DON'T "SCREW JOE THE PLUMMER": THE SAUSAGE-MAKING OF FINANCIAL REFORM

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This Article examines agency-level activity during the preproposal rulemaking phase—a time period about which little is known despite its importance to policy outcomes—through an analysis of federal agency activity in connection with section 619 of the Dodd–Frank Act, popularly known as the Volcker Rule. By capitalizing on transparency efforts specific to Dodd–Frank, I am able to access information on agency contacts whose disclosure is not required by the Administrative Procedure Act and, therefore, not typically available to researchers.

I analyze the roughly 8,000 public comment letters received by the Financial Stability Oversight Council in advance of its study regarding Volcker Rule implementation and the meeting logs of the Treasury Department, Federal Reserve, Commodity Futures Trading Commission, Securities and Exchange Commission, and Federal Deposit Insurance Corporation prior to the Notice of Proposed Rulemaking. This analysis reveals significant public activity, but also a stark difference in investment by financial institutions versus other actors in influencing Volcker Rule implementation. It further reveals a greater unity of interest among financial market participants than suggested by press reports and the provision's legislative history. Finally, the data shed light on the efficacy of the notice and comment process as a means for federal agencies to engage the general public and solicit relevant information in advance of rulemaking.

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> *in regards to the Volker Rule, just how stupid do you think the working class is? we just passed the two bills of financial reform and here, not even 3 months later, you big banks are at it again to screw joe the plummer.*
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> – Comment from Ronnie Endre to the Financial Stability Oversight Council, November 6, 2010[1]

INTRODUCTION

On July 21, 2010, President Obama signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank"),[2] to fanfare and criticism. At 848 pages, the mammoth statute amends dozens of existing laws and creates major new federal agencies, including the Financial Stability Oversight Council ("FSOC") and the Consumer Financial Protection Bureau, with potentially broad powers over systemically important firms and consumer protection, respectively. It also eliminates the Office of Thrift Supervision, by merging it into the Office of the Comptroller of the Currency ("OCC"), and significantly reshapes the derivatives markets, by requiring many over-the-counter derivatives to be

1. *Comment from Ronnie Endre*, REGULATIONS.GOV (Nov. 6, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-1096 (spelling, grammar, capitalization, and punctuation are all retained from the original source).

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

cleared and traded through exchanges.[3] Dodd–Frank will have major regulatory and legal consequences for banks and many other financial institutions for years to come. It is thus little wonder that both congressional Democrats and the Obama administration claimed credit for passing historic legislation that is the toughest financial reform since the Great Depression.[4]

Many commentators and press members agreed, labeling the legislation "sweeping" and the "most ambitious overhaul of financial regulation in generations."[5] The reactions of Wall Street interest groups, which promptly and vociferously criticized the legislation, confirm this interpretation.[6]

Of particular note is section 619 of the Dodd–Frank Act, popularly known as the "Volcker Rule," which restricts certain risky activities by banking entities and systemically important firms, including proprietary trading and fund investment.[7] Hailed by President Obama as a "simple and common sense reform" in the face of "an army of industry lobbyists from Wall Street,"[8] the Volcker Rule had the potential to seriously undermine profits at many of America's largest and most profitable financial institutions. Had the big banks finally been brought to heel? Not yet.

One of the most persistent criticisms of Dodd–Frank, and of the Volcker Rule in particular, is its many gaps and ambiguities, which leave a host of meaningful issues to subsequent interpretation and implementation by federal agencies. Many worry that, largely freed from public scrutiny, special interests can capture the Dodd–Frank rulemaking process and generate favorable interpretations of the statute's numerous incomplete and contested provisions.[9] Others, in contrast, point to impediments to special interest capture at the agency level,

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3. *Id.* § 723, 124 Stat. at 1675–82 (codified at 7 U.S.C. § 2 (2012)).

4. *See, e.g.*, Senator Jeff Merkley & Senator Carl Levin, *The Dodd–Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 HARV. J. ON LEGIS. 515, 515 (2011) (labeling Dodd–Frank "the broadest financial reforms since the 1930s"); Press Release, White House, Remarks by the President at Signing of Dodd–Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-signing-Dodd–Frank-wall-street-reform-and-consumer-protection-act (referring to Dodd–Frank as "the strongest consumer financial protections in history").

5. Brady Dennis, *Financial Regulation Moves into New Era*, WASH. POST, July 16, 2010, at A1; *see also* Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 22, 2010, at B3 (calling Dodd–Frank "a sweeping expansion of federal financial regulation" and a "major" Democratic legislative victory).

6. Cooper, *supra* note 5 (reporting that "within minutes" of the presidential signing, Wall Street representatives, including the Business Roundtable and U.S. Chamber of Commerce, "were leveling criticism at the new legislation").

7. 12 U.S.C. § 1854 (2012).

8. Press Release, White House, Remarks by the President on Financial Reform (Jan. 21, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-financial-reform.

9. *See infra* notes 80–84 and accompanying text (discussing these concerns).

including the policy preferences of regulators, judicial review, and procedural checks designed to enhance transparency and accountability.[10]

This debate raises the question: What happened to major Dodd–Frank provisions once lawmaking power shifted from Congress to federal agencies? More specifically, are industry groups attempting to influence outcomes? Is there a meaningful counterbalance to influential industry voices? What is the public salience of the reform? Are relevant public interest groups engaged in the issue? And finally, what mode of analysis might yield insight into these questions?

One mode of analysis is substantive: examine the sausage. This sausage approach examines *output*, usually by measuring Dodd–Frank against an idealized version of financial reform—the reform that would have emerged under a perfect political system. This comparison might then yield inferences about the lawmaking process. For example, a provision that appears overly favorable to particular industry segments might lend itself to an inference that the policy outcome is the result of special interest influence. In contrast, one that appears to impose costs in excess of its benefits might be attributed to pandering by elected officials. Dodd–Frank analyses have, to date, been of the sausage variety.

The substantive method has a serious drawback, however: There is little agreement on what the ideal response to the financial crisis should have been. Moreover, the Dodd–Frank sausage is not yet finished and will not be for many years to come. Given that so much of the substantive effect of Dodd–Frank depends on still-pending administrative rulemaking, the sausage method is especially unsatisfying at this early stage of Dodd–Frank's existence.

Alternatively, the procedural, or sausage-making, approach analyzes *inputs* by examining the financial reform sausage as it is being made to see what goes into it. What is the level and type of interest group activity? Do lawmakers appear receptive to interest group overtures? Is there a counterbalance to influential industry voices? What is the public salience of the reform? Are relevant public interest groups ("PIGs") engaged in the issue?

While the sausage-making approach, alone, inevitably leaves unanswered the important question of *actual* (as opposed to *attempted*) interest group influence, its focus on process provides advantages that the substance-oriented sausage approach does not. First, 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.[11] Though technically open to all, administrative law scholars forcefully debate the extent to which this ideal is met in practice.[12] Second, this spirit of openness is in some tension with administrative efficiency, causing many to question whether attempts to expand transparency and access in administrative

10. *See generally* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008).

11. *Id.* at 123–25.

12. *Id.* at 125–33.

rulemaking, particularly to the general public, lead to inefficiency.[13] Finally, the sausage-making procedural approach, when applied after the enactment of final rules or rule re-proposals, could capture some of the benefits of the sausage approach by systematically examining inputs (for example, in the form of comment letters and agency contacts) against changes in output (that is, changes from the proposed rule to the final or re-proposed rule).

This Article, because of the time period studied, adopts the pure sausage-making approach, using the Volcker Rule as a case study to examine the process of Dodd–Frank financial reform from inception through rule proposal, with a particular focus on agency-level activity prior to the Notice of Proposed Rulemaking ("NPRM"). This Article thus systematically examines a less-studied time period about which little is known, despite its acknowledged importance to final policy outcomes.[14] Later articles will address subsequent stages of Volcker Rule activity using a mixed approach that systematically examines both inputs and outputs.

To be clear, this is not a comment on the merits of the Volcker Rule. Numerous objections have been raised to the Volcker Rule, some of which I recount.[15] The Volcker Rule makes for an interesting financial reform case study, not because it is wise—that may or may not be the case. Rather, the congressional maneuvering that accompanied the Volcker Rule's passage and the importance of proprietary and fund activities to banks' bottom line signaled that the provision had the potential to illuminate questions about which voices get heard on a major issue of financial reform as the sausage is really being made.

Part I of this Article reviews the political and economic events leading to Dodd–Frank's passage, setting the stage for the agency-level activity that followed. That review reveals substantial Wall Street lobbying, but also substantial public interest in the legislative process surrounding the Volcker Rule, including the various accommodations and concessions necessary to gain the votes for Dodd–Frank passage. Both the public and the press followed these developments closely and expressed frequent concern, even outrage, at signs that the financial industry might escape the consequences of its role in precipitating the financial crisis.

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13. *See, e.g.*, Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483–84 (1997) (arguing that attempts by courts to ensure public participation and influence in the administrative process have led to inefficiencies and potential ossification).

14. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (arguing that agencies complete the bulk of their work prior to the rule proposal stage and are less responsive to the concerns of affected parties during the notice and comment period); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–13 (2011) (discussing the dearth of research on the preproposal stage, despite its importance).

15. *See infra* notes 36–46 and accompanying text (discussing alternatives to the Volcker Rule, including capital requirements, other systemic risk regulations, bank downsizing, and a return to Glass–Steagall).

Part II digs into Volcker Rule activity from Dodd–Frank passage to rule proposal. Sections A and B set the stage by discussing reactions to the Volcker Rule's gaps and ambiguities, and the resulting importance of the preproposal rulemaking phase. Section C analyzes the roughly 8,000 public comment letters received by FSOC during the 30-day public comment period in advance of its statutorily required Volcker Rule study, placing these data within the context of prior comment letter research. Though scholars may debate the extent to which comment letters can—and should—reveal information to agencies,[16] comments can reveal a great deal of information to the interested researcher, in this case exposing both public sentiment and the involvement of relevant PIGs on this issue.

This analysis shows that a consortium of PIGs—Americans for Financial Reform, Public Citizen, and U.S. PIRG—managed to generate a surprising level of Volcker Rule interest among private citizens, who sent in letters by the thousands. But, 7,316 (or 91%) of those comments are a virtually identical form letter. The comment letters from private citizens that were not a form letter (515 comments) confirm that people are angry about the economy; about the plight of working Americans; and about the politicians who allowed the financial crisis to develop. The banks are "fools," "hogs," and "criminals" out to "screw joe the plummer" and should be "put in jail," receiving no more "bailouts with citizens' money."[17] Political officials and regulators fare little better.

But at the same time, the contrast with the meticulously drafted, argued, and researched—though far less numerous—letters from the financial industry and its representatives is stark. In comparison, the citizen letters are short and provide little evidence that citizen commenters even understand, or care, what proprietary or fund investment is, much less the ways in which agency interpretation of the Volcker Rule's complex and ambiguous provisions might govern such activities.

Part II.D analyzes meeting logs of the Federal Reserve, United States Treasury Department ("Treasury Department"), Commodity Futures Trading Commission ("CFTC"), Securities and Exchange Commission ("SEC"), and Federal Deposit Insurance Corporation ("FDIC"), which, as part of the new transparency efforts associated with Dodd–Frank implementation, were made publicly available for the first time shortly after Dodd–Frank was signed into law on July 21, 2010.[18] It is here that the differential investment by financial

16. *Compare* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 912 (2006) (arguing that comment letters—particularly those from the general public—are unlikely to provide meaningful information to agencies), *and* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (referring to notice-and-comment rulemaking as Kabuki theater), *with* Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 103–19 (2005) (finding that interest group comments can, and often do, affect the content of final government regulations).

17. *See infra* Part II.C.2 (discussing these and other comment letters in detail).

18. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 11 (2010), *available at* http://www.llsdc.org/attachments/

institutions in influencing this early stage of Volcker Rule implementation is most evident. Financial institutions, financial industry trade groups, and law firms representing such institutions and trade groups collectively accounted for roughly 93% of all federal agency contacts on the Volcker Rule during the time period studied. In contrast, public interest, labor, advocacy, and research groups, and other persons and organizations accounted for only about 7%. Moreover, the quality of federal agency contacts with financial industry representatives exceeds that of other contacts on several measures. Finally, the meeting logs, particularly when combined with the comment letters, reveal a level of industry cohesion that would not be predicted based on either press reports or the legislative history.

This Article concludes that, as feared by many Dodd–Frank critics, the powerful interest groups most affected by Dodd–Frank did not waste the opportunities provided by the Volcker Rule's gaps and ambiguities. Instead, as evidenced by both public comment letters and meeting logs, they actively lobbied agencies to adopt favorable definitions, interpretations, and exemptions prior to the NPRM. Countervailing voices were not wholly absent during this early stage of Volcker Rule implementation. Angry citizens sent in letters by the thousands, potentially shading FSOC's view of the public salience of the Volcker Rule and of the relative power of active PIGs. Conclusions regarding the ultimate impact of this activity are left for another day. Nonetheless, these results challenge the efficiency of current administrative processes and suggest that the pluralist ideal of administrative law has not been fully realized, at least in the case of the Volcker Rule.

I. FROM INCEPTION TO PASSAGE

A. Crisis and Reform

Dodd–Frank emerged in the wake of the worst U.S. financial crisis since the Great Depression.[19] U.S. financial firms suffered heavy losses in 2007 and 2008, largely from sharp declines in the value of mortgage-related assets. Several firms failed. Others were saved only through taxpayer bailouts. Fannie Mae and Freddie Mac were placed in government conservatorship; Merrill Lynch was sold to Bank of America in a deal backed by the Federal Reserve and the Treasury Department; Lehman Brothers filed for bankruptcy; and AIG, facing catastrophic losses on credit default swaps, averted default only through an $85 billion loan

files/255/CRS-R41472.pdf (discussing voluntary transparency efforts by the federal agencies charged with implementing Dodd–Frank, including logging interest group meetings and making such logs publicly available through agency websites).

19. The general facts of the financial crisis have by now been retold many times in numerous sources. The details in this paragraph are drawn from FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; *The Financial Crisis: A Timeline of Events and Policy Actions*, FED. RES. BANK ST. LOUIS, http://timeline.stlouisfed.org/index.cfm?p=timeline (last visited Feb. 11, 2013) (providing detailed timeline of these events).

from the Federal Reserve. In the wake of general financial panic, Congress intervened with the $700 billion Troubled Asset Relief Program ("TARP"), and the Federal Reserve stepped in to provide liquidity through several lending facilities. Despite these interventions, the crisis exacerbated already weakening economic conditions: asset prices fell; unemployment rose; business investment stalled; and consumers suffered losses in housing values, retirement, and investment funds. Against this background, Congress and the Obama administration launched a financial reform effort.

The legislation that became Dodd–Frank got its start when the Obama administration announced on June 17, 2009, an "extraordinary response to a historic economic crisis," and outlined the basic framework it intended to pursue for financial reform.[20] This was followed by a more extensive proposal from the Treasury Department."[21]

Although President Obama later claimed that Dodd–Frank contained 90% of his initial framework,[22] early reactions to the proposed reforms were negative.[23] Throughout the second half of 2009, reform advocates from the Obama camp (and, in particular, Treasury Secretary Tim Geithner) defended the administration's financial reform proposal against critics on both the right and the left. Conservative Republicans, for example, portrayed the President's proposed financial reforms as a formalization of the "too big to fail" policies from 2008 and as more of the same Big Government outlook that gave us health care reform.[24] The Left, meanwhile, complained that the proposal overly favored Wall Street and failed to account for consumer concerns.[25] As a consequence, the administration was forced to alter certain portions of the proposal that critics contended invited bailouts, and to make other concessions.[26]

One important concession was the addition of a provision that would limit banks' ability to engage in proprietary trading and to invest in or sponsor hedge or private equity funds.[27] That provision, known as the Volcker Rule, was highly

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20. Press Release, White House, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform.

21. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), *available at* http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

22. Press Release, White House, Remarks by the President on Wall Street Reform (June 25, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-wall-street-reform-1.

23. DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD–FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 3 (2011).

24. *Id.*

25. *Id.*

26. *Id.*

27. Only a single sentence in the Treasury Department's initial 89-page proposal references proprietary trading and hedge funds. DEP'T OF THE TREASURY, *supra* note 21, at 32 ("Finally, the Federal Reserve and the federal banking agencies should tighten the

contested, both because of philosophical objections and because it had the potential to seriously impact the profitability of banks' operations.[28] The full depth of that impact will ultimately depend on interpretation and enforcement, as discussed below.

B. The Volcker Rule: Politics and History

The Volcker Rule originated in January 2009, when the Group of Thirty, an international group of 30 leading finance professionals and academics (including Paul Volcker, chair of the financial reform working group, former Chairman of the Trustees, and now Chairman Emeritus), released a report containing 18 recommendations for global financial reform.[29] The first of those recommendations proposed that:

> Large, systemically important banking institutions should be restricted in undertaking proprietary activities that present particularly high risks and serious conflicts of interest. Sponsorship and management of commingled private pools of capital (that is, hedge and private equity funds in which the banking institutions own capital is commingled with client funds) should ordinarily be prohibited and large proprietary trading should be limited by strict capital and liquidity requirements.[30]

But the idea was not initially embraced, either by the Obama administration or by House and Senate Democratic leaders.

The initial House version of Dodd–Frank, introduced by Barney Frank on December 2, 2009, did not ban proprietary trading nor did it limit fund investment.[31] It did, however, grant power to the Board of Governors of the Federal Reserve System to prohibit proprietary trading if the Board determined that it posed "an existing or foreseeable threat to the safety and soundness of such

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supervision and regulation of potential conflicts of interest generated by the affiliation of banks and other financial firms, such as proprietary trading units and hedge funds.").

28. Christine Harper, *Goldman Special Situation Profit Seen at Risk with Volcker Rule*, BLOOMBERG (Mar. 27, 2011, 6:08 PM), http://www.bloomberg.com/news/2011-03-28/goldman-special-situation-profit-at-risk-with-volcker-correct-.html (discussing the importance of certain proprietary investment activity to Goldman Sachs' profits); Cyrus Sanati, *Wall St. Tries to Put a Price on Volcker Rule*, DEALBOOK (Jan. 28, 2010, 6:33 PM), http://dealbook.nytimes.com/2010/01/28/wall-st-tries-to-put-a-price-on-the-volcker-rule/ (estimating the effects of the Volcker Rule proprietary trading ban on various banking institutions).

29. GROUP OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR REGULATORY STABILITY (2009), *available at* http://fic.wharton.upenn.edu/fic/Policy%20page/G30Report.pdf.

30. *Id.* at 28.

31. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (as introduced in House of Representatives, Dec. 2, 2009). For a more detailed legislative history of the Volcker Rule, see Merkley & Levin, *supra* note 4, at 531–38.

company or to the financial stability of the United States."[32] This portion of the bill was passed by the House unchanged.[33]

The Senate version, originally introduced by Christopher Dodd on April 15, 2010, directed the appropriate federal banking agencies to develop rules prohibiting both proprietary trading and fund investment and sponsorship.[34] These prohibitions were subject to the recommendations and modifications of FSOC, which was directed to conduct a study regarding the risks and conflicts associated with proprietary trading by the entities covered in the bill.[35] Both the House and Senate versions contained exceptions to these restrictions, many of which were retained in the final Dodd–Frank legislation, the details of which are discussed below in Part I.C.

As already noted, the Obama administration's reform proposal did not contain restrictions on proprietary trading or fund investment. Indeed, the administration explicitly resisted such limits,[36] believing that size and interconnectedness—rather than organization as a banking entity—were what made an institution too important to fail.[37] Many economists agreed.[38]

In the wake of the crisis and the bailouts that accompanied it, some reform advocates wanted to break up the largest financial institutions so that no entity could again be too big to fail.[39] Several economists actively involved in reform debates, such as Simon Johnson, Joseph Stiglitz, and Nouriel Roubini publicly advocated this approach, which gained some adherents in the Senate.[40]

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32. H.R. 4173, § 1116.

33. *Id.* § 1117 (as engrossed in House of Representatives, Dec. 11, 2009).

34. Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. §§ 619, 989 (as introduced in Senate, Apr. 15, 2010).

35. *Id.* § 989.

36. SKEEL, *supra* note 23, at 54–57. Though Tim Geithner is often depicted as the public face of such resistance, other sources paint Larry Summers as the primary roadblock to the Volcker Rule within the Obama camp. *See* RICHARD WOLFFE, REVIVAL: THE STRUGGLE FOR SURVIVAL IN THE OBAMA WHITE HOUSE 170–71 (2011) (discussing Larry Summers's opposition to the Volcker Rule, which he considered "unrealistic and unworkable").

37. John Cassidy, *The Volcker Rule: Obama's Economic Adviser and His Battles over the Financial-Reform Bill*, NEW YORKER, July 26, 2010, at 25, 27.

38. *Id.* ("[T]he crisis would have unfolded precisely as it did" even if the Volcker Rule had been in effect (quoting Benn Steil, economist at the Council on Foreign Relations)); *Id.* at 30 (arguing that banks were likely to find other ways to take risks and that the Volcker Rule could create a false sense of safety (quoting Raghuram Rajan, University of Chicago economist)).

39. SKEEL, *supra* note 23, at 49–50.

40. *See generally Debt Financing in the Domestic Financial Sector: Hearing on S. 270 Before the Subcomm. on Fin. Insts. & Consumer Prot. of the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 10 (2011) (testimony of Dr. Joseph Stiglitz) ("We should not allow any bank to grow to a size that it poses a systemic risk to the economy."); SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 208–13 (2010) (discussing the risk to the financial system posed by large, concentrated financial power and urging a breakup of big banks); Nouriel Roubini &

The Brown-Kaufman SAFE Banking Amendment, introduced in the Senate on April 21, 2010, would have prohibited bank holding companies from holding more than 10% of total U.S. insured deposits and more than 2% of gross domestic product ("GDP") in liabilities and would have imposed other capital requirements and leverage restrictions.[41] The rule reportedly would have required downsizing by some of the largest U.S. banks, including Citigroup and Goldman Sachs.[42] It was defeated 33–61 on May 6, 2010, with 27 Democrats voting against the amendment.[43]

Other reformers looked back with nostalgia at Glass–Steagall, which since the 1930s had separated commercial and investment banking.[44] Since its repeal in 1999, the lines between commercial and investment banking had become increasingly blurred and proprietary trading had come to represent an ever-larger share of the profits of financial institutions, including commercial banks and bank holding companies.[45] As a result, many—including Paul Volcker himself—believed that the Volcker Rule would at least partially restore Glass–Steagall's legal divide between commercial and investment banking.[46]

Needless to say, affected financial institutions lobbied hard against these efforts.[47] Just as importantly, the Obama administration also resisted these reforms, arguing that Dodd–Frank's increased oversight of systemically important institutions was sufficient to protect against future bailouts.[48] However, intervening events between introduction and passage of Dodd–Frank continued to stoke the American public's fears of another financial crisis and their anger over perceived Wall Street excesses, which necessitated further action from the Obama administration if Dodd–Frank was to become a reality.

Stephen Mihm, *Bust up the Banks*, DAILY BEAST (May 6, 2010, 8:00 PM), http://www.thedailybeast.com/newsweek/2010/05/07/bust-up-the-banks.html (arguing that the Obama reform proposals do not go far enough and that "drastic changes . . . including breaking up big banks and imposing new firewalls in the financial system" are needed).

41. Safe, Accountable, Fair, and Efficient Banking Act of 2010, S. 3241, 111th Cong. §§ 3–4 (Apr. 21, 2010) (as introduced by Sen. Brown, on behalf of himself and Sens. Kaufman, Casey, Merkley, Whitehouse, & Harkin).

42. David M. Herszenhorn, *Senate Liberals Move to Toughen Bill Regulating Wall Street*, N.Y. TIMES, May 6, 2010, at B3.

43. David M. Herszenhorn, *Bid to Shrink Big Banks Falls Short*, N.Y. TIMES May 7, 2010, at B1.

44. SKEEL, *supra* note 23, at 86–87.

45. Harper, *supra* note 28 (discussing the economic impact of the Volcker Rule on many financial institutions); Sanati, *supra* note 28 (same).

46. Cassidy, *supra* note 37, at 25 (reporting that Volcker believed the rule would "go a long way toward restoring" the commercial banking/investment banking distinction).

47. Ctr. for Responsive Politics, *Lobbying Spending Database*, OPENSECRETS, http://www.opensecrets.org/lobby/lookup.php?type=i&q=dodd+frank (last visited Feb. 11, 2013) (posting lobbying disclosures on Dodd–Frank).

48. SKEEL, *supra* note 23, at 44–52 (discussing the key players in Dodd–Frank debates and their various positions); Cassidy, *supra* note 37, at 27 (discussing the belief by Geithner and Summers that capital requirements were a better mechanism for protecting against bailouts than either the Volcker Rule or Glass–Steagall).

The public detested the 2008 bailouts and, as economic and employment fears lingered into 2010, popular backlash increased, reaching a crescendo as news of lavish bonuses and compensation packages at bailed-out financial firms hit the press.[49] Alarmed by the growing public discontent, senior White House officials reportedly began to reevaluate Volcker's reform proposals.[50] The final straw came on January 19, 2010, when Republican Scott Brown was elected to fill Ted Kennedy's Senate seat in Massachusetts. Two days later, on January 21, 2010, President Obama appeared with Paul Volcker and publicly announced his support for the Volcker Rule.[51] Most observers concluded that the two events were not independent.[52]

Ironically, however, Scott Brown's election also prompted some of the Volcker Rule's exemptions and ambiguities. As noted, a strict ban on proprietary trading and fund investment had the potential to seriously compromise existing banking entity operations. Those financial institutions affected by the rule forcefully lobbied key congressional members to weaken it.[53] As it became clear that Scott Brown's vote was necessary for Dodd–Frank passage, he wielded substantial clout, which he reportedly used to protect Massachusetts firms such as State Street, Fidelity, and MassMutual.[54] Only after Brown secured a definition of "systemically significant" firms that looked to activities, rather than to size (reportedly a carve-out for Fidelity), and a de minimis exemption for fund investment that would allow banks to invest up to 3% of Tier 1 capital (reportedly, a carve-out for State Street), did he provide the last vote needed for Dodd–Frank passage.[55]

C. The Volcker Rule: Statutory Text

Subject to important exceptions, the Volcker Rule prohibits banking entities from "engag[ing] in proprietary trading" and from "acquir[ing] or retain[ing] any equity, partnership, or other ownership interest in or sponsor[ing] a hedge fund or a private equity fund."[56] Systemically important nonbank financial

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49. SKEEL, *supra* note 23, at 55; Cassidy, *supra* note 37, at 28.

50. Cassidy, *supra* note 37, at 28–29.

51. Press Release, White House, *supra* note 8.

52. SKEEL, *supra* note 23, at 55; Editorial, *The Volcker Rule Could Clarify Roles and Risks in the Financial System*, WASH. POST (Jan. 23, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012204348.html.

53. Cassidy, *supra* note 37, at 29; Jia Lynn Yang, *A Key Republican Vote Keeps Banking Curbs in Play*, WASH. POST, June 23, 2010, at A12.

54. Yang, *supra* note 53; Silla Brush, *Wall Street Bill Tests Scott Brown's Clout*, HILL (June 22, 2010, 5:00 AM), http://thehill.com/homenews/senate/104631-wall-street-bill-tests-scott-browns-clout.

55. *Fidelity and State Street Win in Brown Deal*, DEALBOOK (July 14, 2010, 12:02 PM), http://dealbook.nytimes.com/2010/07/14/fidelity-and-state-street-win-in-brown-deal/.

56. 12 U.S.C. § 1851(a)(1) (2012). "Banking entity" is broadly defined, with some exceptions, to include FDIC-insured depository institutions, entities that control such an institution (such as bank holding companies), and the affiliates—i.e., under 25% common control—of both of these entities (including non-U.S. affiliates). *Id.* § 1851(h)(1).

institutions are not banned from trading and fund activity, though they must carry additional capital and comply with other restrictions on such dealings.[57]

The Volcker rule became effective on July 21, 2011, two years after Dodd–Frank enactment, despite the lack of implementing rules. However, covered entities were granted the full two-year period provided by the statute (that is, until July 21, 2014) to comply with the Volcker Rule, with the possibility of extensions.[58] Both parts of the rule—the ban on proprietary trading and the restrictions on fund investment and sponsorship—are subject to substantial ambiguities that require agency definition and rulemaking.

1. Proprietary Trading

The term "proprietary trading" is defined as "engaging as a principal for the trading account of [a] banking entity."[59] "Trading account," in turn, is defined as any account used for acquiring or taking positions:

> principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements), and any such other accounts as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule as provided in subsection (b)(2), determine.[60]

Much turns on the interpretation of the phrase "trading account," which is unclear and appears to depend on the trader's intent when purchasing.[61] Thus, a purchase made with long-term investment intent may be permitted, even if ultimately quickly sold.[62] Similarly, speculative trades may be permitted under the rule, provided they are held beyond the "near term," however that phrase is ultimately defined by regulators.[63]

More ambiguity is added by the nine exceptions to the ban on proprietary trading explicitly contained in Dodd–Frank, as well as the power granted to the federal banking agencies, SEC, and CFTC to draft exceptions to the exceptions in order to "promote and protect the safety and soundness of the banking entity and the financial stability of the United States."[64] Of particular importance are the exceptions for transactions in connection with underwriting or market-making activities, risk-mitigating hedging activities, and transactions on behalf of customers. Each of these is a potentially vast exception, with the potential to

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57. *Id.* § 1851(a)(2).
58. *Id.* § 1851(c).
59. *Id.* § 1851(h)(4).
60. *Id.* § 1851(h)(6).
61. Memorandum from Cadwalader, Widkersham & Taft LLP to Clients and Friends, An Analysis of the Dodd–Frank Act's Volcker Rule 5 (2010), *available at* http://www.cadwalader.com/assets/client_friend/101510VolckerRuleAnalysis.pdf.
62. *Id.*
63. *Id.* at 5–6.
64. 12 U.S.C. § 1851(d)(1)(J).

permit much trading activity previously undertaken under the rubric of proprietary trading.

2. Hedge and Private Equity Funds

Subject to essentially the same exceptions that apply to the ban on proprietary trading, the Volcker Rule prohibits banking entities from "acquir[ing] or retain[ing] any equity, partnership, or other ownership interest in or sponsor[ing] a hedge fund or a private equity fund."[65] Hedge fund and private equity fund are collectively defined as:

> an issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), but for section 3(c)(1) or 3(c)(7) of that Act, or such similar funds as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule, as provided in subsection (b)(2), determine.[66]

Section 619 provides a "de minimis" exception to the restrictions on fund activity,[67] with the goal of facilitating customer-focused advisory services.[68] This amount must not exceed 3% of the total ownership interests of the fund one year after its inception and must be immaterial to the covered banking entity as defined by regulation.[69] In addition, the aggregate investments of each regulated banking entity in all such funds may not exceed 3% of its Tier 1 capital.[70]

As is the case with the restrictions on proprietary trading, the restrictions on fund investment require substantial agency definition and clarification. For example, the 3(c)(1) and 3(c)(7) exemptions are relied on by a variety of legal entities other than hedge and private equity funds. Employee pension funds and traditional parent-subsidiary investments thus could be impacted by a strict interpretation of section 619, even though these activities do not appear to have been within Congress's intended restrictions.[71] At the same time, a strict interpretation would exempt certain commodity pools and other risky activities from the Volcker Rule's reach, even though these investments pose similar risks to the activities Congress sought to restrict.[72]

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65. *Id.* § 1851(a)(1)(B).
66. *Id.* § 1851(h)(2).
67. *Id.* § 1851(d)(4).
68. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-529, PROPRIETARY TRADING: REGULATORS WILL NEED MORE COMPREHENSIVE INFORMATION TO FULLY MONITOR COMPLIANCE WITH NEW RESTRICTIONS WHEN IMPLEMENTED 4 (2011), *available at* http://www.gao.gov/new.items/d11529.pdf.
69. 12 U.S.C. § 1851(d)(4)(b)(ii)(I).
70. *Id.* § 1851(d)(4)(b)(ii)(II).
71. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 40.
72. *Id.*

D. Section Summary

In sum, the Volcker Rule originated as a political concession. Dismissed by the Obama administration and many economists as unnecessary and unworkable, it nonetheless became a necessary element in the campaign to quell complaints that Dodd–Frank did not do enough to reign in large, risky financial institutions. But for reasons both practical and political, the Volcker Rule that emerged from the legislature and was signed into law contained broad gaps and ambiguities on key definitional issues.

An examination of the problems in defining and identifying proprietary trading will help illustrate these points. In anticipation of the Volcker Rule, a number of affected banking entities shut down or announced an intention to shut down their stand-alone proprietary trading desks.[73] But, even before Volcker Rule passage, stand-alone proprietary trading activity accounted for a relatively small amount of banking entity revenues, probably around 3%.[74] To avoid an easy end-run around the Volcker Rule's restrictions, federal regulators will have to police proprietary trading that takes place outside of designated proprietary trading desks.

This is no easy task. Much of the trading activity explicitly permitted by the Volcker Rule—in particular, market making, hedging, underwriting, and transactions on behalf of customers—displays objective characteristics very similar to proprietary trading, with the distinguishing trait being primarily the trader's motive.[75] Many firms, for example, take proprietary positions in the course of servicing customer orders or market making, and their trades are argued to provide liquidity, especially in thin markets.[76] Affected industry members contend that zealous enforcement of the proprietary trading ban, which could restrict other bank principal positions, would impair customer service, market liquidity, and other beneficial functions performed by many banking entities.[77] Many banking entity customers and other market participants agree.[78] Balancing these competing concerns and implementing workable and enforceable definitions of permitted and

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73. FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS ON PROHIBITIONS ON PROPRIETARY TRADING & CERTAIN RELATIONSHIPS WITH HEDGE FUNDS & PRIVATE EQUITY FUNDS 2 (2011), *available at* http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf. The same is true of much impermissible fund activity. *Id.*

74. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 16.

75. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 73, at 1.

76. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 28–29.

77. *Id.* at 28.

78. *See, e.g.*, Letter from Investment Company Institute to Financial Stability Oversight Council 1–2 (Nov. 5, 2010), *available at* http://www.ici.org/pdf/24696.pdf (urging that the FSOC study clarify that the exceptions to the proprietary trading ban permit the provision of liquidity and execution services on investment fund trades); Letter from Private Equity Growth Capital Council to Financial Stability Oversight Council 2–3 (Nov. 5, 2010), *available at* http://www.pegcc.org/wordpress/wp-content/uploads/PEGCC-FSOC-Volcker-Rule-Comment-Letter.pdf (arguing that Congress did not intend the Volcker Rule to prohibit the ability of banks to provide intermediary services to the private equity industry).

prohibited activity falls to the five federal agencies charged with Volcker Rule implementation.

II. MAKING THE SAUSAGE: FROM PASSAGE TO PROPOSAL

A. Setting the Stage: Gaps and Ambiguities

The preceding Part detailed the substantial definitional ambiguities surrounding important Volcker Rule provisions, including the definitions of "proprietary trading" and its nine exceptions, as well as the definitions of "hedge" and "private equity" fund. Other Dodd–Frank sections are similarly indefinite, prompting numerous requests for the clarification of definitions, prohibitions, and exemptions.[79]

Dodd–Frank is conspicuously lacking in particulars, a fact recognized by nearly every commentator—popular, academic, and practitioner—to address the issue. As *The New York Times* stated shortly before Dodd–Frank's passage: "[Dodd–Frank] is basically a 2,000-page missive to federal agencies, instructing regulators to address subjects ranging from derivatives trading to document retention. But it is notably short on specifics, giving regulators significant power to determine its impact—and giving partisans on both sides a second chance to influence the outcome."[80]

A widely circulated memo by the law firm Davis Polk opined that "the legislation is complicated and contains substantial ambiguities, many of which will not be resolved until regulations are adopted, and even then, many questions are likely to persist" and predicted a "dynamic" regulatory process between market participants and regulators.[81] Academic commentary similarly has noted the degree

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79. Peter Madigan, *Goldman Sachs Tops List of Firms That Met CFTC*, RISK.NET (July 1, 2011), http://www.risk.net/risk-magazine/analysis/2080403/goldman-sachs-tops-list-firms-met-cftc (discussing the numerous industry meetings with the CFTC regarding Dodd–Frank implementation and noting that most meeting participants request clarification of various definitions, especially those involving swap dealers and major swap participants).

80. Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. TIMES, June 27, 2010, at A1.

81. Memorandum from Davis Polk & Wardwell LLP to Clients and Friends, Summary of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Passed by the House of Representatives on June 30, 2010, at i (2010), *available at* http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf. A memo from the law firm Arnold & Porter similarly advises:

> We believe the ultimate impact of the Act on the financial industry will be shaped largely by the outcome of these rulemakings. . . . In addition, entities affected by the Act will have an opportunity to comment on the new regulations as they are drafted and finalized by the regulators, making participation in the process critical.

Memorandum from Arnold & Porter LLP to Clients and Friends, Are You Prepared? A Compendium of Advisories on the Dodd–Frank Act 109 (2010), *available at*

to which Dodd–Frank delegates authority and leaves the resolution of serious issues to regulators.[82] Even the Congressional Research Service acknowledges that "many of the changes are likely to be implemented through regulations that are to be developed and issued by regulatory agencies."[83]

Many of the statute's critics worry that this filling-in takes place outside of the public glare that accompanied the congressional deliberations on Dodd–Frank and provides the large Wall Street firms with another opportunity to shape the final law in their favor.[84] Some fear this potential is heightened as memories of the financial crisis fade and the general public—temporarily galvanized by financial-institution bailouts into an interest in credit derivatives and systemic risk—turns its attention to other political issues.

These Dodd–Frank gaps and ambiguities assumed new political importance as a Republican majority entered the House during the interim period between Dodd–Frank's passage and implementation. Some Republicans, nearly all of whom voted against Dodd–Frank, explicitly warned regulators to tread lightly in implementing the statute and particularly in implementing the Volcker Rule.[85] Alabama Republican Representative Spencer Bachus, for example, urged FSOC to implement the Volcker Rule "in such a way as to minimize its substantial and very real costs, given that the gains are likely to be illusory."[86] A group of congressional representatives led by Michele Bachmann went further, introducing House Bill 87, a one-sentence bill that would repeal Dodd–Frank.[87] Finally, budget battles for both the SEC and CFTC, each of which require additional resources to fulfill the

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http://www.arnoldandporter.com/resources/documents/Dodd%20Frank%20Act%20Compendium%20%28eBook%29.pdf.

82. *See, e.g.*, Edward J. Kane, *Missing Elements in U.S. Financial Reform: A Kubler-Ross Interpretation of the Inadequacy of the Dodd–Frank Act*, 36 J. BANKING & FIN. 654, 659–60 (2012). "[D]uring and after what will be an extended post-Act rulemaking process, decision-makers will be energetically lobbied to scale back taxpayer and consumer protections to sustain opportunities for extracting safety-net subsidies." *Id.* at 656.

83. COPELAND, *supra* note 18, at 1. A total of 330 Dodd–Frank provisions expressly require (148, or 44.8%) or permit (182, or 55.2%) rulemaking. *Id.* at 4. But this does not fully capture the extent of likely agency rulemaking under Dodd–Frank as numerous provisions that do not expressly mention rulemaking will nonetheless require agency action. *Id.*

84. *See supra* notes 80–83 and accompanying text.

85. Deborah Solomon, *Bachus Urges Regulators Not to Rigidly Implement Volcker Rule*, WALL ST. J. (Nov. 4, 2010, 2:56 PM), http://online.wsj.com/article/SB10001424052748703805704575594473849188154.html. The post-conference vote breakdown is available at http://www.govtrack.us/congress/vote.xpd?vote=s2010-208 (Senate vote) and http://www.govtrack.us/congress/vote.xpd?vote=h2010-413 (House vote).

86. Letter from Spencer Bachus, Ranking Member, H. Comm. on Fin. Servs., to Members of the Financial Services Oversight Council 1 (Nov. 3, 2010), *available at* http://www.ft.com/intl/cms/d983eaa6-e793-11df-8ade-00144feab49a.pdf.

87. H.R. 87, 112th Cong. (2011).

requirements of Dodd–Frank, have prominently featured critiques of the agencies' lack of attention to the economic impact of their respective regulations.[88]

In sum, the Volcker Rule, like many Dodd–Frank provisions, entered the administrative process both highly incomplete and highly contested. The federal agencies charged with rulemaking under the statute would play a substantial role in shaping the final policy outcomes and would likely do so under the continued watchful eye of affected industry members and potentially other interested parties. The remainder of this Part confirms these intuitions.

B. The Preproposal Period

Dodd–Frank required FSOC to study and make recommendations to relevant federal agencies regarding Volcker Rule implementation within six months of the statute's enactment.[89] Those agencies were then statutorily required, within nine months of the completion of the FSOC study, to adopt rules implementing the Volcker Rule, based on a consideration of FSOC's recommendations.[90] On October 11, 2011, the OCC, Federal Reserve, FDIC, and SEC issued an NPRM (hereinafter the "Joint Rule"), requesting comments prior to January 13, 2012, on proposed rules to implement the Volcker legislation.[91] That deadline was later extended to February 13, 2012.[92] The CFTC, by a vote of 3–2, adopted the entire text of the Joint Rule in an NPRM dated February 14, 2012, requesting comments prior to April 16, 2012.[93]

The following Subsection analyzes relevant agency activity during the period from presidential signing on July 21, 2010 to the NPRM on October 11, 2011. This Article is one of the few studies to systematically analyze the preproposal period, a time period about which little is known, despite its

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88. Jessica Holzer, *SEC, CFTC Ask US Congress for Budget Increases*, COMPENDIUM (May 6, 2011), http://commoditymkts.wordpress.com/2011/05/06/sec-cftc-ask-us-congress-for-budget-increases/.

89. 12 U.S.C. § 1851(b)(1) (2012). Those agencies are the OCC, FDIC, Federal Reserve, SEC, and CFTC. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 73, at 1 n.6.

90. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 73, at 8. The agencies are required by the statute to consult on Volcker implementation, under the coordination of the FSOC chairperson (the Treasury Secretary). *Id.*

91. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (proposed Oct. 11, 2011) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pt. 255); *see also* Press Release, Office of the Comptroller of the Currency, The OCC Issues Volcker Rule Proposal for Public Comment (Oct. 11, 2011), *available at* http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-126.html.

92. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 77 Fed. Reg. 23 (Jan. 3, 2012) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pt. 255).

93. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Covered Funds, 77 Fed. Reg. 8332, 8332 (Feb. 14, 2012) (to be codified at 17 C.F.R. pt. 75).

importance to policy outcomes.[94] Subsequent articles will analyze the period from the October 11, 2011 NPRM to final rule issuance.[95]

As Wagner, Barnes, and Peters discuss in detail, the need to produce a proposed rule that is ready for comment pushes much regulatory work to this early stage of the rule development process.[96] As a result, preproposal collaborations between agencies and regulated industry members, who are likely to have technical and other expertise necessary to produce a rule that withstands judicial review, become practical necessities.[97]

If much of the real work of final rule creation takes place during the preproposal period, then one might predict both substantial preproposal lobbying activity and limited changes between rule proposal and final rule. Both predictions are generally borne out by existing research.[98] However, research on the preproposal stage of the rule development process has traditionally been impeded by a lack of information; Administrative Procedure Act docketing and other transparency requirements are generally limited to the period after publication of the proposed rule.[99] Dodd–Frank's transparency innovations thus provide a wealth of information previously unavailable to researchers. This Article is the first to systematically analyze that information.

C. FSOC Comment Letters

1. The Numbers

The newly formed FSOC's first action was to request public input on Volcker Rule implementation—a request that resulted in more than 8,000 comments.[100] To put this number into context, studies repeatedly show limited comment activity in connection with most rulemakings, with the exception of a relatively small number of high-salience issues that generate thousands (in a few cases, hundreds of thousands) of comments.[101] Far more typical, however, are

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94. *See supra* note 14 and accompanying text.

95. Kimberly D. Krawiec & Guangya Liu, Influencing the Volcker Rule (Jan. 1, 2013) (unpublished manuscript) (on file with authors).

96. Wagner, Barnes & Peters, *supra* note 14, at 110 ("[T]he courts have made it painfully clear that if a rule is to survive judicial review, it must be essentially in final form at the proposed rule stage.").

97. *Id.* at 110–11.

98. *See* CROLEY, *supra* note 10 (summarizing these studies); *see also supra* notes 14, 96–97 and accompanying text (summarizing the limited research on preproposal activity).

99. Wagner, Barnes & Peters, *supra* note 14, at 112.

100. Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds, 75 Fed. Reg. 61,758 (Oct. 6, 2010) (soliciting public comments in advance of a Volcker Rule study); FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 73, at 10.

101. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 950–59 (2006) (summarizing empirical studies of rulemaking activity).

dockets that receive a handful of comments.[102] By this standard (and as suggested by the legislative analysis in Part I), the Volcker Rule is a relatively high-salience issue, particularly for a technical piece of financial reform legislation not yet at the rule proposal stage.[103]

FSOC concluded that, of these 8,000 comment letters, roughly 6,550 "were substantially the same letter arguing for strong implementation of the Volcker Rule."[104] FSOC gave no further information about these letters and did not make them publicly available. But an analysis of the remaining comment letters (confirmed by conversations with PIG representatives) reveals that the 6,550 identical letters are the result of an action campaign by a PIG consortium—Citizens for Financial Reform, Public Citizen, and U.S. PIRG. Members of these groups were provided a form letter (the "PIG form"), included as an Appendix to this Article, urging the prompt implementation of the Volcker Rule and the closing of any loopholes.

With the help of three research assistants, I analyzed and hand-coded the remaining, roughly 1,450, comment letters.[105] FSOC concluded that these "remaining 1450 comments each set forth individual perspectives from financial services market participants, Congress, and the public."[106] However, this is not the case.

Table 1 provides summary statistics on these comments. Figure 1 displays this same information graphically. First, the exclusion of duplicate comment postings left a total of 1,374 comments. Of these, as detailed in Table 1, 1,281, or 93%, were submitted by private individuals. The remainder were submitted by financial industry members, trade groups, public interest groups, think tanks, academics, and congressional members. At first blush, these numbers seem to

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102. *Id.* at 956; John M. DeFigueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 992–93 (2006) (finding limited comment activity on the FCC docket, outside of a few outlier events).

103. Bruce Bueno de Mesquita defines salience as:

> how focused a stakeholder is on the issue. Its value is best thought of in terms of how prepared the stakeholder is to work on the issue when it comes up rather than some other issue on his or her plate. Would the stakeholder drop everything else to deal with the issue? Would the player work on it on a weekend day, come back from vacation, etc.? The more confidently it can be said that this issue takes priority over other matters in the stakeholder's professional life (or personal life if the issue is about a personal or family matter), the higher the salience value.

Bruce Bueno de Mesquita, *Game*, PREDICTIONER'S GAME, http://www.predictioneersgame.com/game (last visited Feb. 11, 2013).

104. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 73, at 10.

105. We collected these comments from Regulations.gov, Docket ID: FSOC-2010-0002, as of June 2011. *See Docket Browser: Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds*, REGULATIONS.GOV, http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=FSOC-2010-0002;fp=true;ns=true (last visited Feb. 11, 2013).

106. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 73, at 10.

confirm an extraordinary public interest in the Volcker Rule—the raw number of comment letters from private individuals dwarfs the number submitted by all other categories of actors combined, including industry actors.

Pausing yet again to put these data into context, recall that—leaving aside a comparatively small number of high-salience issues—most rulemakings receive only a limited number of comments, very few of which emanate from individual citizens. Instead, the lion's share of commentary is typically submitted by industry members, trade groups, law firms, and political consultants.[107] The comment letter data thus confirm some level of Volcker Rule salience, including to members of the general public.

Yet, a breakdown of the 1,281 letters submitted by private individuals reveals several interesting patterns. Contrary to setting forth an individual perspective, over half (nearly 56%) of these comments from private individuals use the same form letter, with some slight variations, as the other 6,550 identical letters received by FSOC. These letters often add a sentence or two outlining a personal hardship arising from the financial crisis or use only a portion of the form (typically, the demands). Therefore, these comments were not *exactly* identical and escaped whatever recognition software or rough exclusion methods FSOC employed. Yet, they are the same—*nearly* identical—substantive letter. Thus, of the 8,000 letters received by FSOC on the Volcker Rule, 7,316 (or 91%) are a form letter. This is roughly consistent with prior findings on individual citizen comment activity.[108]

Though scholars may debate the extent to which comment letters, particularly letters from the general public, can—and should—reveal useful information to agencies, such comment letters contain a wealth of information for researchers.[109] On one hand, the Volcker Rule does have some public salience—individuals sent in letters by the thousands. Even if that salience is largely a PIG creation, the fact that PIGs were able to rally public interest in the issue may suggest both something about the issue and about those PIGs' power. Moreover, as detailed in Table 1, other nonindustry participants—including academics, public intellectuals, and members of Congress—submitted comments. Though these were fewer in number, they contained significantly more substance than the public citizen comments, as would be expected.

At the same time, however, the implications to be drawn from this comment activity are probably quite different from the conclusions one might draw about the public's dedication to an issue about which a regulatory body had

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107. DeFigueiredo, *supra* note 102, at 987 (documenting scant individual participation in FCC rulemaking, outside of a few high-salience issues); Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* 10–11 (Resources for the Future, Discussion Paper No. 03-22, 2003), *available at* http://ageconsearch.umn.edu/bitstream/10681/1/dp030022.pdf (same with respect to Department of Transportation rulemakings).

108. *See* Coglienese, *supra* note 101, at 953–54; Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 449 (2005).

109. *See supra* note 16 and accompanying text.

received 8,000 individuated comments expressing both concern about and, importantly, knowledge regarding the terms of a particular legislative enactment. Certainly, submitting a form letter does not require the same level of investment as the detailed comments submitted by financial institutions and trade groups.[110] As we shall see in Part II.C, Volcker Rule interpretation is also a high-salience issue to financial firms, particularly the large banks most affected by it, and they are willing to expend large resources toward influencing that interpretation.

2. The Content

The remaining 515 comments submitted by private individuals that were not traceable to the PIG form letter yield a useful comparison to letters from other groups. Table 2 breaks down the comments by group and word count. Figure 2 displays this information graphically, showing the distribution of word count by private individuals not using the PIG form (in light gray), private individuals using the form (in dark gray), and all others (in black).

There are three spikes in the data, at less than 50 words, at 200–249 words, and at 250–299 words (note the larger sizes of the two far right bins, representing comments with 350–799 words and those with 800 words or more). The spikes at 200–249 words and 250–299 words represent the PIG form letter and its slight variations, discussed above (in its original form the letter is 244 words). The spike at comments of less than 50 words represents only letters from private individuals.

The shortest comment—only a single word, "regulate"—was submitted by a private individual.[111] The longest comment, received from the Securities Industry and Financial Markets Association ("SIFMA"), measures 19,500 words.[112] The industry and trade group comments are, as a general rule, lengthy and contain cogent arguments in support of a generally narrow interpretation of the Volcker Rule's scope of prohibited activity. Overall, they advance detailed legal arguments relying on numerous statutes and cases, reference the Dodd–Frank legislative history, and often contain thorough empirical data. Most are meticulously argued and carefully drafted.

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110. At a minimum, we might conclude that the Volcker Rule is not an issue of the highest salience to the public, meaning: "This is my most important issue. I would drop whatever I am doing and turn to this issue whenever asked." Mesquita, *supra* note 103. The same is likely not true for financial institutions affected by the Volcker Rule. *See infra* Part II.D (discussing the financial industry's investment in influencing Volcker Rule implementation); *see also* Shabnam Mousavi & Hersh Shefrin, *Prediction Tools: Financial Market Regulation, Politics and Psychology*, 3 J. RISK MGMT. FIN. INSTITUTIONS 318, 325–26 (2010) (assigning a Dodd–Frank salience measure of 99 out of 100 to financial firms).

111. *Comment from Val Laurent, Activist*, REGULATIONS.GOV (Nov. 6, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-1094. Punctuation, spelling, and typographical errors in this and the following comments are all retained from the original sources.

112. *Comment from Randolph Snook, SIFMA*, REGULATIONS.GOV (Nov. 5, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0908.

This does not mean, however, that industry and trade group letters necessarily contain unique information and arguments. In fact, a close substantive read of these comments suggests that, within each industry subgroup, the arguments and evidence are quite similar. As Stuart Benjamin and Art Rai conclude in an analysis of industry and trade group comment letters to the Federal Communications Commission, "the words differed, but the arguments did not."[113]

In contrast, comments from the general public tend to be short—the average word count, excluding the PIG form letters, is only 86, and roughly half of the comments, again excluding those using the PIG form letter, are less than 50 words. In addition, these public comments by and large lack specific suggestions or recommendations for interpreting and implementing the Volcker Rule; generally urge that the rule be "enforced" or "adopted"; contain many grammatical, punctuation, and typographical errors; and express extreme anger at the banks and, often, at the political system as well.

One letter, from which this Article's title is drawn, aptly illustrates these points. Note the writer's anger and his "working class versus the big banks" mentality:

> in regards to the Volker Rule, just how stupid do you think the working class is? we just passed the two bills of financial reform and here, not even 3 months later, you big banks are at it again to screw joe the plummer. aren't you wondering why everyone is preferring to do business at a credit union over a bank? how about all of us that have canceled all of our credit cards? whatch it or we all might just pull all of our money out of the banks and make you go under! and lose your home![114]

Another commenter, echoing a common refrain, considers banks criminals and wonders why they are not yet jailed: "Please pass the Volker Law!. I am disgusted that banks were deregulated over the last 8 yrs which caused this economic disaster and now they want to weaken the laws that were just passed! They should be jailed. Where are the arrests!! They are all criminals!"[115]

Another, like many of the private individual letter writers, echoes the working class versus rich banks theme exemplified by the "joe the plummer" commenter. Her family, unlike the "unscrupulous" bank CEOs and shareholders, works for its money:

> The Volker Rule is critical to preventing banks from unscrupulous banking activities. At the expense of American citizens, their dependants, and their posterity banks have made trillions of dollars for their CEO's and shareholders. It is time to stop their inner-circle deals and demand justice for every American. I will not allow some

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113. Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 74 (2008).

114. *Comment from Ronnie Endre*, *supra* note 1.

115. *Comment from Katherine Myskowski, Public Citizen*, REGULATIONS.GOV (Nov. 4, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0528.

> bank to rob me and my familiy of everything that we work for with our blood, sweat, and tears.[116]

This raw anger at the banks pervades the public comments. They are "fools . . . [and] hogs"[117] that should be "put . . . in jail," and receive "no more passes"[118] or "bailouts with citizens' money."[119] Wall Street caused "a HUGE amount of destruction and are busily going Who? Me? now."[120] Regulators, for their part, must impose "control" lest the banks "continue to screw up,"[121] and must "[s]top the fraud."[122] Indeed, the entire country is on the wrong track. We need to get "back to industry" so that our country "produces and exports things," rather than finance, which "export[s] jobs and produc[es] poverty for people who actually work."[123]

Many commenters express dissatisfaction with the political system that enabled Wall Street to accumulate so much power. One commenter sees "no reason to waste my time voting" unless "we replace the regulations we had on Wall Street."[124] Urges another: "Don't let Big Banks write the rules!"[125] One writer finds it "craven" that elected officials are accountable to big business, rather than to the citizens:

> Obviously we need to do as much as we can to control the banks which ruin this country. They have already heisted most of the money—to allow them to continue unimpeded would be sheer lunacy. We understand the relationship between the money big business gives elected officials and the laws that are written and we are sick and tired of laws being written by and for big business at the expense of human beings. this is craven—there is no other word for it—and it much stop. the volker rule and any others that are

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116. *Comment from Amy Margolis, Lebanon Property Management*, REGULATIONS.GOV (Nov. 4, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0523.

117. *Comment from Dan Guerena, Change.org*, REGULATIONS.GOV (Nov. 4, 2011), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0555.

118. *Comment from Katherine Myskowski, Public Citizen*, REGULATIONS.GOV (Nov. 4, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0530.

119. *Comment from Abigail Winston*, REGULATIONS.GOV (Nov. 3, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0285.

120. *Comment from Bill Jaynes, Swan River Software*, REGULATIONS.GOV (Oct. 28 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0294.

121. *Comment from Ann McGill, Public Citizen*, REGULATIONS.GOV (Nov. 4, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0430.

122. *Comment from Abigail Winston*, *supra* note 119.

123. *Comment from Dan Guerena*, *supra* note 117.

124. *Comment from Mary Lou Czupek, Public Citizen Member*, REGULATIONS.GOV (Oct. 28, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0240.

125. *Comment from Victor Escobar, Member of Americans for Financial Reform*, REGULATIONS.GOV (Nov. 03, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-1058.

> meant to regulate the banks and keep more people's money from disappearing in the maw of corporate america the better.[126]

Though some consider regulators, like the banks they regulate, "crooks [who] will ignore this,"[127] others urge regulators to stand firm against the "rapacious financial institutions":

> Surely you understand the necessity of standing firm for the subject prohibitions as promoted by the distinguished Paul Volcker. You will be facing gale force threats, bribes, and deceptions from financial institutions who have amply proved they care not one whit for the economic health of the country, for the strategic national interest, or even the longevity of their own institutions; subordinating all of this to their greed for bonuses that can lock in generations of family wealth in just a few years of gambling with other people's money. Without the full strength of this prohibition, the nation is doomed to be blackmailed again to rescue a kidnapped economy. You can't allow this, if you have one shred of integrity. You must ignore the promises and prospects for lucrative employment by the rapacious financial institutions anf do what is right.[128]

These letters are notable for several reasons and confirm many of the intuitions gleaned from the review of the Dodd–Frank legislative process in Part I, and the analysis of form letters in the prior Subsection. The individual citizen letters reveal disgust and anger over perceived Wall Street excesses and expose a "Wall Street versus Main Street" mentality. People are angry about the economy, about the plight of working people, and about the politicians who they hold responsible for these outcomes. But importantly, the citizen letters provide no substantive guidance to FSOC on how to interpret and enforce the Volcker Rule's complex and ambiguous provisions. Indeed, the letters provide little evidence that commenters even understand, or care, what proprietary trading or fund investment is, much less the ways in which the Volcker Rule might govern such activities.[129]

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126. *Comment from Rachel Kaplan, the Village Way*, REGULATIONS.GOV (Nov. 5, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0966.

127. *Comment from Leo Stack*, REGULATIONS.GOV (Nov. 5, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0990.

128. *Comment from Critz George*, REGULATIONS.GOV (Nov. 6, 2010), http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-1202.

129. DeFigueiredo and Cuéllar each find similar results. DeFigueiredo's examination of FCC filings from 1999 to 2004 reveals that the media ownership rules received more filings than any other issue but were largely identical texts, mass electronic mailings, and simple click-throughs that failed to demonstrate an individual understanding of the complex issues. DeFigueiredo, *supra* note 102. Cuéllar's analysis of three rules issued by the Treasury Department, the Federal Election Committee ("FEC"), and the Nuclear Regulatory Commission ("NRC") concluded that "[i]ndividual commenters often came across as being angry and exasperated," failed to understand "the distinction between the regulation and the statute," and rarely offered "anything remotely resembling a concrete proposal." Cuéllar, *supra* note 108, at 443.

The contrast with the meticulously drafted, argued, and researched—though far less numerous—letters from financial industry members and trade groups is stark.

D. The Meeting Logs

1. Introduction

As part of the new transparency efforts associated with Dodd–Frank implementation, the Treasury Department, Federal Reserve, CFTC, SEC, and FDIC began disclosing their contacts regarding Dodd–Frank shortly after the bill was signed into law in July 2010. These logs give some insight into the work of Dodd–Frank statutory interpretation and implementation that goes on behind closed doors: Who is meeting with the regulators that will ultimately determine the scope of the Volcker Rule? What interests do they represent? What are the topics on which they are meeting? What questions are being asked and answered, and what sort of information is being conveyed? These logs are especially noteworthy given the previously discussed importance of the preproposal period to final policy outcomes, combined with the traditional inaccessibility of this data.

There is wide variation in the amount and quality of information provided by the federal agency meeting logs concerning the Volcker Rule, both across agencies and across meetings for any given agency. As a general rule, the Federal Reserve's logs were the most detailed, while the CFTC's contained the least information. Although all agency logs disclose the date, starting time, and format of the meeting (for example, a conference call versus a live meeting), as well as the names and affiliations of the parties in attendance, there are large differences in the level of detail surrounding the subject matter of the meeting. Some meeting logs disclose only that the parties met to discuss the Volcker Rule,[130] while others provide detail on the specific topics discussed, as well as the parties' positions on those topics. For example, according to Federal Reserve meeting logs, at a January 20, 2012 meeting American Bankers Association representatives raised concerns about the application of the Volcker Rule to small banks, argued that some small banks were surprised to learn that the Volcker Rule may apply to their activities, and expressed concerns that some banks could not comply with the Volcker Rule by the July 21, 2012 effective date.[131]

Despite these differences, it is possible to form educated guesses about the general content of the meetings, even when detailed meeting logs are absent. Often, parties that met with federal agencies on the Volcker Rule also submitted comment letters. These comment letters provide some insight into the likely concerns and positions raised during agency meetings. This mechanism—

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130. *See, e.g.*, *External Meetings: Americans for Financial Reform*, U.S. COMMODITY FUTURES TRADING COMM., http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/dfmeeting_031212_1433 (last visited Feb. 11, 2013).

131. FED. RESERVE, MEETING BETWEEN FEDERAL RESERVE BOARD STAFF AND REPRESENTATIVES OF THE AMERICAN BANKERS ASSOCIATION JANUARY 20, 2012 (2012), *available at* http://www.federalreserve.gov/newsevents/rr-commpublic/aba-meeting-20120120.pdf.

extrapolating information regarding informal participation from formal participation records—has been used by other researchers for similar purposes, for example, to estimate *ex parte* contacts.[132]

In addition, one can sometimes divine the likely content (or, at least, eliminate certain content) of meetings based on the combination of participants. A participant at a meeting that includes representatives of Goldman Sachs, J.P. Morgan Chase, and Morgan Stanley, for example, is unlikely to be meeting for the purpose of urging the relevant agency to apply the Volcker Rule in a manner that severely restricts banking entity activity.

2. The Numbers

Table 3 shows the federal agency meetings with financial institutions in which the Volcker Rule was discussed. These meetings occurred between July 21, 2010, the date of presidential signing, and October 11, 2011, the date of the NRPM. J.P., Morgan Chase, Goldman Sachs, and Morgan Stanley met with federal agencies most frequently on the Volcker Rule, with 27, 22, and 19 meetings, respectively. This accounts for nearly 20% of financial institution meetings with federal agencies on the Volcker Rule.[133] In total, there were 351 financial institution meetings with federal regulators regarding the Volcker Rule during this time period, which accounts for more than 78% of all such meetings during the relevant time period, as shown by Table 8 and Figure 3.

Table 4 shows federal agency meetings with law firms in which the Volcker Rule was discussed. Each of these law firms represents financial institutions or financial industry trade groups, and representatives of those institutions or trade groups were typically also in attendance at each meeting. In total, these law firms met with the federal agencies charged with Volcker Rule implementation 35 times during the relevant time period. Sullivan & Cromwell, Davis Polk, and Debevoise met most frequently with federal regulators, with 11, 9, and 8 meetings each.

Table 5 shows federal agency meetings with financial industry trade associations, lobbyists, and policy advisors to discuss the Volcker Rule—a total of 32 meetings. SIFMA and the Financial Services Roundtable met most frequently with federal agencies—eight and five times, respectively.

Table 6 shows federal agency meetings with public interest, labor, research, and advocacy groups to discuss the Volcker Rule—a total of 19 meetings, nearly 40% of which are with labor union representatives.[134] Finally,

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132. *See, e.g.*, Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373, 381–82 (2012) (using this technique and citing similar uses).

133. "Financial institution" is defined broadly in this Subsection to include not only commercial and investment banks, but also asset managers, investment advisors, and insurance companies.

134. Labor unions are included in Table 6 because of their advocacy on behalf of a strong Volcker Rule.

Table 7 shows a total of 12 meetings by other persons and organizations: namely, Senators Merkley and Levin and their staffs and Paul Volcker and his staff.

In sum, whereas financial industry representatives met with federal agencies on the Volcker Rule a total of 351 times, there were only 31 meetings with entities or groups that might reasonably be expected to act as a counterweight to industry representatives in terms of the information provided and the types of interpretations pressed (those listed in Tables 6 and 7). This is nearly the same number of times that a single financial institution—J.P. Morgan Chase—met with federal agencies on Volcker Rule interpretation and implementation. As shown by Table 8 and Figure 3, financial institutions, financial industry trade groups, and law firms representing such institutions and trade groups collectively accounted for 93.1% of all federal agency Volcker Rule meetings, whereas public interest, research, advocacy, and labor groups, and other persons and organizations, accounted for only 6.9%.

This is not meant to suggest that these very different types of financial industry members raised identical concerns at every meeting. To the contrary, the exact subject matter of the meetings appeared to differ according to the particular regulatory concern faced by each group. The important point for these purposes, however, is that nearly all of the industry representatives that met with federal agencies on the Volcker Rule were seeking clarifications on the rule's application to their activities—most often, a clarification that the Volcker Rule would not prohibit the activities in question.

This latter observation is an important point, as dissension among important industry actors ensures that agencies will receive competing views and information on the Volcker Rule, even in the absence of effective participation by public interest groups and other potential watchdogs. For example, one might have predicted that some industry segments—perhaps, hedge funds—would view banks' proprietary trading activities as competing with their own operations and would advocate on behalf of the Volcker Rule in order to advance their own competitive positions. But this is not the case. Instead, the meeting logs, when combined with the comment letters, suggest that hedge and private equity fund Volcker Rule activity has largely centered on the rule's impact on their own activities. Specifically, hedge and private equity fund comment letters and meeting logs reveal concerns that restrictions on banks' fund investments will economically harm the hedge and private equity fund business, request delays in implementation and effective dates, and argue that the Volcker Rule should be interpreted narrowly to permit certain fund investment activity by banks.[135]

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135. *See, e.g.*, FED. RESERVE, MEETING BETWEEN FEDERAL RESERVE BOARD STAFF AND REPRESENTATIVES OF BLACKROCK, INC. ("BLACKROCK") JUNE 30, 2011 (2011), *available at* http://www.federalreserve.gov/newsevents/rr-commpublic/black_rock_meeting_20110630.pdf (discussing the Volcker Rule's impact on BlackRock's business model); Letter from Alternative Investment Management Association to Financial Stability Oversight Council (Nov. 5, 2010), *available at* http://www.aima.org/objects_store/aima_-_comments_to_fsoc_on_nbfcs_-_5_nov_10.pdf (noting the potential adverse impact of the Volcker Rule's restrictions on the hedge and private equity fund industry); Letter from

Similarly, Senators Merkley and Levin (the Volcker Rule's sponsors), among others, promoted the Volcker Rule as a means to reduce conflicts of interest between banking entities and their customers caused by proprietary trading operations.[136] One might, therefore, predict that large institutional investors would be highly involved in Volcker rulemaking, to ensure that this purported benefit of the legislation is not undercut. However, large institutional investors are notably absent from Volcker Rule administrative activity, at least in the preproposal phase. Although the Council of Institutional Investors submitted a comment letter supporting the Volcker Rule, it is short (under 300 words) and nonsubstantive.[137] The Council did not meet with agencies in person on the Volcker Rule, though it did meet in connection with other Dodd–Frank provisions.[138] On the rare occasions when institutional investors met with federal agencies on the Volcker Rule, the topic appears to concern the Volcker Rule's application to their own activities, rather than to the proprietary trading or fund activities of banking entities.[139]

Moreover, not all agency meetings are created equal. Many of the meetings in Table 3 are group meetings, often part of an industry trade association meeting. For example, 27 separate financial institution representatives were listed in attendance at an April 7, 2011 SIFMA–SEC meeting with Chairman Schapiro.

Perhaps more telling, nearly all of the Table 6 contacts are group meetings of this type. For example, representatives of AFL-CIO, Laborer's International Union of America, AFSCME, and SEIU are logged for an October 13, 2010 SEC meeting with Kayla J. Gillan and Jim Burns. These are four of the five meetings by public interest, labor, and advocacy groups with the SEC (Americans for Financial Reform met separately with the SEC on April 13, 2011). And all of the CFTC meetings with public interest, labor, and advocacy groups on the Volcker Rule took place together, on March 16, 2011.

In addition, the identity (or number) of agency representatives at certain meetings may signal something about the importance of the event. For example,

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Private Equity Growth Capital Council to Financial Stability Oversight Council, *supra* note 78 (expressing concern about the impact of the Volcker Rule on private equity funds).

136. *See* Merkley & Levin, *supra* note 4, at 549 ("The Merkley–Levin provisions' broad restrictions on proprietary trading should significantly reduce the opportunities for conflicts of interest in trading.").

137. E-mail from Jeff Mahoney, Gen. Counsel, Council of Institutional Investors, to Timothy Franz Geithner, Chairman, Fin. Stability Oversight Council (Oct. 28, 2010), *available at* http://s3.documentcloud.org/documents/12382/councilinstitutionalinvestors-letter-to-fsoc.txt (supporting the Volcker Rule due to the conflicts of interest created by proprietary trading at depository institutions and their holding companies).

138. FED. RESERVE, MEETING BETWEEN FEDERAL RESERVE BOARD STAFF AND REPRESENTATIVES OF INVESTORS IN MORTGAGE PRODUCTS APRIL 6, 2011 (2011), *available at* http://www.federalreserve.gov/newsevents/rr-commpublic/investors_mortgage_20110406.pdf (discussing section 941 of the Dodd–Frank Act).

139. *See, e.g.*, FED. RESERVE, MEETING BETWEEN FEDERAL RESERVE BOARD STAFF AND REPRESENTATIVES OF TIAA-CREF OCT. 19, 2010 (2010), *available at* http://www.federalreserve.gov/newsevents/rr-commpublic/TIAA_CREF_Meeting_20101019.pdf (discussing the application of the Volcker Rule's restrictions to insurance companies).

the log for an August 3, 2010 CFTC meeting with SIFMA and ISDA at which the Volcker Rule was discussed (along with other Dodd–Frank provisions) lists 53 SEC and CFTC staff members in attendance. But Goldman Sachs' CEO, Lloyd Blankfein, is logged as meeting alone with SEC Chairman Mary Schapiro; Chief of Staff Didem Nisanci; and Robert Cook, Director of Trading & Markets, on March 9, 2011. Mr. Blankfein met with Chairman Schapiro again on October 8, 2010 at an SEC–Financial Services Roundtable meeting, at which Jamie Dimon of J.P. Morgan, Robert H. Benmosche (President and CEO of AIG), Richard K. Davis (President and CEO of U.S. Bancorp), and other major financial institution CEOs are logged as being in attendance.

3. Section Summary

The meeting log data reaffirm the impression gained from the analysis in prior Subsections: The Volcker Rule contained substantial gaps and ambiguities on key issues, generating an intense interest in the rule's implementation that began as soon as the legislation was signed. Notably, federal agency contacts with industry representatives significantly outpace those of any other group in terms of both quantity and quality. This finding is consistent with the limited number of other studies examining the preproposal period.[140]

Moreover, financial industry interests appear, at least from these data, more unified in their interests than press reports and the legislative history would predict, reducing the probability that conflict among powerful interest groups will diminish the influence of any single position. This is an important finding, and one that can be discerned only by an examination of agency-level data. Prior research has documented a measurable influence of preproposal interest group activity on final agency rules when there is a high level of consensus among those groups.[141]

Finally, the data demonstrate continuing interest in, and oversight of, the Volcker Rule by Senators Merkley and Levin (the provision's sponsors) and by Paul Volcker (the provision's original architect).[142] While it is true that other members of Congress hostile to the Volcker Rule have also remained involved in the rulemaking process, those contacts appear, at least based on documented evidence, limited to comment letter activity.[143] No other congressional members or elected officials have committed the human capital that Merkley, Levin, and Volcker have. Is this attention sufficient to offset any superior influence enjoyed by a unified regulated industry? It is impossible to determine from these data at this stage of the rulemaking process. However, Susan Webb Yackee finds that the

140. *See* Wagner, Barnes & Peters, *supra* note 14, at 125 ("[The] pre-NPRM period was almost completely monopolized by regulated parties.").

141. David Nelson & Susan Webb Yackee, *Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking*, 74 J. POL. 339, 340 (2012).

142. *See infra* Table 7.

143. *See supra* notes 85–86 and accompanying text.

more congressional attention a rule enjoys, the less interest group influence the final rule exhibits.[144]

CONCLUSION

Statutes, like contracts, can be more or less complete, but will inevitably have some gaps and ambiguities that courts or agencies must fill. In neither setting—contract or statute—is this outcome necessarily bad.[145] To the contrary, lawmakers may delegate such discretionary authority to other governmental branches for a variety of salutary reasons. For example, statutory incompleteness may allow lawmakers to harness the expertise of courts and agencies, provide the flexibility to adapt the statute to changing circumstances, or reduce the transaction costs associated with lawmaking.[146]

Proprietary trading and fund investment are technical questions of financial regulation about which federal agencies have substantial expertise and experience. Understandably, Congress relied on that experience and expertise for much of the definitional work of the Volcker Rule. But the Volcker Rule is not by any means the type of low-salience rule that characterizes the bulk of daily administrative work. Instead, the political conditions surrounding Dodd–Frank's passage suggest unusual populist pressure to address the perceived power and problems posed by large financial institutions, which the public blamed for the financial crisis, the bailouts that followed it, and the continuing economic woes of the average working American. This populist pressure was met with intense lobbying by affected financial institutions in an effort to, if not stave off regulation entirely, at least minimize the damage that financial reform would cause. As evidenced by the data, that populist pressure and industry interest continued into the rulemaking phase.

Against this economic and political background, Dodd–Frank arose, purportedly to stop "'too big to fail' [and] to protect the American taxpayer by ending bailouts."[147] But the Volcker Rule—largely an afterthought by the Obama administration, which considered the rule unworkable and unnecessary—was an essential concession to gain political support from Dodd–Frank critics who argued that the law did too little to restrict risky banks. As a result, the Volcker Rule—like many other Dodd–Frank provisions—entered the rulemaking process both highly incomplete and highly contested, thus ensuring the importance of the rulemaking process and of interest group attempts to influence that process.

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144. Susan Webb Yackee, *Assessing Inter-Institutional Attention to and Influence on Government Regulations*, 36 BRIT. J. POL. SCI. 723, 725 (2006).

145. Parties may leave contractual gaps and ambiguities for a variety of innocuous reasons, including bounded rationality and the high transaction costs of specifying precisely all future contingencies. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989). Such gaps may also be strategic. *Id.* at 94.

146. *See generally* Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72. GEO. WASH. L. REV. 663 (2004).

147. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376 (2010).

Thanks to the Obama administration's new transparency efforts under Dodd–Frank, scholars are able to view that agency-level activity from the moment after presidential signing—well before the NPRM phase that triggers most of the Administrative Procedure Act's docketing and transparency requirements. This information, seldom available to researchers up to this point, confirms what, with the exception of a handful of studies, has been largely an intuition: The preproposal phase is a battleground for agenda setting and that battleground is dominated by regulated industry. Though this Article ends with the NPRM and thus cannot document the effectiveness of these attempts, other researchers have found such preproposal activity critical to final rule development.[148]

Countervailing voices were not entirely absent on the Volcker Rule. Angry citizens sent in letters by the thousands, potentially shading FSOC's view of the public salience of the Volcker Rule and of the relative power of relevant PIGs. But the comment letter findings are consistent with much prior research on public comment letters—they are short, angry, duplicative, and provide little, if any, useful substantive information. It is precisely this type of data that has prompted some researchers to question the efficiency and utility of informal notice and comment as a means of generating public input.[149]

Other countervailing voices include PIGs, academics, and three individuals involved in crafting the original legislation—Senators Merkley and Levin and Paul Volcker. This latter group, as suggested by prior research, may be a particularly effective counterweight to regulated industry.

Finally, there is a notable lack of countervailing voices within the financial industry itself. Industry segments, such as institutional investors, that might (based on press reports and the legislative history) be expected to fight any weakening of Volcker Rule protections that supposedly accrue to their benefit are almost entirely absent from the preproposal stage. Whether this is because the benefits of the legislation to those parties was overstated, or because, for whatever reason, they have found it unnecessary to join in Volcker Rule administrative activity during the preproposal phase is unclear, though research on later rulemaking stages should shed light on this question.

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148. *See, e.g.*, Keith Naughton et al., *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258 (2009).

149. Benjamin & Rai, *supra* note 113, at 74–75; DeFigueiredo, *supra* note 102, at 992–93.

Table 1: Number of Comments by Submitter

Private Individuals	1,281	93.2%
Private Individuals Using Public Citizen Form	766	55.7%
Private Individuals Not Using Public Citizen Form	515	37.5%
Industry Trade Groups	26	1.9%
Asset Management	16	1.2%
Public Interest, Research, Advocacy, and Labor Groups	14	1.0%
Academics/Public Intellectuals	12	0.9%
Insurance Companies/Employee Benefits	10	0.7%
Financial Institutions	8	0.6%
Congress	7	0.5%
Total	**1,374**	**100%**

Table 2: Word Count Statistics

	Average Comment Length (Words per Comment)	Total Words
Longest Comment		19,500
Shortest Comment		1
All Private Individuals	187	239,547
Private Individuals Not Using PIG Form	86	44,290
Academics/Public Intellectuals	1,522	18,264
Asset Management	2,055	32,880
Congress	2,651	18,557
Insurance Companies/Employee Benefits	2,761	27,610
Public Interest, Research, Advocacy, and Labor Groups	3,465	48,508
Financial Institutions	3,852	30,816
Industry Trade Groups	4,027	104,702
All	379	520,884

Table 3: Financial Institution Meetings with Federal Agencies to Discuss the Volcker Rule, July 26, 2010 to October 11, 2011

Organization	Treasury	CFTC	SEC	Federal Reserve	FDIC	Total	%
J.P. Morgan Chase	8	2	6	11		27	7.7
Goldman Sachs	7	2	7	6		22	6.3
Morgan Stanley	2	2	7	6	2	19	5.4
Bank of America	2	2	5	6		15	4.3
Barclays	2	2	4	6		14	4
Credit Suisse	2	1	6	5		14	4
Citigroup	2	1	4	6		13	3.7
BNY Mellon	4	1	4	2		11	3.1
RBC	1		5	4	1	11	3.1
State Street	2	1	4	4		11	3.1
Deutsche Bank	1	2	3	3		9	2.6
GE Capital	3		3	3		9	2.6
BlackRock	3		3	2		8	2.3
Wells Fargo	2	1	3	1		7	2
BB&T	2		1	2	1	6	1.7
BNP Paribas		3	1	1		5	1.4
Prudential	1		2	2		5	1.4
MetLife	1		2	1		4	1.1

RBS	2	1	1	4	1.1
UBS	1	1	2	4	1.1
HSBC	1		2	3	0.9
Northern Trust	1	1	1	3	0.9
PNC Financial	1	1	1	3	0.9
Principal Financial Group	1	1	1	3	0.9
Silicon Valley Bank Financial Group		1	2	3	0.9
Sun Trust	1	1	1	3	0.9
U.S. Bancorp	1	2		3	0.9
Allstate		2		2	0.6
Ameriprise Financial	1	1		2	0.6
Brown Brothers Harriman	1		1	2	0.6
Edward Jones		2		2	0.6
Harris Bank	1	1		2	0.6
ING		1	1	2	0.6
Lincoln Financial	1		1	2	0.6
Millennium Partners	1	1		2	0.6
Nationwide	1		1	2	0.6
Nomura	1		1	2	0.6
Pyramis Global Advisors	1	1		2	0.6

Societe Generale		1	1		2	0.6
T. Rowe Price	2				2	0.6
The Hartford	1			1	2	0.6
TIAA-CREF	1			1	2	0.6
Zions Bank	1		1		2	0.6
AIG			1		1	0.3
Alexandra & James LLC			1		1	0.3
Alliance Bernstein Special Opportunities and Advisory Services	1				1	0.3
Allianz	1				1	0.3
Arab Bank Plc				1	1	0.3
Atlanta Capital Management		1			1	0.3
AXA Financial			1		1	0.3
Banco Itau BBA				1	1	0.3
BancWest Corp			1		1	0.3
Bank of Montreal				1	1	0.3
BankcorpSouth			1		1	0.3
Brevan Howard	1				1	0.3
BTM UFJ				1	1	0.3
Cantor Fitzgerald			1		1	0.3

Capital Research and Management	1				1	0.3
Capstone	1				1	0.3
Carlyle	1				1	0.3
Charles Schwab & Co.	1				1	0.3
CIBC World Markets Corp.				1	1	0.3
City National Bank			1		1	0.3
Comerica Inc.	1				1	0.3
Commerzbank AG				1	1	0.3
Credit Agricole				1	1	0.3
Crossroads Strategies LLC	1				1	0.3
Davidson Companies			1		1	0.3
Discovery Capital Management	1				1	0.3
Dodge & Cox	1				1	0.3
Estrada Hinojosa			1		1	0.3
Fidelity			1		1	0.3
Fifth Third Bancorp	1				1	0.3
Glenview Capital	1				1	0.3
Highfields Capital	1				1	0.3
Hovde Capital	1				1	0.3
Huntington Bancshares Incorporated	1				1	0.3

ICAP			1	1	0.3
Janney Montgomery Scott		1		1	0.3
Jefferies		1		1	0.3
John Hancock	1			1	0.3
KeyBank National Association	1			1	0.3
Knight Capital Group		1		1	0.3
Loomis, Sayles & Company		1		1	0.3
Lord Abbett & Co.		1		1	0.3
LPL Financial		1		1	0.3
M.R. Beal & Company		1		1	0.3
MasterCard		1		1	0.3
Mitsubishi UFJ Financial Group, Inc.			1	1	0.3
Mizuho Corporate Bank, Ltd.			1	1	0.3
Moore Capital Management	1			1	0.3
National Australia Bank			1	1	0.3
National Bank of Pakistan			1	1	0.3
Natixis Global Asset Management			1	1	0.3
New York Life			1	1	0.3
Nomura Holding America		1		1	0.3

Pershing LLC (BNY Mellon subsidiary)			1		1	0.3
PIMCO	1				1	0.3
PioneerPath Capital	1				1	0.3
Protective Life Corp.			1		1	0.3
Putnam Investments	1				1	0.3
Raymond James Financial			1		1	0.3
Round Table IMC	1				1	0.3
Scott & Stringfellow LLC (BB&T Affiliate)			1		1	0.3
Soros Fund Management LLC	1				1	0.3
Standard Chartered Bank				1	1	0.3
Stephens Inc.			1		1	0.3
Stifel, Nicolaus & Company			1		1	0.3
SVB Financial Group		1			1	0.3
Swiss Re			1		1	0.3
TD Bank	1				1	0.3
Thomson Reuters				1	1	0.3
Thrivent	1				1	0.3
Tolleson Wealth Management				1	1	0.3
Toyota			1		1	0.3

Tudor Investment Corporation	1			1	0.3
UnionBanCal Corp			1	1	0.3
Unum			1	1	0.3
USAA	1			1	0.3
Webster Bank			1	1	0.3
Wellington Asset Management		1		1	0.3
Western Asset Management Co.	1			1	0.3
Wiley Bros.			1	1	0.3
Total				**351**	**100%**

Table 4: Federal Agency Meetings with Law Firms to Discuss the Volcker Rule, July 26, 2010 to October 11, 2011

Organization	Treasury	CFTC	SEC	Federal Reserve	FDIC	Total	%
Sullivan & Cromwell	2	2	2	4	1	11	31.4
Davis Polk		3	3	3		9	25.7
Debevoise & Plimpton	3		2	3		8	22.9
WilmerHale	1			1		2	5.7
Barnett, Sivon & Natter			1			1	2.9
Cleary Gottlieb Steen & Hamilton				1		1	2.9
Haynes & Boone, LLP				1		1	2.9
Schiff Hardin			1			1	2.9
Skadden Arps				1		1	2.9
Total						**35**	**100%**

Table 5: Federal Agency Meetings with Trade Associations, Lobbyists, or Policy Advisors to Discuss the Volcker Rule, July 26, 2010 to October 11, 2011

Organization	Treasury	CFTC	SEC	Federal Reserve	FDIC	Total	%
SIFMA		4	3	1		8	24.2
Financial Services Roundtable			2	2	1	5	15.2
American Council of Life Insurers	1		1	1		3	9.1
ABA Securities Association	1			1		2	6.1
AIMA (Alternative Investment Management Association)	1		1			2	6.1
Clearinghouse Association	1			1		2	6.1
Institute of International Bankers				2		2	6.1
Managed Funds Association					2	2	6.1
Foreign Exchange Committee Chief Dealers Working Group				1		1	3.0
Greg Wilson Consulting			1			1	3.0
ISDA		1				1	3.0
Private Equity Growth Capital Council	1					1	3.0
The Financial Services Forum			1			1	3.0
Washington Analysis		1				1	3.0
Woodbine Associates			1			1	3.0
Total						**33**	**100%**

Table 6: Federal Agency Meetings with Public Interest, Labor, Research, and Advocacy Groups to Discuss the Volcker Rule, July 26, 2010 to October 11, 2011

Organization	Treasury	CFTC	SEC	Federal Reserve	FDIC	Total	%
Americans For Financial Reform	2	1	1	1		5	26.3
AFL-CIO	1	1	1			3	15.8
AFSCME	1		1			2	10.5
Demos	1	1				2	10.5
Public Citizen	1	1				2	10.5
Better Markets	1					1	5.3
Laborer's International Union of America			1			1	5.3
SEIU			1			1	5.3
Third Way Capital Markets Initiative Advisory Group (TWCMIG)	1					1	5.3
University of Massachusetts	1					1	5.3
Total						**19**	**100%**

Table 7: Federal Agency Meetings with Other Persons and Organizations to Discuss the Volcker Rule, July 26, 2010 to October 11, 2011

Organization	Treasury	CFTC	SEC	Federal Reserve	FDIC	Total	%
Senator Carl Levin and/or Staff		1	3	1		5	41.7
Senator Jeff Merkley and/or Staff		1	3	1		5	41.7
Paul Volcker and/or Staff		1		1		2	16.7
Total						**12**	**100%**

Table 8: Federal Agency Meetings to Discuss the Volcker Rule: July 26, 2010 to October 11, 2011

Financial Institutions		Law Firms Representing Financial Institutions		Financial Industry Trade Associations, Lobbyists, or Policy Advisors		Public Interest, Research, Advocacy, and Labor Groups		Other Persons and Organizations	
J.P. Morgan Chase	27	Sullivan & Cromwell	11	SIFMA	8	Americans For Financial Reform	5	Senator Carl Levin and/or Staff	5
Goldman Sachs	22	Davis Polk	9	Financial Services Roundtable	5	AFL-CIO	3	Senator Jeff Merkley and/or Staff	5
Morgan Stanley	19	Debevoise & Plimpton	8	American Council of Life Insurers	3	AFSCME	2	Paul Volcker and/or Staff	2
Bank of America	15	WilmerHale	2	ABA Securities Association	2	Demos	2		
Barclays	14	Barnett, Sivon & Natter	1	Alternative Investment Management Association	2	Public Citizen	2		
Credit Suisse	14	Cleary Gottlieb Steen & Hamilton	1	Clearinghouse Association	2	Better Markets	1		
Citigroup	13	Haynes & Boones, LLP	1	Institute of International Bankers	2	Laborer's International Union of America	1		
BNY Mellon	11	Schiff Hardin	1	Managed Funds Association	2	SEIU	1		
RBC	11	Skadden Arps	1	Foreign Exchange Committee Chief Dealers Working Group	1	Third Way Capital Markets Initiative Advisory Group	1		
State Street	11			Greg Wilson Consulting	1	University of Massachusetts	1		
Deutsche Bank	9			ISDA	1				
GE Capital	9			Private Equity Growth Capital Council	1				
BlackRock	8			The Financial Services Forum	1				
Wells Fargo	7			Washington Analysis	1				
BB&T	6			Woodbine Associates	1				
Other Financial Institutions	155								
Total	**351**		**35**		**33**		**19**		**12**
%	**78**		**7.8**		**7.3**		**4.2**		**2.7**

Figure 1. Number of Comments by Submitter

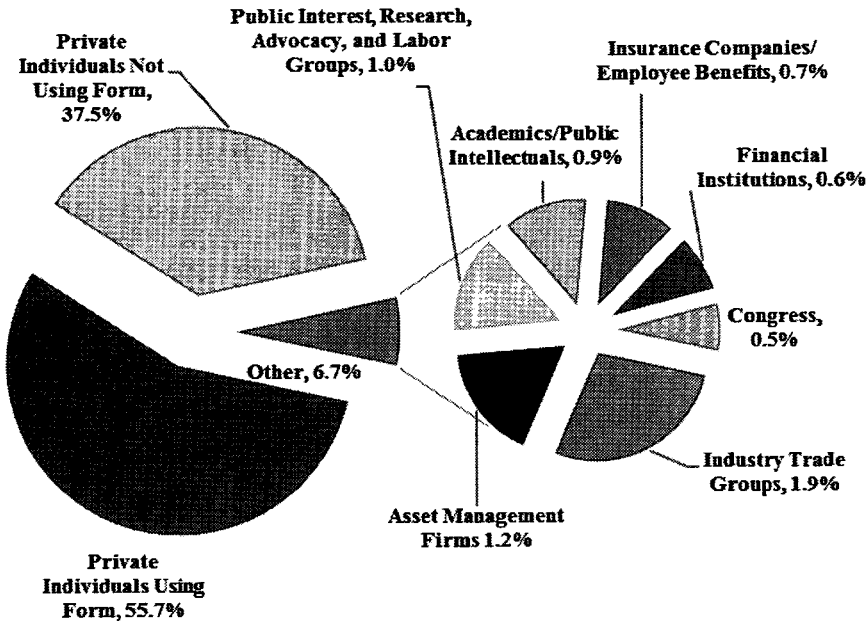


Figure 2. Word Counts By Submitter

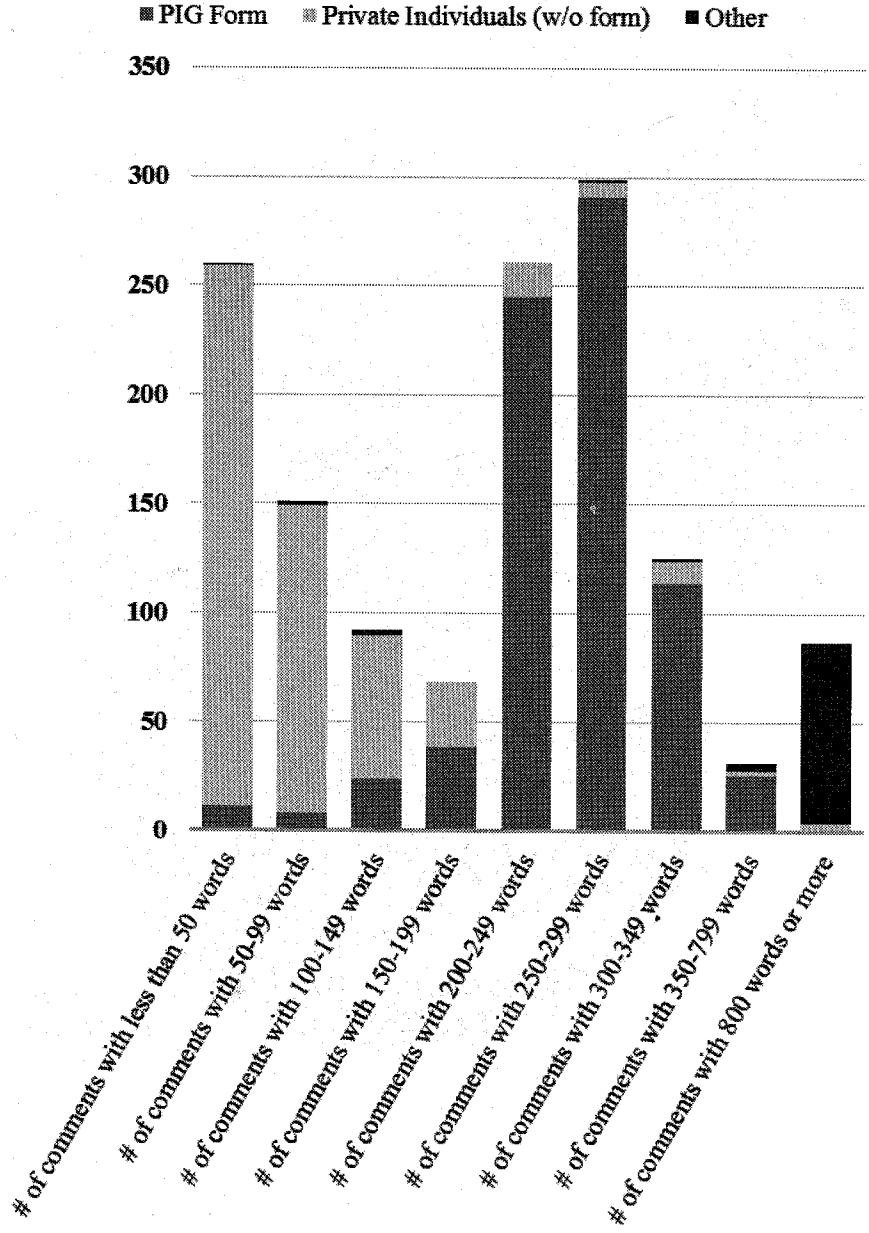
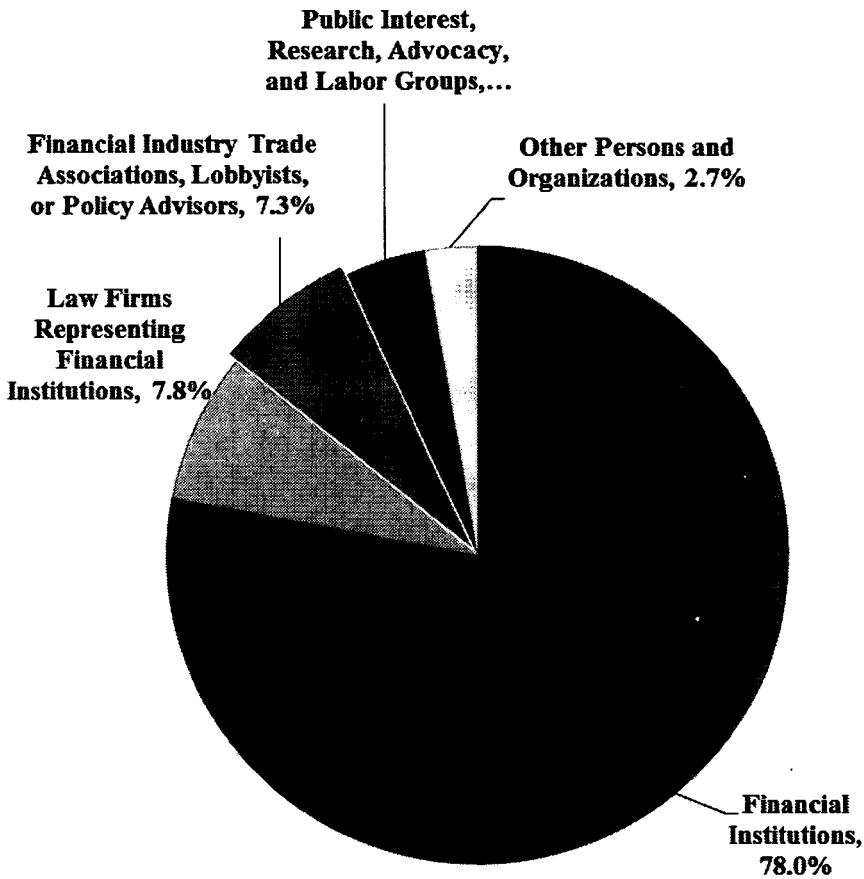


Figure 3. Federal Agency Meetings To Discuss The Volcker Rule: July 26, 2010–October 11, 2011



Appendix: Public Interest Group Form Letter

Just two years after the Wall Street banks were bailed out and just three months after we passed a tough new law to rein them in, the Wall Street bankers want weak regulations so they can keep making risky bets with your money.

Because of the upcoming election, the banks thought nobody would notice that they redeployed their army of more than 1,500 lobbyists to try to weaken the new rules as they're being written.

They were wrong. We noticed. And we need your help to fight back.

Regulators are accepting public comments on the new law's important "Volcker rule." The rule is named for a vocal White House official who called on Congress to stop banks from making risky bets for their own profit while relying on taxpayer bailouts if the bets go bad.

Here's how you can help:

1. Follow this link, and you'll get to the page where you can submit a comment about the Volcker rule.

2. Next, cut and paste the SAMPLE COMMENT that follows this message into the comment box. Fill out all the required information.

3. In the required field that asks for your "Organization Name" write "PUBLIC CITIZEN MEMBER."

4. Click "Submit."

The banks have already submitted their regulatory comments. Now it's our turn!

The Volcker rule will prevent banks from trying to make a quick buck by betting—and possibly losing—trillions of dollars and leaving you with the tab.

It's your money that the regulators should be protecting, not the big banks' risky practices.

Follow this link to submit your comment.

Please copy and paste the SAMPLE COMMENT below. Feel free to edit it and add your perspective on the economic crisis:

RE: Docket ID: FSOC-2010-0002—Public Input for the Study Regarding the Implementation of the Prohibition on Proprietary Trading and Certain Relationships With Hedge Funds and Private Equity Funds.

Dear Members of the Financial Stability Oversight Council:

I am writing as a concerned citizen affected by the financial meltdown and bailouts caused by Wall Street banks' high-risk trading. I am submitting this comment pursuant to the Financial Stability Oversight Council's (FSOC) request for comment on Sections 619–621 of the Wall Street Reform and Consumer Protection Act.

Banks should be in the business of lending to America's small businesses and families, not using our money to run a private casino where the House always wins. We never again want to be left on the hook for bad bets by Wall Street.

I urge regulators to implement a strong Volcker Rule:

1) Don't let the exceptions swallow the rule. If banks are profiting from swings in prices, that's prohibited proprietary trading, plain and simple.

2) The rule cannot allow hedge fund bailouts. Bear Stearns ended up spending $3 billion bailing out a hedge fund in which it had invested just $35 million.

3) Regulators must ban any activity that allows banks to bet against their customers, or for that matter creates any material conflict of interest between banks and their customers. Regulators should investigate the full range of ways that Wall Street insiders are profiting at the expense of the rest of us, collect all the trading data needed to monitor the system and protect taxpayers, and then use their new powers to crack down on abuses.

Thank you for your consideration of my views.

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