¹¹⁷ Some in the mainstream media similarly report that the proposed revision “opens the financial system back up to the abuse and risky behavior that crippled the U.S. economy a decade ago . . . at a time when financial firms are posting record profits.”¹¹⁸ Another editorial report cynically retorted that “Congress is

¹¹⁴ Letter from Paul A. Volcker to Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys. (Aug. 20, 2019), <https://www.dlapiper.com/~media/files/insights/publications/2019/09/august20letter.pdf> [<https://perma.cc/PNS9-P5QK>].

¹¹⁵ Public Citizen, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds 3 (Sept. 20, 2017), https://downloads.regulations.gov/OCC-2017-0014-0019/attachment_1.pdf [<https://perma.cc/95FD-48BV>].

¹¹⁶ Better Markets, Inc., Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds 3 (Sept. 21, 2017), <https://bettermarkets.com/sites/default/files/OCC%20-%20CL%20-%20Volcker%20Rule%20-%202017-21-17.pdf> [<https://perma.cc/66PQ-TWAF>].

¹¹⁷ *Id.*

¹¹⁸ Werner, *supra* note 66.

picking apart the Dodd-Frank Act of 2010 just in time for the 10th anniversary of the Great Recession, the type of economic conflagration the law was supposed to prevent.”¹¹⁹

The second type of pro-Volcker argument takes a more qualified approach to the Volcker Rule’s importance and indispensability. Rather than premising their stance on an assertion of the connection between the Rule and the specific failures that led to the 2008 financial crisis, arguments of this sort contend that the businesses practices the Rule is designed to check are problematic enough on their own to warrant their restriction. For example, one pro-Volcker scholar admits that “[a] causal relationship between such proprietary trading and the financial crisis is . . . difficult to establish,” and acknowledges that “it is easier to assert that proprietary trading exacerbated the impact of the crisis.”¹²⁰ Similarly, in a statement of dissent to the final regulatory revisions of the Volcker Rule, SEC Commissioner Allison Herren Lee qualifies that “[t]he Volcker Rule is complex [and] . . . could do with some simplification and clarity,” before contending that “we can just as easily achieve simplicity and clarity with a plainly defined but appropriately broad scope and stronger compliance requirements.”¹²¹ Many such arguments build upon acknowledgements that “[p]rudence would argue for waiting until we have tested how the new framework performs through a full [credit] cycle before we make judgments about its performance.”¹²²

C. Perspectives Against the Rule and in Favor of Rollbacks

Arguments against the Volcker Rule and its strong enforcement also take a variety of forms. While some argue against the Rule’s necessity, many arguments in favor of rollbacks endorse the Rule’s essential goal and existence in some form. Broadly, opponents of a strong Volcker Rule tend to

¹¹⁹ Saporito, *supra* note 107.

¹²⁰ Onnig H. Dombalagian, *Proprietary Trading: Of Scourges, Scapegoats, and Scofflaws*, 87 U. CIN. L. REV. 387, 392–93 (2012).

¹²¹ Press Release, Allison Herren Lee, *supra* note 101.

¹²² Press Release, Lael Brainard, *supra* note 95.

point to the mixed evidence as to how related proprietary trading and hedging were to the financial crisis of 2008; the problematic regulatory ambiguities that threaten to over- or undershoot the Rule's intended impact; and the various undesired, unintended public and private costs that the Rule is likely to cause.

Commentators who most aggressively argue against the Volcker Rule contend that the Rule is fundamentally flawed in principle and ought to be repealed entirely. Many individuals who espouse this viewpoint cite data indicating that “[p]roprietary trading did not cause the financial crisis [of 2008,]” and argue that as a result “[t]he justification for banning proprietary trading for [even] large banks is dubious at best.”¹²³ In particular, some express fears that “reducing the amount of capital banks can legally put into hedge and private equity funds will hurt these funds, especially funds that rely extensively on their significant connections with banking entities.”¹²⁴ Others challenge the wisdom of reinstating Glass-Steagall's division between banking functions, contending that this division no longer captures a relevant distinction in contemporary financial markets.¹²⁵ For example, one commentator recently noted that:

Proprietary trading has moved to less-regulated businesses The result is likely to be an increase in overall risk-taking, absent market or regulatory restraint. . . . In short, even if proprietary trading is no longer located in banks, it may now be conducted by less-regulated entities that affect banks and banking

¹²³ Competitive Enterprise Institute, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Sept. 21, 2017), <https://cei.org/sites/default/files/Volcker%20Rule%20-%20Comments%20-%2020160921.pdf> [<https://perma.cc/D6ZG-N9Y6>]. See also Coffee, Jr., *supra* note 7, at 1073 (observing that there is “almost no evidence that proprietary trading was responsible for the failure of any financial institution” in the financial crisis of 2008).

¹²⁴ Brissette, *supra* note 2, at 241.

¹²⁵ See Whitehead, *supra* note 29, at 46 (observing that “[t]he Volcker Rule . . . fails to reflect an important shift in the financial markets”).

activities. . . . [As a result] [b]anks . . . will continue to be exposed to proprietary trading—perhaps less directly, but now also with less regulatory oversight, than before.¹²⁶

Complementing these perspectives, several institutional commenters responding to agency notices of proposed rule-makings (“NPRMs”) have recommended that ideally “[t]he Volcker Rule should be repealed” wholesale, and only in the meantime should regulatory agencies enact “revise[d] rules to mitigate [its] harmful effects on the economy.”¹²⁷ Even more recently, a similarly strong stance was adopted by SEC Commissioner Hester Peirce, who contended that the Rule’s “immense administrative complexities . . . discourage banking entities from engaging in market-making and hedging activity” and “impose significant compliance costs on bank-affiliated broker-dealers and investment advisers,” thereby “detering critically important economic activities.”¹²⁸

In contrast to these strict perspectives, most anti-Volcker arguments take a more nuanced form, generally agreeing to the Rule’s merits in principle and acknowledging the virtue of its essential premise while arguing that its current construction is inherently flawed. Many of these arguments highlight the lack of evidence as to the Rule’s practical success along with the problematic ambiguities within the Rule’s regulatory

¹²⁶ *Id.* at 39.

¹²⁷ American Bankers Association, Comment Letter on Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule) 1 (Sept. 21, 2017). *See also* Center for Capital Markets Competitiveness, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Sept. 21, 2017), <https://centerforcap.wpengine.com/wp-content/uploads/2017/09/CCMC-Comment-of-Volcker-Rule.pdf> [<https://perma.cc/QWX2-D22F>] (“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.”); Competitive Enterprise Institute, *supra* note 123 (“While we believe that Congress should repeal the Volcker Rule in its entirety, we applaud the OCC’s efforts to revise the rule to ease the regulatory burden—particularly on smaller banks—consistent with the framework of the statute . . .”).

¹²⁸ Press Release, Peirce, *supra* note 105.

framework. With respect to the latter issue, one article explains that among the major areas in which the Rule lacks clarity are the precise definition of what constitutes a “trading account” and the hazy distinction between prohibited proprietary trading activity and permitted market-making activity.¹²⁹ As to the former issue, several recent studies call for revisions to the Volcker Rule by casting doubt upon its practical effectiveness. One of these studies finds “no evidence of the rule’s intended reduction in the riskiness of covered firms’ trading in corporate bonds,”¹³⁰ while another finds that “attempt[s] to separate legitimate and acceptable market-making from speculative and risky market-making is not productive” and yields significant costs in terms of weakening the liquidity of the U.S. corporate bond market.¹³¹

The nonprofit organization Financial Services Roundtable also adopts this type of argument in commenting although that its constituent members “appreciate that the Rule was enacted to limit threats to the safety and soundness of large bank holding companies resulting from excessive risk taking in certain trading and funds activities,” in practice “the regulation implementing the Rule overreaches” insofar as it “restricts client-oriented activities that do not pose a material risk to the safety and soundness of institutions subject to the Rule, or the broader financial system.”¹³² Similarly, in a statement delivered in 2018, SEC Chairman Jay Clayton justified rollback proposals by arguing that “to effectively implement the Volcker Rule, one size does not fit all and its terms should reflect [the agencies’] collective experience . . . to help make the Volcker rule work in a more efficient manner, consistent with the purposes of the statute.”¹³³ The Office of the Comptroller of the Currency (“the

¹²⁹ Nester, *supra* note 2, at 3079.

¹³⁰ Allahrakha et al., *supra* note 93, at 1.

¹³¹ Bao et al., *supra* note 93, at 9.

¹³² Financial Services Roundtable, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds 8 (Oct. 6, 2017), <https://www.regulations.gov/document?D=OCC-2017-0014-0069> [<https://perma.cc/72M6-J352>].

¹³³ Press Release, Jay Clayton, Chairman, Sec. & Exch. Comm’n, Statement at Open Meeting on Inter-Agency Proposal for Amendments to

OCC”) released a statement the following year upon the approval of the regulatory revisions to the Volcker Rule, expressing fundamentally the same message. Specifically, the OCC’s statement explained that while “the limits and protections put in place by the prior version of the ‘Volcker Rule’ remain to ensure inappropriate risk practices do not recur[,]” the revised regulations still make “substantial progress [in] eliminating ineffective complexity and addressing aspects of the rule that restrict responsible banking activity.”¹³⁴

IV. INPUT AND OUTPUT: WHOSE FEEDBACK IS DRIVING THE VOLCKER RULE’S DEVELOPMENT?

This Part transitions from the survey of the Volcker Rule’s public reception to an analysis of the civic input that propelled the Rule’s development. Section IV.A surveys the public statements that were submitted in response to the Rule’s legislative revision, and Section IV.B reviews data from the notice-and-comment procedures that have taken place attendant to the Rule’s ongoing regulatory evolution. Section IV.C then discusses what this data demonstrates about existing lawmaking processes as applied to financial regulation in general.

A. Review of Public Commentary to Statutory Updates

The passage of the EGRRCPA has been said to “show a bipartisan recognition that, in certain ways, Dodd-Frank can be rejiggered and [made] more risk-focused.”¹³⁵ Nonetheless, while statutory revisions to the Volcker Rule were backed by much-touted bipartisan support,¹³⁶ a closer look at published

the Volcker Rule (June 5, 2018), <https://www.sec.gov/news/public-statement/statement-clayton-060518-2> [<https://perma.cc/W5SU-R727>].

¹³⁴ Press Release, Office of the Comptroller of the Currency, *supra* note 106.

¹³⁵ Jon Hill et al., *Senate Bill Takes Scalpel, Not Ax, To Dodd-Frank, Attys Say*, LAW360 (Mar. 14, 2018), <https://www.law360.com/articles/1022403/print?section=assetmanagement> [<https://perma.cc/8EXQ-KCSH>].

¹³⁶ Ryan Tracy & Andrew Ackerman, *How Congress Rolled Back Banking Rules in a Rare Bipartisan Deal*, WALL ST. J. (May 22, 2018),

statements, commentaries, and statistics surrounding the enactment of the EGRRCPA reveal a process fraught with more conflict than agreement.

That the Republican-spearheaded EGRRCPA bill emerged from the Senate with the support of seventeen moderate Democratic Senators reflects, to some extent, a spirit of cooperation.¹³⁷ By settling for more modest goals than those publicly advertised by the Trump Administration and sought by more hardline Republicans,¹³⁸ Senator Mike Crapo managed to garner backing from a sufficient number of Democrats in the Senate to pass the bill.¹³⁹ Although the Senate bill displayed “more modest ambitions” than it otherwise might have,¹⁴⁰ it comes as little surprise that centrist voices in both the Democratic and Republican camps emerged as the bill’s standard-bearers.¹⁴¹

<https://www.wsj.com/articles/how-congress-rolled-back-banking-rules-in-a-rare-bipartisan-deal-1527030512> [<https://perma.cc/D6WE-AL84>].

¹³⁷ *Id.*

¹³⁸ *Id.* (noting that “during the negotiations, Mr. Crapo rejected potentially controversial proposals . . . [and] narrowed others to win Democratic support”).

¹³⁹ *Id.* (observing that “[t]en of [the bill’s Democratic supporters] [we]re also up for re-election in 2018, with seven representing states that Mr. Trump won in 2016”).

¹⁴⁰ Hill et al., *supra* note 135.

¹⁴¹ See, e.g., Michael Macagnone, *Senate Banking Debate Stalls Vote On Regulation Rollbacks*, LAW360 (Mar. 8, 2018), <https://www.law360.com/articles/1020030/print?section=banking> [<https://perma.cc/F3S8-AT6C>] (“What this bill is trying to do is recognize that, of course, after the financial crisis there was a regulatory exposure that we needed to address,” [Republican Senator Thom] Tillis said. “The problem is we simply went too far or, at least, with the passing of time we now know that we can claw back those regulations on certain banks”); Tracy & Ackerman, *supra* note 136 (“Too big to fail had become too small to succeed,” [Democratic Senator Heidi] Heitkamp said.”). See also Erica Werner & Renae Merle, *Senate Passes Rollback of Banking Rules Enacted After Financial Crisis*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/business/economy/senate-passes-rollback-of-post-financial-crisis-banking-rules/2018/03/14/43837aae-27bd-11e8-b79d-f3d931db7f68_story.html [<https://perma.cc/W2FG-23JH>] (reporting that “for the first time since Trump became president, the divisions lurking within the Senate Democratic Caucus burst into full view, with [liberal Democrats] leading vehement opposition to the bill, even as supporters—

While the Trump White House characterized the legislation as enacting mere “common-sense reforms,”¹⁴² the liberal wing of the Democratic party, led by Senators Sherrod Brown and Elizabeth Warren, denounced the bill as “[going] too far to help an industry posting record profits” and even criticized Democratic supporters of the bill by name in a fundraising email.¹⁴³ In a statement, Senator Warren dubbed the law the “Bank Lobbyist Act” and warned that it threatened to “peel away vital safeguards we put on large banks after the financial crisis.”¹⁴⁴

Reactions from the general public were similarly varied and stratified along party lines. Predictably, Wall Street watchdog groups criticized the EGRRCPA as “unnecessary[,]” “potentially dangerous[,]” and “a giveaway to bank lobbyists,”¹⁴⁵ while business community lobbyists like the American Bankers Association praised the bill as an “important step toward bringing much-needed regulatory relief to help banks better serve their customers and communities.”¹⁴⁶ Similarly, whereas some editorials congratulated policymakers for “scal[ing] back their priorities to maintain support for a compromise[.]”¹⁴⁷ others excoriated them for “ignoring the past” in loosening “rules intended to keep [banks] from self-destructing again.”¹⁴⁸ Still others characterized the law as a “modest, targeted package of changes” while prudently acknowledging that its ultimate success or failure “may not be so much a

including Democrats up for reelection in states Trump won—supported it with equal vigor”).

¹⁴² See Macagnone, *supra* note 141.

¹⁴³ Tracy & Ackerman, *supra* note 136. See also Macagnone, *supra* note 141 (“‘The more people hear about this bill the less they like it,’ [Senator] Brown said. ‘There is a collective amnesia in this Senate. We’ve forgotten what happened 10 years ago.’”).

¹⁴⁴ Hill et al., *supra* note 135.

¹⁴⁵ *Id.*

¹⁴⁶ *Congress Enacts Bipartisan, ABA-Advocated Regulatory Reform Bill*, ABA BANKING J. (May 22, 2018), <https://bankingjournal.aba.com/2018/05/congress-enacts-bipartisan-aba-advocated-regulatory-reform-bill/> [<https://perma.cc/6SX7-BFWA>].

¹⁴⁷ Tracy & Ackerman, *supra* note 136.

¹⁴⁸ Saporito, *supra* note 107.

matter of what [it] does as what regulators do with [it].”¹⁴⁹ Although, as is the case with nearly all legislative developments, a detailed assessment of public opinion is hard to come by, data collected from a Gallup poll conducted immediately after the EGRRCPA passed suggests a similar divide. As of Fall 2018, the Gallup poll reflected that Republicans were becoming less likely to complain of too much financial regulation, Democrats were becoming more likely to complain of too little financial regulation, and the percentage of the public that held the opinion that too much financial regulation exists was at its lowest since 2008.¹⁵⁰

B. Survey of Public Contribution to Regulatory Updates

An examination of administrative rulemaking procedures opens a window of insight into the substance and dialogue of legal development unavailable through evaluation of the text of a regulation. As Professor Krawiec observes, “the informal notice and comment process seeks a pluralist goal of facilitating engagement opportunities for broad segments of society, including individuals and firms, as well as public and private interest groups.”¹⁵¹ In practice, however, administrative rulemaking is also less publicly visible, less likely to “attract challenges from political entrepreneurs,” and at least as vulnerable to the pressure of political lobbyists as legislative lawmaking, thus offering a unique opportunity for affected industry members to “forc[e] regulators to trim their sails.”¹⁵² With an eye toward exploring these dynamics, this Section surveys data from the notice-and-comment rulemakings that have driven the Volcker Rule’s regulatory evolution to better understand the public’s role in its development.

¹⁴⁹ Hill et al., *supra* note 135.

¹⁵⁰ Jim Norman, *Americans Worry Less About Government Regulation*, GALLUP (Oct. 11, 2018), <https://news.gallup.com/poll/243662/americans-worry-less-government-regulation.aspx> [<https://perma.cc/JM6Q-UWQ6>].

¹⁵¹ Krawiec, *supra* note 10, at 56. *See also* CASS SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 87–89 (2018) (“Democratization of the regulatory process[] through public comment . . . helps to collect dispersed knowledge and to bring it to bear on official choices.”).

¹⁵² Coffee, Jr., *supra* note 7, at 1028.

The Administrative Procedure Act mandates that federal administrative agencies follow a process called notice-and-comment rulemaking by publishing notices of proposed rulemakings and soliciting public input on the proposed rulemakings prior to promulgating new regulations or updating existing regulations.¹⁵³ The final joint agency regulations implementing the Volcker Rule were adopted in 2014, and until the writing of this Note, only three Volcker-related NPRMs—all promulgated within the past three years—proposed revising the regulations that directly implemented the Rule originally.¹⁵⁴ The first of these three NPRMs was published by the OCC in August 2017, entitled “Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule)” (“the 2017 NPRM”).¹⁵⁵ The 2017 NPRM solicited public comments “to assist in determining how the final rule implementing section 13 of the Bank Holding Company Act . . . should be revised to better accomplish the purposes of the statute . . . [and] suggest[] improvements in the ways in which the final rule has been applied and administered to date.”¹⁵⁶ The second of these NPRMs, published in July 2018 and titled “Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds” (“the 2018 NPRM”), was released jointly by the five administrative agencies in charge of implementing the

¹⁵³ See 5 U.S.C. § 553 (2018).

¹⁵⁴ See *Rules and Proposed Rules, Prohibitions and Restrictions on Proprietary Trading*, REGULATIONS.GOV (2020), <https://www.regulations.gov/searchResults?rpp=50&so=DESC&sb=post-edDate&po=0&s=%22Prohibitions%2Band%2BRestrictions%2Bon%2BProprietary%2BTrading%22&dct=PR%2BFR&pd=12%7C01%7C13-01%7C01%7C20> [<https://perma.cc/97XZ-RKM3>]. See also *infra* Appendix A, Figure 2 (displaying data on the meetings held between administrative agencies and institutional commenters prior to amendments to the Volcker Rule between 2017 and early 2020).

¹⁵⁵ Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule); Request for Public Input, 82 Fed. Reg. 36,692 (Aug. 7, 2017) (to be codified at 12 C.F.R. pt. 44).

¹⁵⁶ *Id.* at 36,692.

Volcker Rule.¹⁵⁷ The 2018 NPRM solicited public comments on its proposal to amend the aforementioned regulations by “provid[ing] banking entities with [more] clarity about what activities are prohibited and . . . improv[ing] supervision and implementation of section 13.”¹⁵⁸ The third NPRM, published in April 2019 and titled “Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds” (“the 2019 NPRM”), was also released jointly by the five agencies.¹⁵⁹ The 2019 NPRM proposed amendments that would “exclude from [the Rule’s] restrictions certain firms” under a minimum asset threshold, and would “permit an investment adviser that is a banking entity to share a name with [a] fund under certain circumstances.”¹⁶⁰ Together, these three NPRMs prefigured the final regulatory revisions made to the Volcker Rule discussed in the previous Section.

The public’s response to these NPRMs was not nearly as overwhelming as the public’s response to the NPRMs that preceded the original promulgation of regulations implementing the Volcker Rule.¹⁶¹ In total, 8,556 public comments were reportedly received by the OCC in response to the 2017 NPRM;¹⁶² 3,808 public comments were reportedly received in

¹⁵⁷ Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432 (July 17, 2018) (to be codified at 12 C.F.R. pts. 44, 248, 351 and 17 C.F.R. pts. 75, 255).

¹⁵⁸ *Id.* at 33,432.

¹⁵⁹ Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 2,778 (Feb. 8, 2019) (to be codified at 12 C.F.R. pts. 44, 248, 351 and 17 C.F.R. pts. 75, 255).

¹⁶⁰ *Id.* at 2,778.

¹⁶¹ See Press Release, Bd. of Governors of the Fed. Reserve Sys. et al., *supra* note 58 (noting that the notice-and-comment rulemaking procedure leading up to the promulgation of the original final regulations implementing the Volcker Rule drew “more than 18,000 comment letters”). See also *infra* Appendix A, Figure 1 (displaying the distribution of public comments responding to Volcker Rule NPRMs).

¹⁶² See *Docket Folder OCC-2017-0014: Request for Comment on the Volcker Rule*, REGULATIONS.GOV (Oct. 24, 2017),

response to the 2018 NPRM;¹⁶³ and a mere eighteen public comments were received in response to the 2019 NPRM.¹⁶⁴ Of the comments submitted in response to the 2017 NPRM, nearly ninety-nine percent were identical form letters sent by private citizens in opposition to the Volcker Rule rollbacks.¹⁶⁵ Another thirty comments sent in response to the 2017 NPRM were short original letters sent by private citizens, all but one of which expressed general opposition to the proposed rollbacks.¹⁶⁶ Fifty-six comments were letters sent by various businesses and political action organizations, all but five of which argued in favor of the proposed rollbacks.¹⁶⁷ Of the comments submitted in response to the 2018 NPRM, over ninety-six percent were identical form letters sent by private citizens in opposition to the proposed rollbacks.¹⁶⁸ Sixty-two comments to the 2018 NPRM were short original letters sent by private citizens, all but two of which expressed opposition to the

<https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=OCC-2017-0014> [<https://perma.cc/3843-7VXQ>].

¹⁶³ See *Docket Folder OCC-2018-0010: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, REGULATIONS.GOV (Nov. 5, 2018), <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=OCC-2018-0010> [<https://perma.cc/7NBR-UWVU>].

¹⁶⁴ See *Docket Folder OCC-2018-0029: Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds - Community Bank Relief and Removal of Naming Restrictions*, REGULATIONS.GOV (Apr. 15, 2019), <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=OCC-2018-0029> [<https://perma.cc/EL6E-JVC6>].

¹⁶⁵ See *Docket Folder OCC-2017-0014: Request for Comment on the Volcker Rule*, *supra* note 162; *Volcker Rule Form Letter (8,465 similar comments received; 8,466 total letters received)*, REGULATIONS.GOV (Oct. 5, 2017), <https://www.regulations.gov/document?D=OCC-2017-0014-0068> [<https://perma.cc/8CX2-YP99>].

¹⁶⁶ See *Docket Folder OCC-2017-0014: Request for Comment on the Volcker Rule*, *supra* note 162.

¹⁶⁷ See *id.*

¹⁶⁸ See *Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds: Docket Folder OCC-2018-0010*, *supra* note 163.

proposed rollbacks,¹⁶⁹ and seventy were comment letters sent in by businesses and political action organizations, all but eight of which argued in favor of the proposed rollbacks.¹⁷⁰ Finally, one comment to the 2018 NPRM was a letter sent by a member of Congress, expressing opposition to the proposed rollbacks.¹⁷¹ Of the comments submitted in response to the 2019 NPRM, eight were short original letters sent by private citizens, all but one of which opposed the proposed rollbacks;¹⁷² nine were letters sent by various businesses and political action organizations, all of which argued in favor of the proposed rollbacks;¹⁷³ and the last was from a member of Congress, which expressed support for the proposed rollbacks.¹⁷⁴

The vast majority of the comments submitted by private citizens read similarly and raised the same few points. Nearly all of these private citizen comments contained sentences that implored administrative agencies to “strengthen our laws against using taxpayer-backed deposits on risky investments.”¹⁷⁵ Some also shared personal snapshots of difficulties

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.*; Letter from Sen. Jeffrey A. Merkley to Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys., et al. (Oct. 3, 2018), <https://www.merkley.senate.gov/download/merkley-volcker-comment-letter> [<https://perma.cc/GFS9-GHKA>].

¹⁷² *See Docket Folder OCC-2018-0029: Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds - Community Bank Relief and Removal of Naming Restriction, supra* note 164.

¹⁷³ *See id.*

¹⁷⁴ Letter from Rep. Blaine Luetkemeyer, Representative to Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys., et al. (Dec. 21, 2018), <https://www.fdic.gov/regulations/laws/federal/2019/2019-proposed-revisions-to-prohibitions-3064-ae88-c-002.pdf> [<https://perma.cc/U93V-56MZ>].

¹⁷⁵ *Volcker Rule Form Letter (3,669 similar comments received; 3,670 total letters received)*, REGULATIONS.GOV (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0030> [<https://perma.cc/5ZQG-S72K>]. *See also Volcker Rule Form Letter (8,465 similar comments received; 8,466 total letters received)*, *supra* note 165 (“I ask you to strengthen, not weaken, the Volcker Rule.”).

experienced during and after the financial crisis of 2008,¹⁷⁶ while others expressed incredulity or anger at the perceived greediness of banks and financial companies.¹⁷⁷ Several public comments also expressed anger at the apparent ignorance of the administrative agencies to the danger posed by rolling back the protections of the Volcker Rule.¹⁷⁸ Whereas some private citizens made general suggestions, which recommended

¹⁷⁶ See, e.g., Arline Taylor, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0096> [<https://perma.cc/AN8J-CEBD>] (“My husband and I are in our mid 70’s, worked from the age of 16, lived within our means and invested wisely so that we could retire with enough to be comfortable. In 2008 we were preparing to sell our modest home that we had lived in for 35 years . . . and then the 2008 crash wiped out half of our IRA! Ten years later we are close to back to where we were before the crash. Our plans to downsize were put on hold - we cannot take another crash!”); Leanne Turley, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0124> [<https://perma.cc/7TQW-NVS9>] (“[L]ost my job and my home during [the crisis] and can work only part time now. I will never be able to make those losses up. It is unfair to make taxpayers who have lost so much also have to pay for bailouts.”).

¹⁷⁷ See, e.g., Dave Kisor, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0094> [<https://perma.cc/JR55-S9TQ>] (“Wall Street Banksters will do anything they want, as they have learned the federal government will bail them out of any jam. They’ll gamble with our money, lose and when the customers are in the poor house, the banksters will just say it happens and then lobby for more money to gamble away . . .”).

¹⁷⁸ See Daniel George, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0116> [<https://perma.cc/Y2PC-KC97>] (“Despite appearances, we are still digging out of from the damage that [banks and institutional investors] caused by sparking the 2008 crash a decade ago. Advocates of weaker regulation are either forgetful or dangerous.”).

retaining the old Glass-Steagall framework,¹⁷⁹ increasing “transparency around how the Volcker Rule has been implemented,”¹⁸⁰ and “implement[ing] banker pay reforms . . . to cut back risky behavior by banks,”¹⁸¹ exceedingly few private citizens made reference to any specific provisions of the Rule.¹⁸² Many of these comments were premised explicitly on the insistence that banks are inherently bad actors that caused the most recent financial crisis and must be safeguarded against.¹⁸³

¹⁷⁹ See, e.g., Edward Price, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0099> [<https://perma.cc/P58V-38TM>]; M. Linton, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 18, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0140> [<https://perma.cc/5A9Q-7QMR>].

¹⁸⁰ Glen Kraus, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0112> [<https://perma.cc/X3KP-EHXA>]. See also Mark Harris, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 19, 2017), <https://www.regulations.gov/document?D=OCC-2017-0014-0074> [<https://perma.cc/M2S8-ZWMA>] (“[M]ore vigorous, transparent enforcement of the Volcker Rule is needed. Specifically, enforcement actions for violations -- and trading results—should be made public.”).

¹⁸¹ Gayle Janzen, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 12, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0130> [<https://perma.cc/M49A-U55N>].

¹⁸² Cf. Lori Nukolls, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Sept. 18, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0023> [<https://perma.cc/4QGG-L296>] (methodically and comprehensively explaining why the proposed regulation’s guidance to small banks is inadequate and at odds with the Volcker Rule’s stated rationale).

¹⁸³ See, e.g., Leo Blackman, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests

In contrast to the comments received from private citizens, feedback submitted by institutional commenters suggest a much higher degree of engagement with the details of both the existing Volcker Rule and the proposed changes to it. Among the recurrent themes of these comments are “the need to fully implement limits on the extraterritorial application of the Volcker Rule, so that it focuses on risks to the U.S. financial system and U.S. banking entities”;¹⁸⁴ the necessity of streamlining compliance requirements, including through the proposed regulation’s three-tiered model for reporting requirements;¹⁸⁵ the benefit of tightening and clarifying the scope of

in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0102> [<https://perma.cc/2THK-9ZTB>] (“The 2008 crash was caused entirely by calculated unscrupulous behavior by financiers. Their actions need be supervised. so the working guy doesn’t get screwed again.”); Virginia Madsen, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0113> [<https://perma.cc/USC2-RZQS>] (“I am convinced that the Volcker Rule is the major reason I wasn’t financially destroyed in 2007–2008 We need MORE stringent regulations for yet another industry that DOES NOT police itself in order to protect people’s savings.”); Jennifer Paterson, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Oct. 11, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0106> [<https://perma.cc/C3NB-E3JC>] (“No bank would ever allow me (or anyone else!) to gamble with *their* money; why should I let them do that with *MY* money? We (the majority of the American public) need strong oversight of big banks, [and] even the Volker Rule could be tightened for more transparency to make sure big banks can’t screw us over again.”).

¹⁸⁴ Institute of International Bankers, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 1–2 (Oct. 17, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0073> [<https://perma.cc/FLY2-NBCU>].

¹⁸⁵ See, e.g., State Street Corporation, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 2, 7 (Oct. 17, 2018), <https://www.sec.gov/comments/s7-14-18/s71418-4532607-176089.pdf> [<https://perma.cc/H3QZ-TGJK>]; New England Council,

prohibited proprietary trading to align the regulatory standard with the underlying statutory intent behind the Rule;¹⁸⁶ and the desirability of adding exclusions to the definition of “covered funds.”¹⁸⁷ Institutional comments opposing rollbacks—coming almost exclusively from nonprofit watchdog organizations—cited statistics in their comments that indicated that proprietary trading played an important role in causing the 2008 financial crisis,¹⁸⁸ raised specific concerns as to the ways in which the proposed reforms “double[] down on the already self-regulatory nature of the current Volcker Rule,”¹⁸⁹ and cautioned against altering the definitions of

Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 1 (Oct. 17, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0046> [<https://perma.cc/T333-6KL9>].

¹⁸⁶ See, e.g., State Street Corporation, *supra* note 185, at 2; American Action Forum, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 2 (Sept. 4, 2018), <https://www.regulations.gov/document?D=OCC-2017-0014-0042> [<https://perma.cc/B9NP-CSVZ>].

¹⁸⁷ See, e.g., State Street Corporation, *supra* note 185, at 7–8; Committee on Capital Markets Regulation, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 9–10 (Oct. 17, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0045> [<https://perma.cc/2H4A-6UMW>]; Center for American Entrepreneurship, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 3 (Oct. 17, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0050> [<https://perma.cc/P2T7-BBK8>]; Loan Syndications & Trading Association, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 2–3 (Oct. 16, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0035> [<https://perma.cc/5QY4-WPFY>].

¹⁸⁸ See Public Citizen, *supra* note 115, at 2–3.

¹⁸⁹ See Americans for Financial Reform, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity

“banking entity,” “covered fund,” and “proprietary trading” to be more flexible than they already are.¹⁹⁰

In addition to feedback received through public comments, the five relevant administrative agencies also conducted meetings with representatives from various interested organizations.¹⁹¹ Altogether, fifteen meetings are reported to have occurred between the OCC and such parties between 2017 and early 2020 relating to proposed changes to Volcker Rule regulations, all of which are memorialized in summary memoranda published by the agency and docketed along with the NPRM associated with each meeting.¹⁹² Fascinatingly, of the nearly forty organizations reported to have attended these meetings, all are recognizably members or representatives of the banking and investment business communities, and not a single one came out against rolling back the Volcker Rule’s regulatory mandate.¹⁹³ Instead, every one of these institutions discussed with the relevant administrative agencies specific

Funds 2 (Oct. 17, 2018), <https://www.regulations.gov/document?D=OCC-2018-0010-0077> [<https://perma.cc/UNA7-GZ8T>].

¹⁹⁰ See, e.g., Occupy the SEC, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds 2, 4–6 (Sept. 20, 2017), <https://www.regulations.gov/document?D=OCC-2018-0010-0037> [<https://perma.cc/RKS9-T9DV>].

¹⁹¹ See *Docket Folder OCC-2017-0014: Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds - Community Bank Relief and Removal of Naming Restrictions*, *supra* note 162; *Docket Folder OCC-2018-0010: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, *supra* note 163; *Docket Folder OCC-2018-0029: Request for Comment on the Volcker Rule*, *supra* note 164. See also *infra* Appendix A, Figure 2 (displaying data on the meetings held between administrative agencies and institutional commenters between 2017 and early 2020).

¹⁹² See *Docket Folder OCC-2018-0010: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, *supra* note 163; *Docket Folder OCC-2018-0029: Request for Comment on the Volcker Rule*, *supra* note 164. See also *infra* Appendix A, Figure 2 (collecting and displaying this data).

¹⁹³ See *infra* Appendix A, Figure 2.

proposals to expand the Rule's permitted activity exceptions¹⁹⁴ and streamline the Rule's compliance and administrative burdens.¹⁹⁵

C. Analysis of Public Response to the Volcker Rule's Development

Former OIRA Administrator Cass Sunstein noted that “the goal of notice-and-comment rulemaking is emphatically not to take an opinion poll [or] to take some kind of political temperature . . . [but] to fill gaps in knowledge and to see what might have been overlooked.”¹⁹⁶ Nonetheless, as former Deputy White House Counsel Steven Croley notes, “[u]ltimately, it is efficacious participation, not mere participation, that affects regulatory outcomes.”¹⁹⁷ This being said, the distribution of “efficacious participation” in the Volcker rulemaking process is hardly encouraging.

Indeed, procedural statistics from the Rule's administrative development reflect both stark polarity and unbalanced industry influence. While the reaction to the Rule's legislative development tends to eschew detail for either broad commendation over the very achievement of bipartisan compromise or broad disapproval of Congress's reckless deferral to the

¹⁹⁴ See, e.g., Memorandum from Mark O'Horo, Att'y, Office of the Comptroller of the Currency, to the Public Comment File 4 (Apr. 12, 2019), <https://beta.regulations.gov/document/OCC-2018-0010-0147> [<https://perma.cc/6HP9-ZTVN>] (urging that the revised Rule define applicable “trading accounts” by “[a]pply[ing] a clear, objective, standard that covers only the short-term trading activity that Congress intended to capture,” and recommending ten discrete exclusions therefrom).

¹⁹⁵ See, e.g., Memorandum from Mark O'Horo, Att'y, Office of the Comptroller of the Currency, to the Public Comment File 3 (Nov. 16, 2018), <https://beta.regulations.gov/document/OCC-2018-0010-0142> [<https://perma.cc/DL8D-XGWW>] (proposing more forgiving compliance requirements that would “grant each banking entity the flexibility to . . . calculate and report[] the metrics that are most useful in determining whether [that] entity may be engaged in potentially impermissible proprietary trading”).

¹⁹⁶ SUNSTEIN, *supra* note 151, at 88.

¹⁹⁷ STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 127 (2008).

interests of banking lobbyists,¹⁹⁸ evidence from the Rule's regulatory development reveals a much sharper distinction between the viewpoints expressed by private citizens and those expressed by organizational and institutional commenters. For one thing, nearly all institutional commenters tended to argue in favor of the proposed Volcker rollbacks, whereas nearly all private citizen commenters tended to argue against the rollbacks and in favor of maintaining and strengthening the original regulatory Rule.¹⁹⁹ For another, private citizens' comments tended to be much less sophisticated than institutional comments: not only did the vast majority of private commenters submit prewritten form letters rather than original comments,²⁰⁰ but nearly all of these submissions were less than a page in length, spoke in broad terms, and demonstrated a limited understanding of what the Rule does and how the agencies proposed to change it.²⁰¹ Finally, the

¹⁹⁸ Compare Alan Rappaport, *Senate Passes Bill Loosening Banking Rules, but Hurdles Remain in the House*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/business/senate-banking-rules.html> [<https://perma.cc/R8DX-W4JP>], with Saporito, *supra* note 119.

¹⁹⁹ See *infra* Appendix A, Figure 1.

²⁰⁰ See *supra* notes 161–74 and accompanying text.

²⁰¹ Rather than addressing any of the specific prompts provided in the NPRMs, many private citizen commenters have used the Regulations.gov comment portal to angrily air out their general political grievances against banks and the financial regulators themselves. See, e.g., Rod Tanner, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Sept. 20, 2017), <https://beta.regulations.gov/document/OCC-2017-0014-0075> [<https://perma.cc/MQ6K-8B3V>] (“You’re stealing from the national treasury paid for by the middle class Although you’re too self-centered and lacking in intellect to know it, your actions steadily and consistently create a more bleak future for your children. But then, what the hell, you don’t give a whit about your children, do you?”); Steve Ditore, Comment Letter on Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Sept. 18, 2017) <https://beta.regulations.gov/document/OCC-2017-0014-0084> [<https://perma.cc/JTR2-7NBS>] (“Want another 2008-style crash? Only WORSE this time, with no possibility of convincing people that it’s ‘over’ when for most of us, it never was the first time? Can you imagine the hell that will rain down on YOUR PORTFOLIOS if this shit happens again?”).

available data reveals that the pro-Volcker perspective was not represented in meetings with administrative agencies, facially evidencing a disproportionate lobbying influence of financial companies in the Rule's regulatory development.²⁰²

On the whole, the data from both private agency meetings and the public comment forums suggests a glaring if not unsurprising imbalance: members of the business community tend to be both in favor of Volcker Rule rollbacks and far better-positioned than the general public to offer substantive feedback promoting their regulatory interests. This phenomenon is likely not a coincidence, but a direct product of the demographical and political orientations of the financial industry as distinguished from those of the public. Professor John Coffee commented on this relative positioning by noting that while "United States investors and shareholders are . . . dispersed, disorganized, and . . . [e]asily distracted by other important issues . . . the financial services industry is well organized, focuse[d] on the issues that most affect it, and . . . incentive[d] to maintain a powerful lobbying presence."²⁰³ Indeed, it seems logical that the actors most directly affected by financial regulation are also those most likely to encounter its problems and be incentivized to lobby for pragmatic solutions. Knowing this, it ought to be of little surprise that administrative agencies are more likely to consider the nuanced feedback of expert sources rather than big-picture pushback from removed watchdog organizations and private citizens.

What is more, the complexity of the Volcker Rule's subject matter, the unified political front presented by the business community, and the superior financial sophistication of financial industry participants all suggest a more fundamental problem with administrative rulemaking processes as applied to the development of effective financial regulation. As Sunstein puts it, "[if] the purpose of the public comment process .

²⁰² See *infra* Appendix A, Figure 2.

²⁰³ Coffee, Jr., *supra* note 7, at 1021. See also CROLEY, *supra* note 197, at 132 ("[B]usiness or industry interests participate in agency decisionmaking processes significantly more than other, broad-based types of interests, especially as measured by the frequency and volume of their participation.").

. . . is to allow We the People . . . to participate [in rulemaking,] . . . then intelligibility and clarity are indispensable, and complexity is a fatal problem.”²⁰⁴ In the context of complex financial regulations such as the Volcker Rule, however, clarity comes at a premium. Far from the democratized process that notice-and-comment procedure is theoretically meant to be, the administrative procedure behind the implementation and development of the Volcker Rule acts as a sort of “bar to entry,” soliciting meaningful input from a privileged minority of sophisticated commenters while flying over the heads of the less informed with complex prompts, weighted language, and technical terminology.²⁰⁵ Ultimately, the complexity of the Volcker Rule’s subject matter and the discrepancy of relevant technical knowledge between the affected business community and the general public skews the debate to the point where only the pro-business, pro-rollback side is adequately able to formulate a coherent and impactful argument. This in itself may explain why constituents of the business community have invested so much more than proponents of the Volcker Rule into arranging direct meetings with regulatory agencies, why administrative agencies themselves seem to be much more interested in meeting with these parties than with the Rule’s proponents, and why the net result of these efforts has been the implementation of proactive rollbacks.

Notwithstanding the bleakness of these takeaways, it is important to qualify this picture by noting another, more subtle observation evident from our review of the Volcker Rule’s evolution. Building on the premise that “in the long term, smaller, better-motivated interest groups will likely dominate

²⁰⁴ SUNSTEIN, *supra* note 151, at 89.

²⁰⁵ See, e.g., Public Citizen, *supra* note 115, at 1–2 (“[W]e protest the tenor of this request[,] [whose] abiding theme . . . is that Volcker Rule should be diluted. [This] request for comment is glutted with loaded argument [suggesting that] . . . [t]he Comptroller is merely obliging the Administrative Procedures Act perfunctorily before consummating the Trump administration’s stated goal of rolling back this reform.”); Letter from Jeffrey Merkley, *supra* note 30, at 2 (criticizing the lack of “data or analysis . . . provid[ing] support to many of the significant policy changes included in the [NPRMs][,]” without which “many of the more than 1,000 questions posed [therein] are not readily answerable . . . except perhaps by the banking industry itself”).

over the majority,” some scholars predicted nearly a decade ago that “interest-group politics [would] produce a major downsizing in the Dodd-Frank Act, both by way of administrative implementation and legislative revision.”²⁰⁶ In hindsight, it is apparent that this expectation was fundamentally correct, but also that this change has occurred more slowly and moderately than anticipated. Specifically, the input submitted by affected entities in general opposition to the Rule reflects a surprising effort by the business community to facilitate the development of a workable regulatory standard rather than eliminating the Rule entirely. While some financial industry constituents continue to argue that the Volcker Rule ought to be eliminated wholesale or reduced dramatically,²⁰⁷ the evidence surveyed herein indicates that most of these entities are submitting practical proposals that would change the way in which the Rule functions.²⁰⁸ In other words, even though popular input regarding the Volcker Rule continues to come from predictable sources and break down along politicized lines, discourse about the Rule is no longer about whether the Rule should exist, but about how it ought to be administered efficiently. From this perspective, the moderate development of the Volcker Rule despite the vitriolic polarity of the current political environment unexpectedly reflects more cooperation than the façade of popular rhetoric would suggest.

V. CONCLUSION: A MISUNDERSTOOD WORK IN PROGRESS

Our review of the legislative and regulatory development of the Volcker Rule over the past three years gives rise to several concrete observations. First, it seems that behind the superficialities of political posturing, many people do not actually know what the Volcker Rule is or does, let alone how the Rule practically affects the economy. In particular, an

²⁰⁶ Coffee, Jr., *supra* note 7, at 1023, 1027.

²⁰⁷ See *supra* notes 123–28 and accompanying text.

²⁰⁸ See *supra* notes 129–34 and accompanying text, See also *infra* Appendix A, Figure 2.

examination of the administrative notice-and-comment process behind the continued development of the Volcker Rule shows that most private citizen commenters demonstrate little to no understanding of how the Rule functions and what it is designed to do, whereas almost all sophisticated comments come from a small group of affected banks, credit unions, and advocacy organizations.²⁰⁹ Popular input concerning the Rule's merits and if or how it ought to be changed tends to come, by and large, from unsurprising sources and break down along predictably politicized lines.²¹⁰ The roots of this partisan dialogue appear to reach beyond the financial crisis of 2008 as far back as the Glass-Steagall Act itself, and reflect differing schools of financial regulatory thought as much as political polarity and popular vitriol.²¹¹

Second, a survey of studies and articles written about the practical impact of the Volcker Rule indicates that many of the predictions made as to the prospective impact of the Rule have not yet come to fruition.²¹² Potentially due to reasons ranging from the immense complexities of the financial system to the dearth of relevant data on point, research findings published to date do not lend conclusive statistical support to either the fatalistic concerns of Volcker Rule opponents or the optimistic anticipations of Volcker Rule proponents.²¹³

Third, the data examined herein indicates that Professor Krawiec's procedural critique remains as relevant to the later stages of the Volcker Rule's regulatory development as it has proven to be to its earlier stages.²¹⁴ Driven unevenly by the influential suggestions of business community constituents rather than results-based evidence and the input of the general public, the Volcker Rule's stilted evolutionary process appears in many ways to be representative of problems that plague the enactment of American financial regulation in

²⁰⁹ See *supra* notes 175–95 and accompanying text.

²¹⁰ See *infra* Sections IV.A–B.

²¹¹ See *infra* Part II.

²¹² See *infra* Section III.A.

²¹³ See, e.g., Allahrakha et al., *supra* note 93; Butz, *supra* note 2, at 465.

²¹⁴ Krawiec, *supra* note 10, at 59.

general. If the aim of notice-and-comment rulemaking is indeed to “supply a corrective”²¹⁵ to regulatory assessments, then the fact that most regulators and market actors operate with “a lens colored by an outdated understanding of the financial system”²¹⁶ seems to translate inevitably into disproportionate representation of knowledgeable business insiders foiling the administrative democratization of financial regulatory reform.

Fourth and finally, despite the polarizing rhetoric that has persisted since the Volcker Rule’s original enactment, substantive discourse about the Rule has shifted somewhat from the plane of pro-or-con to the dimension of how-and-why. In other words, even those politicians and affected entities that have vocally opposed the Rule have worked over the past several years to facilitate the development of a workable regulatory standard, rather than merely eliminating the Rule wholesale.²¹⁷ In this sense, recent changes to the Volcker Rule surprisingly reflect more cooperation than the frontage of political bombast alone would suggest: although its proponents and opponents disagree on much, the Volcker Rule may yet be on track to better achieve its intended goals, rather than abandoning them entirely.

²¹⁵ See SUNSTEIN, *supra* note 151, at 88.

²¹⁶ See Awrey & Judge, *supra* note 13, at 5.

²¹⁷ See *infra* Section IV.C.

APPENDIX

A: Charting the Distribution of Responses to Volcker NPRMs, 2017–2019

Figure 1: NPRMs re: Regulatory Volcker Rule, 2017–2019²¹⁸

<p style="text-align: center;"><u>2019 NPRM</u></p> <p>Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 2778 (Feb. 8, 2019) (to be codified at 12 C.F.R. Pts. 44, 248, 351, and 17 C.F.R. Pts. 75, 255).</p>	18 Total Comments	
	9 Comments from Businesses & Organizations (all pro-rollback)	American Bankers Ass'n*; Bessemer Group, Inc.*; California Bankers Ass'n*; Competitive Enterprise Institute 1*; Competitive Enterprise Institute 2*; EnerBank USA*; Independent Community Bankers of America*; Investment Adviser Ass'n*; Nat'l Ass'n of Federally Insured Credit Unions*
	1 Congressman (pro-rollback)	Blaine Luetkemeyer, U.S. House of Reps. (R-MO)*
	8 Comments from Private Citizens (1 pro-rollback, 7 anti-rollback)	
<p style="text-align: center;"><u>2018 NPRM</u></p> <p>Proposed Revisions to Prohibitions and</p>	3,807 Total Comments (of which: 1 withdrawn, 1 duplicate, 1 hidden)	
	3,670 Form Letters (all anti-rollback)	

²¹⁸ All data available at and sourced from *Docket Folder OCC-2017-0014: Request for Comment on the Volcker Rule*, *supra* note 162; *Docket Folder OCC-2018-0010: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, *supra* note 163; *Docket Folder OCC-2018-0029: Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds - Community Bank Relief and Removal of Naming Restriction*, *supra* note 164. A * designation indicates the commenter was in favor of rollbacks to the Volcker Rule.

<p>Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432 (July 17, 2018) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pts. 75, 255).</p>	<p>70 Comments from Businesses & Organizations (62 pro-roll-backs, 8 anti-roll-backs)</p>	<p>American Action Forum*; American Bankers Ass'n*; American Investment Council*; Arnold & Porter – 060619*; Arnold & Porter*; Arvest Bank*; Ass'n for Corporate Growth*; B&F Capital Markets*; Bank Policy Institute*; Better Markets, Americans for Financial Reform, Public Citizen, and Center for American Progress; BMO Financial Group*; BOK Financial*; BOK Financial-2*; BVI German Investment Funds Ass'n*; Canadian Bankers Ass'n*; Center for American Entrepreneurship*; Center for Capital Markets Competitiveness*; CFA Institute*; Chatham Financial et al.*; Coalition for Derivatives End-Users*; Commercial Real Estate Finance Council*; Commercial Real Estate Finance Council, Mortgage Bankers Association, and The Real Estate Roundtable*; Committee on Capital Markets Regulation*; Covington & Burling LLP*; Credit Suisse*; Data Boiler Technologies, LLC*; EnerBank USA*; European Banking Federation*; European Fund and Asset Management Ass'n*; Federated Investors*; Financial Services Agency Gov't of Japan, and Bank of Japan*; Financial Services Forum*; Futures Industry Ass'n*; Global Foreign Exchange Division*; Goldman Sachs*; HSBC Bank*; Institute of Int'l Bankers*; Int'l Swaps & Derivatives Ass'n 1*; Int'l Swaps & Derivatives Ass'n 2*; Investment Adviser Ass'n*; Investment Company Institute*; Japanese Bankers Ass'n*; KeyCorp*; Marketplace Lending Ass'n*; Mortgage Bankers Ass'n*; Nat'l Ass'n of Federally-Insured Credit Unions 1*; Nat'l Ass'n of Federally-Insured Credit Unions 2*; Nat'l Ass'n of Federally-Insured Credit Unions 3*; Nat'l Ass'n of Industrial Bankers 1*; Nat'l Ass'n of Industrial Bankers 2*; Nat'l Venture Capital Ass'n*; New York Community Bank*; Regional Banking*; Securities Industry & Financial Markets Ass'n 1*; Securities Industry & Financial Markets Ass'n 2*; Small Business Investor Alliance*; State Street Corp.*; Structured Finance Industry Group*; Bank of New York Mellon Corp.*; The Insurance Coalition*; Loan</p>
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		Syndications & Trading Ass'n*; The New England Council *
		The Systemic Risk Council; Americans for Financial Reform; Better Markets, Inc.; Center for American Progress; Occupy the SEC; Public Citizen 1; Public Citizen 2; The Volcker Alliance
	1 Congress-person	Jeff Merkley, U.S. Senate (D-OR)
	62 Comments from Private Citizens (2 pro-rollbacks, 60 anti-rollbacks)	
<p align="center"><u>2017 NPRM</u> Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Volcker Rule); Request for Public Input, 82 Fed. Reg. 36,692 (Aug. 7, 2017) (to be codified at 12 C.F.R. pt. 44).</p>	8,556 Total Comments (of which: 1 withdrawn, 3 hidden)	
	8,466 Form Letters (all anti-rollbacks)	
	56 Comments from Businesses & Organizations (51 pro-rollbacks, 5 anti-rollbacks)	American Bankers Ass'n*; American Investment Council*; BBVA Compass Bancshares, BMO Fin. Corp., Capital One, CIT Bank, N.A., Citizens Fin. Group, Inc., and Discover Financial Services et. al*; Beneficial State Bank*; BMO Financial Corp.*; BOK Financial*; Canadian Bankers Ass'n*; Chatham Financial Corp., Atlantic Capital Bank, and Blue Hills Bank et al.*; CITIC Group Corp.*; Community Bankers Ass'n of Illinois*; Community Development Venture Capital Alliance*; Competitive Enterprise Institute*; CRE Finance Council*; CRE Finance Council, MBA, NAHB, The Real Estate Roundtable, and Nat'l Multifamily Housing Council et. al*; Credit Suisse 1*; Credit Suisse 2*; Data Boiler Technologies, LLC*; EnerBank USA*; European Banking Federation*; European Fund & Asset Mgmt. Ass'n*; Financial Services Agency Gov't of Japan, and Bank of Japan*; Financial Services Roundtable*; Huntington Nat'l Bank*; Independent Community Bankers of America*; Institute of Int'l Bankers*; Insurance Coalition*; Int'l Swaps &

	<p>Derivatives Ass'n*; Investment Adviser Ass'n*; Investment Company Institute*; Japanese Bankers Ass'n*; Jubilee USA*; Loan Syndications & Trading Ass'n*; MB Schoen & Associates, Inc.*; Midsize Bank Coalition of America*; First Tennessee Bank*; Mitsubishi UFJ Financial Group, Inc.*; Mortgage Bankers Ass'n*; Nat'l Venture Capital Ass'n*; Norway Savings Bank*; Property Casualty Insurers*; Risk Mgmt. Ass'n - Committee on Sec. Lending*; Sec. Industry & Fin. Mkt. Ass'n*; Simpson, Thatcher & Bartlett, LLP*; Small Business Investor Alliance*; State Street Corp.*; Stifel Financial Corp.*; Structured Finance Ass'n*; Teachers Ins. & Annuity Ass'n*; The Charles Schwab Corp.*; The Clearing House Ass'n*; U.S. Chamber of Commerce*</p>
	<p>American Action Forum; Better Markets, Inc.; Centers for American Progress; Occupy the SEC; Public Citizen</p>
	<p>30 Comments from Private Citizens (1 pro-rollbacks, 29 anti-rollbacks)</p>

Figure 2: NPRMs re: Regulatory Volcker Rule, 2017–2019²¹⁹

<p>2019 NPRM Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 2778 (Feb. 8, 2019) (to be codified at 12 C.F.R. Pts. 44, 248, 351, and 17 C.F.R. Pts. 75, 255).</p>	2 Total Meetings		
	Meetings with Businesses & Organizations (both pro-rollback)	07.11.2019 Meeting with State Street*	“[D]iscussed several proposed rules, including revisions to the supplementary leverage ratio for custodial banking organizations and custody banks; simplifying and tailoring the Volcker Rule; and the net stable funding ratio.”
07.16.2019 Meeting with TD Bank*		“[D]iscussed several proposed rules, including simplifying and tailoring the Volcker Rule and tailoring capital and liquidity standards for foreign banking organizations, and the advance notice of proposed rulemaking to modernize the Community Reinvestment Act regulations.”	
<p>2018 NPRM Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432</p>	13 Total Meetings		
	Meetings with Businesses & Organizations (all pro-rollback)	05.20.2019 Meeting with the EBF, BNP Paribas, Crid Agricole, CIB Natixis, CIB Americas and Credit Suisse*	Discussed the Rule’s compliance obligations, the Rule’s effect internationally, and managing the Rule’s effect on liquidity
		05.06.2019 Meeting with the IIB*	Discussed the Rule’s compliance obligations, the Rule’s effect

²¹⁹ All data available at and sourced from *Docket Folder OCC-2017-0014: Request for Comment on the Volcker Rule*, *supra* note 162; *Docket Folder OCC-2018-0010: Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds*, *supra* note 163; *Docket Folder OCC-2018-0029: Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds - Community Bank Relief and Removal of Naming Restriction*, *supra* note 164. A * designation indicates the commenter was in favor of rollbacks to the Volcker Rule.

(July 17, 2018) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pts. 75, 255).			internationally, and the proposed accounting test
		04.12.2019 Meeting with BPI*	Discusses numerous specific suggestions summarized in BPI comment letter, including defining prohibited proprietary trading and covered funds, compliance obligations, proposed exclusions to the Rule
		02.06.2019 Meeting with the ABA, BOK, Northern Trust, PNC, Flagstar, BNY Mellon*	“[D]iscussed issues likely to impact midsize and regional banks.”
		02.12.2019 Meeting with SFIG, Mayer Brown, Citi*	Discussed loan securitization exclusions from the Rule, Super 23A, and defining “ownership interest.”
		12.17.2018 Meeting with the IIB Cleary Bank of Ireland UBS Barclays Societe Generales BNP Paribas and MUFG*	Discussed numerous proposed exclusions, lighter compliance requirements, and limiting the impact of the rule upon international activity
		11.16.2018 Meeting with Goldman Sachs*	Discussed the items of concern raised in comment letter, including covered funds, the accounting test, and metrics reporting requirements
		10.09.2018 Meeting with IIB Cleary*	Discussed “(1) foreign excluded funds, (2) foreign public funds, and (3) the CEO attestation requirement.”
		09.25.2018 Meeting with Bank of America*	Discussed “(1) the accounting-based definition of trading account, (2) proposed revisions to the metrics reporting requirements, (3) proposed revisions to the market-making exemption, and (4) proposed revisions to the

			covered fund portions of the rule.”
		09.19.2018 Meeting with ICI, PNC, Debevoise*	Discussed proposed exclusions from “banking entity” and “covered funds”
		08.08.2018 Meeting with Bank of America, Bar- clays, Capital One, Citi, Deutsche Bank, JPMor- gan, Key Bank, PNC, Wells Fargo, Accounting Policy Plus, BPI and Sul- livan & Cromwell*	“[A]ddressed the commenters concerns about the impact of the proposed accounting-based definition of the trading account on their regular, core banking functions.”
		06.25.2018 Meeting with Goldman Sachs, Sulli- van & Crom- well*	Discussed “(1) the proposed accounting-based definition of trading account, (2) proposed revisions to the metrics reporting requirements, (3) proposed revisions to the market-making exemption, and (4) the definition of covered fund.”
		06.06.2018 Meeting with Northern Trust, State Street, BNY*	Discussed “Payment, Clearing, and Settlement Services, Super 23A Restrictions, the Rule’s Approach to Limiting Certain Relationships with Covered Funds, and Compliance Metrics and Reporting Requirements.”