CCMR Petitions Key Lawmakers for Oversight Hearings on Rulemakings Required by the Dodd-Frank Act

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CAMBRIDGE, Mass., Dec. 16, 2010 /PRNewswire/ -- The Co-Chairmen and the Director of Committee for Capital Markets Regulation, an independent non-partisan body pressing for more competitive, better regulated U.S. capital markets, has distributed a letter to key U.S. Senators and Representatives that urgently seeks Congressional oversight hearings over the substantial rulemaking process mandated by the Dodd-Frank Act.

The letter, dated and delivered on Capital Hill yesterday, was sent by CCMR Co-Chairman R. Glenn Hubbard, Dean of the Columbia University Graduate School of Business and John Thornton, Chairman of the Board of Trustees of the Brookings Institution and Professor and Director of the Global Leadership Program at the Tsinghua University School of Economics and Management in Beijing, as well as Hal Scott, the Committee Director and Nomura Professor of International Financial Systems at Harvard Law School.

The substance of the letter follows. For a full copy, including footnotes, contact Tim Metz, tim@hmcllc.com (mailto:tim@hmcllc.com), or Erica Glass, erica@hmcllc.com (mailto:erica@hmcllc.com), at Hullin Metz & Co.

<u>Re: The Pace of Rulemaking Under the Dodd-Frank Act</u>

Dear Chairman Dodd, Ranking Member Shelby, Chairman Frank and Ranking Member Bachus:

We believe there is an urgent need for your Committees to hold oversight hearings on the implementation through rulemaking of the Dodd-Frank legislation. We believe that the current rulemaking process is sacrificing quality and fairness for apparent speed, risking lengthy court challenges and poor rules that will damage our financial system and hinder economic recovery. This is not to say the regulators should always apply the brakes. Where the problems are well understood and the solutions are clear, regulators should act quickly.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) has created a unique challenge for the businesses and individuals who will be affected by the unprecedented pace and quantity of major agency rulemakings. Dodd-Frank requires federal agencies to write at least 230 new rules, and many more may be issued after that. These are no ordinary rulemakings—this is almost a complete rewrite of the rules governing the country's financial markets. The Securities and Exchange Commission (SEC), which in 2005 and 2006, before the financial crisis, issued on average fewer than ten new rules a year, must now issue approximately one hundred new rules, some sixty of which must be written by July 2011, one year after Dodd-Frank was enacted. The Commodity Futures Trading Commission (CFTC) issued eleven new rules total in the two years before the crisis; it must now issue nearly forty by July 2011.

Table 1: Average annual rate of rulemaking (rules per year)

Agency	Pre-Dodd-Frank (2005–2006)	Post-Dodd-Frank
SEC	9.5	59
CFTC	5.5	37
FDIC	8	6
Federal Reserve	4.5	17

The process the federal regulators are using to create these new rules is seriously flawed. Rather than using a prudent deliberative process, sweeping reforms are being quickly pushed forward without providing adequate time for meaningful fact-finding or dialogue.

This push for speed can be traced to the August pledge Secretary of the Treasury Geithner made in response to charges that regulatory uncertainty would hinder economic recovery. Glenn Hubbard and Hal Scott published an op-ed in the *Wall Street Journal* shortly thereafter pointing out that Secretary Geithner's pledge "ignores the basic legal requirement for deliberative and rational regulatory implementation" but regulators seem to have missed the message. CFTC Chairman Gary Gensler has been the most aggressive and speediest rule maker, vigorously defending his agency's rapid rulemaking schedule and warning not to expect extensions of public comment periods on proposed rules.

The Administrative Procedure Act (APA) requires an informed rulemaking process that is transparent and responsive to the public and affected parties. Indeed, the D.C. Circuit has noted that even if the Congress "vest[s] broad rulemaking authority in an agency...[and] charge[s] the agency with swiftly and effectively implementing a national policy,...the agency remains bound by the APA's notice and comment requirements." Historically the SEC, the CFTC, the Federal Reserve System, and the Federal Deposit Insurance Corporation (FDIC) respected the rulemaking process. Although those agencies are not subject to rulemaking review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, which imposes a minimum 60-day period for public comments on proposed rules, a random sample of those agencies' rulemakings during 2005 and 2006 revealed that during that time they allowed on average more than 60 days for public comment. Major rulemakings were open for comment for as many as 90 or 120 days. Further, rulemakings did not even begin until the proposing agency did its homework, extensively surveying existing practices and consulting with industry experts about the consequences of various possible courses of action. In contrast, in the first three months after the passage of Dodd-Frank, those same agencies and the new Financial Stability Oversight Council (FSOC) gave an average of just over 30 days for comment. Although the average comment period for all Dodd-Frank rulemakings is now a bit over 40 days, it is still too short, particularly since the financial regulators issued nearly 40 proposed rules in November alone. We are not hopeful that the agencies will be flexible with these deadlines.

This focus on speed over participation undercuts the traditional deliberate rulemaking process that the public has come to expect. The customary practice of allowing all interested parties to have their say during the rulemaking process is