

## THE VOLCKER RULE: A BRIEF POLITICAL HISTORY

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### I. INTRODUCTION

On December 10, 2013, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (the “Fed”), the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC) (hereafter, collectively referred to as the “Volcker Agencies”) adopted final regulations (the “Final Rule”) to implement section 619 of the Dodd-Frank Act, popularly known as the “Volcker rule.” The Final Rule arrived more than two years after the proposed rule and more than three years after Dodd-Frank signing.

Full Volcker rule implementation will take even longer. Recently, for example, the Fed granted banking entities an extension until July 21, 2017, to conform ownership interests in and relationships with certain “legacy” covered funds.<sup>1</sup> And, in a controversial move that President Obama has threatened to veto, House republicans (who uniformly opposed Dodd-Frank) were joined by 29 democrats to pass a bill that would extend that date to 2019.<sup>2</sup>

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<sup>1</sup> Board of Governors of The Federal Reserve System, Order Approving Extension of Conformance Period Under Section 13 of the Bank Holding Company Act (Dec. 18, 2014).

<sup>2</sup> H.R.37 - Promoting Job Creation and Reducing Small Business Burdens Act, 114th Congress (2015-2016).

While federal regulators and others defend these extensions as necessary to ease compliance burdens and avoid market disruptions caused by banks dumping covered assets into the marketplace, critics, including Paul Volcker, attack the changes as unnecessary industry concessions. Said Rep. Maxine Waters (D-Los Angeles): "Somehow, Wall Street bankers, the supposedly smartest people in the room, can't seem to comply with a law passed in 2010 by ... 2017. . . Seven long years isn't enough. The Republicans and the banks want nearly a decade."<sup>3</sup>

Volcker expressed similar sentiments, saying:

It is striking that the world's leading investment bankers, noted for their cleverness and agility in advising clients on how to restructure companies and even industries however complicated, apparently can't manage the orderly reorganization of their own activities in more than five years. . . Or, do I understand that lobbying is eternal, and by 2017 or beyond, the expectation can be fostered that the law itself can be changed?<sup>4</sup>

As this article will demonstrate, recent debates over compliance dates are merely the latest in a long-running dispute over the contours and coverage of the Volcker rule. In part, of course, the long Volcker rule time line (illustrated in Figure 1) stems from the sheer complexity of the rule and the activities it seeks to regulate. But a full understanding of the many twists and turns in the Volcker rule's life requires understanding its political history as well. That history suggests that the long implementation time line, political battles over the statute's meaning and coverage, compliance hurdles, and uncertainty regarding key features of the

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<sup>3</sup> <http://www.latimes.com/business/la-fi-dodd-frank-republicans-volcker-rule-20150114-story.html>.

<sup>4</sup> Peter Eavis, *Fed's Delay of Parts of Volcker Rule Is Another Victory for Banks*, THE N.Y. TIMES DEALBOOK, (Dec. 19, 2014)

statute's reach were all presaged by the rule's political history. It also suggests that it will be many years until the full impact of the Volcker rule is understood and a complete weighing of the costs and benefits is possible.

Part II traces the birth of the Volcker rule as a political concession originally rejected by Obama administration leaders, who considered the rule both unnecessary and unworkable. Part III.A. discusses the statutory text, explaining that, for reasons both practical and political, the Volcker rule entered the rulemaking process with key issues still contested and unresolved, ensuring that disagreements regarding the rule's scope continued into the rulemaking phase. Parts III.B and C discuss the earliest part of the rulemaking phase prior to the Notice of Proposed Rulemaking ("NPRM") -- the "Pre-NPRM Period" -- analyzing agency-level lobbying efforts. An analysis of meeting logs and comment letters reveals unusually high interest in the Volcker rule, with industry participants, the general public, public interest groups, and other stakeholders weighing in on open issues.

Part IV examines the "Post-NPRM period," which extends from the NPRM to the Final Rule, observing that the high levels of interest observed during the Pre-NPRM phase of Volcker rule development continued into the final rulemaking stage. A systematic analysis of meeting logs and comment letters reveals that much of this activity involved the market making exemption. Specifically, commenters disputed how broadly the exemption should be interpreted and applied, the extent to which limitations on banks' abilities to make markets would reduce market liquidity, and the likely costs of any such reduction, should it occur. Part V concludes.

## II. THE BIRTH OF THE VOLCKER RULE

The legislation that would eventually become Dodd-Frank was born of the Great Recession when, on June 17, 2009, President Barack Obama outlined a basic framework of financial reform, which was followed by a more substantial Treasury Department proposal.<sup>5</sup> The Volcker rule was not part of that proposal – indeed, only one sentence of the Treasury Department’s initial 89-page proposal even addressed proprietary trading.<sup>6</sup>

But the Administration’s proposed financial reforms initially faced opposition from both the political left and right. Conservative republicans opposed the law as a “big government” tool that entrenched “too big too fail.” Liberals, meanwhile, complained that the proposed law was too soft on the big banks and failed to do enough for the consumers and working classes that had been hard hit by the recession.<sup>7</sup>

In order to gain the necessary support, therefore, the Obama administration was forced to make a number of concessions and revisions. One such revision was the addition of a provision -- the Volcker rule -- that would limit banks’ ability to engage in proprietary trading and to invest in or sponsor hedge or private equity funds. The brainchild of former Federal Reserve Chairman Paul Volcker, the Volcker rule was first floated in a January 2009 Group of Thirty report, but was not

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<sup>5</sup> [https://www.whitehouse.gov/the\\_press\\_office/Remarks-of-the-President-on-Regulatory-Reform/](https://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/)

<sup>6</sup> 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](http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf).

<sup>7</sup> David Skeel, *THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD– FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES* 3 (2011).

embraced at the time, either by the Obama Administration or by Congressional lawmakers.<sup>8</sup> Indeed, influential members of the Obama Administration, including Tim Geithner and Larry Summers, actively resisted the Volcker rule, believing that Dodd-Frank's new provisions governing systemically important institutions were sufficient to control risky bank behavior.<sup>9</sup>

As the effects of the economic recession lingered into 2010 and public discontent continued unabated, however, Administration officials reportedly began to reevaluate Paul Volcker's proposals to limit bank proprietary trading and fund activity. On January 21, 2010, President Obama, with Paul Volcker by his side, publicly announced his support for the Volcker rule.<sup>10</sup>

In other words, the Volcker rule originated as a political concession. Dismissed by critics (including economists within the Obama administration) as unnecessary and unwieldy, it nonetheless became a key tool in a package of reforms designed to placate Wall Street critics who contended that Dodd-Frank did not do enough to contain risky financial institution behavior. As will be discussed in the following section, however, for both practical and political reasons the Volcker rule that emerged from the legislature left key contested issues unresolved and delegated broad authority to federal agencies, ensuring that debates about the proper scope of the rule continued into the rulemaking phase.

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<sup>8</sup> Group Of Thirty, *Financial Reform: A Framework For Regulatory Stability* (2009), available at [http://fic.wharton.upenn.edu/fic/Policy%20page/G30 Report.pdf](http://fic.wharton.upenn.edu/fic/Policy%20page/G30%20Report.pdf).

<sup>9</sup> Skeel, *supra* note 7, at 54–57; 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.

<sup>10</sup> 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>.

### III. FROM STATUTE TO PROPOSED RULE – THE PRE-NPRM PERIOD

#### A. Text

Subject to important exceptions, the Volcker rule prohibits “banking entities” (a defined term) from engaging in proprietary trading and from acquiring or retaining any equity, partnership, or other ownership interest in or sponsoring a hedge fund or a private equity fund. Although systemically important nonbanks may continue to engage in these activities, they must carry additional capital and comply with other restrictions in order to do so, rendering the rule of interest to many large nonbank entities as well.<sup>11</sup>

Both parts of the Volcker rule—the ban on proprietary trading and the restrictions on fund investment and sponsorship—required extensive agency definition and rulemaking and, even now, pose open issues. With respect to the ban on proprietary trading, for example, simply closing proprietary trading desks at affected firms is an easy enough matter. Even before the Volcker rule, stand-alone proprietary trading activity accounted for a relatively small portion of banking entity revenues.<sup>12</sup> But banks often take proprietary positions in the course of performing other activities explicitly permitted by the Volcker rule and which constitute an important part of the financial system, including market making, underwriting, hedging, and customer service. Effective Volcker rule implementation

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<sup>11</sup> 12 U.S.C. § 1851(a)(2) (2010).

<sup>12</sup> 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* 16 (2011), available at <http://www.gao.gov/new.items/d11529.pdf>.

and enforcement thus requires differentiating forbidden proprietary trading activity from these permitted behaviors.

And therein lies much of the political tension and practical difficulty surrounding the Volcker rule. Critics warn that overly broad definitions or enforcement will curtail valuable efforts at market making or customer service, especially in thin markets, reducing market liquidity and impairing other beneficial functions performed by many banking entities. Supporters, in contrast, worry that regulated entities will seek to disguise risky proprietary activity as a permitted exemption, and urge the agencies to narrowly interpret statutory exemptions and strictly enforce the proprietary trading ban.<sup>13</sup>

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 other interested parties.

### *B. Meetings*

Efforts to influence the Volcker rule at the agency level began immediately after presidential signing. As part of the new transparency efforts associated with Dodd–Frank implementation, the Volcker Agencies, together with the Treasury Department, began disclosing their contacts regarding Dodd–Frank shortly after the

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<sup>13</sup> See *infra* notes 28-33 and accompanying text (discussing these arguments in more detail).

bill was signed into law in July 2010.<sup>14</sup> These logs give some insight into the work of Dodd–Frank statutory interpretation and implementation that goes on behind closed doors. They also demonstrate the extent to which unresolved debates about the proper scope of the Volcker rule’s application and exemptions, many of which remain unresolved today, continued into the rulemaking phase.

Table 1 and Figure 2 show the federal agency meetings at which the Volcker rule was discussed during what we refer to as the “Pre-NPRM Period” – the period between July 21, 2010, the date of presidential signing, and October 11, 2011, the date of the Notice of Proposed Rulemaking (NPRM). There were nearly 450 total meetings, the vast majority of which were with some sort of financial entity (for example, a bank, asset management entity, or insurance company) or the representative of such entity (for example, an industry trade group, law firm, or lobbying consultant). J.P. Morgan Chase, Goldman Sachs, and Morgan Stanley met with federal agencies most frequently on the Volcker rule during this time period, accounting for over 15% of all federal agency meetings on the Volcker rule during this time frame.<sup>15</sup> Law firms were also very active during this time period, accounting for nearly 8% of federal agency meetings at which the Volcker rule was discussed. Of industry trade group meetings during the pre-proposal period, SIFMA

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<sup>14</sup> 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/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).

<sup>15</sup> See generally, Kimberly D. Krawiec, *Don’t “Screw Joe the Plummer”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013) (breaking down pre-NPRM data in more detail).



(the Securities Industry and Financial Markets Association) and the Financial Services Roundtable met most frequently with federal agencies, accounting for 40% of trade group meetings with regulators. Congressional meetings with regulators were made up solely of the Volcker rule sponsors, Senators Merkley and Levin, and their staffs.

### *C. Comment Letters*

It is unusual, though not unheard of, to request written public feedback prior to rule proposal. For example, federal agencies sometimes issue an Advanced Notice of Proposed Rulemaking (ANPRM) to solicit feedback prior to drafting a proposed rule.<sup>16</sup> The Volcker rule, however, did not follow this pattern. Although the Volcker agencies did not issue an ANPRM, Dodd-Frank required the newly formed Financial Stability Oversight Council (FSOC) to conduct a study and make recommendations on effective Volcker rule implementation not later than six months after the date of statute enactment.<sup>17</sup> Pursuant to that directive, beginning on October 6, 2010, FSOC solicited public input for a thirty-day period in advance of the study.<sup>18</sup> We thus have a record of public comment activity prior to the Volcker rule NPRM, giving an additional window into agency-level lobbying from the earliest stages of Volcker rule development.

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<sup>16</sup> Office of the Federal Register, A Guide to the Rulemaking Process, “How does an agency involve the public in developing a proposed rule?” [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

<sup>17</sup> 12 U.S.C. § 1851(b)(2010).

<sup>18</sup> *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 Federal Register 61758 (October 6, 2010).

FSOC's first action as a new council was to request public input on Volcker rule implementation—a request that, as demonstrated by Table 2 and Figure 3, resulted in more than 8,000 comments. 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.<sup>19</sup> 8000 comments during a thirty day period in advance of a rule proposal is, therefore, a surprisingly high level of comment activity and suggests that the Volcker rule was a high salience issue, even at this early stage.

Of these 8,000 comment letters, FSOC concluded that roughly 6,550 “were substantially the same letter arguing for strong implementation of the Volcker Rule.”<sup>20</sup> In prior work, one of the present authors analyzed and hand-coded the remaining, roughly 1,450, comment letters, concluding that the exclusion of duplicate comment postings left a total of 1,374 comments, of which 1,281, or 93%, were submitted by private individuals. The remainder was submitted by financial industry members, industry trade groups, public interest groups, academics, and congressional members.

A further breakdown of the 1,281 letters submitted by private individuals reveals several interesting patterns. First, contrary to “setting forth an individual perspective,” as concluded by FSOC, over half (nearly 56%) of these comments use

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<sup>19</sup> Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 950–59 (2006) (summarizing empirical studies of rulemaking activity).

<sup>20</sup> Fin. Stability Oversight Council, *Study & Recommendations On Prohibitions On Proprietary Trading & Certain Relationships With Hedge Funds & Private Equity Funds* 10 (2011).

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 sharing some personal experience with the financial crisis or use only a portion of the form letter, thus escaping 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 private individual comment activity.<sup>21</sup>

Second, these data reinforce a number of points highlighted by the earlier discussion, in Part II, of the Volcker rule’s political history. The Volcker rule entered the rulemaking phase with important, contested points yet to be decided. A variety of stakeholders, including financial institutions and the general public, participated in the rulemaking process, from the earliest stage, in an attempt to influence the shape of the Final Rule. This is in stark contrast to most rulemakings, which receive only a limited number of comments, very few of which emanate from private individuals.

Yet the method by which stakeholders participated in the Pre-NPRM stage of Volcker rulemaking differs. Financial institutions and their representatives were most active in face-to-face agency meetings and were less active in comment letter writing, both as compared to private individuals and as compared to financial institution letter writing in the post-NPRM period (discussed in Part IV). Private individuals, in contrast, while surprisingly active in letter writing, were wholly

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<sup>21</sup> See, e.g., Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 449 (2005).

absent from agency meetings. At the same time, the vast majority of letters from private individuals were form letters. And unique individual letters were far from sophisticated. Comments from the general public were short—the average word count (excluding form letters) is only 86, and roughly half of the comments, again excluding form letters, are less than 50 words. Few, if any, contain specific substantive suggestions for interpreting and implementing the Volcker Rule.<sup>22</sup>

#### IV. FROM PROPOSED RULE TO FINAL RULE – THE POST-NPRM PERIOD

On October 11, 2011, the Volcker Agencies, other than the CFTC, issued a Notice of Proposed Rulemaking (NPRM) requesting comments on proposed rules to implement the Volcker legislation prior to January 13, 2012. That deadline was later extended to February 13, 2012. The CFTC, by a vote of 3–2, adopted the entire text of the Volcker Agencies’ proposed rule in an NPRM dated February 14, 2012, requesting comments prior to April 16, 2012. Comments on the Volcker rule were collected in a single OCC docket on Regulations.gov.<sup>23</sup> Each agency, as well as the Treasury Department, also maintained separate logs documenting meetings set up for the purpose of discussing the Volcker rule.

As will be shown, the high levels of interest in the Volcker rule evident from the pre-NPRM period continued into the post-NPRM phase. Participants included affected industry members, industry trade groups, and their representatives, as well as private individuals, public interest groups, academics, foreign and domestic government entities and agencies, and members of Congress. This represents an even greater diversity of participants in the comment letter process than was seen in the pre-NPRM period.

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<sup>22</sup> Krawiec, *supra* note 15 (discussing the pre-NPRM data in more detail).

<sup>23</sup> See, Volcker Rule - Prohibition on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds, Docket ID: OCC-2011-0014 (available at, <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=OCC-2011-0014>).

### *A. Meetings*

During the period between Oct. 11, 2011, the date of the NPRM, and December 10, 2013, the date of final rule issuance, there were 947 meetings with federal agencies to discuss the Volcker rule, as shown in Table 1. Of these, as shown in Figure 4, the vast majority of meetings were with financial institutions and their representatives (law and consulting firms and industry trade groups), followed by members of other affected industries, such as asset management and insurance companies, and their trade associations, law, and consulting firms.

Although nonindustry voices were represented, they were far less numerous, both as compared to industry voices and as compared to their representation in the comment letter analysis discussed in Part IV.B, below. Roughly 11% of meetings were held with public interest groups, less than 2% with academics, and just under 5% with foreign (3.1%) and domestic (.3%) government entities and members of congress or their staff (1.3%). Though the percentage of meetings commanded by nonindustry stakeholders is relatively small, as is evident from the side-by-side comparison in Table 1, both public interest groups and academics command a larger share of meetings in the post-NPRM period, as compared to the pre-NPRM period. Moreover, foreign and state governments are seen only in the post-NPRM data, suggesting that the Volcker Agencies had access to a wider range of viewpoints during the post-NPRM period than in the pre-NPRM phase.

### *B. Comments*

The unusually high volume of comment letter activity seen during the Volcker rule pre-NPRM phase carried through to the post-NPRM phase. As shown by Table 3, the Volcker Agencies received nearly 18,500 comments during the post-NPRM period. Letters from private individuals far outpace participation by any other group, representing 98% of total letters received (n=18,109).

As was the case during the pre-NPRM period, however, the vast majority of comments are form letters from the general public. This is demonstrated by Table 3 and Figure 5.A. – of the 18,450 letters received, only 381 (or just over 2%) were

unique, as opposed to form, letters.<sup>24</sup> Although individuals were the most frequent users of form letters, submitting three different varieties totaling 18,039 comments, we also identified the use of form letters by affected industry members, specifically insurance companies and venture capital firms.

Looking only at unique comment letters, shown in figure 5.B., although industry players dominate, private individual and congressional member comments are nearly as numerous. Moreover, public interest groups, academics, foreign and state governments, and others also provided unique comment letters.

### *C. Content*

What issues were being raised in these letters? The Agencies themselves provide much information on this question, in Attachment B to the Adopting Release of the final rule.<sup>25</sup> This information is selective, however, and does not provide a systematic and inclusive account of comment letter content. We, therefore, systematically coded the comment letters for content, using sorting software to analyze the results. We were interested not only in the types of issues raised and the changes to the rule suggested, but also in which types of commenters made which suggestions, and what sort of persuasive tactics they employed. Elsewhere, we discuss this analysis in more detail.<sup>26</sup> Here, however, we focus on the issue most often raised by commenters – the market making exemption.

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<sup>24</sup> The Volcker Agencies counted 600 unique comment letters. We believe that our count is more accurate, however, as the agency count identifies some industry form letters as unique and appears to double count what are actually copies of the same letter. See Office of the Comptroller of the Currency, Treasury (“OCC”); Board of Governors of the Federal Reserve System (“Board”); Federal Deposit Insurance Corporation (“FDIC”); and Securities and Exchange Commission (“SEC”), *Prohibitions And Restrictions On Proprietary Trading And Certain Interests In, And Relationships With, Hedge Funds And Private Equity Funds: Final Rule, Attachment B* (Dec. 10, 2013).

<sup>25</sup> *Id.*

<sup>26</sup> Kimberly D. Krawiec & Guangya Liu, *Pointless Pluralism? An Empirical Study of Volcker Rulemaking* (unpublished draft on file with authors).

The comments addressed all major provisions of the proposed Volcker rule.<sup>27</sup> The most commonly discussed substantive provision, however, as demonstrated by Table 4, was the market-making exemption, which was addressed by nearly a third of all comment letters. Interest in the market-making exemption was broad-based – indeed, as illustrated by Table 5, every commenter type, except venture capital firms, addressed the market making exemption in comments. Nonfinancial institution commenters raised the issue most often, with 80% of letters addressing market making. Financial institutions, foreign governments, public interest groups, and lobbying firms also commonly addressed the market making exemption, raising it in nearly half of letters.

These findings are consistent with the Volcker Agencies' own comment letter analysis, which noted "the Agencies received significant comment regarding the proposed market-making exemption."<sup>28</sup> Much of that commentary involved the impact of the exemption on financial markets, with commenters disagreeing, sometimes quite aggressively, about those impacts. For example, some commenters argued that the Volcker rule, as proposed, would limit bank's ability to engage in market making, with negative effects on market liquidity, price discovery, bid-ask spreads, and capital formation.<sup>29</sup>

Others disputed these contentions. Some commenters, including Paul Volcker, argued that reduced market liquidity was a benefit, rather than a cost.<sup>30</sup> More commonly, however, commenters disputed the contention that the Volcker rule would reduce market liquidity, even if banks ultimately engaged in less market making activity. Some argued, for example, that to the extent the Volcker rule limited banks' ability to make markets, other entities not subject to the Volcker rule would pick up the slack.<sup>31</sup> Others argued that banks currently take liquidity from the

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<sup>27</sup> *Attachment B*, supra note 24 at 5.

<sup>28</sup> *Id.* at 142.

<sup>29</sup> *Id.* at 149-150.

<sup>30</sup> See, e.g., Letter of Paul Volcker.

<sup>31</sup> *Attachment B*, supra note 24 at 152 (discussing these comments).

market, by attempting “to beat” other institutional investors, and that the Volcker rule would add some market liquidity, by prohibiting such opportunism.<sup>32</sup>

Our analysis confirms this commenter interest in market liquidity issues. Table 4, for example, shows that a full 40% of commenters raised concerns about the liquidity impacts of the Volcker rule – more than any other type of economic argument that was raised. Other frequently raised concerns included arguments about the general economic costs of the Volcker rule (32% of commenters) and concerns about systemic risk or too big to fail (normally raised by commenters writing in support of the Volcker rule).

As noted above, these concerns about the liquidity impacts of the Volcker rule are closely tied to debates about the scope of the market making exemption. As shown in Table 4, some commenters (16, by our count) relied on or challenged (10 commenters) the findings of a study by Stanford economics professor Darrell Duffie commissioned by SIFMA, which enumerated a number of negative effects from the Volcker rule related to banks’ impaired ability to engage in market making, including reduced liquidity and financial system stability.<sup>33</sup>

## V. CONCLUSION

The Volcker rule has proven to be one of the most contested and protracted rulemaking tasks imposed by Dodd-Frank. Politicians, academics, market participants, and the general public continue to debate the rule’s costs and benefits

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<sup>32</sup> *Id.* See also, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J., 882, 974-78 (2015) (discussing the difficulty of assessing the costs of lost market liquidity stemming from the Volcker rule); Onnig H. Dombalagian, *The Expressive Synergies of the Volcker Rule*, 54 Boston College L. Rev. 469 (2013) (discussing the market making exemption and its potential liquidity effects in detail).

<sup>33</sup> Darrell Duffie, *Market Making Under the Proposed Volcker Rule* (January 16, 2012), available at <http://www.darrellduffie.com/uploads/policy/duffievolckerrule.pdf>.



and will likely do so for some time to come.<sup>34</sup> As this article demonstrates, this contentiousness was presaged by the rule's political history.

The Volcker rule originated, not out of a deep Obama administration commitment to the provision, but as a political concession designed to placate Wall Street critics who contended that Dodd–Frank did not do enough to contain risky financial institution behavior. In the face of deep divisions about the proper scope of the rule, it emerged from the legislature with key issues unresolved and delegated broad authority to federal agencies to determine the ultimate scope of the rule.

As a result, the Volcker rule, like many Dodd–Frank provisions, entered the administrative process both highly incomplete and highly contested, ensuring that debates about the proper scope of the statute's prohibitions continued into the rulemaking phase. Efforts to influence the Volcker rule at the agency level began immediately after presidential signing, through both meetings with Volcker agency personnel and letter writing campaigns. Those expressing an opinion on the Volcker rule's prohibitions included affected industry members, public interest groups, academics, and the general public, among others. This interest only intensified after the NPRM, when more than 18,000 separate commenters wrote in to express their views on the Volcker rule and concerned stakeholders continued face-to-face meetings with the Volcker Agencies.

It is thus not surprising that today, more than six years after the Group of Thirty report in which Paul Volcker first outlined his proposal and more than five

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<sup>34</sup> See, e.g., Roberta Romano, *Regulating In The Dark And A Postscript Assessment Of The Iron Law Of Financial Regulation*, 43 HOFSTRA L. REV. 25, 69-75 (2014) (discussing this debate and criticizing the Volcker rule and the broad delegation of Congressional authority that it represents).

years after Dodd-Frank was first signed into law, there remains much uncertainty about important aspects of the Volcker rule's application, contentious disputes about the costs and benefits of the rule, and much work still be done before the full extent of the Volcker rule's prohibitions are completely understood and a full accounting of costs and benefits can begin.

Figure 1. Volcker Rule Time Line

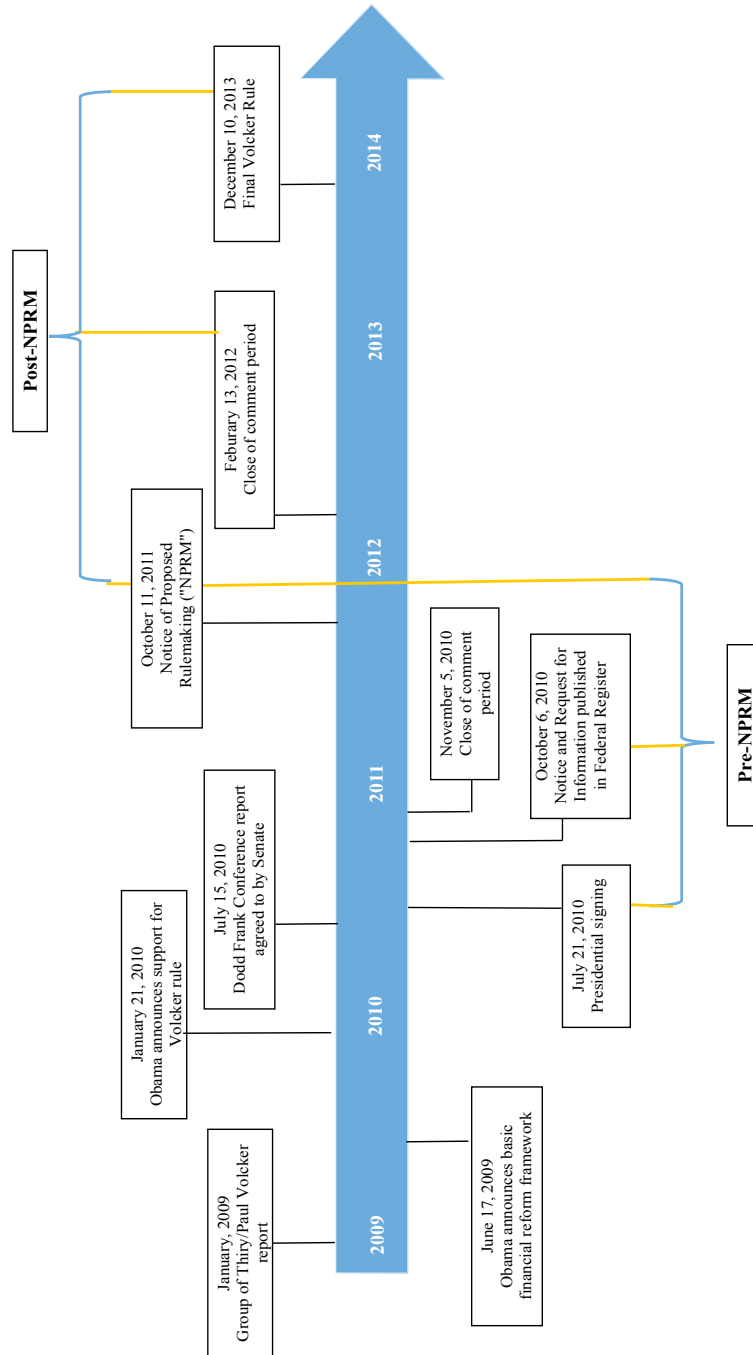


Figure 2. Pre-NPRM Meetings

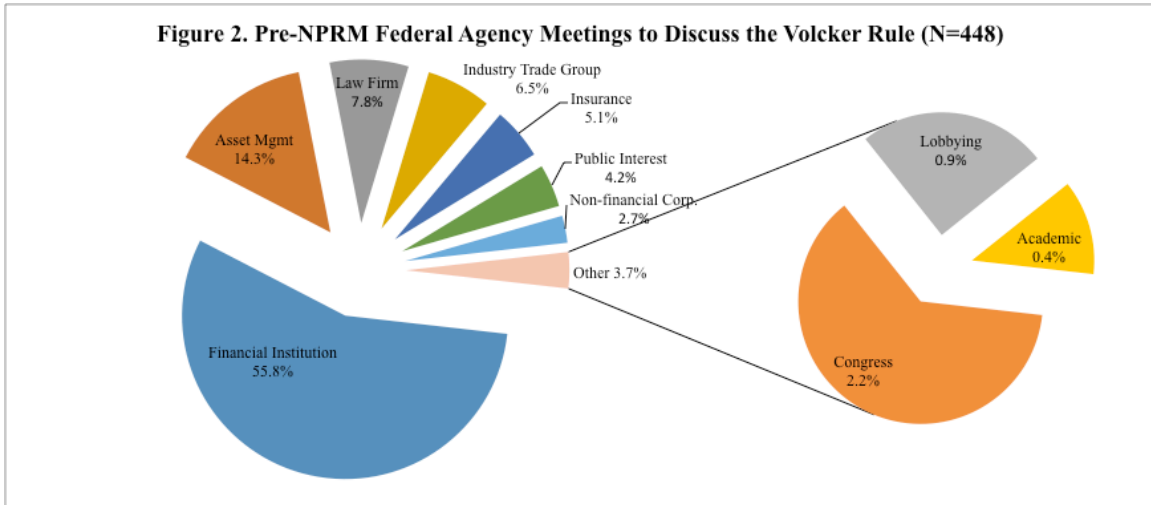


Figure 3. Pre-NPRM Comments

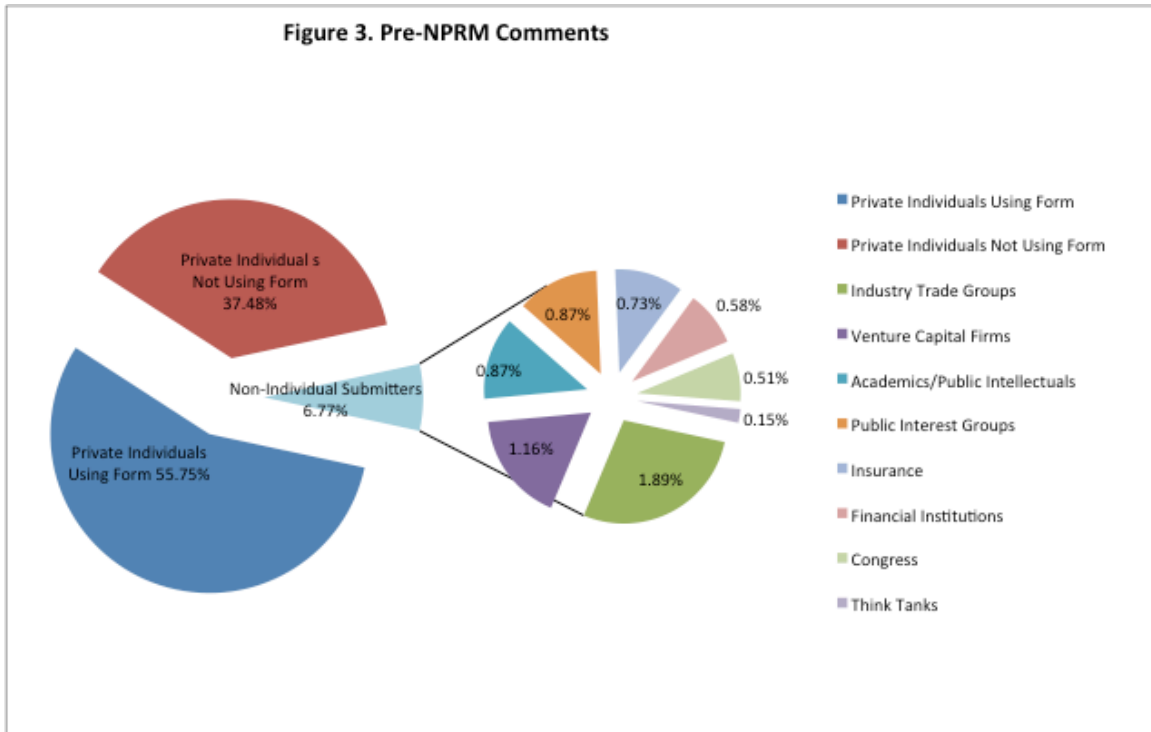


Figure 4. Post-NPRM Meetings

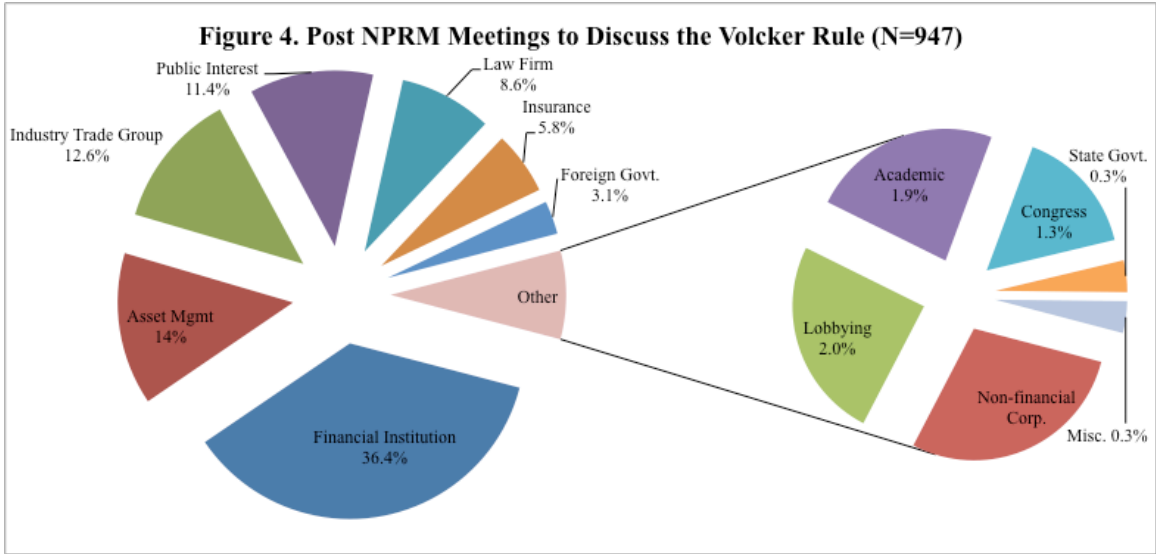


Figure 5A. Post-NPRM Comment Letters

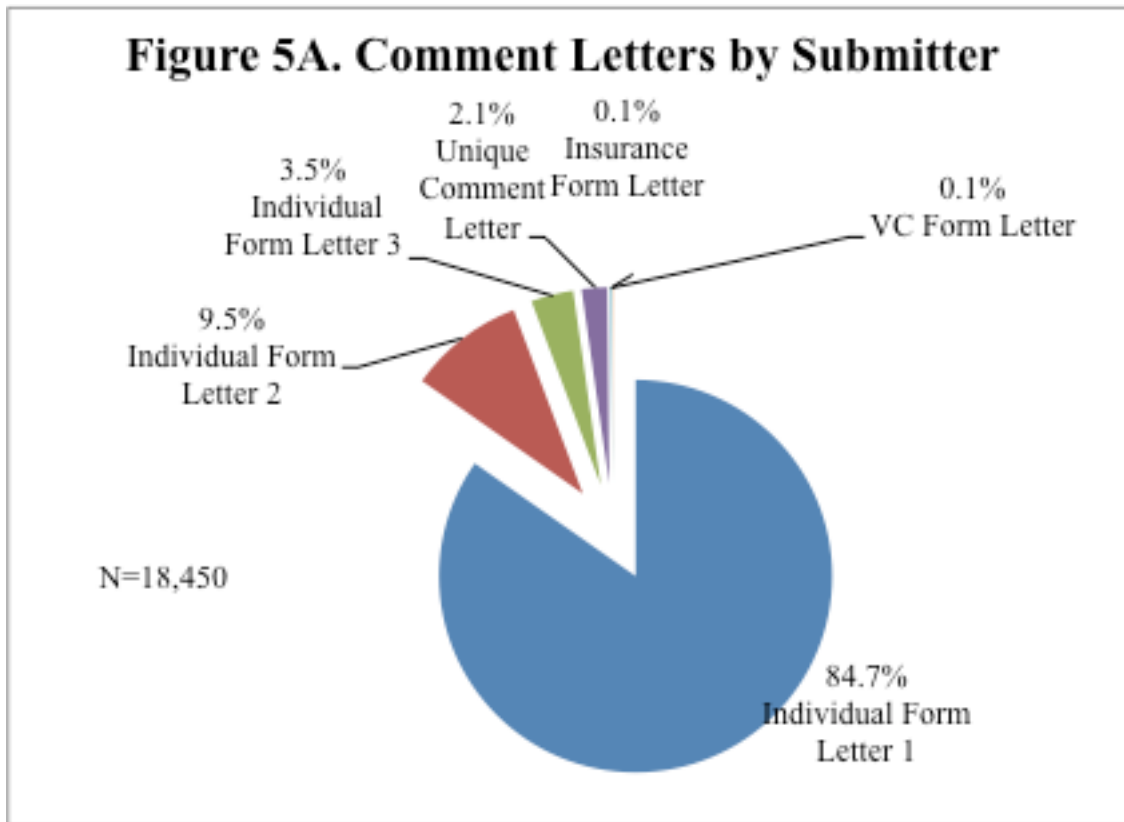
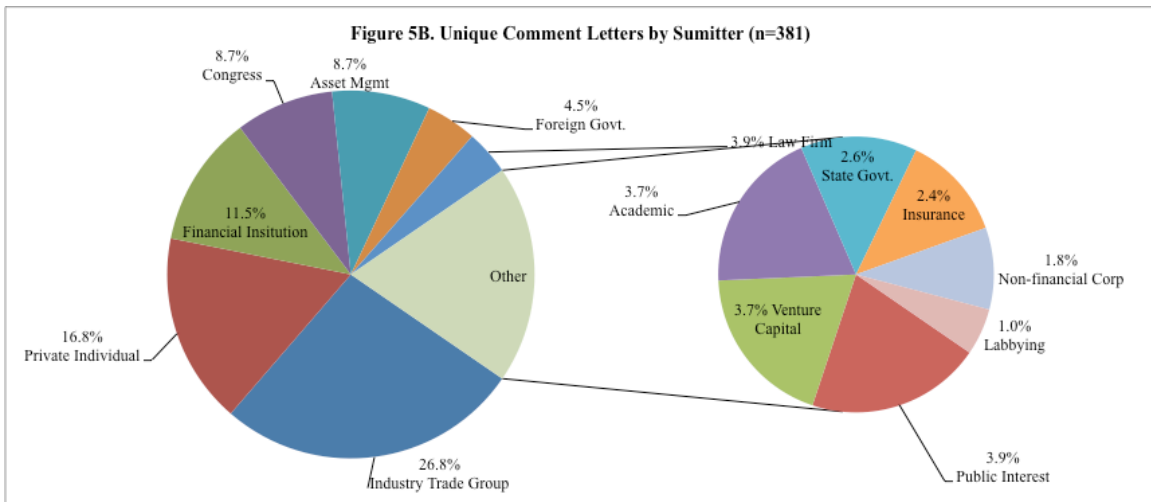


Figure 5B. Post-NPRM Unique Comment Letters





**Table 1. Federal Agency Meetings to Discuss the Volcker Rule**

<b>Pre-NPRM</b>			<b>Post-NPRM</b>		
<b>Type</b>	<b># of Meetings</b>	<b>%</b>	<b>Type</b>	<b># of Meetings</b>	<b>%</b>
Financial Institution	250	55.8	Financial Institution	345	36.4
Asset Mgmt	64	14.3	Asset Mgmt	133	14.0
Law Firm	35	7.8	Industry Trade Group	119	12.6
Industry Trade Group	29	6.5	Public Interest	108	11.4
Insurance	23	5.1	Law Firm	81	8.6
Public Interest	19	4.2	Insurance	55	5.8
Non-financial Corp.	12	2.7	Foreign Govt.	29	3.1
Congress	10	2.2	Non-financial Corp.	22	2.3
Lobbying	4	0.9	Lobbying	19	2.0
Academic	2	0.4	Academic	18	1.9
Foreign Govt.	0	0.0	Congress	12	1.3
Miscellaneous	0	0.0	State Govt.	3	0.3
State Govt.	0	0.0	Miscellaneous	3	0.3
<b>Total</b>	<b>448</b>	<b>100.0</b>	<b>Total</b>	<b>947</b>	<b>100.0</b>

**Table 2. Pre-NPRM Comment Letters**

	#	% of total	% of total unique letters
<b>Form Letters</b>			
Private Individual Using Form Letter	766	55.7	
<b>Total Form Letters</b>	<b>766</b>	<b>55.7</b>	
<b>Unique Letters</b>			
Private Individual	515		
Industry Trade Group	26		
Asset Mgmt	16		
Public Interest***	14		
Academic†	12		
Insurance	10		
Financial Institution	8		
Congress*	7		
<b>Total Unique Comment Letters</b>	<b>608</b>	<b>2.1</b>	<b>100.0</b>
<b>Total Comment Letters</b>	<b>1374</b>	<b>100.0</b>	

\*Includes members of Congress and their staff

\*\*\*Includes public interest, research, advocacy, and labor organizations

† Includes academics and public intellectuals

**Table 3. Post-NPRM Comment Letters**

	#	% of total	% of total unique letters
<b>Form Letters</b>			
Private Individual Using Form Letter 1	15,639	84.7	
Private Individual Using Form Letter 2	1,757	9.5	
Private Individual Using Form Letter 3	643	3.5	
Insurance Form Letter	20	0.1	
Venture Capital Form Letter	10	0.1	
<b>Total Form Letters</b>	<b>18,069</b>	<b>97.9</b>	
<b>Unique Letters</b>			
Industry Trade Group	102	0.6	26.8
Private Individual	64	0.3	16.8
Financial Institution	44	0.2	11.5
Congress*	33	0.2	8.7
Asset Mgmt	33	0.2	8.7
Foreign Govt.**	17	0.1	4.5
Law Firm	15	0.1	3.9
Public Interest***	15	0.1	3.9
Venture Capital	14	0.1	3.7
Academic†	14	0.1	3.7
State Govt.††	10	0.1	2.6
Insurance	9	0.0	2.4
Non-financial Corp.	7	0.0	1.8
Lobbying†††	4	0.0	1.0
<b>Total Unique Comment Letters</b>	<b>381</b>	<b>2.1</b>	<b>100.0</b>
<b>Total Comment Letters</b>	<b>18,450</b>	<b>100.0</b>	

\*Includes members of Congress and their staff

\*\*Includes Foreign governments, entities, central banks, regulatory bodies, and international organizations acting on their behalf

\*\*\*Includes public interest, research, advocacy, and labor organizations

† Includes academics and public intellectuals

†† Includes state and municipal governments, subdivisions, and officials

††† Includes lobbying or political consulting firms



## Table 4. Exemptions Raised By Comment Letters

Table 4. Issues Raised in Comment Letters (N=377)\*

Issue	Counts	%
Economic Arguments		
Liquidity-Market Impacts	151	40.1
General Economic Costs of Rule	120	31.8
Systemic Risk-TBTF	94	24.9
Financial Crisis	78	20.7
Industry Competitiveness	77	20.4
Government Subsidies	57	15.1
Small firms-Start ups	46	12.2
Taxpayer Bailouts	32	8.49
General Economic Costs of No Rule	22	5.84
Specific Institution Failures	16	4.24
Exemptions		
Market Making	111	29.4
US Govt Securities	63	16.7
Municipal Securities	60	15.9
Risk Mitigating Activities	57	15.1
Underwriting	51	13.5
Trading On Behalf Of Customers	31	8.22
Liquidity Management	20	5.31
Battle of the Experts		
Cite Duffie study favorably in Text	16	4.24
Counter cite to Duffie	5	1.33
Dispute Duffie	5	1.33

\*Four letters were determined to raise no identifiable issues

Table 5. Issues Raised By Entity Type

Issue	Industry Trade Group (n=102)	Non-Financial Company (n=7)	Financial Insurance (n=9)	Foreign Govt (n=17)	Financial Institution (n=44)	Private Individua (n=64)	Law Firm (n=15)	Asset Mgmt (n=33)	Academic (n=14)	State Govt. (n=10)	Venture Capital (n=14)	Public Interest (n=15)	Lobbying Congress (n=33)
Economic Arguments	0	0	0	0	0	0	0	0	0	0	0	0	0
Liquidity-Market Impacts	49	80	22	65	66	3	13	64	36	60	0	47	30
General Economic Costs of Rule	35	60	44	18	68	6	0	45	14	40	29	27	24
Systemic Risk-TBTF	17	0	11	29	36	20	7	27	29	30	50	47	0
Financial Crisis	16	0	0	6	14	34	7	18	43	0	0	67	25
Industry Competitiveness	27	60	11	12	41	3	0	33	14	0	29	13	0
Government Subsidies	11	0	11	18	20	19	7	12	29	0	0	40	0
Small firms-Start ups	17	40	11	0	11	2	0	6	7	10	50	13	25
Taxpayer Bailouts	1	0	0	6	7	25	0	6	7	0	0	27	0
General Economic Costs of No Rule	1	0	0	0	5	11	0	6	7	0	0	33	0
Specific Institution Failures	0	0	0	0	2	6	0	6	21	0	0	33	0
Exemptions	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>Market Making</b>	<b>28</b>	<b>80</b>	<b>11</b>	<b>41</b>	<b>50</b>	<b>8</b>	<b>7</b>	<b>48</b>	<b>21</b>	<b>40</b>	<b>0</b>	<b>47</b>	<b>50</b>
US Govt Securities	21	0	0	59	32	2	0	15	14	10	0	33	6
Municipal Securities	20	0	0	12	25	2	7	30	7	90	0	13	9
Risk Mitigating Activities	20	20	0	12	36	2	7	15	7	10	0	40	6
Underwriting	15	40	11	12	20	3	7	24	7	20	0	40	6
Trading On Behalf of Customers	9	0	22	6	20	3	0	3	7	0	0	27	3
Liquidity Management	6	20	0	18	14	2	7	3	0	0	0	7	0