UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ERIC TAYLOR and KRISTINE EKMAN *Plaintiffs*, -against- BEN BERNANKE, in his official capacity as Chairman of the Board of Governors of the Federal Reserve System; MARTIN J. GRUENBERG, in his official capacity as Chairman of the Federal Deposit Insurance Corporation; MARY JO WHITE, in her official capacity as Chairperson of the U.S. Securities and Exchange Commission; GARY GENSLER, in his official capacity as Chairman of the U.S. Commodity Futures Trading Commission; THOMAS J. CURRY, in his official capacity as Comptroller at the Office of the Comptroller of the Currency, U.S. Department of the Treasury, MARY J. MILLER, in her capacity as Under Secretary for Domestic Finance, U.S. Department of the Treasury; JACOB LEW in his official capacity as Secretary of the Treasury at the U.S. Department of the Treasury. *Defendants*.	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** Civil Case No. CV 13-1013 (Ross, J.) (Azrack, M.J.)

Plaintiffs Eric Taylor and Kristine Ekman, as individuals and in their capacities as members of Occupy the SEC ("OSEC"), hereby cross-move for summary judgment seeking declaratory, injunctive and mandamus relief under the Administrative Procedure Act ("APA") and this Court's mandamus powers to compel the Defendants, in their capacities as officers or employees of certain federal agencies, to issue a joint Final Rulemaking under 12 U.S.C. § 1851 ("Volcker Rule"), which is the codification of Section 619 of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd–Frank Act"). Pub. L. No. 111-203, 124

Stat. 1376 (2010). Plaintiffs also request that the Court retain jurisdiction to ensure compliance such that Defendants implement a Final Rulemaking on a timely basis.

Defendants' motion to dismiss introduces new facts that allow this motion to be converted to a Rule 56 motion for summary judgment. *See* Fed. R. Civ. P. 12(d). Plaintiffs are entitled to such a judgment based on the totality of the undisputed facts. The Points and Authorities in support of this Motion are set forth below.

FACTUAL AND LEGAL BACKGROUND

A. The Parties

Section 619 directs certain agencies (the Federal Reserve Board, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC") (collectively, the "Agencies")) to promulgate coordinated regulations implementing the Volcker Rule. 12 U.S.C. § 1851(b)(2)(A); Defendants' Pre-Motion Letter to Dismiss (ECF No. 9) ("Defs.' Pre-Mot. Ltr.") at 2. The Department of the Treasury is responsible for coordination of the regulations as chairperson of the Financial Stability Oversight Council ("FSOC"). 12 U.S.C. § 1851(b)(2)(B)(iii); Defs.' Pre-Mot. Ltr. at 2. Defendants are senior officers at these agencies, and have responsibility over the issuance of a Final Rulemaking in connection with the Volcker Rule. Am. Compl. ¶¶ 7-12 (ECF No. 12).

Plaintiff Eric Taylor is a 30 year-old U.S. citizen residing in Brooklyn, NY. Mr. Taylor has deposits in a checking account held by JPMorgan Chase Bank, N.A., which is a national bank and a U.S. insured depository institution. *Id.* ¶ 5. Plaintiff Kristine Ekman is a 36 year-old U.S. citizen residing in Brooklyn, NY. *Id.* at ¶ 6. Ms. Ekman has deposits in a

checking account held by Wells Fargo Bank, N.A., which is a national bank and a U.S. insured depository institution. *Id*.

Mr. Taylor and Ms. Ekman are members of Occupy the SEC, a subgroup of the Occupy Wall Street movement and an unincorporated association that advocates for regulatory reforms in the banking and financial system. *Id*. at ¶¶ 5, 6. OSEC has been recognized internationally as an authoritative voice on the Volcker Rule. Taylor Decl. ¶ 8. OSEC's advocacy on the Rule has included meetings with hundreds of Congressional staffers and regulatory officials from each of the five Agencies in charge of writing the Rule, op-ed articles, press releases, and close to one hundred interviews with domestic and international media outlets. *Id*. OSEC submitted a 325-page comment letter in February 2012 in response to the Proposed Rule promulgated by the five Agencies responsible for the Volcker Rule rulemaking. *Id*. ¶ 7. This comment letter has been praised as "powerful" by the N.Y. Times, "amazing" by Reuters, and an "intelligent, sober response to a serious issue" by Time Magazine. *Id*.

B. Background on the Volcker Rule

The Volcker Rule generally prohibits banking entities from engaging in proprietary trading and from maintaining certain relationships with hedge funds or private equity funds. 12 U.S.C. § 1851. It was passed to help avert another global financial crisis, by restraining the type of high-risk proprietary trading that can undermine insured depository institutions. *See* 156 Cong. Rec. S5894 (daily ed. July 15, 2010) (statement of Sen. Merkley).

The Glass-Steagall Act of 1933 protected bank depositors from market fluctuations by prohibiting retail banks from engaging in most trading activities. Am. Compl. ¶ 13. That law generally required a structural separation of retail banks from investment banks. *Id*. The Financial Services Modernization Act of 1999 repealed parts of the Glass-Steagall Act, allowing

investment, depository, and insurance activities to become increasingly intertwined. *Id.* By the time of the global financial crisis of 2008, deposit-taking banks were actively engaged in "proprietary" (speculative) trading activities that put bank deposits at risk and proliferated that risk across the industry. *Id*. ¶ 14. In 2009 the International Monetary Fund ("IMF") estimated that U.S. banks and financial institutions faced losses of $4 trillion from toxic assets. International Monetary Fund, Responding to the Financial Crisis and Measuring Systemic Risk xi (Apr. 2009), http://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf.

The recent financial crisis is regarded as the worst since the Great Depression. Am. Compl. ¶ 14. Congress passed the Volcker Rule in 2010 in order to re-orient deposit-taking banks towards safe, traditional banking activities (like offering checking accounts and making loans to individuals and businesses), and away from the kind of speculation that has imperiled deposited funds as well as the global economy at large. *See* 156 Cong. Rec. S5894 (daily ed. July 15, 2010) (statement of Sen. Merkley).

Senator Merkley, one of the architects of the Volcker Rule, has stated that the Rule is a vital part of the government's attempt to avert another financial meltdown at the hands of Too Big to Fail banks.

> Beginning in the 1980's, new financial products and significant amounts of deregulation undermined the Glass-Steagall Act's separation of commercial banking from securities brokerage or "investment banking" that had kept our banking system relatively safe since 1933. Over time, commercial and investment banks increasingly relied on precarious short term funding sources, while at the same time significantly increasing their leverage. It was as if our banks and securities firms, in competing against one another, were race car drivers taking the curves ever more tightly and at ever faster speeds. Meanwhile, to match their short-term funding sources, commercial and investment banks drove into increasingly risky, short-term, and sometimes theoretically hedged, proprietary trading. When markets took unexpected turns, such as when Russia defaulted on its debt and when the U.S. mortgage-backed securities market collapsed, liquidity evaporated, and financial firms became insolvent very rapidly. No amount of capital could provide a sufficient buffer in such situations. **In the face of the worst financial crisis in 60 years**, the January 2009 report by the Group of 30, **an**

> **international group of financial experts, placed blame squarely on proprietary trading**…. **Section 619 is intended to limit proprietary trading** by banking entities and systemically significant nonbank financial companies. Properly implemented, section 619's limits will tamp down on the risk to the system arising from firms competing to obtain greater and greater returns by increasing the size, leverage, and riskiness of their trades. This is a critical part of ending too big to fail financial firms.
> *Id*. (emphasis added).

Almost three years since the passage of the Dodd–Frank Act, Defendants have yet to finalize regulations implementing the Volcker Rule. While some banks have attempted to pare down their proprietary trading activities in anticipation of a fully implemented Volcker Rule, such activities remain legally permissible so long as the Rule is not finalized. With each passing day, the absence of a fully implemented Volcker Rule compounds the risk to the Plaintiffs' deposits.

C. The Mandatory Timeframe Set by Congress for Regulatory Implementation of the Volcker Rule

Section 619 of the Dodd–Frank Act amends the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.) to mandate that the Agencies under the Defendants' control "**shall**" adopt a Final Rulemaking for the Volcker Rule within nine (9) months after the completion of a study by the FSOC relating to the Volcker Rule. 12 U.S.C. § 1851(b)(2)(A) (emphasis added). The plain language of the statute affords the Agencies no discretion to delay the final rulemaking. *See id*.

On January 18, 2011, the FSOC issued its study and recommendations, Defs.' Pre-Mot. Ltr. at 2, meaning that the Agencies should have finalized the Volcker Rule no later than October 2011. The Defendants have yet to heed 12 U.S.C. § 1851(b)(2)(A)'s statutory mandate, as a Final Rulemaking has still not been issued. Taylor Decl. ¶ 6. Thus, the Agencies have already missed Congress's explicit deadline by over twenty months.

On November 7, 2011, all of the Agencies except the CFTC published a joint notice of *proposed* rulemaking in the Federal Register. 76 Fed. Reg. 68846 (Nov. 7, 2011). On February 14, 2012, the CFTC published a similar notice of proposed rulemaking. 77 Fed. Reg. 8332 (Feb. 14, 2012). Since issuance of the proposed rules, the Agencies have received around 600 distinct comment letters on the Volcker Rule, and many of those letters are brief and devoid of substantive policy recommendations. Taylor Decl. ¶ 5.[1] OSEC's submitted its 325-page comment letter to the Agencies in early 2012. *Id*. ¶ 7.

D. The Harms Suffered by the Plaintiffs Because of the Agencies' Failure to Issue A Final Rulemaking

By statute, the Volcker Rule was technically enacted on July 21, 2012. 12 U.S.C. § 1851(c). However, the Dodd–Frank Act also gave banks a two year "conformance period for divestiture" beginning on July 22, 2012, during which time banks could transition towards the whole-scale transformation envisioned by a final version of the Rule. *See id*. The Conformance Period was *not* included in the statute to give the Agencies extra time to finalize the Rule.[2] By the Agencies' own admission, the Conformance Period was "intended to give markets and firms an opportunity to adjust to the prohibitions and requirements of [12 U.S.C. § 1851] *and any implementing rules adopted by the agencies*." Federal Reserve Board, Statement of Policy Regarding the Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities, 77 Fed. Reg. 33949, 33950 (Jun. 8, 2012) (emphasis added).

Without a Final Rulemaking, banks cannot begin to comply with the Volcker Rule in good-faith. Taylor Decl. ¶ 10. Banks cannot conform their multi-trillion dollar operations to the

[1] While the Agencies have technically received approximately 18,600 comment letters on the Volcker Rule, over 18,000 of them were form letters based on four templates. *Id*.
[2] Indeed, the statute is unequivocal in setting an earlier, fixed deadline for rulemaking. 12 U.S.C. § 1851(b).

undefined contours of an unwritten rule. *Id.* After implementing regulations are written, banks will face a monumental challenge in transitioning to compliance, as complex systems, operations, hierarchies and business processes worldwide will need to be modified. *Id.* There is no on-off switch for conformance. Indeed, the Agencies have stated that "during the conformance period, every banking entity…is expected to…develop and implement a conformance plan that is *as specific as possible*." Federal Reserve Board, Statement of Policy Regarding the Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities, 77 Fed. Reg. 33949, 33950 (emphasis added). The absence of a Final Rule precludes such specificity, as the banks have nothing to conform to. The Conformance Period continues to diminish, leaving the banks less time to comply with the Final Rule after it is enacted. Thus, bank compliance with the Volcker Rule is being frustrated by the Agencies' day-by-day depletion of the Conformance Period.

More significantly for this case, Defendants' depletion of the Conformance Period also deprives Plaintiffs of the opportunity to monitor banks' compliance with the Volcker Rule, advocate for improvements to such compliance, object to instances of non-compliance, and advocate for revisions to the Volcker Rule in view of its real-world implementation. Taylor Decl. ¶ 11. Each of these advocacy goals is contingent on the existence of a Final Rule. *Id.* Unfortunately, the Volcker Rule remains a theoretical construct rather than a hard-and-fast rule due to the Agencies' delay. Plaintiffs' real-world advocacy efforts are thereby frustrated and indefinitely postponed. *Id.* As per statute, the Plaintiffs should have been able to engage in these advocacy activities months ago.

The Agencies' failure to issue a Final Rulemaking also puts Plaintiffs' deposited money at risk, because banks can continue to speculate with it as long as the Volcker Rule has not been

implemented. For instance, a recent Senate investigation revealed that in April of 2012, the Chief Investment Office ("CIO)" at the London office of JPMorgan Chase bank had utilized deposited funds, like those of Plaintiffs, to invest in extremely risky, speculative credit default swaps and credit indices (derivatives of derivatives) and lost over $6 billion in the process. U.S. Senate Permanent Subcommittee on Investigation, Committee on Homeland Security and Governmental Affairs, JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses 29, 156 (Mar. 15, 2013), http://www.hsgac.senate.gov/subcommittees/investigations/hearings/chase-whale-trades-a-case-history-of-derivatives-risks-and-abuses. Further, it has recently been reported that other traders at JPMorgan actually bet against the CIO office, virtually guaranteeing that some division within the bank would suffer losses. Taylor Decl. ¶ 4. A properly implemented Volcker Rule would have prohibited JPMorgan from engaging in these speculative bets. *Id*. JPMorgan's CIO debacle emblematizes the risk that Plaintiffs face from the Defendants' continued delay in implementing the Volcker Rule. *See id*. The next such fiasco at JPMorgan (or a similar catastrophe at Plaintiff Kristine Ekman's bank, Wells Fargo) could well wipe out Plaintiffs' deposits.

Moreover, the Defendants' failure to finalize the Volcker Rule also increases the risk of loss to Plaintiffs' deposits arising from the failure of a *third party* bank. The banking system involves highly interconnected exposure such that the failure of one bank can affect all others. *Id*. ¶ 3; *see also*, Securities and Exchange Commission, Address by Chair Mary L. Schapiro before the United States Senate Committee on Banking, Housing and Urban Affairs, Washington, DC (May 12, 2011), https://www.sec.gov/news/testimony/2011/ts051211mls.htm. The rapid downfall of Lehman Brothers and the ensuing deterioration of the global financial

system attest to this entangled web of risk. Taylor Decl. ¶ 3. Furthermore, as noted by the Senate report on JPMorgan, it is unclear "how many other financial institutions may be disregarding risk indicators and manipulating models to artificially lower risk measurements and capital requirements." Senate Permanent Subcommittee on Investigation, JPMorgan Chase Whale Trades at 154. Thus, given the level of interconnectedness in the banking sector, without the protections accorded by the Volcker Rule, risky activities at even a remote U.S. bank could well imperil the Plaintiffs' deposits at JPMorgan or Wells Fargo. It is of no surprise then that the Senate report found that "derivatives continue to present the U.S. financial system with multiple, *systemic* problems that require resolution" and recommended the immediate finalization of the Volcker Rule as a step towards that resolution. *Id*. at 15, 17 (emphasis added). Unfortunately, Defendants continue to flout Congressional intent as to Volcker Rule finalization, thereby putting Plaintiffs' deposits, and the banking system at large, at risk.

E. The Plaintiffs Have Exhaused Administrative Remedies

In its February 2012 comment letter to the Agencies, OSEC petitioned the agencies responsible for the implementation of the Volcker Rule to enact certain modifications and to avoid "any delay in [the Rule's] full and aggressive implementation." Taylor Decl. ¶ 7. At this stage, Plaintiffs have exhausted all administrative remedies available, and are left with no choice but to wait until the Defendants cease their tarrying and finally heed Congress's rulemaking mandate.

Unfortunately, Defendants have given no official indication that the Volcker Rule will be finalized in the near future. In January 2013, SEC Commissioner Daniel M. Gallagher indicated in a public speech that he believed there was "no end in sight" for the final implementation of the Volcker Rule and that the agencies would be better off prioritizing other matters. Am. Compl. ¶

22. This admission confirms that the Defendants do not intend to issue final regulations for the Volcker Rule in the near future, despite the clear statutory mandate of 12 U.S.C. § 1851(b)(2)(A).

F. <u>This Court has Jurisdiction Over this Matter</u>

This case relates to the rulemaking process by federal agencies, and thereby presents a federal question within this Court's jurisdiction under 28 U.S.C. § 1331. Also, this case involves a request for mandamus relief, thereby affording this Court an additional basis for subject matter jurisdiction, under 28 U.S.C. § 1361. Venue is proper in this district court under 28 U.S.C. § 1391(e)(3) as the Defendants are officers or employees of the United States, the Plaintiffs reside in this district, and no real property is involved in the action. Am. Compl. ¶ 4.

ARGUMENT

Summary judgment is appropriate where admissible evidence demonstrates both the absence of a genuine issue of material fact and one party's entitlement to judgment as a matter of law. *See Viola v. Philips Med. Sys. Of N. Am*., 42 F.3d 712, 716 (2d Cir. 1994); Fed. R. Civ. P. 56(a). No genuinely triable issue of fact exists when the movant demonstrates, with all inferences and ambiguities resolved in favor of the non-movant, that no rational jury could find in the non-movant's favor. *See Chertkova v. Conn Gen Life Ins. Co.*, 92 F.3d 81, 86 (2d Cir. 1996). Still, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment: the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The non-movant must "do more than simply show that there is simply some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010)

(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). In this case, there appear to be no material facts in dispute. Defendants have plainly violated a clear statutory requirement, and Plaintiffs are accordingly entitled to judgment based on the undisputed facts.

I. PLAINTIFFS ARE ENTITLED TO A MANDAMUS ORDER

In this action, Plaintiffs ask this Court to issue a writ of mandamus against the Defendants because of their failure to abide by a clear statutory mandate requiring issuance of a Final Rulemaking for the Volcker Rule. *See* 12 U.S.C. § 1851(b)(2)(A). A mandamus plaintiff must establish that a) the defendant has a clear duty to perform the act in question, b) the plaintiff has a clear right to the relief, and c) no other adequate remedy exists. *Hussein v. Ashcroft*, No. 01-CV-1239, 2002 WL 31027604, at *3 (E.D.N.Y. Sep. 12, 2002).

A writ of mandamus is a drastic remedy reserved for extraordinary cases. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004). Nevertheless, where an agency's duty is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that a mandamus writ may properly compel the duty's performance. *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206 (1930). Here, mandamus is appropriate because the Defendants have failed to perform "a plainly defined and peremptory duty." *See McHugh v. Rubin*, 220 F.3d 53, 57 (2d Cir. 2000).

A. Defendants Have a Clear Duty to Have Promulgated a Final Rulemaking for the Volcker Rule Over Twenty Months Ago

The Agencies alone can issue implementing regulations for the Rule, and 12 U.S.C. § 1851(b)(2) plainly requires them to have done so over twenty months ago. In fact, Congress pointedly utilized the word "shall" in setting this deadline:

> not later than 9 months after the completion of the [FSOC study], the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures

> Trading Commission, **shall** consider the findings of the study under paragraph (1) and adopt rules to carry out this section. . .
> *Id*.

The Supreme Court has reaffirmed innumerable times that when a statute uses the word "shall," a mandatory duty has been imposed upon the subject of the command. *See, e.g.*, *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using the word "shall," "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory in cases where the statute applied").

Where an executive official performs a **discretionary** act, any application to the courts for a writ of mandamus over that act "would be rejected without hesitation." *Marbury v. Madison*, 5 U.S. (1 Cranch) 170-71. In contrast, mandamus relief is available in cases where an executive official fails to perform a nondiscretionary, plainly defined, and purely ministerial duty. *See Decatur v. Paulding*, 39 U.S. (1 Pet.) 496, 514-17 (1840); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). To be enforceable through mandamus, the agency's duty must be "so plainly prescribed as to be free from doubt and equivalent to a positive command." *Wilbur v. United States*, 281 U.S. 206, 218 (1929). Here, Section 1851(b)(2)'s language is an unequivocal, "positive command" to finalize the Volcker Rule within nine (9) months after the completion of the FSOC study, which date has long passed. The Dodd–Frank Act affords the Defendants no discretion whatsoever to set an alternate timeframe within which to implement the Volcker Rule. *See* 12 U.S.C. § 1851(b)(2)(A). All that remains is for the Agencies to discharge their clear duty by completing the ministerial task of promulgating regulation.

B. Plaintiffs Have a Clear Right to Madamus Relief

In a mandamus action, the plaintiff must demonstrate that the defendant is required to perform a duty that is "owed to the plaintiff." 28 U.S.C. § 1361. That is, the plaintiffs must have

a clear right to the relief requested. *See id.*; *Ahmed v. I.N.S.*, 911 F.Supp. 132, 134 (S.D.N.Y. 1996). In this case, Plaintiffs have a clear right to the Volcker Rule's timely implementation, both in their capacities as depositors and as advocates for financial reform.

The Volcker Rule was passed in order to protect depositors, like Plaintiffs, from speculative risk-taking by banking entities.[3] Thus, the Defendants' clear duty to finalize the Volcker Rule is plainly owed to the Plaintiffs, as it is the latter's deposits that are at stake.

The Defendants' duty to finalize the Rule is also owed to Mr. Taylor and Ms. Ekman given the advocacy efforts that they engage in as members of OSEC. Certain courts have applied a "zone of interests" test (normally a concept that applies to the separate issue of standing) to determine whether a prospective plaintiff is owed mandamus relief. *See Jarecki v. United States*, 590 F.2d 670, 675 (7th Cir. 1979); *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975). The "zone of interests" test denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the statute. *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992). That is, the test requires some non-trivial relation between the interests protected by the statute and the interest the plaintiff seeks to vindicate. *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995) (citing *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987)). In the instant case, Plaintiffs' activism towards reforms of the banking system is entirely consistent with and directly related to the purpose of the Volcker statute. Senator Merkley has clarified that the Volcker Rule was passed in order to safeguard the banking system.[4] Similarly, Plaintiffs engage in activism that seeks to

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[3] *See* 156 Cong. Rec. S5894 (daily ed. July 15, 2010) (statement of Sen. Merkley). ("[T]he intent of section 619 is to restore the purpose of the Glass-Steagall barrier between commercial and investment banks"); *see also* 77 Cong.Rec. 3837 (1933) (remarks of Rep. Steagall) ("The purpose of [the Glass-Steagall Act] is to protect the people of the United States in the right to have banks in which their deposits will be safe.").

[4] *See* 156 Cong. Rec. S5894 (daily ed. July 15, 2010) (statement of Sen. Merkley) ("section 619 seeks to reorient the U.S. banking system away from leveraged, short-term speculation and instead towards the safe and sound provision of [banking services].").

safeguard the banking system for the benefit of the public at large. Taylor Decl. ¶ 1.[5] Thus, there is a direct confluence of interest between the Rule's objectives and the Plaintiffs' objectives, which means that the Plaintiffs have a clear right to mandamus relief under the "zone of interests" test.

C. Plaintiffs Have No Other Adequate Remedy for Relief

The issuance of a writ of mandamus "is a drastic remedy" that can be invoked only where the plaintiff has no other adequate remedy available. *Morelli v. Alexander*, 920 F. Supp. 556, 558 (S.D.N.Y. 1996); *see also Lovallo v. Froehlke*, 468 F.2d 340, 342 (2d Cir. 1972). This requirement is met in the instant case.

Plaintiffs have already petitioned the Agencies for timely implementation of the Volcker Rule, in vain. Am. Compl. ¶ 21. Although the Dodd–Frank Act imposes a wide variety of duties and obligations on the Defendants, it does not create any additional administrative avenue through which Plaintiffs could challenge the Defendants' failure to meet their rulemaking responsibilities. Consequently, this lawsuit is Plaintiffs' last resort to ensure that the Volcker Rule is finalized in the near future. They are left with no alternate administrative process to pursue acceleration of Volcker rulemaking.

II. <u>DEFENDANTS HAVE VIOLATED THE ADMINISTRATIVE PROCEDURE ACT IN FAILING TO ISSUE VOLCKER RULE REGULATIONS BEFORE THE DEADLINE SPECIFIED BY CONGRESS</u>

Section 706 of the Administrative Procedure Act ("APA") presents an additional basis for relief that is entirely distinct from the mandamus claim described above. *See Watson v. Blumenthal*, 586 F.2d 925, 932 (2nd Cir. 1978) (an action seeking "nonstatutory review of agency action is distinct from an action under the APA."). The Defendants' failure to publish a

[5] Plaintiffs have expended considerable efforts thus far to advocate for timely and vigorous implementation of the Volcker Rule by the Agencies, and are being foreclosed from engaging in further advocacy, compliance-monitoring and analysis relating to the Volcker Rule's real-world implementation. Taylor Decl. ¶ 11.

final regulation within the deadline stipulated at 12 U.S.C. § 1851(b)(2) constitutes agency action that is both "unlawfully withheld" and "unreasonably delayed" under the APA. *See* 5 U.S.C. § 706(1).

In passing § 706 of the APA, Congress unequivocally stated that courts must compel agency action that has been "unlawfully withheld" **or** "unreasonably delayed." *Id*. The district court for the Southern District of New York has explicitly recognized that "unlawfully withheld" and "unreasonably delayed" constitute two distinct standards under 5 U.S.C. § 706(1). *Natural Resources Defense Council, Inc. v. Fox*, 93 F. Supp. 2d 531 (S.D.N.Y. 2000)("*NRDC*") (citing *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998)). In fact, each standard is mutually exclusive: "[a]n agency action may be deemed 'unreasonably delayed' where the governing statute does not require action by a date certain, whereas an action is 'unlawfully withheld' when an agency fails to meet a clear deadline prescribed by Congress." *NRDC* at 543.

This Court should likewise recognize that 5 U.S.C. § 706(1) embodies two distinct standards. Conflating "unreasonably delayed" with "unlawfully withheld" would render one or the other superfluous. An axiomatic canon of statutory construction holds that courts should construe statutory language to avoid interpretations that would render any phrase superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

An action alleging "unreasonably delayed" agency action is analyzed under a six-part reasonableness test described by the District of Columbia Circuit in the case of *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)("*TRAC*"). In sharp contrast, the *TRAC* factors do not apply in cases alleging "unlawfully withheld" agency action. *See NRDC* at 543; *Forest Guardians* at 1272; *see also Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1178 (9th Cir. 2002). When an agency misses a

statutorily-imposed deadline, its failure is not reviewed on a reasonableness basis. *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992). Where a statute sets a bright-line rule for agency action, "there is no room for debate -- congress has prescribed a categorical mandate that deprives [the agency] of all discretion over the timing of its work." *Id*. (citing *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)).

In this case, the Agencies have unlawfully withheld a Final Rulemaking before a date certain. Alternatively and in addition, the Agencies have unreasonably delayed such a Rulemaking.

A. Defendants Have "Unlawfully Withheld" a Final Rulemaking

As argued above, Defendants have missed a fixed deadline that Congress imposed for the finalization of the Volcker Rule's regulations. *See* 12 U.S.C. § 1851(b)(2)(A). When an agency fails to meet a concrete statutory deadline, it has *per se* "unlawfully withheld" agency action. *Forest Guardians* at 1268, 1273 (recognizing that when Congress directs that an agency shall perform an action by a concrete date, "'[s]hall' means shall"). The six-part *TRAC* factors do not apply to "unlawfully withheld" claims because neither the *TRAC* case nor any of the cases it relied on involved agency inaction in the face of a mandatory statutory deadline. *Id*. at 1272-73 (construing *TRAC*, 750 F.2d at 80); *see also NRDC* at 543. Rather, the six-part *TRAC* factors only apply in cases involving discretionary or generalized timing provisions. *See Forest Guardians* at 1272-73. Where Congress has established a specific, non-discretionary timeframe within which an agency must act, a reviewing court is compelled to grant injunctive relief as a matter of law, *id*. at 1272, and has no discretion to balance the agency's countervailing priorities as mitigating factors. *See Biodiversity*, 309 F.3d at 1177-78. Section 1851(b)(2)(A) imposes a peremptory and specific timing mandate, in light of which this Court should grant judgment in

favor of Plaintiffs. "To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers." *Forest Guardians* at 1272. Congress has already mandated a deadline for Volcker implementation, and it is not within the ambit of this Court to second-guess the reasonableness of that mandate.

B. Defendants Have "Unreasonably Delayed" a Final Rulemaking

The Supreme Court has confirmed that the APA allows federal courts to compel an agency to take a discrete action that it is required to take. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (referencing 5 U.S.C. § 706(1)). Courts in the Second Circuit follow the D.C. Circuit's *TRAC* decision in adjudicating claims of "unreasonably delay" under § 706. *NRDC* at 543-44. The following are the *TRAC* factors:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety . . . in order to hold that agency action is unreasonably delayed.
> *Id*. (citing *TRAC*, 750 F.2d at 80).

This Court's analysis of these factors should lead to the conclusion that the defendant Agencies have unreasonably delayed in promulgating Volcker regulations.

The first factor, applying a rule of reason, has been characterized as the most important. *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 540 (S.D.N.Y. 2009)(citing *In re Core Communs., Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)). In assessing whether an agency's delay is unreasonable, "a reasonable time for agency action is typically counted in weeks or months, not years." *Id*. (citing *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)).

Here, the Defendants' delay beyond the statutory deadline for Volcker implementation approaches two years, which is patently unreasonable. This delay is also unreasonable given the gravity of the recent financial crisis and the central role that an implemented Volcker Rule would play in averting a similar crisis in the future. *See* 156 Cong. Rec. S5894 (daily ed. July 15, 2010) (statement of Sen. Merkley).

Under the second TRAC factor, a statutory deadline can supply the content for the reasonableness test. *TRAC*, 750 F.2d at 80. As argued above, Defendants have plainly missed Congress's deadline by close to two years. This should be seen as *prima facie* evidence of unreasonableness.

The third TRAC factor states that delays in the sphere of human health and welfare are less tolerable than those in the sphere of economic regulation. *TRAC*, 750 F.2d at 80. Even so, economic harm is clearly an important consideration and will, in some cases, justify court intervention. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). Moreover, the magnitude of a particular issue before an agency should impact a reviewing court's judgment as to the reasonableness of agency delay. *Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). While the Volcker Rule is clearly an economic regulation, its importance to the overall banking system is so profound that the Agencies' delay in finalizing it renders that delay unreasonable.

An investigation by the U.S. Senate found that enormous proprietary trading holdings at major banks fueled the recent financial crisis, as unfavorable market movements led such banks to lose billions, declare bankruptcy, be sold off or require bailouts from the federal government. U.S. Senate Permanent Subcommittee on Investigation, Committee on Homeland Security and Governmental Affairs, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse 35-

36 (Apr. 13, 2011). As a result, the average American family's net worth dropped almost 40% between 2007 and 2010 (from $126,400 to $77,300 in 2010). Board of Governors of the Federal Reserve, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* (June 2012), *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf. In light of the troubling role that proprietary trading played in the crisis, the finalization of the Volcker Rule (which would place severe limits on proprietary trading) is vital for the nation's economic health. The American people are relying on the Defendants to pass the Volcker Rule to help avert another financial catastrophe. Unfortunately, the Agencies' tardiness in implementing the Volcker Rule sends a clear signal to the public that the Agencies have fallen asleep behind the regulatory wheel. Agency delay runs afoul of the APA if it "saps the public's confidence in an agency's ability to discharge its responsibilities." *Families for Freedom*, 628 F. Supp. 2d at 541 (internal citation omitted).

The fourth *TRAC* factor requires a reviewing court to consider the effect that expediting delayed action would have on agency activities of a higher or competing priority. *TRAC*, 750 F.2d at 80. Still, if a statute imposes a fixed deadline for an agency to publish a final regulation, that agency must be ordered to comply without regard to the agency's preferred priorities. *Forest Guardians* at 1272. By mandating that the Volcker Rule be implemented within a concrete timeframe, Congress has endorsed the Rule as having the highest of priorities.

Moreover, a court order may expedite delayed agency action where a plaintiff's interests are of the utmost importance. *See id*. The Volcker Rule, when implemented, will transform the banking system by reducing the amount of systemic risk that plagues the economy and jeopardizes the financial interests of all. Taylor Decl. ¶ 3. The legislative history further

confirms that Congress intended the Volcker Rule to play a preeminent role in the Dodd–Frank Act's reordering of banking regulation. *See* 156 Cong. Rec. S5894 (daily ed. July 15, 2010) (statement of Sen. Merkley). Plaintiffs' interests, which coincide with those of the American people, *see id*. ¶ 1, are of the utmost importance.

Under the fifth factor, a reviewing court should consider the interests prejudiced by an agency's delay. As noted above, Congress passed the Volcker Rule to help avert another financial crisis like the Great Recession of 2008, which negatively impacted virtually everyone in the United States with any connection to the economy. Thus, in delaying the Rule's implementation, the Defendants jeopardize the financial interests of virtually every person in the United States. Moreover, the Defendants jeopardize the Plaintiffs' deposits, which are held at banks that remain free to engage in speculative proprietary trading. Incidents like JPMorgan's CIO debacle demonstrate that the Plaintiffs' money is not necessarily safe from speculative dissipation by their banks. Further, Defendants' delayed implementation also deprives Plaintiffs of the opportunity to monitor banks' compliance with the Volcker Rule, advocate for improvements to such compliance, object to instances of non-compliance, and advocate for revisions to the Volcker Rule in view of its real-world implementation. Taylor Decl. ¶ 11. Plaintiffs have engaged in extensive advocacy efforts relating to the Volcker Rule, and the Agencies' delay frustrates the Plaintiffs' continued ability to engage in financial activism relating to the Rule and its real-world implementation.

Memories fade. To the myopic, the horrors of 2008 seem like ancient history. The longer that Defendants delay in finalizing the Rule, the greater the difficulty that Plaintiffs face in corralling popular support for strict bank compliance with the Volcker Rule, which is as

necessary for the nation's fiscal health now as it was in 2010, when the Dodd–Frank Act was passed. *See id*.

The sixth TRAC factor reminds the Court that it may compel the Defendants to issue a Final Rule even if it does not find that the Agencies have acted in bad-faith or with malicious intent. *TRAC*, 750 F.2d at 80. The Court need not broach the issue, as the Agencies should be compelled to act on the basis of the unequivocal deadline established by 12 U.S.C. § 1851(b)(2)(A). The Agencies' intent, whether saintly or devilish, is irrelevant as a matter of law.

CONCLUSION

In light of the above, we request that the Court grant judgment in favor of the Plaintiff and a) declare that the Defendants' delay in issuing a Final Rulemaking for the Volcker Rule violates the Dodd–Frank Act, b) grant a permanent injunction and/or order of mandamus compelling Defendants and those acting under them to perform their duty to expeditiously issue a Final Rulemaking for the Volcker Rule, within a timeframe established by the Court, and c) retain jurisdiction to ensure that Defendants implement a Final Rulemaking on a timely basis.

Respectfully submitted,

Dated: New York, New York
June 21, 2013

By: ____/s/________________________

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of June, 2013, a true and correct copy of the foregoing was served on the following counsel of record by email and a mailing by USPS regular mail, in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules.

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Dated: New York, New York
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