Texas A&M Law Review

Volume 6 | Issue 2

3-2019

Treating Apples Like Oranges: The Benefits of Exempting Community Banks From The Volcker Rule

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COMMENTS

TREATING APPLES LIKE ORANGES: THE BENEFITS OF EXEMPTING COMMUNITY BANKS FROM THE VOLCKER RULE

*by: Gregory Butz**

ABSTRACT

In response to the Financial Crisis of 2008 and the Great Recession that followed, Congress passed the Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010. The Volcker Rule is a controversial section of the Dodd–Frank Act that prohibits all banks, no matter their size, from proprietary trading and entering into certain relationships with private equity funds. But the Volcker Rule forces banks to incur significant costs to ensure compliance. While Big Banks have the capital and infrastructure to comply with the Volcker Rule, small Community Banks often do not. This gives Big Banks an unfair competitive advantage over Community Banks. However, recently there has been renewed interest in the Volcker Rule, particularly regarding its effects on Community Banks. Both the legislative and executive branches are calling for changes to the Volcker Rule. But there is no consensus on how the Volcker Rule should be changed and what types of financial institutions those changes should affect. This Article will explore this issue. First, this Article will discuss the background of the Financial Crisis, Great Recession of 2008, Dodd–Frank, and the Volcker Rule. Second, this Article differentiates between the business models of Big Banks and Community Banks. Third, this Article examines the Volcker Rule's effect on Community Banks. Fourth, this Article will consider recent proposals for changes to the Volcker Rule by the House of Representatives, Senate, and the Department of Justice. Finally, this Article will argue that Community Banks should be exempted from the Volcker Rule, preferably by a bill recently proposed by the Senate Banking Committee.

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* J.D. Candidate, Texas A&M University School of Law, December 2018; B.M. in Music Business, Oklahoma City University, May 2011. I thank Professor Neal Newman for his guidance while writing this Article and the staff of *Texas A&M Law Review* for their assistance during the editing process. I dedicate this Article to my mother and in memory of my father. If not for their early advocacy regarding my learning differences, I would not have had the opportunity to attend law school as an adult, much less have the privilege of writing this Article.

DOI: https://doi.org/10.37419/LR.V6.I2.4

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I. Introduction

More than ten years have passed since the Great Recession of 2008, and the American economy has recovered and is thriving once more. Today, U.S. financial markets continuously reach new record highs.[1] One could give some credit for this recovery to the policymakers and regulators who enacted laws and promulgated regulations in the years following the outset of the Financial Crisis. These rules and regulations arguably do make the U.S. financial markets more secure and safer for consumers.[2] Despite the beneficial effects of these laws and regulations, they also have detrimental effects, especially on small financial institutions.[3] Indeed, even one sponsor of Dodd–Frank admits that the law places too much of a financial burden on Small Banks and could use modification to address this issue.[4] One section of Dodd–Frank in particular, the Volcker Rule, has placed a disproportionate cost on small financial institutions.[5] The Volcker Rule limits the types of investments a financial institution can make with its own capital, regardless of its size.[6]

The Volcker Rule places a disproportionate burden on Community Banks because they do not typically enter into these types of invest-

1. Sue Chang & Mark DeCambre, *Stock Market Gains as Dow Industries Mark 40th Record Close of 2017*, Market Watch (Sept. 18, 2017, 4:40 PM), http://www.marketwatch.com/story/dow-sp-500-line-up-for-fresh-records-to-start-the-week-2017-09-18 [https://perma.cc/PQE7-LHUA].

2. Walter Frick, *What You Should Know About Dodd–Frank and What Happens If It's Rolled Back*, Harv. Bus. Rev. (Mar. 2, 2017), https://hbr.org/2017/03/what-you-should-know-about-dodd-frank-and-what-happens-if-its-rolled-back [https://perma.cc/EGE4-QNUU].

3. Arthur E. Wilmarth, Jr., *A Two-Tiered System of Regulation is Needed to Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 Mich. St. L. Rev. 249, 283 (2015).

4. Saheli Roy Choudhury, *Yes, Banking Regulations Need Reform, But Don't Kill Dodd–Frank, Barney Frank Says,* CNBC (Feb. 6, 2017, 12:07 AM), https://www.cnbc.com/2017/02/06/barney-frank-dodd-frank-needs-reforms-under-trump-white-house.html [https://perma.cc/X4NE-EJZT].

5. Amanda R. Huff, *The Volcker Rule: The Prohibitions, Compliance and the Cost on the Small Bank*, 41 W. St. U. L. Rev. 81, 99 (2013).

6. *See id.*

ments but still have to pay for the costs of compliance.[7] The issue has not escaped the notice of regulators and legislatures, who have been calling for loosening regulations on Community Banks almost since the inception of Dodd–Frank.[8] This Article will explore those proposals, their potential effects, and ultimately argue for an exemption to the Volcker Rule for Community Banks.

Part II provides a brief background of the Financial Crisis and the Dodd–Frank legislation, which resulted from the crisis. Part III describes the basic framework of the Volcker Rule and the reason for its inclusion in the Dodd–Frank legislation. Part IV classifies Big Banks, Regional Banks, and Community Banks, and compares each of their different functions. Part V discusses the disproportionate burdens that the Volcker Rule places on Community Banks. Part VI contemplates the recent proposals by Congress and regulators to address these burdens. Part VII recommends the Senate's bill or Treasury Department's proposal as the best options to alleviate this problem. And finally, Part VIII concludes this Article.

II. Background

A. *The Financial Crisis of 2008*

There are many factors that led to the Financial Crisis of 2008, and the root causes are still a widely debated topic.[9] While full delineation of all the factors that led to the financial collapse is beyond this Article's purview, this Section explains how financial market deregulation has contributed to the financial collapse.

The first major piece of legislation to regulate banks was the Banking Act of 1933 ("Glass–Steagall Act").[10] Passed in response to the market crash of 1929,[11] the Glass–Steagall Act prohibited all banks from engaging in most investment and trading activities, with the exception of buying, selling, and trading of government bonds and other similar low-risk investments.[12] The Glass–Steagall Act also created the Federal Deposit Insurance Corporation ("FDIC"), which still functions today.[13] The FDIC insures consumer and business deposits

7. *Id.*

8. Alan Rappeport, *Bill to Erase Some Dodd–Frank Banking Rules Passes in House,* N.Y. Times (June 8, 2017), https://www.nytimes.com/2017/06/08/business/dealbook/house-financial-regulations-dodd-frank.html?mcubz=0 [https://perma.cc/H232-6246].

9. Devan Goldstein, *The Glass–Steagall Act: What it is and Why it Matters*, NerdWallet (May 2, 2017), https://www.nerdwallet.com/blog/banking/glass-steagall-act-explained/ [https://perma.cc/5XBR-ABSL].

10. Huff, *supra* note 5, at 84.

11. *Id.*

12. Goldstein, *supra* note 9.

13. *See Who is the FDIC?,* Fed. Deposit Ins. Corp., https://www.fdic.gov/about/learn/symbol/ (last updated May 3, 2017) [https://perma.cc/NJG7-A77N].

up to $250,000 in the event of a bank failure.[14] The Glass–Steagall Act was passed, in part, to lower the risk of insuring such deposits.[15]

In response to years of lobbying from the banking industry, Congress passed the Gramm–Leach–Bliley Act in 2000.[16] The Gramm–Leach–Bliley Act was passed to cure the years of supposed over-regulation of the banking industry and partially repealed the Glass–Steagall Act.[17] The Gramm–Leach–Bliley Act allowed bank holding companies to deal securities,[18] "effectively crossing the firewall between commercial and investment banking."[19] The reasoning was that deregulation would allow banks to diversify their profit-seeking activities and allow broad banking, thereby reducing the risk of bankruptcy.[20] "Broad banking" refers to the expanded range of activities and services that banks could enter into after the passing of the Gramm–Leach–Bliley Act.[21] In 2000, shortly after the passing of the Gramm–Leach–Bliley Act, the tech stock bubble collapsed.[22] The "tech stock bubble" refers to the downward shift in the economy following steep gains in the financial markets in the late 1990s due to the advent of the internet.[23] This event prompted the Federal Reserve to aggressively cut interest rates several times, from 6.5% in 2000 to 1% by 2003, in order to ease the impact of the tech bubble's collapse on the financial markets.[24] This ultra-low interest rate environment made it very attractive for banks to borrow from the Federal Reserve because inflation outpaced interest rates in such a way that "the Federal Reserve was in effect paying banks to borrow money."[25]

During the same period of time, these ultra-low interest rates caused financial institutions to seek out new types of loan products that attracted customers who previously may not have sought to enter into loan agreements.[26] These types of loans caused many American households to incur more debt, which caused the simultaneous decrease in disposable income.[27] Financial institutions were engaged in the practice of finding customers and "lock[ing] [them] into complex

14. *Id.*
15. Goldstein, *supra* note 9.
16. *Id.*
17. *Id.*
18. Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N.Y.U. J.L. & Bus. 549, 557 (2009).
19. Goldstein, *supra* note 9.
20. Quinn, *supra* note 18, at 558–59.
21. James R. Barth et al., *Policy Watch: The Repeal of Glass–Steagall and the Advent of Broad Banking*, 14 J. Econ. Persp. 191, 192 (2000).
22. Quinn, *supra* note 18, at 562.
23. Andrew Beattie, *Market Crashes: The Dotcom Crash (2000–2002)*, Investopedia, http://www.investopedia.com/features/crashes/crashes8.asp (last visited Mar. 6, 2018) [https://perma.cc/24SJ-26NK].
24. Quinn, *supra* note 18, at 562.
25. *Id.*
26. *Id.*
27. *Id.* at 563.

loans with hidden [fees]."[28] As interest rates decreased, customers took out loans with the expectation that they could refinance their loans as interest rates continued to fall.[29] But the housing market subsequently collapsed, and banks began to foreclose on customers that fell behind on their mortgages payments.[30] Essentially, banks were gambling with huge amounts of borrowed money.[31] Banks were self-regulating, lending rules were not being enforced, and the "taxpayers were on the hook if a [B]ig [B]ank" ever went under on account of its risky bets.[32] During this time, there was a growing consensus among many in the federal government that the current Financial Crisis was aggravated by the deregulation of the U.S. banking sector.[33] As a result, legislators began to search for solutions that moved away from deregulation and moved toward increased governmental oversight.[34] In order to stop such a financial crisis in the future, the U.S. government responded with a massive piece of financial legislation: the Dodd–Frank Wall Street Reform and Consumer Protection Act.[35]

B. *Dodd–Frank*

In response to the Financial Crisis of 2008, Congress passed the Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010.[36] The devastating effect that the Financial Crisis had on the U.S. economy can hardly be understated. According to an industry expert:

> Following the American and global [F]inancial [C]risis, there was legitimate political demand to try to prevent it from repeating. And the cost in terms of lost output, lost jobs, lost houses, lost opportunities, as well as political repercussions, was so enormous that it seemed to mandate a very big rethinking of the financial system. The rethink took place in the context of a lot of skepticism (at best) about the banking system, the banking business model, and its contribution to American well-being.[37]

While the Dodd–Frank Act is an ambitious and complicated piece of legislation, it can be broken down into five core components. First, Dodd–Frank raises the amount of self-owned capital that banks are required to maintain on hand, meaning more of their own funds are at

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28. President Barack Obama, Remarks by the President at Signing of Dodd–Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) [hereinafter Obama Remarks], *available at* https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act [https://perma.cc/XZ5C-Z2KU]; Huff, *supra* note 5, at 85–86.
29. *See* Quinn, *supra* note 18, at 565–67; Huff, *supra* note 5, at 86.
30. Quinn, *supra* note 18, at 567; Huff, *supra* note 5, at 86.
31. Obama Remarks, *supra* note 28; Huff, *supra* note 5, at 86.
32. Obama Remarks, *supra* note 28; Huff, *supra* note 5, at 86.
33. Huff, *supra* note 5, at 86.
34. *See id.*
35. Frick, *supra* note 2.
36. *Id.*
37. *Id.*

risk when lending.[38] Second, Dodd–Frank restricts certain types of lending activities that banks previously engaged in, such as the non-transparent practice of splitting and bundling loans into investment products.[39] The third component of Dodd–Frank, particularly aimed at Big Banks, is the requirement for financial institutions to implement living wills, which makes it less difficult for regulators to shut down a failing financial institution if another crisis takes place.[40] A fourth and significant component of Dodd–Frank is the requirement that large financial institutions submit to stress tests.[41] Stress tests are useful because they force Big Banks to be aware of the risks they face:[42]

> Stress tests are a specific form of simulation developed by the Federal Reserve and other central banks to allow [regulators] to figure out how badly a given financial institution's portfolio would hold up if there was a broad sell-off across [many] asset classes or a specific kind of shock like [the economy] suffered in 2008.[43]

Stress tests are also a powerful tool because they require financial institutions to disclose results to regulators, who may in turn use the information to determine their level of oversight on financial intuitions.[44] Finally, the Dodd–Frank Act implements the Volcker Rule, as discussed below.

III. The Volcker Rule

A. *Framework*

This Section provides an overview of the essential components of the Volcker Rule. It discusses the types of relationships and trading activities that banks are prohibited from entering into generally and notes a few major exceptions to the Volcker Rule. This Section concludes with a discussion of the five institutions that enforce the Volcker Rule.

Considered "the linchpin of the Dodd–Frank Act,"[45] the Volcker Rule prohibits many types of investment activities and relationships a bank may enter into.[46] Due to the Volcker Rule's complexity, as well as lobbying from the banking industry, it was the last piece of the Dodd–Frank Act to be enacted.[47] Generally, the Volcker Rule pro-

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *See id.*
45. Huff, *supra* note 5, at 86.
46. *See* 12 U.S.C. § 1851(a)(1) (2012).
47. Neil Irwin, *Everything You Need to Know About the Volcker Rule*, Wash. Post (Dec. 10, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/12/10/

vides for two major restrictions. First, all U.S. banks are prohibited from "owning, sponsoring, or having certain relationships" with particular types of hedge funds or private equity funds.[48] Second, the Volcker Rule implements a very broad prohibition on an investment activity known as proprietary trading.[49] "Proprietary trading" refers to the practice of financial institutions engaging in investment activities with its own capital—rather than customer capital—for the purposes of generating additional profit for themselves, rather than their customers.[50] All U.S. banking organizations are "restricted from engaging in proprietary trading of securities, derivatives, commodity futures and options for their own account."[51] Trading positions held in a financial institution's own funds that range from one day to sixty days are presumed to be proprietary trading.[52] CEOs of financial institutions must attest to compliance with the Volcker Rule, and every employee of a financial institution is legally liable for Volcker Rule violations.[53]

Despite its broad language, the Dodd–Frank Act carves out exceptions to the Volcker Rule. Most importantly, financial institutions are still permitted to trade on their clients' behalf.[54] Therefore, the Gramm–Leach–Bliley Act remains intact. This exception also allows a financial institution to buy investments through drawing from a fund that contains both its own money and its clients' money, so long as its own money does not exceed 3%.[55] A second major exception to the Volcker Rule allows certain types of trading that a financial institution must engage in to run its business, such as currency trading.[56] A third major exception to the Volcker Rule allows "[t]he purchase, sale, acquisition, or disposition of obligations of the United States or any agency" by a financial institution.[57] This exception allows financial in-

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everything-you-need-to-know-about-the-volcker-rule/?utm_term=.4143597b4004 [https://perma.cc/J4LD-Y2AU].

48. THOMAS W. KILLIAN, THE VOLCKER RULE'S IMPACT ON REGIONAL AND COMMUNITY BANKS: SIGNIFICANTLY LIMITS BANK INVESTMENT IN STRUCTURED PRODUCTS RESTRICTS HEDGING ACTIVITIES TO RISK MITIGATION 2 (2013), http://www.sandleroneill.com/Collateral/Documents/English-US/Volcker%20Rule%20Impact.pdf [https://perma.cc/6NNT-GVGK].

49. *Id.*

50. Heather Stewart, *What is 'Proprietary Trading'?*, GUARDIAN (Jan. 21, 2010, 2:06 PM), https://www.theguardian.com/business/2010/jan/21/proprietary-trading-wall-street-banks [https://perma.cc/8DB3-KRE4].

51. KILLIAN, *supra* note 48.

52. Matt Levine, *Goldman Sachs Actually Read the Volcker Rule*, BLOOMBERG (Jan. 22, 2015, 12:51 PM), https://www.bloomberg.com/view/articles/2015-01-22/goldman-sachs-actually-read-the-volcker-rule [https://perma.cc/Q3NG-D3WF].

53. Kimberly Amadeo, *Six Ways the Volcker Rule Protects You (and Why Banks Hate It)*, BALANCE, https://www.thebalance.com/volcker-rule-summary-3305905 (last updated May 31, 2018) [https://perma.cc/V68M-NWDQ].

54. *Id.*

55. Levine, *supra* note 52.

56. Amadeo, *supra* note 53.

57. 12 U.S.C. § 1851(d)(1) (2012).

stitutions to purchase securities, such as bonds, that the federal government issues. A fourth major exception to the Volcker Rule provides for a substantial catchall. Banks may enter into "[s]uch other activity as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission determine . . . would promote and protect the safety and soundness of the banking entity and the financial stability of the United States."[58] In other words, a financial institution may engage in an otherwise prohibited activity if the federal regulators who enforce the Volcker Rule allow a financial institution to do so.

B. *Agencies that Enforce the Volcker Rule*

In 2013, four federal regulators approved regulations regarding the enforcement of the Volcker Rule. These regulators include the Securities and Exchange Commission ("SEC"); the Federal Reserve; the Commodities Futures Trading Commission ("CFTC"); the FDIC; and the Office of the Comptroller of the Currency ("OCC"), which is a division of the Department of the Treasury. These agencies oversee the enforcement of the Volcker Rule. The FDIC regulates the majority of Community Banks, with the remainder split between the OCC and the Federal Reserve.[59] The SEC is responsible for monitoring Volcker Rule compliance with registered broker-dealers, investment advisers, security-based swap dealers, majority security-based swap participants, and investment companies.[60] Finally, the Consumer Financial Protection Bureau ("CFPB") also enforces the Volcker Rule. The CFPB is a unique and controversial agency. The Dodd–Frank Act created the CFPB, which is an "independent agency within another independent agency, the FDIC."[61] The CFPB possesses a great amount of autonomy because Congress does not directly control its budget, and the President cannot remove the head of the agency without cause.[62] In addition, the CFPB possesses the ability to conduct

58. *Id.* § 1851(d)(1)(J).

59. Ryan Tracy, *Exempting Small Banks From Volcker Rule Is Popular, but Not With Their Regulator*, WALL ST. J. (Dec. 26, 2017, 12:53 PM), https://www.wsj.com/articles/exempting-small-banks-from-volcker-rule-is-popular-but-not-with-their-regu lator-1514294938 [https://perma.cc/S2P9-4VG2].

60. Sarah N. Lynch, *Exclusive: SEC May Seek More Power to Enforce Volcker Rule*, REUTERS (Jan. 16, 2014, 10:40 AM), https://www.reuters.com/article/us-financi al-regulation-volcker/exclusive-sec-may-seek-more-power-to-enforce-volcker-rule-id USBREA0F19K20140116 [https://perma.cc/7PHQ-9KZC].

61. Laurence Arnold & Elizabeth Dexheimer, *What You Need to Know About the CFPB*, BLOOMBERG (Nov. 26, 2017, 11:00 PM), https://www.bloomberg.com/news/arti cles/2017-11-25/all-about-the-cfpb-washington-s-new-flashpoint-quicktake-q-a [https:/ /perma.cc/M3XG-FKAJ].

62. *Id.*

onsite compliance checks and can impose steep penalties for regulatory violations.[63]

C. *Reasons for the Volcker Rule's Inclusion in the Dodd–Frank Act*

Ironically, one argument for including the Volcker Rule in the Dodd–Frank Act was that it would prevent larger banks from acquiring smaller banks. The Volcker Rule attempts to prevent banks from becoming too big to fail and mitigate the damage caused by the partial repeal of the Glass–Steagall Act.[64] Before the Gramm–Leach–Bliley Act, investment banks were small and did not need to be regulated.[65] By contrast, commercial banks could loan money to consumers at regulated rates and could make a profit on thin margins due to the immense reserves to depositor funds. With the passing of the Gramm–Leach–Bliley Act, Big Banks could trade with depositor funds without regulation, thereby producing greater returns than conventional loan products.[66] This gave banks with an investment-banking arm a competitive advantage over other banks that did not engage in investment activity.[67] This situation allowed Big Banks to acquire smaller banks, which allowed Big Banks to grow even bigger.[68] Therefore, the Volcker Rule was passed to help prevent Big Banks from growing to an unreasonable size, as such growth would lead to government bailouts in the event of a bank failure.[69]

Prominent supporters and lobbyists in the banking industry argue that there is no direct link to any bank failures—or near-failures of banks that government bailouts saved—to risky investment practices. Indeed, while there may be many causes underlying the Financial Crisis and the Great Recession, most research (and the analysis above) indicates that the Housing Crisis was the significant factor leading to the Financial Crisis, not bank investments in proprietary trading.[70] But Volcker Rule proponents state that while proprietary trading might not have been the leading cause of the Financial Crisis, losses resulting from this type of activity nonetheless contributed to the crisis.[71] Additionally, these proponents argue that the Volcker Rule will prevent speculative trading that may destabilize the economy in the

63. Susan Thomas Springer, *What Happens When a Bank Hits $10 Billion?*, INDEP. BANKER (Feb. 27, 2017), http://independentbanker.org/2017/02/what-happens-when-a-bank-hits-10-billion/ [https://perma.cc/4S65-MKU7].

64. Amadeo, *supra* note 53.

65. *Id.*

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Quinn, *supra* note 18, at 562–67.

71. Irwin, *supra* note 47.

future.[72] Perhaps the reason for the inclusion of the Volcker Rule in the Dodd–Frank Act was to curtail the ability of banks to enter into any type of risky bet that might once again endanger the global economy, regardless of whether those risky bets took the form of investment trading or high-risk lending.

IV. Types of Banks

Articles and news outlets often use the terms Big Banks, Regional Banks, and Small Banks or Community Banks, but many fail to define what these labels actually mean. This Section of the Article will attempt to do so.

A. *Big Banks*

The term "Big Banks" is probably the most used out of these three types of banks. Indeed, the definition became popular prior to the Financial Crisis of 2008. One might justifiably think of America's five biggest banks when trying to define the term "Big Bank": namely, JPMorgan Chase, Bank of America, Wells Fargo, Citigroup, and U.S. Bancorp.[73] After all, these are arguably America's most recognizable financial institutions. These banks control a substantial portion of America's assets under management.[74] As of 2015, "[t]he largest five banks in the U.S. . . . control[led] nearly 45[%] of the industry's total assets."[75] But this Article takes the view that this definition is too narrow. The definition should also include the next five biggest banks: Morgan Stanley, U.S. Bancorp, PNC Financial Services Group, TD Group US Holdings, and Capital One.[76] Together, these ten financial institutions control $11.8 trillion in assets.[77] All this money combined would be "enough to buy every one of the 7.6 billion human beings on Earth a 13-inch MacBook Pro, with a little left over for accessories."[78] Put another way, the smallest of the Big Banks, Capital One, who manages $348.55 billion in assets, has "a sum so large that, if converted into $100 bills laid end to end, would reach the moon (with several thousand miles left over to check out the view)."[79] Moreover,

72. *Id.*

73. Jeff Cox, *5 Biggest Banks Now Own Almost Half the Industry*, CNBC (Apr. 15, 2015, 2:33 PM), https://www.cnbc.com/2015/04/15/5-biggest-banks-now-own-almost-half-the-industry.html [https://perma.cc/9A4N-B68L].

74. *Id.*

75. *Id.*

76. Amanda Dixon, *America's 15 Largest Banks*, Bankrate (Feb. 21, 2018), http://www.bankrate.com/banking/americas-top-10-biggest-banks/#slide=1 [https://perma.cc/TR4N-LPAC].

77. *Id.*

78. *Id.*

79. *Id.*

many Big Banks have grown even larger since the Financial Crisis.[80] Even with the addition of these five institutions, the ten Big Banks still make up a minuscule number of financial institutions compared to the entire number of all the U.S. financial institutions. For example, in 2013, the six largest banks held 67% of the $14.4 trillion of the United States' banking assets.[81] That number is out of 6,934 total banks in the United States.[82]

B. *Community Banks*

In both the banking industry and the federal government, there is no apparent consensus on what exactly a Community Bank (or Small Bank) is. Indeed, there even seems to be confusion over the definition of the word within the same governmental agency.[83] The OCC defines a Community Bank as a bank with under $10 billion in assets.[84] The FDIC has offered conflicting definitions of Community Banks in the past, at times stating that they are banks under $1 billion in assets, and at other times stating that they are banks with less than $10 billion in assets.[85]

The best way to look at Community Banks is in the context of the CFPB's regulatory ability. While Community Banks are required to follow the rules that CFPB promulgates, the CFPB does not have direct regulatory oversight of Community Banks.[86] The cutoff point for CFPB oversight, including direct oversight of the Volcker Rule, is $10 billion.[87] Therefore, Community Banks should be defined as banks with less than $10 billion in assets.

Community Banks play a very important role, primarily in local communities.[88] Community Banks often reinvest their profits into the local economy and provide jobs to the communities.[89] Big Banks may use a deposit made by a customer on one side of the country to lend to

80. Stephen Gandel, *By Every Measure, the Big Banks are Bigger*, FORTUNE (Sept. 13, 2013), http://fortune.com/2013/09/13/by-every-measure-the-big-banks-are-bigger/ [https://perma.cc/YM6F-NGP4].

81. *Id.*

82. *Id.*

83. Ken Tumin, *How Do You Define a Community Bank?*, DEPOSITACCOUNTS (Dec. 20, 2012), https://www.depositaccounts.com/blog/2012/12/how-do-you-define-a-community-bank.html [https://perma.cc/PVQ3-DK7C].

84. Douwe Miedema, *U.S. Regulator Estimates Volcker Rule's Cost for Banks*, REUTERS (Mar. 20, 2014, 3:26 PM), https://www.reuters.com/article/us-banks-volcker-costs/u-s-regulator-estimates-volcker-rules-cost-for-banks-idUSBREA2J25O20140320 [https://perma.cc/MK56-8J3E].

85. *Id.*

86. Springer, *supra* note 63.

87. *Id.*

88. *Community Banks Build Communities*, INDEP. COMMUNITY BANKERS OF AM., http://www.icba.org/about/community-banking (last visited Mar. 5, 2018) [https://perma.cc/8PPL-LHTU].

89. *Id.*

a customer on the other side of the country.[90] In contrast, Community Banks take deposits and lend to customers who live in the same local community.[91] Community Banks often have more latitude to extend loans to customers and may take more factors into account than Big Banks when deciding to extend credit, such as family history and discretionary spending.[92] In that same vein, Community Banks are also able to make quicker decisions because underwriting decisions are made locally, rather than in a different part of the country.[93] Indeed, despite the continued growth of Big Banks in recent years,[94] Community Banks are the preferred lender for small businesses.[95] Additionally, Community Banks approve more loan applications, more often than Big Banks.[96] According to a 2016 press release by New York's Federal Reserve Bank, Community Banks have "extended at least some of the financing requested to 76[%] of applicants. Large banks approved 58[%] of applicants."[97] These factors illustrate that Community Banks focus primarily on lending, whereas Big Banks are involved in many different activities in the financial industry.

C. *Regional Banks*

If Community Banks are extremely small financial institutions and Big Banks are extremely large financial institutions, Regional Banks fill the space in between. There is a "vast expanse between community lenders and their money-center brethren. Sandwiched in the middle are a wide array of [R]egional [B]anks."[98] Simply put, Regional Banks encompass every other type of bank other than Big Banks and Community Banks. More specifically, this space encompasses every bank with over $10 billion in assets to just below $201.3 billion in assets, which is the size of the smallest Big Bank.[99] Once a former Community Bank passes the $10 billion mark to become a Regional Bank, it comes under the oversight of the CFPD.[100] After a bank passes this $10 billion milestone, "several federal regulations kick in," including a more stringent form of the Volcker Rule.[101] In order to fully under-

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. Gandel, *supra* note 80.
95. *Federal Reserve Banks Release Report on Credit Experiences of Small Businesses*, FED. RES. BANK N.Y. (Mar. 3, 2016), https://www.newyorkfed.org/newsevents/news/regional_outreach/2016/an160303 [https://perma.cc/DT8Y-7GUX].
96. *Id.*
97. *Id.*
98. John Maxfield, *Regional Banks: Investing Essentials*, MOTLEY FOOL (Aug. 1, 2014, 11:00 AM), https://www.fool.com/investing/general/2014/08/01/regional-banks-investing-essentials.aspx [https://perma.cc/7H4H-YR7G].
99. Dixon, *supra* note 76.
100. Springer, *supra* note 63.
101. *Id.*

stand the context of different types of banks, one must understand where Regional Banks fit within the confines of the banking industry. While I invite future discussion on the subject, the effect of the Volcker Rule on Regional Banks is beyond the purview of this Article.

V. Volcker Rule's Effect on Community Banks

The Volcker Rule puts an unfair and disproportionate burden on Community Banks compared to Big Banks. Since the Volcker Rule's implementation, Community Banks have suffered. By far, the biggest burden the Volcker Rule places on Community Banks is ongoing compliance costs.[102] Specifics on how much Dodd–Frank cost the banking industry in general, much less Community Banks specifically, are inconsistent and difficult to quantify.[103] The U.S. Chamber of Commerce blames bank regulators for the lack of economic data regarding the Volcker Rule.[104] The OCC estimates (in an incredibly wide range) the Volcker Rule cost the banking industry between $413 million and $4.3 billion.[105] These numbers represent a one-time cost over a year to put compliance measures in place.[106] While Big Banks incurred much of these costs, Community Banks had to expend capital to follow the Volcker Rule as well.[107] But even now that these measures are put into place, Community Banks continue to incur steep expenses to comply with the Volcker Rule[108] As small businesses, Community Banks have less infrastructure, manpower, and capital than bigger banks. Therefore, these types of compliance costs affect Community Banks more heavily than Big Banks. That Community Banks are even required to comply with the Volcker Rule is ironic because the vast majority of Community Banks never engage in the activity prohibited by the Volcker Rule, such as proprietary trading or entering into certain relationships with private equity funds.[109] If exempted from the Volcker Rule, Community Banks would likely not engage in this prohibited behavior in the future.[110]

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102. Emily Stephenson, *U.S. Congress should exempt small banks from Volcker rule – regulator*, Reuters (Dec. 2, 2014, 11:30 AM), https://www.reuters.com/article/financial-regulations-volcker/u-s-congress-should-exempt-small-banks-from-volcker-rule-regulator-idUSL2N0TM0VR20141202 [https://perma.cc/EDR5-SRY6].

103. Llewellyn Hinkes-Jones, *How Much Did Dodd–Frank Cost? Don't Ask Banks*, Bloomberg BNA (Feb. 2, 2017), https://www.bna.com/doddfrank-cost-dont-n57982083194/ [https://perma.cc/RAF4-NJEQ].

104. Miedema, *supra* note 84.

105. *Id.*

106. *Id.*

107. *Id.*

108. Stephenson, *supra* note 102.

109. Steven T. Mnuchin & Craig S. Phillips, U.S. Dep't Treasury, A Financial System That Creates Economic Opportunities Banks and Credit Unions, 72 (2017).

110. *Id.*

The Volcker Rule burdens Community Banks in more ways than just compliance costs. Financial technology, also known as fintech,[111] is one example of this continuing burden.[112] The Volcker Rule makes it difficult for financial institutions to invest in funds that invest in fintech[113] Essentially, "[f]inancial technology is broadly defined as any technological innovation in financial services."[114] Fintech can include more mundane technology, such as mobile banking applications, to more exotic technology, such as cryptocurrencies like Bitcoin and Etherium.[115] Though Community Banks typically do not enter into risky investments, Community Banks would benefit by investing in funds that invest in fintech because it may give them access to the technology.[116] The Volker Rule forces banks to either develop their own fintech or invest in individual companies who develop fintech.[117] Similar to compliance costs, this is less of a problem for larger banks because they have the infrastructure, manpower, and capital to do so.[118] Community Banks work with fewer resources than Big Banks, so to develop their own fintech is a riskier option for Community Banks.[119] Moreover, Community Banks are less likely to invest in individual companies.[120] Whereas Big Banks are more willing to try to navigate within the confines of the Volcker Rule, Community Banks "have generally tried to steer clear of anything that might conflict with the [Volcker] [R]ule for fear of running afoul of examiners."[121] If a modification to the Volcker Rule is not made soon, Community Banks are likely to miss out on current fintech innovations, once again putting them at a disadvantage in relation to Big Banks.[122]

Even prior to the Financial Crisis of 2008, the Community Banking Industry was in decline.[123] This decline is troubling due to the valuable role that Community Banks play in the economy. Since 1994, Community Banks have decreased in number by 40%, and "[its] share of U.S.

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111. *Everything You've Always Wanted to Know About Fintech*, CNBC, https://www.cnbc.com/2017/10/02/fintech-everything-youve-always-wanted-to-know-about-financial-technology.html (last visited Oct. 8, 2018) [https://perma.cc/YA59-XWT3].

112. Lalita Clozel, *Small Banks' Fintech Efforts Held Back by Volcker Rule*, FinReg & Pol'y Watch (Aug. 11, 2017, 4:00 PM), https://finreg.sourcemedia.com/news/small-banks-fintech-efforts-held-back-by-volcker-rule [https://perma.cc/A97K-BE6X].

113. *Id.*

114. *Everything You've Always Wanted to Know About Fintech*, *supra* note 111.

115. *See id.*

116. Clozel, *supra* note 112.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Carrie Sheffield, *Dodd–Frank is Killing Community Banks,* Forbes (Feb. 9, 2015, 9:42 PM), https://www.forbes.com/sites/carriesheffield/2015/02/09/dodd-frank-is-killing-community-banks/#5ee2289f73a7 [https://perma.cc/VJZ2-YYWU].

banking assets fell by more than half—from 41[%] to 18[%]. In contrast, the biggest banks saw their share of assets rise from 18[%] to 46[%]."[124] While Dodd–Frank did not cause this decline in Small Banks, it is certainly exacerbating the problem.[125] Since the passage of Dodd–Frank, "[C]ommunity [B]anks have lost market share at a rate *double* what they did" the previous four years.[126] While exempting Community Banks from the Volcker Rule will not completely fix this decline, it will be one less burden they have to face, which will help level the playing field in the banking industry.

VI. Recent Proposals to Modify Volcker

There have been recent proposals that have attempted to modify or completely repeal the Volcker Rule in both the legislative and executive branches. Some proposals are superior to others. This Section of the Article will discuss these proposals.

A. *Financial Choice Act*

In June of 2017, the House of Representatives passed the Financial Choice Act.[127] The Act rolled back many of the Dodd–Frank regulations, including a provision to entirely eliminate the Volcker Rule for all financial institutions, whether large or small.[128] While the Act ultimately would have a beneficial impact on Community Banks, a more nuanced law would have a greater beneficial effect on the economy as a whole. At a surface level, this provision would cure the burden on Community Banks, which are saddled by the administrative costs of the Volcker Rule. Ironically, much like Dodd–Frank itself, the Financial Choice Act is overly broad. Despite the Volcker Rule's shortcomings, it does help protect the economy by prohibiting large financial institutions from entering into risky investments that put the global economy in jeopardy. Furthermore, it has been argued that even if the Volcker Rule were to be repealed, it is unlikely that large financial institutions would be affected because they have already expended a large amount of capital instituting the administrative controls to comply with the Volcker Rule.[129] In either event, the Financial Choice Act is unlikely to be passed due to the lack of bipartisanship in general.[130] If the House of Representatives passed a less ambitious form of the Financial Choice Act, such as the Senate Banking Committee's version of the banking reform bill, then there would be an increased likelihood of the bill passing.

124. *Id.*
125. *See id.*
126. *Id.*
127. Financial Choice Act, H.R. 10, 115th Cong. (2017).
128. Rappeport, *supra* note 8.
129. *Id.*
130. *Id.*

B. *Senate Bill*

Like the House of Representatives, the Senate has been in the process of trying to figure out an option to roll back some of the provisions of Dodd–Frank.[131] Recently, both Senate Republicans and Democrats have attempted to draft a reform of Dodd–Frank that will help relieve the regulatory burdens on Community Banks.[132] In a rare showing of bipartisanship, Republicans and Democrats on the Senate Banking Committee recently compromised on a draft of a banking reform bill.[133] The bill exempts Community Banks with under $10 billion in assets from the Volcker Rule.[134] Republican Senate Banking Committee member Mike Crapo unveiled the bill.[135] Whereas past efforts to overhaul Dodd–Frank have failed because they went too far in rolling back banking regulations, the current bill is more moderate.[136] The bill recently passed in the Senate.[137]

Even though the bill passed in the Senate, it still might not pass in the House. The House has a larger majority of Republicans than the Senate, and House Republicans might feel like the bill does not go far enough to curtail banking regulation in its current form. Additionally, officials at the FDIC have come out against the bill, stating that it could allow "new risks [to] creep into the banking system."[138] FDIC Vice Chairman Thomas Hoenig stated, "I think this would be a loophole. It does open a door, if you are oriented to use deposits to speculate."[139] Despite these reasons, the Senate Banking Committee's bill looks like the best legislative chance to relieve Community Banks from the Volcker Rule since Dodd–Frank was passed in 2008.[140]

C. *Treasury Department Proposal*

The Department of Treasury released a report in June of 2017 that detailed its proposed changes to banking regulation. The report has a

131. Elizabeth Dexheimer, *Banks Closer to Winning Regulatory Relief After Senate Deal,* BLOOMBERG (Nov. 13, 2017, 12:32 PM), https://www.bloomberg.com/news/articles/2017-11-13/senate-s-crapo-reaches-deal-with-democrats-on-easing-bank-rules [https://perma.cc/YBB2-Q8GB].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Norbert Michel, *The Crapo Bill Provides Regulatory Relief, But it Does Not Repeal and Replace Dodd–Frank*, FORBES (Apr. 24, 2018, 4:34 PM), https://www.forbes.com/sites/norbertmichel/2018/04/24/the-crapo-bill-provides-regulatory-relief-but-it-does-not-repeal-and-replace-dodd-frank/#3573ed0938ff [https://perma.cc/9NAN-RQ7E].

138. Tracy, *supra* note 59.

139. *Id.*

140. Pete Schroeder, *Senate Committee Advances Bill Easing Banking Regulations*, REUTERS (Dec. 5, 2017, 4:33 PM), https://www.reuters.com/article/us-usa-senate-banks/senate-committee-advances-bill-easing-banking-regulations-idUSKBN1DZ36U [https://perma.cc/PHH2-MZJF].

small—but important—section regarding the Volcker Rule and Community Banks. The section reads as follows:

> Most [S]mall [B]anks do not engage in proprietary trading or invest in or sponsor private equity funds and hedge funds. Although the regulations provide banking entities with $10 billion or less in assets with accommodations from the rule's compliance program requirements, these banks have still been required to expend considerable resources to ensure that their activities do not constitute prohibited proprietary trading. In particular, such institutions, even if they do not engage in any trading, have had to expend resources to confirm that transactions they engage in for hedging their interest rate and other business risks are permitted under the Volcker Rule. The relatively small risk that these institutions pose to the financial system does not justify the compliance burden of the rule, and the risk posed by the limited amount of trading that banks of this size could engage in and can easily be addressed through existing prudential regulation and supervision. For these reasons, banking organizations with $10 billion or less in total consolidated assets should be entirely exempt from all aspects of the Volcker Rule. This exemption would allow these banks to focus on their core business of lending to consumers and small and mid-size businesses.[141]

D. *Best Proposal*

Community Banks should be completely exempted from the Volcker Rule. Some commentators argue for various types of reforms to the Volcker Rule regarding Community Banks.[142] Nevertheless, these commentators state that Community Banks should refrain from engaging in proprietary trading because of the increased risk it places on local economies.[143] For instance, commentators proposed that Community Banks should sign a contract with regulators, promising not to enter into prohibited investment activity.[144] It would be easy to agree with this reasoning and end the discussion at this point. After all, Community Banks rarely engage in the type of activity prohibited by the Volcker Rule,[145] so why should it matter if they are required to sign a contract? But these types of proposals fail to grasp the reason why Congress passed the Volcker Rule in the first place. Congress passed Dodd–Frank, and by extension the Volker Rule, to prevent another event similar to the financial collapse of 2008. Even if a Community Bank were to enter into this type of investment activity (which they are unlikely to do) and fail as a result of those activities, the global economy would be minimally affected. However, small busi-

141. MNUCHIN & PHILLIPS, *supra* note 109, at 72–73.
142. Heidi Mandanis Schooner, *Regulating Angels*, 50 GA. L. REV. 143, 160 (2015); Huff, *supra* note 5, at 111.
143. *Id.*
144. Huff, *supra* note 5, at 111.
145. MNUCHIN & PHILLIPS, *supra* note 109, at 72–73.

ness failures, including a Community Bank's failure, can have detrimental effects on a local economy.[146] While these types of events are unfortunate, Congress has not seen fit to inject taxpayer capital into or place extensive regulations on other types of local businesses. Community Banks should receive similar treatment as other types of small businesses.

The counterargument to this point is that Community Banks receive FDIC support, which differentiates them from other businesses.[147] There were also government initiatives to help Community Banks during the recession of 2008.[148] However, these arguments do not support the policy of why the Volcker Rule was included in Dodd–Frank. Congress passed the Volcker Rule to protect the economy from the types of business activities Big Banks engaged in. To lump Community Banks in with Big Banks violates the underlying policy of the Volcker Rule.

The best option to alleviate the Volcker Rule's effect on Community Banks is the Senate Banking Committee's version of the bill. This is the best option because, if enacted into law, the bill would have bicameral and executive support. If both parties compromise on the bill, then both sides can claim a win. Republicans can claim they rolled back a key provision of Dodd–Frank and decreased regulation; Democrats can claim they retained restraints on Big Banks that protect the economy. Both parties can claim that they helped small businesses. However, it is viewed that the Senate's bill would produce a stable result and would be more likely to sustain regulatory relief of Community Banks through changes of political power from one party to the other. This is not to say that that the Senate bill completely alleviates the burden on Community Banks. Community Banks still have to comply with other regulations that limit its trading activity.[149] Therefore, they will still have to maintain compliance staff for potential audits.[150] Nevertheless, if Congress exempted Community Banks from the Volcker Rule, they will have to comply with one less major regulation, allowing them to commit capital and manpower elsewhere. However, even if the Senate bill garners bipartisan support, it may still fall by the wayside by being overshadowed by more hot button issues such as healthcare reform or immigration. Therefore, other options warrant consideration.

Though passing the Senate Banking Committee's version of the bill is the best option, another alternative exists. The President could at-

146. Schooner, *supra* note 142, at 151.

147. *When a Bank Fails - Facts for Depositors, Creditors, and Borrowers*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/consumers/banking/facts/ (last updated July 28, 2014) [https://perma.cc/HYN8-4BAH].

148. *See* Tracy, *supra* note 59.

149. *Id.*

150. *Id.*

tempt to unilaterally adopt the Treasury Department's proposal to exempt Community Banks by a presidential executive order.[151] The 115th Congress often has difficulty passing major legislation due to disagreements both between different parties and even within the same party. Reforming the Volcker Rule may not be any different. Additionally, as noted above, the House and Senate bills differ with regard to the Volcker Rule. If Congress is unable to find a consensus, the President should issue an executive order to exempt Community Banks from the Volcker Rule.[152] Although this approach will not win the favor of ardent supporters for the separation of powers, it could be an effective tool to immediately alleviate the burden that the Volcker Rule places on Community Banks.

There is a possible limitation to an executive order because the majority of the agencies that enforce the Volcker Rule are independently managed. Dependent agencies are fully part of the executive branch.[153] Congress creates independent agencies, so they are not part of the executive branch, thus the President has limited authority to terminate the head of an independent agency.[154] Independent agencies have more autonomy from the federal government and are partially funded by outside sources.[155] The Department of Treasury, and by extension the OCC, is a dependent agency.[156] The SEC, CFTC, the FDIC, and by extension the CFPB, are all independent agencies.[157] Currently, due to independent agencies' unique level of autonomy, there is uncertainty that independent agencies, particularly the CFPB, are required to follow executive orders like dependent agencies.[158] But the President's administration has previously clarified when an executive order applies to an independent agency and when one does

151. Jeffrey L. Hare et al., *Treasury's Framework to Relax and "Improve" the Volcker Rule: Key Recommended Changes*, DLA PIPER (June 13, 2017), https://www.dlapiper.com/en/us/insights/publications/2017/06/treasury-framework-to-improve-volcker-rule/ [https://perma.cc/LE6G-D38K].

152. *See* Rappeport, *supra* note 8.

153. Brian Bass, *Difference Between Independent and Dependent Agencies*, HOUS. CHRON., http://smallbusiness.chron.com/difference-between-independent-dependent-agencies-18731.html (last visited Mar. 6, 2018) [https://perma.cc/Q7KK-Q7MR].

154. *Id.*

155. *Id.*

156. *See Duties & Functions of the U.S. Department of the Treasury*, DEP'T OF TREASURY, https://www.treasury.gov/about/role-of-treasury/Pages/default.aspx (last updated Jan. 4, 2018, 12:29 PM) [https://perma.cc/X2WM-SYWL].

157. *See* Mary Jo White, *The Fourteenth Annual A.A. Sommer, Jr. Lecture on Corporate Securities & Financial Law at the Fordham Corporate Law Center: The Importance of Independence*, 20 FORDHAM J. CORP. & FIN. L. 1, 5 (2014); *see also Mission & Responsibilities*, U.S. COMMODITY FUTURES TRADING COMMISSION, http://www.cftc.gov/About/MissionResponsibilities/index.htm (last visited Jan. 5, 2018) [https://perma.cc/RP6Y-39WT]; *see also Who is the FDIC?*, *supra* note 13.

158. Yuka Hayashi, *Is CFPB Subject to Trump Executive Orders? No Easy Answer*, WALL ST. J. (Feb. 1, 2017, 6:00 AM), https://www.wsj.com/articles/is-cfpb-subject-to-trump-executive-orders-no-easy-answer-1485946800 [https://perma.cc/YT2B-CPQW].

not.[159] Therefore, it is likely that if the President issued an executive order exempting Community Banks from the Volcker Rule and explicitly stated that independent agencies are required to follow it, then the CFPB, if not all independent agencies, would have to obey.

Even if independent agencies are not required to follow executive orders, an executive order may still be appropriate for three reasons. First, even if the SEC, CFPB, and FDIC are not required to follow an executive order exempting Community Banks from the Volcker Rule, the Department of Treasury still would be. Community Banks would have one less agency's regulations to follow, thereby reducing the burdens imposed by the Volcker Rule. Second, even if the three independent agencies are not required to follow the executive order, they may nonetheless follow it to maintain uniformity in enforcement of the Volcker Rule. Third, the President may appoint like-minded agency heads that will follow the executive order. Indeed, there is speculation that the President's nominee to lead the FCIC, Jelena McWilliams, who has not commented directly on the Volcker Rule, "is expected to be more industry-friendly than the FDIC's current leaders."[160] Therefore, an executive order is still a valid option for exempting Community Banks from the Volcker Rule.

As explained above, the House's Financial Choice Act is the least valid option. The Financial Choice Act uses a broad-brush to attempt to fix a problem that requires a more finessed approach. Requiring Community Banks to abide by the Volcker Rule is the equivalent of presuming guiltiness before innocence is proven.[161] The same cannot be said of Big Banks, whose actions caused the recession of 2008 in the first place. To return to the status quo would reward Big Banks, while forgetting the lessons of the recession of 2008. That being said, the complete elimination of the Volcker Rule for all banks would be preferable to the current situation. But there are better alternatives.

VII. Conclusion

In summary, Community Banks should be completely exempted from the Volcker Rule for a number of reasons. First and foremost, the Volcker Rule was designed to prevent the failure of incredibly large financial institutions. From a policy standpoint, regulating Big Banks and Community Banks the same way does not make sense. While Big Banks and Community Banks offer similar services, both types of banks serve a unique role in the economy.[162] The failure of a Community Bank would not have near the amount of devastating effects on the economy as a Big Bank failure. Second, Community

159. *Id.*
160. Tracy, *supra* note 59.
161. *Id.*
162. *See Community Banks Build Communities*, *supra* note 88.

Banks rarely engage in proprietary trading or enter into relationships with private equity funds.[163] Yet, Community Banks are nonetheless saddled with the administrative costs of ensuring that employees are not engaging in the type of behavior that the Volcker Rule prohibits.[164] Finally, by requiring Community Banks to comply with the Volcker Rule, the legislature is actually assisting Big Banks in growing even larger, which enables them to once again become too big to fail. The extra costs associated with compliance to the Volcker Rule contributes to the financial stress Community Banks face, which in turn makes Community Banks more susceptible to failure or acquisition by larger banks.

This Article does not take the view that Big Banks are the villains they are often made out to be in the media. Nor does it take the view that there is anything inherently wrong with the business practices of Big Banks. Moreover, it does not take any stance on whether regulation on Big Banks should be increased. Big Banks play a substantial role in the national economy. Other types of banks play an important role, albeit on a smaller economic scale. But Dodd–Frank was enacted in response to the business practices of Big Banks, not other types of banks. So why do we regulate all banks the same? To put this in a more colloquial sense, why are we treating apples like oranges?

While they still face many hurdles, the recent developments in both the legislative and the executive branch are encouraging. The struggle of Community Banks is finally coming to the attention of lawmakers. After enduring years of costly and unnecessary regulation imposed by the Volcker Rule, Community Banks may find relief one day soon. While the adoption of the Senate Banking Committee bill would be the superior option, an executive order is also a solution to relieving the burden of the Volcker Rule from Community Banks. In either event, the burden on Community Banks would be, while not completely eliminated, substantially reduced.

163. MNUCHIN & PHILLIPS, *supra* note 109, at 72–73.
164. *Id.* at 72.