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The Volcker Rule and the Presumption Against Extraterritoriality: Utterly Incompatible

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THE VOLCKER RULE AND THE PRESUMPTION
AGAINST EXTRATERRITORIALITY:
UTTERLY INCOMPATIBLE

CHRISTINE P. HENRY*

ABSTRACT

The Volcker Rule, enacted in 2010 as part of the Dodd-Frank Wall Street Consumer Protection Act to address the “too big to fail” problem in today’s interconnected global economy, has been controversial from the outset. The deadline for banks to comply with Volcker regulations has been extended several times, with the most recent deadline set for July 21, 2016. This Note examines the impact of the Volcker Rule on foreign banks, detailing the specific effects of Volcker regulations on two prominent German banks, Deutsche Bank and Commerzbank, and analyzes the countervailing European approach to regulating proprietary trading and risky investment.

This Note argues that the extraterritorial reach of the Volcker Rule should be limited in order to comply with the presumption against extraterritoriality. While there is likely no perfect solution to preventing the “too big to fail” phenomenon, this Note proposes one alternative, which appropriately limits the extraterritorial scope of the Volcker Rule while preserving a primary aim of the Volcker legislation: exempt foreign banks with only minor U.S. subsidiaries comprising less than 25 percent of the foreign bank’s overall operations from the Volcker Rule.

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INTRODUCTION

Paul Volcker, chair of President Obama's Economic Recovery Advisory Board and the grandson of German immigrants,¹ served as the mastermind behind the Volcker Rule.² However, he failed to consider how extraterritorial application of the Volcker Rule might affect banks back "home" in Germany. Enacted in July 2010 as part of the Dodd-Frank Wall Street Consumer Protection Act,³ the Volcker Rule remains highly controversial.⁴ The impending July 2016 deadline⁵ for financial institutions to comply

¹ Paul Volcker also served as Chairman of the Federal Reserve Board from 1979 until 1987. WILLIAM L. SILBER, *VOLCKER: THE TRIUMPH OF PERSISTENCE* 336 (2012).

² The Volcker Rule prohibits banks from engaging in proprietary trading and restricts banks' private equity activity, including investment in hedge funds. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 1851).

³ *Id.*

⁴ See John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1073–75 (2012) (arguing that the Volcker Rule does not adequately address the "too big to fail" problem because there is no evidence that proprietary trading caused the 2008 financial crisis, and that the Volcker Rule is ineffective because it contains too many loopholes and exceptions); Alison K. Gary, Comment, *Creating a Future Economic Crisis: Political Failure and the Loopholes of the Volcker Rule*, 90 OR. L. REV. 1339 (2012) (arguing that the Volcker Rule represents a political failure); Rex Chatterjee, *Dictionaries Fail: The Volcker Rule's Reliance on Definitions Renders it Ineffective and a New Solution is Needed to Adequately Regulate Proprietary Trading*, 8 B.Y.U. INT'L L. & MGMT. REV. 33 (2011) (arguing that the Volcker Rule is ineffective and proposing an alternative regime to solve the proprietary trading problem); Ryan K. Brissette, *The Volcker Rule's Unintended Consequences*, 15 N.C. BANKING INST. 231, 234–35 (2011) (arguing that the Volcker Rule does not conform to the primary purpose behind the Rule and that restricting proprietary trading does not solve the problem the Volcker Rule was designed to address).

⁵ The deadline for banks to comply with Volcker regulations has been pushed back several times. After the final Rule was promulgated in December of 2013, banking entities were required to comply by July 2015. On December 18, 2014, the Federal Reserve Board announced that it was extending this deadline to July 21, 2016 for "legacy covered funds," defined as funds that were in place prior to December 31, 2013. Thus, banks have an additional year in which to conform their investments to Volcker regulations. The Federal Reserve Board also announced that it intends to provide yet another one-year extension until July 21, 2017. Press Release, Bd. of Governors of the Fed. Reserve Sys. (Dec. 18, 2014), <http://www.federalreserve.gov/newsevents>

with Mr. Volcker's regulations has brought the Volcker Rule into the spotlight, generating substantial criticism of this legislation designed to address the "too big to fail" problem.⁶

While the effects of the Volcker Rule on U.S. banks have been extensively investigated and documented, this Note focuses instead on the effects of this Rule on German banks, specifically Deutsche Bank and Commerzbank—large German banks with substantial subsidiaries in the United States. This Note documents both the critical European reaction to the Volcker Rule as well as the European approach to prevent the "too big to fail" phenomenon. This Note argues that extraterritorial application of the Volcker Rule should be limited without sacrificing the overall aim of the legislation. Volcker regulations should only reach foreign banks with substantial U.S. subsidiaries, as well as subsidiaries of U.S. banks abroad, but not foreign banks with only minor U.S. subsidiaries that comprise less than 25 percent of the foreign bank's overall operations. While there is no uniquely perfect solution to preventing the "too big to fail" phenomenon in today's truly global economy, this proposal effectively limits the extraterritorial reach of the Volcker Rule, while also aptly preserving Mr. Volcker's aims.⁷

This Note is organized as follows. Part I discusses the historical underpinnings and background of the Volcker Rule. Part II explores European criticism of the Volcker Rule and documents the effects of the Volcker Rule on two large German banks, Deutsche Bank and Commerzbank. Part III argues that the extraterritorial reach of the Volcker Rule should be limited to conform with the presumption against extraterritoriality. Part IV lays out the European approach to preventing the "too big to fail" phenomenon. Finally, Part V proposes a solution that limits the

/press/bcreg/20141218a.htm [https://perma.cc/H7ZB-TT26]. Recently, the Republican Party has sought to scale back several Dodd-Frank provisions, including the Volcker Rule; the continued delay in implementation of the Volcker Rule led President Obama to threaten to veto the "Republican Volcker-delay bill" in January 2015. Emily Stephenson, *Obama threatens veto of Republican Volcker-delay Bill*, REUTERS (Jan. 12, 2015, 6:16 PM), <http://uk.reuters.com/article/us-usa-congress-volcker-idUSKBN0KL2BX20150112> [https://perma.cc/XNA6-G6VR].

⁶ See GARY H. STERN & RON J. FELDMAN, *TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS* (2009) for an overview of the "too big to fail" phenomenon.

⁷ Coffee, *supra* note 4.

extraterritorial effect of the Volcker Rule without sacrificing its noble aims.

I. HISTORY AND BACKGROUND OF THE VOLCKER RULE

The Volcker Rule (the “Rule”) was passed as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) in July 2010.⁸ A primary aim of the Obama administration was to address the “too big to fail”⁹ problem and recent financial recession by implementing wide-reaching legislation touching all areas of banking law and significantly affecting the financial services industry.¹⁰ More specifically, the Dodd-Frank Act was implemented “to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end too big to fail, to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices.”¹¹ In support of the comprehensive Dodd-Frank financial regulatory scheme, the Volcker Rule “prevent[s] banks ... as the central actors in the financial world, from bringing down the whole system through

⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 1851).

⁹ “Too big to fail” refers to the problem of systemic risk in an interconnected global economy. This problem comes in three distinct flavors:

(1) A financial institution can simply be “too big to fail.” Citigroup probably is, but Lehman was perceived not to be.

(2) An institution can be too connected to fail, largely a result of the increased use of OTC derivatives, including credit default swaps. As a result, the failure of one can imply the eventual failure of its counterparties in a cascade of falling financial dominoes. This scenario explains the government's bailout of AIG, upon whom all other major financial institutions relied on for protection.

(3) Financial institutions can also be too risk-correlated to fail, with the result that the failure of one implies intense stress on the others. Although policies such as diversification can manage uncorrelated risk, risks that are correlated cannot be similarly resolved or protected against.

Coffee, *supra* note 4, at 1056–57.

¹⁰ *Wall Street Reform: The Dodd-Frank Act*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> [<https://perma.cc/AA6D-HM8L>].

¹¹ 12 U.S.C. § 1851 (2012).

risky speculation.”¹² The Obama administration further describes the purpose of the Rule in very broad terms, as a measure to “ensure that banks are no longer allowed to own, invest, or sponsor hedge funds, private equity funds, or proprietary trading operations for their own profit, unrelated to serving their customers.”¹³

After the notice and comment rulemaking process, the final version of the Rule was issued on December 10, 2013.¹⁴ The Volcker Rule effectively prohibits U.S. banks, as well as foreign banks with U.S. subsidiaries, from engaging in proprietary trading,¹⁵ and also restricts their private equity activity, including investment in hedge funds.¹⁶

The Volcker Rule applies to “banking entities,” defined as “(i) any insured depository institution; (ii) any company that controls an insured depository institution; (iii) any [foreign banking organization]; and (iv) any affiliate of the foregoing.”¹⁷

The specific language of the Volcker Rule prohibits the acquisition of ownership interests in “covered funds” by any banking entity, or sponsoring a covered fund.¹⁸ The proposed Rule broadly defined a “covered fund” as:

¹² Christoph Scherrer, *Finance capital will not fade away on its own*, in *DON'T WASTE THE CRISIS: CRITICAL PERSPECTIVES FOR A NEW ECONOMIC MODEL* 32 (Nicolas Pons-Vignon ed., 2010).

¹³ *Wall Street Reform: The Dodd-Frank Act*, *supra* note 10.

¹⁴ Henry M. Field & Barbara R. Mendelson, *The Volcker Rule: Impact of the Final Rule on Foreign Banking Organizations*, MORRISON & FOERSTER LLP (Dec. 13, 2013), <http://media.mofo.com/files/Uploads/Images/131211-Volcker-Rule.pdf> [<https://perma.cc/WV86-TGRT>].

¹⁵ The Volcker Rule defines “proprietary trading” as “engaging as a principal for the trading account of the banking entity ... to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery [and] any option on such security, derivative, or contract.” 12 U.S.C. § 1851(h)(4). William Silber aptly describes proprietary trading as a “polite euphemism for speculation.” SILBER, *supra* note 1, at 281.

¹⁶ 12 U.S.C. § 1851(a)(1)(A)–(B); *Wall Street Reform: The Dodd-Frank Act*, *supra* note 10.

¹⁷ MORRISON & FOERSTER LLP, A USER’S GUIDE TO THE VOLCKER RULE 4 (Feb. 18, 2014) (parenthetical omitted), <http://media.mofo.com/files/Uploads/Images/131223-A-Users-Guide-to-The-Volcker-Rule.pdf> [<https://perma.cc/F8XY-B23F>].

¹⁸ SULLIVAN & CROMWELL LLP, VOLCKER RULE: AGENCIES APPROVE LONG-AWAITED FINAL RULE; MOST REQUIREMENTS TO TAKE EFFECT ON JULY 21,

- any issuer that relies on Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940;
- a commodity pool (i.e. an enterprise operated for the purpose of trading in commodity interests); and
- certain foreign funds.¹⁹

Under the final Volcker Rule, the definition of a “foreign covered fund” was narrowed, but still included funds sponsored by a U.S. banking entity or an affiliate that satisfies three requirements:

- (i) the fund must be, or hold itself out as, an entity that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; (ii) the fund must be organized abroad, and (iii) its ownership interests must be offered and sold solely outside the United States.²⁰

If a U.S. entity invests in such a fund, it is clearly subject to Volcker regulations, but if a foreign bank invests in this same fund solely outside of the United States, that foreign bank is exempt from the Volcker Rule.²¹ The third prong of the “foreign covered fund” definition is included in order to prevent U.S. banking entities from using this loophole to avoid compliance with Volcker regulations when investing in a foreign fund.²² However, the only corresponding exemption for a foreign banking entity is the “solely outside of the United States” exception.²³

Beginning with the proposed Rule and continuing through passage of the final Rule, practitioners have debated regarding how broadly the definition of a “covered fund” should be read, and just how far the Volcker Rule should reach.²⁴ Clearly, U.S.

2015, app. A-8 (Dec. 13, 2013), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Volcker_Rule_5C6B.pdf [<https://perma.cc/9H6F-8NLJ>].

¹⁹ *Id.*

²⁰ Field & Mendelson, *supra* note 14, at 4.

²¹ *Id.*

²² MORRISON & FOERSTER LLP, A USER’S GUIDE TO THE VOLCKER RULE, *supra* note 17.

²³ See *infra* notes 33–34 and accompanying text for a more in-depth discussion of the “solely outside of the United States” exception to the Volcker Rule.

²⁴ See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536 (Jan. 31, 2014).

banks are subject to Volcker regulations. The subsidiaries of U.S. banks abroad must also comply with the Rule.²⁵ More problematic, however, is the fact that German banks with subsidiaries located in the United States, including both Deutsche Bank and Commerzbank, are subject to Volcker regulations, regardless of the size of their subsidiaries.²⁶

Banking entities subject to the Volcker Rule must meet several requirements. In order to comply with these new regulations, banks must expend considerable resources to ensure that the bank takes steps in four important areas: (1) effective compliance and reporting standards; (2) comprehensive data gathering and reporting structures; (3) compensation and governance; and (4) communication and culture.²⁷ Mayer Brown LLP, an international law firm, details tasks that German banks affected by the Volcker Rule are required to engage in before the conformance period ends in July 2016:

- Develop a conformance plan based on final regulations;
- Assess activities subject to the Volcker Rule, including any necessary reliance on exemptions;
- Make good faith efforts to be in a position to comply fully by the end of the conformance period;
- Determine if and when reporting metrics will apply for proprietary trading exemptions; and
- Determine scope of applicable compliance requirements and develop compliance programs *as soon as practicable*.²⁸

²⁵ DAVIS POLK LLP, FINAL VOLCKER RULE REGULATIONS 3–4 (Jan. 6, 2014), <http://www.davispolk.com/dodd-frank/memoranda/volcker-rule/> [<https://perma.cc/M5MX-JWFS>].

²⁶ *Id.*

²⁷ Steve Culp, *Final Volcker Rule Leaves Banks Facing Compliance Hurdles*, FORBES (Dec. 17, 2013), <http://www.forbes.com/sites/steveculp/2013/12/17/final-volcker-rule-leaves-banks-facing-compliance-hurdles/>.

²⁸ MAYER BROWN, IMPACT OF VOLCKER, THE EU PROPOSAL AND TRENNBANKENGESETZ ON GERMAN BANKS (Feb. 13, 2014), <https://www.mayerbrown.com/files/Event/6de9e941-6ac1-4226-833a-9a3ba3741d3e/Presentation/EventAttachment/405445b1-b027-4e28-9e33-c02d34957e1a/140213-Presentation.pdf> [<https://perma.cc/3BM8-ZRBL>] (emphasis added).

While U.S. subsidiaries of foreign banks must expend considerable resources in order to successfully comply with Volcker regulations for prohibited activities, the foreign parent bank might also attempt to relocate its proprietary trading outside of the United States in order to avoid compliance costs. Either way, the foreign bank is significantly affected by Volcker regulations, whether directly through compliance costs imposed on its U.S. subsidiary, or indirectly due to a desire to move proprietary trading offshore to evade Volcker regulation.²⁹ Linklaters, an international law firm, described the effect of the Volcker Rule on foreign banks particularly well: “[t]he Volcker Rule will constrain the worldwide activities of virtually all internationally active non-U.S. banks and their affiliates. In the absence of an exception, both proprietary trading in most financial instruments and sponsorship of and investment in alternative funds will be prohibited.”³⁰

While the Volcker Rule imposes stringent requirements on institutions considered “covered entities,” the Rule also includes several notable exceptions.³¹ Perhaps the exceptions even undermine the Rule entirely, as “even the dumbest banker can get around the Volcker Rule.”³²

The primary exception applies to banking entities “solely outside of the [United States],” commonly known as the “SOTUS” exception.³³ The SOTUS exception exempts foreign banks’ proprietary trading from the Volcker Rule if the banks comply with two requirements: (1) proprietary trading occurs outside of the

²⁹ See also John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can’t Come Home*, 99 CORNELL L. REV. 1259, 1289 (2014) (arguing that the Volcker Rule does apply extraterritorially to foreign banks by requiring them to meet compliance obligations to ensure that their offshore proprietary trading qualifies for an exemption from the Volcker Rule).

³⁰ LINKLATERS LLP, *THE FINAL VOLCKER RULE AND ITS EXTRATERRITORIAL CONSEQUENCES FOR NON-U.S. BANKS* (Dec. 20, 2013), <http://www.linklaters.com/Insights/US-Publications/Pages/Final-Volcker-Rule-Extraterritorial-Consequences-Non-US-Banks.aspx> [<https://perma.cc/2U87-BBMA>].

³¹ A common criticism of the Volcker Rule is that it provides far too many exceptions, thereby inviting banks to seek out loopholes to avoid being subject to Volcker regulations. See Lee Sheppard, *The Loopholes in the Volcker Rule*, FORBES (Jan. 8, 2014, 10:28 PM), <http://www.forbes.com/sites/leesheppard/2014/01/08/the-loopholes-in-the-volcker-rule/>; Gary, *supra* note 4.

³² Sheppard, *supra* note 31.

³³ See 12 U.S.C. § 1851(d)(1)(H) (2012).

United States; and (2) the banking entity is not “directly or indirectly” controlled by a banking entity that is organized in the United States.³⁴ A foreign bank with only one branch office located in the United States is thus subject to the Volcker Rule, absent a showing that the disputed transaction occurred “solely outside of the United States.”³⁵ In effect, a foreign bank is only exempt from the Volcker Rule if the bank can demonstrate that it has no territorial or corporate connection to the United States, a very difficult test to meet in today’s interconnected global economy.³⁶ Large German banks, including both Deutsche Bank and Commerzbank, have significant U.S. subsidiaries³⁷ and are unable to disentangle their operations sufficiently to take advantage of the SOTUS exception. Therefore, both banks must comply with Volcker regulations.

II. EUROPEAN RECEPTION OF THE VOLCKER RULE

The European reaction to the passage of the Volcker Rule proved especially negative from the outset. This Part details the European consensus following passage of the Volcker Rule and provides a case study analyzing the specific impact of the Volcker Rule on two large German banks, Deutsche Bank and Commerzbank.

A. The European Financial Community Heavily Criticizes the Volcker Rule

Originally, the general consensus within Germany was that the Volcker Rule would only impact Deutsche Bank, but the final Rule, when passed, required compliance from twelve German banks.³⁸ As of December 2013, the number of affected German

³⁴ *Id.*

³⁵ See Coffee, *supra* note 29, at 1288 (agreeing that a line-drawing exercise is necessary).

³⁶ *Id.*

³⁷ See *infra* Part II.B for an overview of the structure and revenues of both Deutsche Bank and Commerzbank.

³⁸ Eyk Henning, Ainsley Thomson & Geoffrey T. Smith, ‘Volcker Rule,’ *EU-Style: Germany, U.K. Move to Tackle Proprietary Trading by Banks*, WALL ST. J. (Feb. 4, 2013), <http://online.wsj.com/news/articles/SB10001424127887324900204578283971336611166> [<https://perma.cc/J7VT-27W9>].

banks increased to fifteen, and includes Deutsche Bank, Commerzbank, and UniCredit.³⁹ Noting that the United States constitutes a core market of Deutsche Bank, a prominent German newspaper, *Frankfurter Allgemeine Zeitung*, revealed substantial unease regarding the potentially significant impact of the Volcker Rule on German banks.⁴⁰ The reaction of German financial organizations proved especially negative, and heavy criticism was levied even before the final Volcker Rule was promulgated.⁴¹

As early as December 2012, Commerzbank already recognized the potential for significant impact of the Volcker Rule in the “risk factors” section of one of its registration statements.⁴² Commerzbank’s early identification of Dodd-Frank regulation as a potentially significant risk to its business reflects the strong animosity German banks felt, and still feel, towards the Volcker Rule.

Deutsche Bank also submitted several comments during the notice and comment period prior to adoption of the Volcker Rule, primarily arguing for a narrow reading of “covered funds,” and providing explanations for how a broader reading of this term might adversely impact Deutsche Bank’s business activities and its customers.⁴³ Deutsche Bank also supported the creation of additional statutory exemptions for “underwriting, market-making

³⁹ Norbert Kuls, Maximilian Weingartner & Hanno Mussler, *Nach der Volcker Regel: Warum Goldman Sachs jetzt um Milliarden zittert*, FRANKFURTER ALLGEMEINE ZEITUNG (Dec. 11, 2013), <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/nach-der-volcker-regel-warum-goldman-sachs-jetzt-um-milliarden-zittert-12706754.html> [<https://perma.cc/8CZU-2DHT>].

⁴⁰ *Id.*

⁴¹ See Henning et al., *supra* note 38; Kuls et al., *supra* note 39.

⁴² COMMERZBANK AKTIENGESELLSCHAFT, REGISTRATION DOC. (Dec. 12, 2012), https://www.commerzbank.com/media/aktionaere/emissionsprogramme/registrierungsformular_2/Registrierungsformular12122012_en.pdf [<https://perma.cc/UVT5-BMRP>]. Commerzbank included the following language anticipating potential effects from the impact of the Volcker Rule in Germany:

Although it is not yet clear what effects the legislative amendments in connection with the Dodd-Frank Act and EMIR will have, many elements of this new legislation could lead to changes which would affect the profitability of the Group’s business activities, require adaptations to its commercial practices, or increase its costs, including the compliance costs.

Id.

⁴³ Deutsche Bank, Comment Letter on Volcker Rule (Feb. 13, 2012), <http://www.sec.gov/comments/s7-41-11/s74111-284.pdf> [<https://perma.cc/7ECZ-PANA>].

related activities and risk-mitigating hedging,” and advocated for applying those exemptions to both the covered funds and proprietary trading portions of the Rule.⁴⁴

Bundesverband Investment und Asset Management e.V. (BVI),⁴⁵ a trade association representing the German investment fund and management industry, similarly submitted comments to the proposed Volcker Rule.⁴⁶ Among several criticisms, the organization primarily took issue with the overly broad language pertaining to “covered funds,” and argued that this definition should be restricted so that non-U.S. regulated funds, such as funds regulated by the Undertakings for the Collective Investment of Transferable Securities (UCITS),⁴⁷ would be excluded.⁴⁸ Further, Deutsche Bundesbank,⁴⁹ the central bank of the Federal Republic of Germany, criticized two core components of the Volcker Rule as applied to German banks, namely the problematic extraterritorial reach of the Rule and an exception permitted only for U.S. governmental proprietary trading.⁵⁰ Deutsche

⁴⁴ *Id.*

⁴⁵ BVI represents eighty-two members handling assets in the amount of €1.8 trillion, comprised of both investment funds and individual accounts. The organization also assists 50 million private clients in capital management. BVI, Comments on OCC Docket No. OCC-2011-14; FRB Docket No. R-1432 and RIN 7100 AD 82; FDIC RIN 3064-AD85 [hereinafter BVI, Comments]; SEC File No. S7-41-11: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds 2 (Feb. 13, 2012), <http://www.sec.gov/comments/s7-41-11/s74111-213.pdf> [<https://perma.cc/9SYB-JSPE>].

⁴⁶ *Id.*

⁴⁷ UCITS is an organization that coordinates the distribution and management of unit trusts within the European Union. *Undertakings For The Collective Investment of Transferable Securities - UCITS*, INVESTOPEDIA, <http://www.investopedia.com/terms/u/ucits.asp> [<https://perma.cc/VX9E-MU6N>]. These funds are marketed solely within the European Union, subject to the disclosure requirements of the individual country. *Id.*

⁴⁸ BVI Comments, *supra* note 45, at 6.

⁴⁹ Deutsche Bundesbank is the central bank of the Federal Republic of Germany. DEUTSCHE BUNDESBANK, <http://www.bundesbank.de/Navigation/EN/Tasks/tasks.html?startpageId=Startseite-EN&startpageAreaId=Navigationsbereich&startpageLinkName=tasks+1736> [<https://perma.cc/3RM2-RRQT>]. Deutsche Bundesbank’s core business areas are comprised of the Eurosystem monetary policy, banking supervision, and cash operations. *Id.*

⁵⁰ Deutsche Bundesbank, Letter to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Securities

Bundesbank argued that the Volcker Rule imposes U.S. obligations on non-U.S. entities, essentially suggesting that the Volcker Rule might violate principles of extraterritoriality and urging the relevant U.S. organizations responsible for implementing the Volcker Rule to take a closer look at its extraterritorial reach.⁵¹

The notice and comment process for the Volcker Rule stretched on, and legislators took the concerns of European representatives to heart. The final Volcker Rule's prohibition on proprietary trading exempts the following activities from the Rule:

- trading in U.S. government or government agency securities;
- trading in municipal bonds;
- trading by a foreign affiliate of a U.S. banking entity of debt of a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or of any agency or political subdivision of that foreign government, issued by the foreign country in which the foreign affiliate is organized, if the affiliate is a foreign bank or regulated by the foreign sovereign as a securities dealer and the trading is not financed by an affiliate located in the United States or organized under U.S. law;
- trading on behalf of a customer in a fiduciary capacity or as riskless principal; and
- trading by a banking entity that is a regulated insurance company (including a foreign insurance company), whether for the insurance company's general account or for a separate account.⁵²

This expanded list of exemptions reflects the numerous critical comments received before Congress promulgated the final Volcker Rule in December 2013.⁵³

After the final Volcker Rule was passed, European organizations continued to criticize the Rule. Erkii Liikanen, Chair of the

and Exchange Commission Regarding the Volcker Rule (Feb. 10, 2012), <http://www.sec.gov/comments/s7-41-11/s74111-222.pdf> [<https://perma.cc/4AG3-SG87>].

⁵¹ *Id.*

⁵² MORRISON & FOERSTER LLP, A USER'S GUIDE TO THE VOLCKER RULE, *supra* note 17, at 11.

⁵³ Field et al., *supra* note 14.

European Union's High Level Expert Group on Banking Reform, in the "Liikanen Report,"⁵⁴ criticized the Volcker Rule for being both the "most narrow" because it primarily targets proprietary trading, and the "most radical" approach to addressing the problem of risky proprietary trading.⁵⁵ Liikanen reasoned that the Volcker Rule's absolute ban on proprietary trading within the entire banking group was especially radical.⁵⁶ Liikanen's less radical approach, as proposed in his report to the E.U. Commission, involves banks separating their investment banking operations from retail banking operations.⁵⁷ In doing so, Liikanen supported the separation of risky activities rather than an outright prohibition on proprietary trading.⁵⁸

Similarly, BVI continued to attack the Rule due to its potential for placing undue burdens on the financial system as a whole.⁵⁹ An article published by the *Wall Street Journal* entitled "German Banks Fear the Consequences of the Volcker Rule" summarizes the core fears of German banks in the wake of passage of the Rule: the Rule imposes "widespread and contradictory demands" on German banks.⁶⁰ Deutsche Bank and Commerzbank are both mentioned in the article, although their representatives declined to comment on the potential impact of the Rule on their respective companies.⁶¹ French E.U. Commissioner Michael Barnier complained that "[the E.U.] can't accept extraterritorial consequences or Europe will be tempted to do the same thing."⁶² While the adoption of an exception for the trading of foreign debt quelled the concerns of many critics, several foreign organizations and

⁵⁴ See *infra* Part IV for a discussion of the Liikanen Report.

⁵⁵ *Chair of E.U. Expert Group Calls Volcker Rule the Most Narrow and Radical Approach*, 7 *Hedge Funds & Private Equity* 3, 2013 WL 2959221 (CCH).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Christian Grimm, *Deutsche Banken fuerchten Folgen der Volcker-Regel*, WALL ST. J. (Dec. 11, 2013, 2:22 PM), <http://www.wsj.de/nachrichten/SB10001424052702303293604579251900984954482> [<https://perma.cc/BF39-VHRF>].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Francesco Guerrera, Tracy Corrigan & Simon Nixon, *EU Red-Flags 'Volcker'*, WALL ST. J. (Jan. 27, 2012), <http://online.wsj.com/articles/SB10001424052970204573704577185100193763384> [<https://perma.cc/AG96-Y75N>].

officials continued to heavily criticize the Volcker Rule's potential to inflict negative systemic consequences.⁶³

B. Case Study: The Effects of the Volcker Rule on Deutsche Bank and Commerzbank

Deutsche Bank's early history reflects a commitment to international expansion. Deutsche Bank was founded in 1870 with the goal of "transact[ing] banking business ... in particular to promote and facilitate trade relations between Germany, other European countries and overseas markets."⁶⁴ After a tumultuous few decades, Deutsche Bank began to focus on international commitments in the 1970s, and became a "global player" beginning in 1989 when it merged with Bankers Trust and became influential in the American market.⁶⁵ Deutsche Bank's modern network remains extensive, as it is now present in over seventy countries.⁶⁶ Deutsche Bank retains a strong presence in the United States, as Deutsche Bank Americas contributes approximately 26 percent of the total Deutsche Bank revenues.⁶⁷

Founded in 1870 in Hamburg, Commerzbank began investigating international opportunities during the period from 1970 to 1990, when it founded the Europartners Group, an association of banks dedicated to pursuing international opportunities.⁶⁸ In 2008, Commerzbank merged with Dresdner Bank and became a European and global powerhouse.⁶⁹ Today, Commerzbank is a leading international bank with branches and offices in more than fifty countries.⁷⁰ While this prominent financial institution

⁶³ *Id.*

⁶⁴ *Deutsche Bank History: Chronicle—from 1870 until Today*, DEUTSCHE BANK, <https://www.db.com/en/media/Deutsche-Bank-History--Chronicle-from-1870-until-today.pdf> [<https://perma.cc/GR2R-G9Q3>].

⁶⁵ *Id.*

⁶⁶ *See Global Network*, DEUTSCHE BANK, <https://www.db.com/en/content/company/Global-Network.htm> [<https://perma.cc/5T38-HUWZ>].

⁶⁷ *Deutsche Bank in the USA*, DEUTSCHE BANK, <https://www.db.com/usa/content/en/company.html> [<https://perma.cc/X47A-KCYA>].

⁶⁸ *Time Bar*, COMMERZBANK, <https://www.commerzbank.de/en/hauptnavigation/konzern/geschichte/zeitstrahl/Zeitstrahl.html> [<https://perma.cc/G9Q8-CT6D>].

⁶⁹ *Id.*

⁷⁰ *Commerzbank at a glance*, COMMERZBANK, https://www.commerzbank.com/en/hauptnavigation/konzern/commerzbank_im_berblick/commerzbank_ueberblick.html [<https://perma.cc/HW25-MN54>].

has grown significantly in the past few decades, its core markets remain Germany and Poland.⁷¹ In 2013, Commerzbank generated gross revenues amounting to €9 billion.⁷²

The Volcker Rule imposes substantial compliance costs on Deutsche Bank and Commerzbank. In addition to satisfying robust, complicated, and acronym-filled compliance measures,⁷³ the final Volcker Rule imposes significant reporting and recordkeeping requirements when banks engage in prohibited proprietary trading of covered funds.⁷⁴ Furthermore, to satisfy the extensive reporting requirements, the Volcker Rule also compels banks to institute a program designed to prevent future violations of the Rule.⁷⁵ The program, which requires periodic review by senior management, is designed to instill in employees a culture of compliance with the Rule.⁷⁶ On top of these compliance requirements, the CEO of the bank must annually certify that the banking entity has appropriate procedures in place to comply with Volcker regulations.⁷⁷ In the case of foreign banking organizations, including Deutsche Bank and Commerzbank, the senior management officer of the U.S. subsidiary must provide the requisite certification.⁷⁸

Proponents of the Volcker Rule argue that the prohibition on proprietary trading and the corresponding compliance measures are necessary in order to effectively protect U.S. taxpayers from a repeat of 2008, when taxpayers bailed out failing financial institutions that had overindulged in foreign derivatives trading.⁷⁹ Further, proponents urge that these measures simultaneously help to protect the global financial system from systemic risk in an unstable global economy.⁸⁰

⁷¹ *Id.*

⁷² *Id.*

⁷³ The compliance measures are set out in Appendix A (Reporting and Recordkeeping Requirements for Covered Trading Activities) and Appendix B (Enhanced Minimum Standards for Compliance Programs). 12 U.S.C. § 1851 (2012).

⁷⁴ MORRISON & FOERSTER LLP, A USER'S GUIDE TO THE VOLCKER RULE, *supra* note 17.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Michael Greenberger, *The Extraterritorial Provisions of the Dodd-Frank Act Protects U.S. Taxpayers from Worldwide Bailouts*, 80 UMKC L. REV. 965, 965–66 (2012).

⁸⁰ *Id.*

While the policy justification for the Volcker regulation centers on a desire to avoid adverse systemic consequences of proprietary trading, this rationale fails to consider the significant compliance costs the Rule imposes on foreign banks. Foreign banks with only a minor presence in the United States face substantial burdens in the name of compliance with the Rule. Proponents of the Volcker Rule should more fully weigh the significant compliance costs attached to the Rule.

III. THE EXTRATERRITORIAL REACH OF THE VOLCKER RULE SHOULD BE LIMITED TO CONFORM TO THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The presumption against extraterritoriality, first set out in *Morrison*, and extended in *Kiobel*, *Microsoft Corp.*, and most recently in *Madoff*, should operate to limit the extraterritorial reach of the Volcker Rule, as applied to foreign banks. This Part lays out the jurisprudence of the presumption against extraterritoriality, analyzes this presumption as applied to the Volcker Rule, and argues that the current Volcker Rule therefore requires amendment.

A. *The Presumption Against Extraterritoriality*

The presumption against extraterritoriality is an accepted canon of construction and “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”⁸¹ The Supreme Court has employed this approach repeatedly, especially in the context of determining whether certain U.S. laws apply abroad.⁸²

In *Morrison v. Nat’l Australia Bank Ltd.*, the Supreme Court reaffirmed its commitment to the presumption against extraterritoriality.⁸³ The Court extended this presumption to cases arising under the Securities & Exchange Act,⁸⁴ and held that

⁸¹ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

⁸² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (reinforcing the *Morrison* holding and applying the presumption against extraterritoriality to the Alien Tort Statute); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007) (applying the presumption against extraterritoriality to a patent case).

⁸³ 561 U.S. 247, 255 (2010).

⁸⁴ 15 U.S.C. § 78a (2016).

Rule 10b-5⁸⁵ did not apply extraterritorially.⁸⁶ The *Morrison* Court relied on the distinction between the language of Section 10(b) and Section 30(a).⁸⁷ While Section 10(b) contains no explicit statement regarding extraterritorial application, Section 30(a) does.⁸⁸ Using this distinction to reinforce the presumption against extraterritoriality, the Court reasoned that Congress did not intend for Section 10(b) to apply extraterritorially.⁸⁹

The Court further noted that when a statute contains a provision for extraterritorial application, the presumption still operates by limiting that provision solely to those terms.⁹⁰ The *Morrison* Court thus compels a narrow reading of statutory language pertaining to extraterritorial application of U.S. laws. The Court emphasized its point in a poetic statement:

For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.⁹¹

Just as Deutsche Bundesbank recognized the potentially problematic components of the Volcker Rule, so too did several European organizations, such as the Federation of German Industries, the French Business Confederation, and the European Banking Federation, all urging that applying U.S. securities regulation abroad would detrimentally interfere with foreign securities regulation.⁹²

⁸⁵ 17 C.F.R. § 240.10b-5 (2016). The United States Securities and Exchange Commission's rule targets securities fraud by prohibiting any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security.

⁸⁶ *Morrison*, 561 U.S. at 263–65.

⁸⁷ *Id.* at 261–65.

⁸⁸ *Id.*

⁸⁹ *Id.* at 265. The Court of Appeals for the Second Circuit extended this holding in *United States v. Vilar*, concluding that Rule 10b-5 does not apply to extraterritorial conduct, regardless of whether the conduct is criminal or civil. 729 F.3d 62 (2d Cir. 2013).

⁹⁰ *Morrison*, 561 U.S. at 265.

⁹¹ *Id.* at 266.

⁹² The following organizations also joined in criticizing extraterritorial application of Rule 10b-5, pushing for a clear test to avoid undue interference with foreign securities regulation: the International Chamber of Commerce, the Swiss Bankers Association, the Institute of International Bankers, the Australian Bankers' Association, and the Association Francaise des Entreprises Privées. *Id.* at 269.

The *Morrison* Court ultimately adopted a test that assuaged these concerns. In order for Rule 10b-5 to apply, one of two conditions must be met: (1) the purchase or sale must be made in the United States; or (2) the transaction must involve a security listed on a domestic exchange.⁹³

On the opposing side, the Solicitor General proposed a test suggesting that Rule 10b-5 should apply extraterritorially to fraud involving “significant and material conduct” in the United States, purporting that this approach better promotes ethics and prevents the United States from becoming a “Barbary Coast” for perpetrating fraud.⁹⁴ The Court ultimately rejected this proposal and its supporting case law because it did not adhere to the presumption against extraterritoriality nor the Court’s narrow reading of statutory provisions that explicitly provide for extraterritorial application.⁹⁵

More recently, in July of 2014, the District Court for the Southern District of New York adhered to the presumption against extraterritoriality in holding that Section 550(a)(2) of the Bankruptcy Code⁹⁶ does not apply extraterritorially. In *Sec. Investor Protection Corp. v. Bernard Madoff Investment Secs. LLC*,⁹⁷ the trustee appointed under the Securities Investor Protection Act (SIPA) sought to recover funds that were transferred by foreign “feeder funds”⁹⁸ to various foreign customers.⁹⁹ The court applied a two-step test for determining whether the presumption against extraterritoriality applied to the situation at hand: (1) whether the factual circumstances at issue require an extraterritorial application of the federal statutory provision; and (2) if so, whether Congress intended for the statute to apply extraterritorially.¹⁰⁰ The court held that the first prong was satisfied because recovery

⁹³ *Id.* at 269–70.

⁹⁴ *Id.* at 270–73.

⁹⁵ *Id.*

⁹⁶ 11 U.S.C.A. § 550(a)(2) (2015).

⁹⁷ 513 B.R. 222, 225 (Bankr. S.D.N.Y. 2014).

⁹⁸ “Feeder funds” are funds that collectively feed into a master fund (an umbrella), which oversees both the trading activity and portfolio investments of all of the funds. Feeder funds are commonly used by hedge funds as a method of pooling investment capital. *Feeder Fund*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/feederfund.asp> [<https://perma.cc/3FL4-9BFW>].

⁹⁹ *Madoff*, 513 B.R. at 225.

¹⁰⁰ *Id.* at 226 (citing *In re Maxwell Commc’n Corp.*, 186 B.R. 807, 816 (Bankr. S.D.N.Y. 1995)).

of the requested foreign funds would require an extraterritorial application of § 550(a)(2) to reach purely foreign feeder funds.¹⁰¹ Next, under the second prong, the court found that SIPA's focus was primarily domestic, noting a lack of intent by Congress to extend SIPA internationally.¹⁰² The court additionally held that even if the presumption against extraterritoriality was rebutted, contrary to the analysis set out above, use of § 550(a) to reach foreign transfers would violate international comity principles.¹⁰³ Thus, the *Madoff* court held that § 550(a)(2) of the Bankruptcy Code could not reach extraterritorially, so the trustee was unable to recover any money transferred from the foreign investment fund to its purely foreign customers.¹⁰⁴ The *Madoff* decision extended the *Morrison* presumption of extraterritoriality to the bankruptcy field.¹⁰⁵

The presumption against extraterritoriality should apply with equal strength in the context of the Volcker Rule. Deutsche Bundesbank highlighted the necessity of limiting the scope of extraterritorial application of the Volcker Rule: "We also regard it as very important that the U.S. authorities limit the scope of the Volcker Rule to foreign banks' U.S. operations and to approve adequate home standards for foreign banks."¹⁰⁶

B. The Volcker Rule Violates the Presumption Against Extraterritoriality

In *Morrison*, the Supreme Court strongly expounded the presumption against extraterritoriality.¹⁰⁷ Even where the statute or regulation at issue contains an explicit provision for extraterritorial application, the Court compelled a narrow reading of that

¹⁰¹ *Id.* at 228.

¹⁰² *Id.* at 230–31.

¹⁰³ *Id.* at 231–32. The principle of international comity refers to "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)) (citations omitted). See *infra* Part IV for a further discussion of the potential impact of double regulation.

¹⁰⁴ *Madoff*, 513 B.R. at 232.

¹⁰⁵ *Id.*

¹⁰⁶ Deutsche Bundesbank, *supra* note 50.

¹⁰⁷ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 272–73 (2010).

provision.¹⁰⁸ Various additional sources corroborate the necessity of a narrow reading if the federal statute or regulation at issue explicitly provides for extraterritorial application, such that the presumption against extraterritoriality is overcome.¹⁰⁹ Once the presumption is overcome, the reasonableness of extraterritorial application is evaluated using the following criteria:

- the degree of conflict with foreign law or policy;
- the extent to which enforcement by either state can be expected to achieve compliance;
- the relative significance of effects on the United States as compared with those elsewhere;
- the extent to which there is an explicit purpose to harm or affect American commerce or interests; and
- the foreseeability of such an effect.¹¹⁰

Application of these factors to all U.S. subsidiaries of foreign banking entities indicates a finding of unreasonableness. While proponents of the Rule point to the goal of financial stability and the protection of American interests, it is unreasonable to subject the small branch office of a foreign bank to such regulations. The “explicit purpose”¹¹¹ of protecting U.S. interests does not exist in such cases.¹¹² The foreseeability of U.S. interests being harmed by this small U.S. presence is correspondingly low, as that small branch office or insignificant subsidiary likely does not engage in proprietary trading to an appreciable extent.¹¹³

The presumption against extraterritoriality demands a stricter limitation on the scope of extraterritorial application of the Volcker Rule’s prohibition on proprietary trading. At a minimum,

¹⁰⁸ *Id.* at 271–72.

¹⁰⁹ See 44B Am. Jur. 2d *International Law* § 71 (2014).

¹¹⁰ *Id.* See *infra* Part IV for a discussion of the European approach to regulating proprietary trading, as well as the potential for double regulation as a result.

¹¹¹ *Id.*

¹¹² Here, the explicit purpose of preventing the “too big to fail” problem should not extend abroad to foreign banks in the form of extensive compliance measures.

¹¹³ A notable assumption is made here: subsidiaries comprising less than 25 percent of the global operations of a foreign bank do not retain a sufficiently significant presence in the United States to warrant compliance with the Volcker Rule.

the statutory language should be read narrowly, as required by the Supreme Court in *Morrison*.

C. The Volcker Rule Is Too Inflexible

In addition to violating the presumption against extraterritoriality, the Volcker Rule also fails to take into account situations in which the U.S. subsidiary of a foreign-organized parent company represents only a minimal proportion of the parent's overall operations.¹¹⁴ The bright-line rule disregards a foreign company with a branch office located in the United States with only minor operations.¹¹⁵ Both scenarios do not justify imposition of Volcker regulations, which necessarily impose substantial compliance obligations on the foreign parent. This is extraterritoriality pushed to an unfortunate extreme, and the Volcker Rule fails to provide flexibility for such cases.

Further, the Volcker Rule fails to acknowledge an inherent hypocrisy. The Rule requires subsidiaries of U.S. companies abroad to comply with Volcker regulations, and yet also imposes the regulations on subsidiaries of foreign banks located in the United States.¹¹⁶ Why subject one set of subsidiaries to U.S. law, and not allow foreign parents to regulate their subsidiaries located in the United States? Which set of regulations should govern in such cases? While the questions posed have generated criticism in the financial world, the Volcker Rule settles with an assertion of territorial jurisdiction as the basis for imposing U.S. regulations on subsidiaries of foreign banks transacting business in the United States.¹¹⁷ Pursuant to the final Volcker Rule, foreign banks are only exempted if they can meet the SOTUS exception.¹¹⁸ Determining whether a particular transaction qualifies for the SOTUS exception in the first place, however, requires extensive analysis by the foreign bank to ensure that it

¹¹⁴ See Coffee, *supra* note 29, at 1295.

¹¹⁵ *Id.* (posing a similar question regarding application of the Volcker Rule to a single branch office of a foreign bank in the United States).

¹¹⁶ DAVIS POLK LLP, *supra* note 25, at 3–4.

¹¹⁷ Coffee, *supra* note 29, at 1297 (acknowledging that extraterritorial application of the Volcker Rule based on mere presence is problematic but ultimately finding that an assertion of territorial jurisdiction is the correct approach).

¹¹⁸ The SOTUS exception is discussed *supra* Part I.

meets all applicable requirements.¹¹⁹ This process could result in substantial compliance costs to disentangle the transaction from a nexus to the United States. Foreign banks with but a mere presence in the United States still need to ensure that the transaction in question does not involve that U.S. branch office in any way.¹²⁰ The Volcker Rule proves inflexible because it fails to take into account circumstances that do not warrant imposing significant compliance costs on foreign banks.¹²¹

Although proponents of the extraterritorial application of the Volcker Rule regard it as a “necessary evil” to protect American interests,¹²² the presumption against extraterritorial application of U.S. laws necessitates a line-drawing exercise.¹²³ Exactly where to best draw that line is quite controversial, perhaps even elusive.

The final Volcker Rule draws the line as follows: U.S.-organized banking entities, including all of their worldwide subsidiaries, are subject to the Volcker Rule;¹²⁴ and foreign-organized banking entities are not themselves subject to the Volcker Rule, but any subsidiaries located in the United States are.¹²⁵ For example, a U.S. bank’s subsidiaries in Germany must comply with Volcker regulations.¹²⁶ A German bank’s subsidiaries located in the United States must similarly comply.¹²⁷ However, the German bank’s operations within Germany, or anywhere else outside of the territorial United States, are not subject to the Volcker Rule.¹²⁸

The basis for an assertion of jurisdiction in the case of subsidiaries of foreign banks located in the United States is traditional territorial jurisdiction.¹²⁹ The rationale is simple: by operating a subsidiary in the United States, that subsidiary must comply with U.S. regulations.¹³⁰ However, the Volcker Rule complicates

¹¹⁹ See Coffee, *supra* note 29, at 1289–90.

¹²⁰ *Id.* at 1295.

¹²¹ *Id.* at 1293.

¹²² See Greenberger, *supra* note 79, at 965–66.

¹²³ Coffee, *supra* note 29, at 1271 (arguing that a line-drawing exercise is necessary).

¹²⁴ DAVIS POLK LLP, *supra* note 25, at 3–4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Coffee, *supra* note 29, at 1297.

¹³⁰ While it is true that territorial jurisdiction would subject the subsidiaries of foreign banks located in the United States to all requirements that

the situation because compliance costs of engaging in proprietary trading often extend far beyond the U.S. subsidiary.¹³¹ Indeed, the effects of Volcker Rule compliance do extend back to the parent located abroad, as the parent must either comply or conduct its proprietary trading abroad such that it qualifies for the SOTUS exception.¹³² The extensive compliance measures specified in lengthy, complicated, and detailed appendices require manpower and substantial amounts of paperwork that place a significant burden on the foreign bank.¹³³

The Volcker Rule fails to comply with the presumption against extraterritoriality. In the alternative, even if that presumption is overcome, the extraterritorial provision should be read narrowly, as required by both *Morrison* and *Madoff*.

IV. THE EUROPEAN APPROACH TO RESTRICTING PROPRIETARY TRADING AND THE POTENTIAL FOR DOUBLE REGULATION

The European Union, as well as both Germany and the United Kingdom individually, have proposed regulations aimed at bank reform in the wake of the 2008 financial crisis.¹³⁴ In January of 2014, the European Commission published a proposal to regulate E.U. credit institutions¹³⁵ due to concern that several E.U. banks were “too big to fail,” “too big to save,” and “too complex to

ordinary U.S. banks must comply with, the effects of requiring compliance from all such subsidiaries extend far beyond the territorial borders of the United States. Compliance costs certainly extend to the foreign parent located abroad, and perhaps even further to other subsidiaries located abroad.

¹³¹ See *supra* Part II.B for a full discussion of the compliance costs imposed on the foreign parent bank as a result of Volcker regulations.

¹³² 12 U.S.C. § 1851(d)(1)(H) (2012).

¹³³ See A USER’S GUIDE TO THE VOLCKER RULE, *supra* note 17, at 26–31; 12 U.S.C. § 1851.

¹³⁴ MAYER BROWN LLP, LEGAL UPDATE: DOES VOLCKER + VICKERS = LIIKANEN? EU PROPOSAL FOR A REGULATION ON STRUCTURAL MEASURES IMPROVES THE RESILIENCE OF EU CREDIT INSTITUTIONS (Feb. 2014), http://www.mayerbrown.com/files/Publication/f6722a7a-b666-4384-931f-0f77d6424e37/Presentation/PublicationAttachment/1a249a85-3015-43eb-8389-26237a62e419/update_volcker_vickers_feb14.pdf [<https://perma.cc/A2Z9-B44F>]; Steven Harras, *European regulators giving second look to ‘Volcker-like rule,’ top U.S. regulators tell Congress*, CONG. Q. (2014).

¹³⁵ EUR. COMM’N, PROPOSAL ON BANKING STRUCTURAL REFORM (Jan. 29, 2014), <http://ec.europa.eu/finance/bank/structural-reform/> [<https://perma.cc/ARH5-UBWL>].

manage, supervise and resolve.”¹³⁶ The European Commission drew upon the Liikanen Report, a Finnish-led effort to study and recommend necessary changes to E.U. banking structure.¹³⁷ At its core, the Liikanen Report proposes a novel method of preventing these problems: require banks to segregate their trading activities from their retail banking business.¹³⁸ As Raimund Roeseler, Chief Executive Director of the German Federal Financial Supervisory Authority,¹³⁹ noted in his praise of the Liikanen Report,¹⁴⁰ the proposed regulations would be limited in scope.¹⁴¹ The strict regulations would only apply to banking entities that are sufficiently “large and interlinked,” and would not apply to most medium and smaller-sized institutions.¹⁴²

However, while these European regulations have the same purpose as the Volcker Rule in achieving structural reform in the banking field, they differ in their approach. Both Germany and the United Kingdom, in line with the Liikanen Report, proposed measures whereby investment banking operations are separated from remaining operations.¹⁴³ Germany adopted the *Trennbankengesetz* (German Banking Separation Law), which became effective on January 31, 2014.¹⁴⁴ Pursuant to this law, German banks are required to separate their investment arms containing hedge funds from the rest of their core operations.¹⁴⁵

¹³⁶ MAYER BROWN LLP, *supra* note 134.

¹³⁷ Erkki Liikanen et al., *High-level Expert Group on reforming the structure of the EU banking sector*, EUR. COMM’N (Oct. 2, 2012), http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf [<https://perma.cc/4AK4-WZQT>]; Coffee, *supra* note 29, at 1291.

¹³⁸ International Securities and Financial Reporting Update, 2013 WL 8369333 (C.C.H.), Vol. 8, No. 1, Jan. 17, 2013; Coffee, *supra* note 29, at 1291.

¹³⁹ The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) performs similar functions as the United States Securities & Exchange Commission.

¹⁴⁰ Liikanen et al., *supra* note 137.

¹⁴¹ International Securities and Financial Reporting Update, *supra* note 138.

¹⁴² *Id.* As discussed *infra* Part V, a limitation on the scope of the Volcker Rule adopts an approach that is similar to the Liikanen Report’s approach.

¹⁴³ MAYER BROWN LLP, *supra* note 134.

¹⁴⁴ *Trennbankengesetz* [German Banking Separation Law], Aug. 13, 2013, BGBl. I S. 3090 (Ger.). Although the *Trennbankengesetz* has already been passed, most of the provisions pertaining to banks do not become effective until July 1, 2015. MAYER BROWN LLP, *supra* note 134.

¹⁴⁵ *Keine Erleichterung fuer die Deutsche Bank*, HANDELSBLATT (Nov. 4, 2014, 1:04 PM), <http://www.handelsblatt.com/politik/deutschland/trennbank>

Similarly, the United Kingdom's Vickers report, issued by the Independent Commission on Banking in September 2011,¹⁴⁶ proposed "ringfencing," whereby U.K. banks are required to "ringfence," or legally and operationally separate their investment banking operations from the rest of their business.¹⁴⁷ Although the United Kingdom has not yet adopted formal legislation to implement the recommendation stemming from the Vickers report, the U.K. government responded positively, and had hopes of implementing legislation in 2015.¹⁴⁸ If implemented, compliance would be required by 2019.¹⁴⁹ Unlike Germany, the E.U. Commission has not been willing to go so far as the *Trennbankengesetz* and has not yet made the ringfencing provision mandatory.¹⁵⁰

Although legislation has not yet been passed in the United Kingdom and the European Commission is still in the initial process of implementing further reform, regulations were expected as early as 2015, coinciding with the deadline for compliance with the Volcker Rule.¹⁵¹ Theoretically, then, U.S. subsidiaries of European

engesetz-keine-erleichterung-fuer-die-deutsche-bank-/10930660.html# [https://perma.cc/MJ4F-EW6J].

¹⁴⁶ Jill Treanor, *Vickers report: key points*, GUARDIAN (Sept. 12, 2011, 3:49 PM), <http://www.theguardian.com/business/2011/sep/12/vickers-report-key-points> [https://perma.cc/2UJ9-EWRC].

¹⁴⁷ *Id.*

¹⁴⁸ Coffee, *supra* note 29, at 1292. The Bank of England noted that it intended to issue final rules regarding ringfencing in 2016, but as of the time of this writing, the final rules have not yet been issued. Policy Statement, Bank of England Prudential Regulation Authority, The implementation of ringfencing: legal structure, governance and the continuity of services and facilities—PS10/15 (May 27, 2015), <http://www.bankofengland.co.uk/pru/Pages/publications/ps/2015/ps1015.aspx> [https://perma.cc/L7KK-BQTJ]. See also BANK OF ENGLAND PRUDENTIAL REGULATION AUTHORITY, CONSULTATION PAPER CP37/15, THE IMPLEMENTATION OF RING-FENCING: PRUDENTIAL REQUIREMENTS, INTRAGROUP ARRANGEMENTS AND USE OF FINANCIAL MARKET INFRASTRUCTURES (Oct. 2015), <http://www.bankofengland.co.uk/pru/Documents/publications/cp/2015/cp3715.pdf> [https://perma.cc/5GBE-JNVK].

¹⁴⁹ Coffee, *supra* note 29, at 1292 (citing EUR. COMM'N, FINAL REPORT OF HIGH-LEVEL EXPERT GROUP ON REFORMING THE STRUCTURE OF THE E.U. BANKING SECTOR, at i (Oct. 2, 2012)).

¹⁵⁰ *Keine Erleichterung fuer die Deutsche Bank*, *supra* note 145.

¹⁵¹ Coffee, *supra* note 29, at 1292 (citing EUR. COMM'N, FINAL REPORT OF HIGH-LEVEL EXPERT GROUP ON REFORMING THE STRUCTURE OF THE E.U. BANKING SECTOR, at i (Oct. 2, 2012)). At the time of this writing, the E.U. Commission has not yet provided further guidance regarding a timeline for implementation of its ringfencing proposals.

banks might be subject to two potentially very different regulations: both the Volcker Rule and European regulations governing some form of ringfencing. Requiring U.S. subsidiaries of foreign banks to comply with two very detailed sets of compliance measures is irrational and overly cumbersome for all parties.

Further, if a measure like the *Trennbankengesetz* applies to the entity, then the parent will already be required to legally separate its “risky” investment operations.¹⁵² This change is likely to affect its subsidiaries as well, although the specific effect is unclear. Requiring a subsidiary to comply with two very different, detailed, and compliance-heavy regulations potentially imposes significant hardship on the foreign bank.

If and when implemented, European measures like the *Trennbankengesetz* will subject foreign parent banks with U.S. subsidiaries to two sets of cumbersome requirements. To avoid the potential for double regulation of foreign banks, the bright-line rule contained within the Volcker Rule should be amended to allow for increased flexibility.

V. ONE POTENTIAL ALTERNATIVE: EXEMPT U.S. SUBSIDIARIES OF FOREIGN BANKS REPRESENTING LESS THAN 25 PERCENT OF THE FOREIGN PARENT’S OPERATIONS

While the core goal of the Volcker Rule, implemented as part of the “too big to fail” legislation, is to prevent future financial crises,¹⁵³ the aforementioned controversial aspects of the Volcker Rule demonstrate the difficulties of regulation in an increasingly interconnected global economy. The United States cannot impose its rules without first ascertaining an appropriate jurisdictional basis. The line certainly must be drawn somewhere, but the Volcker Rule simply extends too far in the name of crisis prevention by requiring all U.S. subsidiaries of foreign banks, regardless of size, to comply with Volcker Rule regulations.

Bright-line rules will always generate substantial difficulties, especially in the field of financial regulation.¹⁵⁴ One alternative

¹⁵² *Trennbankengesetz*, *supra* note 144.

¹⁵³ Coffee, *supra* note 4, at 1056, 1060.

¹⁵⁴ “Use of a bright-line or single-factor test for that sort of question would be at odds with the tendency of modern jurisprudence and would lead to seriously undesirable results, likely to be incompatible with the main objectives

is to make the Rule more flexible by imposing a limitation on the scope of Volcker regulation by exempting U.S. subsidiaries of foreign parents that comprise less than 25 percent of the total operations of the foreign parent.¹⁵⁵ Here, as with all such regulations, a line-drawing exercise becomes necessary yet again.¹⁵⁶ This addresses the example set out above, in which a European-organized bank maintains only one small subsidiary in the United States.¹⁵⁷ The substantial compliance costs facing that small subsidiary will necessarily extend beyond the territorial borders to the foreign parent.¹⁵⁸ If the 25 percent rule were to govern, that insignificant subsidiary would be exempt from compliance with the Volcker Rule.¹⁵⁹

Further, as previously described, the foreign bank might be required to comply with foreign regulations like the *Trennbankengesetz* or prospective legislation in other European countries that are designed to combat the same problems as the Volcker Rule.¹⁶⁰ In the event that the U.S. subsidiary does engage in a substantial amount of proprietary trading, then foreign regulations likely already cover that activity.¹⁶¹ While critics would argue that exempting subsidiaries of foreign banks located in

of the *Morrison* opinion.” *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 220 (2d Cir. 2014).

¹⁵⁵ See Coffee, *supra* note 29, at 1295 (proposing that limiting the reach of the Volcker Rule to foreign banks may be justified).

¹⁵⁶ While bright-line rules are generally disfavored, the proposal introduced simply expands the bright-line rule already contained in the final version of the Volcker Rule. Thus, it is consistent with the holding in *Parkcentral Global Hub Ltd.*, 763 F.3d at 220.

¹⁵⁷ See *supra* Part III.C.

¹⁵⁸ See *supra* Part II.B for a case study that details the significant compliance costs the Volcker Rule imposes on foreign banks as a result of their U.S. subsidiaries being required to comply with Volcker regulations.

¹⁵⁹ If the insignificant subsidiary is not forced to comply with the Volcker Rule, then the parent bank is not required to expend significant resources in the name of compliance.

¹⁶⁰ See *supra* Part IV for a discussion of double regulation and the potential negative consequences associated with requiring foreign banks to comply with both their own regulations, as well as requiring their U.S. subsidiaries to comply with Volcker regulations.

¹⁶¹ As discussed *supra* Part IV, several European Union countries have already enacted legislation designed to address the “too big to fail” problem, or have plans to implement such legislation prospectively.

the United States creates an “enclave” and leads to uneven enforcement of the Volcker Rule,¹⁶² the aforementioned foreign regulations would kick in to regulate proprietary trading of that subsidiary. As noted in *In re Midland Euro Exch. Inc.*, the desire to avoid loopholes in the law, including uneven enforcement, “must be balanced against the presumption against extraterritoriality, which serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”¹⁶³

While the 25 percent number may appear to be arbitrary, imposing this standard preserves the Obama administration’s core goal of preventing the “too big to fail” problem.¹⁶⁴ The 25 percent rule is a very low standard, meaning that the Volcker Rule would still apply to the vast majority of U.S. subsidiaries of foreign parents.¹⁶⁵ Only small subsidiaries would be exempt. The 25 percent rule would add more flexibility to the rigid Volcker Rule by carving out an additional exception that accounts for cases in which requiring compliance is controversial.

CONCLUSION

The Volcker Rule is a unique innovation implemented by the Obama administration to combat the “too big to fail” problem in today’s increasingly interconnected economy. However, the Rule requires some revision in order to more fully balance the significant costs imposed on foreign banks through their U.S. subsidiaries. While there is likely no perfect solution to this important dilemma, the bright-line rule included in the December 2013 final version of the Volcker Rule is too rigid and inflexible. Further, the Rule fails to comply with the presumption against extraterritoriality that has been enshrined in the Court’s jurisprudence in *Morrison*, expanded upon in *Kiobel* and *Microsoft Corp.*, and most recently reemphasized in *Madoff*. Finally, the Rule potentially subjects foreign banking entities to double regulation.

¹⁶² See Greenberger, *supra* note 79, at 965–66.

¹⁶³ *In re Midland Euro Exch. Inc.*, 347 B.R. 708, 726 (Bankr. C.D. Cal. 2006) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

¹⁶⁴ See *Wall Street Reform: The Dodd-Frank Act*, *supra* note 10.

¹⁶⁵ See 12 U.S.C. § 1851(h) (2012).

The Volcker Rule's inherent deficiencies require revision. This Note's proposed solution provides one potential framework for accomplishing an efficient revision of the Rule. By exempting U.S. subsidiaries of foreign banks that comprise less than 25 percent of the parent's global operations, the proposed solution introduces a modicum of flexibility into an otherwise rigid rule. Mr. Volcker's aims remain preserved, as the proposal only exempts a small portion of U.S. subsidiaries from compliance. Far from eliminating all compliance with Volcker regulations, the proposal simply exempts those small and insignificant subsidiaries in order to minimize compliance expenditures. While a perfect solution to the risk inherent in our global economy remains elusive, the proposal described would introduce a small degree of flexibility to, while retaining the core aims of, Mr. Volcker's Rule.