VIII. The Volcker Rule's Market Making Exemption

A. Introduction

The stated objectives of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") include promoting financial stability, preventing banks from becoming "too big to fail", and protecting taxpayers from future government bailouts.[1] To achieve these objectives, Congress included Section 619, the so-called Volcker Rule, to prevent banking entities from engaging in proprietary trading, which is generally defined as a firm using its own capital to trade for its own account, unless otherwise exempted.[2] Congress's decision to exempt certain "market-making related activities" from the Volcker Rule has been greatly debated.[3] A market maker facilitates trades by providing customers with prices at which it is willing to buy and sell a particular financial instrument.[4] Market making plays an important role in providing liquidity and stability to financial markets, and the banking industry has expressed concern over this exemption because of the difficulty in distinguishing proprietary trading from market making activity.[5]

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[2] *See* Comment Letter from Sen. Jeff Merkley & Sen. Carl Levin to the Agencies 2 (Feb. 13, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120216/R-1432/R-1432_021412_104998_542080912901_1.pdf. ("Congress determined that one important step toward putting the guardrails back on the financial sector is to limit proprietary trading, high risk activities, and conflicts of interest by banks."); *Proprietary Trading*, FIN. TIMES LEXICON, http://ftalphaville.ft.com/blog/2010/05/13/218216/when-is-a-market-maker-not-a-market-maker/ (last visited Mar. 7, 2012) (defining proprietary trading).

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act §619, 12 U.S.C.A §1851(d)(1)(B) (West 2010).

[4] *See Third Party Market Maker*, INVESTOPEDIA, http://www.investopedia.com/terms/t/thirdmarketmaker.asp#axzz1oTP2hgDr (last visited Mar. 7, 2012) (defining market making).

[5] *See* Comment Letter from MORGAN STANLEY to the Agencies 2, 11 (Feb. 13, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120214/R-1432/R-1432_021312_104961_544170226356_1.pdf [hereinafter MORGAN STANLEY] ("[T]he line between prohibited proprietary trading and permissible market making is a difficult one to draw . . .").

Congress granted the Federal banking agencies, the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC") the authority to develop the necessary regulations to implement the Volcker Rule, including distinguishing proprietary trading from market making.[6]

On October 11 and 12, 2011, the Federal banking agencies and the SEC jointly released their proposed regulations, and on January 11, 2012, the CFTC approved a nearly identical proposal.[7] The proposed regulations produced a strong reaction with interested parties submitting nearly 17,000 comments.[8] The banking industry and politicians in particular have criticized the proposed regulations for their complexity and the potential negative effects the regulations may have on the industry and the global financial system.[9] This article will focus on the agencies' proposed regulations for implementing the market making exemption and subsequent reactions to the proposal. Part B will examine which financial institutions are subject to the Volcker Rule and how the proposed regulations define proprietary trading. Next, Part C will examine how the agencies distinguished permissible market making from impressible proprietary trading. Finally, Part D will discuss interested parties' reactions, recommended changes to the proposed

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[6] 12 U.S.C.A §1851(b)(2)(B) (delegating rulemaking authority to the enumerated agencies).

[7] *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846, 68,972 (proposed Oct. 11 and 12, 2011) (to be codified in 12 C.F.R. pts. 44, 248 & 351 & 17 C.F.R. pt. 255), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-27184.pdf [hereinafter Proposed Regulations] (documenting when the agencies released the proposal); Silla Brush, *Volcker Rule Trading Ban Gets CFTC 3-2 Vote*, BLOOMBERG (Jan. 11, 2012, 2:50 PM), http://www.bloomberg.com/news/2012-01-11/volcker-rule-ban-on-proprietary-trading-is-approved-in-3-2-vote-by-cftc.html ("The CFTC voted 3-2 to propose the ban . . .").

[8] Jason Zweig, *So Who Commented on The Volcker Rule?*, WALL ST. J. (Feb. 20, 2012, 8:00 AM), http://blogs.wsj.com/totalreturn/2012/02/20/so-who-commented-on-the-volcker-rule/ (detailing comments received).

[9] *See* Phil Mattingly & Cheyenne Hopkins, *Volcker Rule Regulators Resist Lawmakers Calls to Scrap Proposal*, BLOOMBERG (Jan. 18, 2012, 4:51 PM), http://www.bloomberg.com/news/2012-01-18/volcker-rule-regulators-resist-lawmakers-calls-to-scrap-proposal.html (describing criticisms from specific politicians and industry professionals).

regulations and analyze the potential effects the proposal may have on the market making business and the financial markets.

B. Which Financial Institutions are Subject to the Volcker Rule and How is Proprietary Trading Defined?

The Volcker Rule prohibits any "banking entity", essentially any entity within a holding company structure containing an FDIC-insured bank, from engaging in proprietary trading.[10] The proposed regulations define proprietary trading as "engaging as principal for the trading account of the covered banking entity in any purchase or sale of one or more covered financial positions."[11] A "covered financial position" includes "any long, short, synthetic or other position" in a security, derivative, commodity futures contract, or any options on these financial instruments.[12]

Prohibited proprietary trading occurs in a "trading account" defined in the proposal as any account used by a banking entity to "acquire or take one or more covered financial positions":

(A) "principally for the purpose of (1) [s]hort-term resale; (2) [b]enefiting from actual or expected short-term price movements; (3) [r]ealizing short-term arbitrage profits; or (4) [h]edging one [of the aforementioned positions];"

(B) "that are market risk capital rule covered positions if the covered banking entity . . . calculates risk-based capital ratios under the market risk capital rule . . . ;"

(C) in connection with the activities as a registered dealer, municipal securities dealer, government securities dealer, swap dealer, security-based dealer; or while engaged in the business of a dealer, swap dealer, or security-based dealer outside the United States.[13]

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[10] *See* Kevin Petrasic, *The Volcker Rule Proposal – Many Questions, Few Answers*, Stay Current: A Client Alert from Paul Hastings (Paul Hastings LLP, New York, N.Y.), Nov. 1, 2011, at 2, *available at* http://www.paulhastings.com/assets/publications/2038.pdf?wt.mc_ID=2038.pdf.

[11] Proposed Regulations, 76 Fed. Reg. at 68,945, §_.3(b)(1).

[12] *Id.* at 68,946, §_.3(b)(3)(i),

[13] *See id.* at 68,945, §_.3(b)(2)(i)(A)-(C) (defining trading account).

An account is presumed to be a trading account if the banking entity holds a covered financial position for sixty days or less.[14] The banking entity may rebut the presumption by demonstrating that the position was not acquired principally for the purpose of making a short-term profit or engaging in impermissible hedging.[15] Notably, the agencies' definition of trading account differs from the statutory language of Section 619 in a potentially important way.[16] The proposal indicates that a single covered financial position could make an account a "trading account" and thus prohibited proprietary trading.[17] Conversely, Congress defined trading account as any account "used for acquiring or taking positions," implying that multiple covered financial positions would be necessary for an account to be a "trading account."[18]

It is also important to note that the Volcker Rule classifies only principal trading in a trading account, as opposed to acting as an agent, as prohibited proprietary trading.[19] However, Congress recognized the need for banking entities to engage in principal trading to provide important client-oriented financial services and thus exempted principal trading related to these services.[20] The market making exemption is one of the Volcker Rule's most prominent and debated exemptions.

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[14] *Id.* at 68,945-6, §_.3(b)(2)(ii).

[15] *See id.* at 68,946, §_.3(b)(3)(ii) (explaining how the trading account presumption can be rebutted).

[16] *See* SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, DODD-FRANK RULEMAKING: VOLCKER RULER AND SIFI PROPOSALS 8 (2011), *available at* http://skadden.com/evites/NY/Dodd_Frank_Rule_Making_Volcker_Rule_and_SIFI_Proposals_111711.pdf [hereinafter SKADDEN] (highlighting the difference between the proposal and statutory language).

[17] *See id.* (highlighting the difference between the proposal and statutory language for trading account).

[18] *See id.* (highlighting the difference between the proposal and statutory language for trading account).

[19] Dodd-Frank Wall Street Reform and Consumer Protection Act §619, 12 U.S.C.A §1851(h)(4) (West 2010) (defining proprietary trading); *see* Petrasic, *supra* note 10, at 2 (mentioning that defining proprietary trading as principal trading forms the basis for the exemptions).

[20] *See* SKADDEN, *supra* note 16, at 10 (explaining impermissible propriety trading without the exemption).

C. When May a Banking Entity Engage in Market Making Related Activities?

Under the proposed regulations, the ban on proprietary trading does not apply if the "purchase or sale of a covered financial position . . . is made in connection with the covered banking entity's market-making related activities."[21] A banking entity's market making related activities are permissible if the banking entity meets all of the following requirements:

(i) The banking entity must establish an internal compliance program that conforms to requirements outlined in the proposed regulations;
(ii) The banking entity's trading desk must hold "itself out as being willing to buy and sell . . . the covered financial positions for its own account on a regular or continuous basis;"
(iii) The trading desk's market making related activities must be "designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties;"
(iv) The banking entity must be a registered dealer for the particular financial instrument for which it is making a market or be exempted from registration;
(v) The trading desk's market making related activities must be "designed to generate revenues primarily from fees, commission, bid/asks spreads or other income not attributable to . . ." the appreciation or hedging of the covered financial position;
(vi) The trading desk's market making related activities must be "consistent with the commentary provided in Appendix B;"
(vii) The banking entity's "compensation arrangements of persons performing market making related activities are designed not to reward proprietary risk taking."[22]

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[21] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,947, § 4(b)(1) (proposed Oct. 11 and 12, 2011) (to be codified in 12 C.F.R. pts. 44, 248 & 351 & 17 C.F.R. pt. 255).
[22] *Id.* at 68,947-8, § 4(b)(2)(i)-(vii) (defining requirements for a banking entity to engage in market making).

A banking entity may engage in market making related hedging if the covered financial position reduces a specific risk in connection with related individual or aggregated positions and meets the requirements for permitted risk mitigating hedging activities as outlined in the proposed regulations.[23]

As previously mentioned, a trading desk's market making related activities must be consistent with the agencies' commentary in Appendix B outlining six factors that the agencies believe distinguish prohibited proprietary trading from permissible market making.[24] If the trading desk's activity is not consistent with the following requirements, the activity will be deemed proprietary trading unless the entity can provide an adequate explanation.[25] A trading desk's activities may not cause the unit to retain more risk than necessary to provide "intermediation services to customers", generate revenues primarily from price movements, or demonstrate signs of inconsistent revenue or earnings performance.[26] Regulators will also examine whether the trading desk transacts with customers to provide liquidity services or instead retains principal positions in excess of those reasonably expected for near term customer demand.[27] Additionally, a trading desk must not routinely pay fees, commissions, or spreads rather than earn these types of revenues.[28] Finally, the agencies will scrutinize the trading desk's activities to ensure that employee compensation incentives do not reward proprietary risk taking.[29] For each of these factors, the proposed regulations require the banking entities to report quantitative measurements which will be compared by regulators to the trading

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[23] *Id.* at 68,948, § 4(b)(3) (defining when an entity may hedge in connection with market making).

[24] *See id.* at 68,961, app. B (outlining factors agencies will use to distinguish impermissible proprietary trading from market making).

[25] *See id.* ("[Agency] will apply the following factors in distinguishing permitted market making-related activities from trading activities that . . . constitute prohibited proprietary trading.").

[26] *See id.* at 68,961-2 (detailing "risk management, "source of revenues" and "revenues relative to risk").

[27] *Id.* at 68,962 (requiring trading desks to engage in "customer-facing activity").

[28] *Id.* at 68,962-3 (limiting the extent trading desk's pay rather than receive fees, commissions, and spreads).

[29] *Id.* at 68963 (prohibiting trading desks from tying compensation to proprietary risk taking).

desk's prior results and other banking entities' results.[30] For example, the agencies will utilize different Value-at-Risk ("VaR") statistical measures to examine a trading desk's risk management.[31]

D. Reactions to the Proposed Regulations on Market Making

The proposal's requirements for engaging in market making related activities and the Appendix B commentary have produced strong reactions from the banking industry and other interested parties. The banking industry's overarching criticism is that the proposal's numerous requirements create a narrow exemption that fails to honor Congress' intent to permit banking entities to continue providing current market making practices.[32] Opponents claim the agencies do not understand how market makers generally operate and instead tailored the regulations to confine market making to only "highly liquid, exchange-traded markets."[33] For instance, the banking industry contends that market makers only hold themselves out to regularly or continuously buy or sell a specific financial product for a small segment of the total market.[34] These financial products are usually highly liquid assets, such as large capitalization equities.[35] For example, Morgan Stanley claims they maintain an "active and continuous market" in only 1,000 of the approximately 8,000

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[30] *See id.* at 68,961-3 (detailing how the agencies will track and evaluate these factors)

[31] *Id.* at 68,962 (detailing the metrics regulators will use to assess a trading unit's risk management).

[32] Comment Letter of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION ET AL. to the Agencies A-29 (Feb. 13, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120213/R-1432/R-1432_021312_104404_346801484756_1.pdf [hereinafter SIFMA] (arguing proposed regulations "reduce the permitted activity to 'market making,' rather than 'market making-related,' activity . . . .").

[33] *See*, *e.g.*, MORGAN STANLEY, *supra* note 5, at 11-12.

[34] *See*, *e.g.*, *id.* at 18-19.

[35] *See* Comment Letter from GOLDMAN SACHS GROUPS, INC. to the Agencies 22 (Feb. 13, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120216/R-1432/R-1432_021312_104978_464096290625_1.pdf [hereinafter GOLDMAN SACHS] (claiming regulations are based on highly liquid markets).

corporate bond issuers.[36] For less active and liquid financial products, market makers will generally provide a price to a market participant on request.[37] Banking entities have suggested that agencies should modify the proposal to permit trading desks to meet this requirement if they are willing to provide a customer a price to buy or sell upon request. [38]

Similarly, the banking industry has criticized the requirement that market making related activities must be "designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties" because the rule appears to apply the same standard to all asset types.[39] Since the demands for an illiquid financial product will be lower than demands for a highly liquid product, a market maker may hold onto certain positions longer than others.[40] Additionally, banking entities have expressed concern that the agencies' interpretation of "near term" demand will prevent their trading desks from adequately managing their inventory.[41] For example, a trading desk may be required to sell off a large position slowly to reduce price volatility or acquire a position far in advance of anticipated customer demand.[42] These types of activities may not necessarily be consistent with the near term demands of customers but are necessary to operate as a market maker.[43] According to a study conducted by consulting firm Oliver Wyman, limiting inventory holding periods for corporate bonds to one month would have prevented twenty-seven percent of customer trades from being

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[36] MORGAN STANLEY, *supra* note 5, at 19 (providing data on Morgan Stanley's market making business).

[37] *See* GOLDMAN SACHS, *supra* note 35, at 24 (explaining that market makers will provide a price upon request).

[38] *See id.* at 25 (banking entities should be able to meet the "holding out" requirement by providing prices upon request); MORGAN STANLEY, *supra* note 5, at 19 (recommending changes to the proposal).

[39] *See* MORGAN STANLEY, *supra* note 5, at 19 (advocating against a "one-size-fits-all" standard).

[40] *See id*. at 20 ("Near-term demands in illiquid markets will differ from . . . highly liquid equities.").

[41] *See*, *e.g.*, SIFMA, *supra* note 32, at A-42 (arguing proposal will prohibit building inventory).

[42] *See* GOLDMAN SACHS, *supra* note 35, at 26 (describing potentially impermissible standard inventory techniques).

[43] *See id.* ("Market makers must manage the inventories of positions they have taken as principal, which, if done effectively, also allows them to accommodate customers' trades quickly and at favorable prices.").

executed in 2009.[44] The study also found that placing limits on inventory size and inter-dealer trading would significantly restrict market making activities.[45] One recommendation includes modifying the requirement to account for differences in asset types and expanding the interpretation of "near-term" to allow for adequate inventory management.[46]

The industry has also strongly criticized the requirement that market making related activities must produce revenue primarily from fees, commissions, and bid/ask spreads.[47] Opponents argue that market makers rarely earn fees or commissions as a principal and instead only earn these revenue types when acting as an agent, which falls outside the Volcker Rule's scope.[48] According to Morgan Stanley, fees and commissions from principal market making activities account for less than five percent of their "Sales & Trading" revenues for the past three years.[49] Additionally, the use of bid/ask spread is problematic because the spread is often difficult to estimate and only available for highly liquid securities in relatively small transaction sizes.[50] For certain, less liquid asset types, a market maker will often have to hold a security for an extended period of time in inventory and thus profit from the position based on price movements.[51] Interestingly, Appendix B of the proposed regulations

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[44] *See* OLIVER WYMAN, THE VOLCKER RULE RESTRICTIONS ON PROPRIETARY TRADING: IMPLICATIONS FOR MARKET LIQUIDITY 12 (Feb. 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120216/R-1432/R-1432_021312_105368_329620514356_1.pdf ("We find that limiting inventory holding periods to one month would prevent 27% of customers trading volume from being served.").

[45] *See id.* at 14-17 (examining the effects limits on inventory size and inter-dealer trading would have on liquidity).

[46] *See* MORGAN STANLEY, *supra* note 5, at 19-20 (proposing a broader interpretation of "near-term").

[47] *See*, *e.g.*, SIFMA, *supra* note 32, at A-30-34 (advocating market makers benefit from market movements).

[48] *See* MORGAN STANLEY, *supra* note 5, at 13. (claiming market makers rarely earn fees or commission as principal).

[49] *Id.* at 13 (demonstrating that a small percentage of market making revenue comes from fees and commissions).

[50] *See id.* (explaining that the bid/ask spread cannot be estimated for many markets).

[51] *See id.* at 13-14 (explaining that price movements on principal positions held for a long time can be significant).

recognizes that revenue types will vary based on asset type, but the text of the proposal does not account for this market characteristic.[52]

Ultimately, opponents argue that the agencies' failure to craft the exemption to match current business practices will cause banking entities to limit or exit the market making business for certain asset types.[53] According to opponents, a reduction in market making activity will cause a decline in market liquidity and an increase in price volatility for a variety of assets types.[54] In turn, opponents argue that investor's transaction costs will increase and their asset values will decline since it will be harder to sell their assets in the secondary market.[55] The reduction in market activity will also increase borrowing costs for issuers as demand for initial offerings declines.[56] According to Oliver Wyman, the proposed regulations have the "realistic potential" to reduce liquidity by five to fifteen in the corporate bond market.[57] Using data from 2005 to 2007, a period of "exceptionally ample" liquidity, a five to fifteen percent reduction in market liquidity would have caused investors in corporate bonds to lose $10 to $36 billion in asset values, and corporate bond issuers would have incurred an additional $1.6 to $5.5 billion in annual borrowing costs.[58] The effects are greatly magnified in time periods with less liquidity.[59] From 2007 to 2009, a five to fifteen percent reduction in market liquidity would have caused corporate bond asset values to decline by $90 to $315 billion and corporate bond issuers would have incurred an additional $12 to $43 billion in annual

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[52] *See* GOLDMAN SACHS, *supra* note 35, at 31 (highlighting the difference between Appendix B and the regulations).
[53] *See*, *e.g.*, SIFMA, *supra* note 32, at A-22 (implying that overly restrictive regulations will prohibit firms from making markets and in turn have negative effects on the financial system).
[54] *See id.* (claiming the regulations will have "significant deleterious real-world effects on the financial markets").
[55] *See id.* (claiming the regulations will have "significant deleterious real-world effects on the financial markets").
[56] *See id.* at A-22-23 (claiming the regulations would "significantly impair capital formation").
[57] *See* OLIVER WYMAN, *supra* note 44, at 19-20 (explaining that estimating impact on liquidity is "necessarily arbitrary").
[58] *Id.* at 21-22 (reporting results for a 5 to 15% reduction in liquidity in the corporate bond market for 2005 to 2007).
[59] *See id.* (demonstrating that in periods of less liquidity that costs of the proposed regulation would be higher).

borrowing costs.[60] Overall, a reduction in liquidity could cause significant market disruption and whether non-bank entities could completely fill the potential liquidity gap remains up for debate.[61] Opponents have proposed that a way to preserve liquidity is to craft requirements that recognize differences in asset types and to broaden the exemption by permitting transactions that support "customer-facing" activities.[62]

Proponents of the Volcker Rule recognize the importance of liquidity but argue that Volcker Rule's impact will be minimal. In his comment letter on the proposed regulations, Paul Volcker contends that not all liquidity is necessarily beneficial.[63] In fact, at a certain point additional liquidity encourages speculative trading and poses greater systemic risk.[64] Additionally, supporters argue that smaller banks or non-bank entities, such as hedge funds, will make up for any lost liquidity.[65] While a transition period will occur, proponents believe that shifting these activities away from large banks will diversify the market making business and reduce systemic risk.[66] Supporters also contend that if properly constructed, the Volcker Rule will only reduce liquidity in derivatives and complex structure products that are often used as "disguised leveraged proprietary bets" which do not necessarily benefit the "real economy."[67]

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[60] *Id.* (reporting results of a 5 to 15% reduction in liquidity in the corporate bond market for 2007 to 2009).

[61] *See id.* at 18 (finding non-bank entities could fill the gap eventually but at a significant cost and not without risk).

[62] *See* MORGAN STANLEY, *supra* note 5, at 17-18 (proposing additional "customer-facing" criteria); SIFMA, *supra* note 32, at A-23 (proposing that agencies permit "customer-focused market making-related activities").

[63] Comment Letter from Paul A. Volcker to the Agencies 3 (Feb. 13, 2013), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120216/R-1432/R-1432_021312_105358_329618485095_1.pdf.

[64] *See id.* (contending that excess liquidity encourage speculative trading).

[65] *See*, *e.g.*, MATTHEW RICHARDSON, WHY THE VOLCKER RULE IS A USEFUL TOOL FOR MANAGING SYSTEMIC RISK 8 (Feb. 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120214/R-1432/R-1432_021312_104959_543555370801_1.pdf.

[66] *See id.* at 9.

[67] Comment Letter from Robert Johnson & Joseph Stiglitz to the Agencies 6 (Feb. 13, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/February/20120221/R-1432/R-1432_021312_104960_546864496835_1.pdf (claiming rule should not cater to derivatives and structured products)

The Volcker Rule's advocates do not believe the proposed regulations are without criticism. Proponents, including Paul Volcker, have expressed concerns that the proposed regulations are too complex and that the agencies have crafted numerous requirements and exceptions to cater to the banking lobby.[68] Proponents have suggested alternatives that would simplify the rule and prevent banks from circumventing the regulations once implemented.[69] Robert Johnson of the Roosevelt Institute and Columbia University Professor Joseph Stiglitz argue that banking entities should only be permitted to engage in "*clear*, narrow safe harbors for simple activities that serve real economy customers", such as market making in "plain vanilla corporate and government bonds."[70] An alternative solution proposed by New York University Professor Matthew Richardson would allow banking entities to engage in all activities related to market making, including proprietary trading, as long as certain restrictive inventory, holding period and asset type requirements are met.[71] If a banking entity fails to fulfill these requirements, the entity would have to receive permission to engage in the activity from their regulator.[72] Supporters contend that banking entities can either conform to more stringent regulations or give up their access to FDIC insured deposits.[73]

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[68] *See*, *e.g.*, Rachel Armstrong, *Paul Volcker says Volcker Rule Too Complicated*, REUTERS (Nov. 9, 2011 7:52 AM), http://www.reuters.com/article/2011/11/09/us-regulation-volcker-idUSTRE7A83KN20111109.

[69] *See* Richardson, *supra* note 65, at 12.

[70] Johnson & Stiglitz, *supra* note 67, at 4 (claiming a "final rule should provide *clear*, *narrow* safe harbors").

[71] *See* Richardson, *supra* note 65, 13-14 (describing alternative proposal for implementing the Volcker Rule).

[72] *Id.* ("Any activity outside these safe harbors would require permission . . . .").

[73] *See* Johnson & Stiglitz, *supra* note 67, at 4 (contending that entities who want to engage in impermissible activities can give up their FDIC insured deposits); Volcker *supra* note 63, 3-4 (giving entities these options).

E. What Happens Next?

According to one practitioner, Volcker Rule debate has been the "defining fight of this generation" in financial rulemaking.[74] The fight is likely to continue as regulators respond to interested parties' comments in an attempt to enact a final rule by July.[75] Ultimately, regulators will have to determine whether Congress intended to allow banking entities to engage in the same scope of market making activities as the industry currently conducts.[76] If the agencies decide to retain the current scope, the text of the final regulations will likely have to include language permitting trading desks to vary the nature of their activities based on asset type.[77] If the agencies choose to adopt final regulations similar to the proposal or place additional restrictions, banking entities may have to decide whether to stop making markets for certain asset types or relinquish their banking license.[78] The final regulations may determine whether market-making activities will continue to be primarily conducted by large banking entities or whether the business will shift to non-bank entities to fill any liquidity gap produced by the Volcker Rule.[79]

Bryan Settelen[80]

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[74] Cheyenne Hopkins, Silla Brush, & Phil Mattingly, *Volcker Rule Faces Critics as Effective Date Nears,* BLOOMBERG (Feb. 15, 2012, 11:13 AM), http://www.bloomberg.com/news/2012-02-14/u-s-volcker-rule-faces-harsh-global-critics-months-before-it-takes-effect.html (quoting Douglas Landy of Allen & Overy LLP).
[75] *Id.*
[76] *See* SKADDEN, *supra* note 16, at 50.
[77] *See* SIFMA, *supra* note 32, at A-28-29.
[78] *See id.* at A-28; Volcker, *supra* note 63, at 3.
[79] *See* OLIVER WYMAN, *supra* note 44, at 18.
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