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Secretary of the Commission
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Board of Governors of the
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20th Street and Constitution Avenue, NW
Washington, DC 20551

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Treatment of Certain Collateralized Debt Obligations Backed Primarily by Trust Preferred Securities with Regard to Prohibitions and Restrictions on Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (Docket No. OCC-2014-0003, Fed Docket No. R-1480 and RIN 7100 AE-11, FDIC RIN 3064-AE11, SEC File Number S7-01-14, and CFTC RIN 3038-AE13)

Ladies and Gentlemen:

We are writing regarding the interim final rule (the "Interim Final Rule") issued by the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Federal Deposit Insurance Corporation (the "FDIC"), the Securities and Exchange Commission and the Commodity Futures Trading Commission (together, the "Agencies") and published in the Federal Register on January 31, 2014. The Interim Final Rule would permit banking entities to, if certain requirements were met, retain interests in certain collateralized debt obligations backed primarily by trust preferred securities ("TruPS CDOs"), despite the general prohibition against banking entities retaining interests in "covered funds" under Section 619

(commonly referred to as the “Volcker Rule”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

The treatment of trust preferred securities (“TruPS”) by banking entities, both with respect to their investments in TruPS and the treatment of TruPS issued by banking entities for regulatory capital purposes, has been subject to many regulatory changes over the past few years. We believe it is of utmost importance that such changes be applied fairly to banking entities in accordance with their current size and complexity.

New York Private Bank & Trust Corporation (“NYPB&T”) writes this comment letter as the parent of Emigrant Bancorp, Inc., which in turn is the parent of Emigrant Bank, a 155 year old New York chartered community bank with less than \$6.5 billion in assets. We are facing an impending January 1, 2015 phase out of 75% of our approximately \$300 million in TruPS. This will be followed by a 100% phase-out of our TruPS on January 1, 2016, if the changes or clarifications sought by this comment letter are not acted on by the regulators to whom this letter is respectively addressed.

As set forth below, Section 171 of the Dodd-Frank Act (commonly referred to as the “Collins Amendment”) was meant to restrict the inclusion of TruPS in Tier 1 capital by institutions with greater than \$15 billion in total assets. Although this statute is targeted to depository institution holding companies with greater than \$15 billion in assets, it could now apply to an institution with less than \$6.5 billion in assets because the Collins Amendment inexplicably contains a “look back” date of December 31, 2009 (seven months prior to the enactment of the Dodd-Frank Act), for determining whether an institution is a greater than \$15 billion bank or not. The issue with this statute is that it does not provide for the possibility that some institutions may determine for a variety of business reasons that they prefer to serve their communities with less than \$15 billion in assets. The Collins Amendment did not even contemplate that an institution could be above \$15 billion in assets as of December 31, 2009 and subsequently less than \$15 billion in assets before the statute’s enactment.

Emigrant will remain well-capitalized even after the full phase-out of its TruPS. However, as a consequence of this seemingly inconsistently applied statutory provision, NYPB&T must confront the possible loss of almost 25% of its Tier 1 capital by year-end 2015. This means literally billions in reduced community lending capacity. Emigrant Bank was a mutual savings bank until 1985, when it was rescued by its current owners through the contribution of capital under the auspices of the FDIC. In 1992, Emigrant Bank utilized its strong capital position to acquire Dollar Dry Dock Savings Bank, a rescue again coordinated by the FDIC. The loss of almost \$300 million in Tier 1 capital as a consequence of the full implementation of the Collins Amendment also makes it much more likely that it will be difficult to (i) expand our long history of serving the banking and credit needs of the low and moderate income communities in New York City’s Outer Boroughs and surrounding counties and (ii) serve as a merger partner for the purpose of rescuing a failed bank going forward. In addition, because we are not a public company, we cannot readily access the capital markets.

Capital is extremely important to community banks in the current environment, including to those community banks that had more than \$15 billion in total consolidated assets as of December 31, 2009, but whose assets have decreased since then below \$15 billion (and even more particularly to those without ready access to the capital markets). Accordingly, the issue of whether TruPS issued by such community banks before May 19, 2010 may continue to be included as an element of Tier 1 capital is of great importance to community banks like us.

Background of Recent TruPS-Related Regulatory Developments

Collins Amendment

The Collins Amendment provides for the grandfathering of TruPS issued before May 19, 2010 by certain depository institution holding companies that had total assets of less than \$15 billion as of December 31, 2009 (the \$15 billion threshold as of December 31, 2009 is referred to herein as the “2009 \$15 Billion Threshold”). However, under the otherwise-protective provisions of the Collins Amendment, depository institution holding companies that exceeded the 2009 \$15 Billion Threshold, but subsequently decreased below \$15 billion in total consolidated assets, could be subject to an incorrect and unfair phase-out for the TruPS that they issued before May 19, 2010 from inclusion in Tier 1 capital by January 1, 2016.

Basel III Final Rule

In 2013, the Federal Reserve and the OCC adopted a more restrictive final rule (and the FDIC adopted an interim final rule) implementing Basel III (the “Basel III Final Rule”), which provided, with respect to TruPS, that: (i) TruPS issued prior to May 19, 2010 by depository institution holding companies that were below the 2009 \$15 Billion Threshold would be permanently grandfathered for inclusion in Tier 1 capital, subject to a certain limits; and (ii) TruPS issued by depository institution holding companies that exceeded the 2009 \$15 Billion Threshold must be fully phased out of Tier 1 capital by January 1, 2016.

Interim Final Rule

In December, 2013, the Agencies issued the much-anticipated final regulations under the Volcker Rule. One issue that raised many questions under such final regulations was whether TruPS CDOs would be considered “covered funds” under the Volcker Rule.

In response to this issue, on January 14, 2014, the Agencies approved the Interim Final Rule to permit banking entities to retain interests in certain TruPS CDOs despite the general prohibition under the Volcker Rule against banking entities retaining interests in “covered funds.” As noted in the prefatory comments to the Interim Final Rule, TruPS were issued by community banks frequently

through TruPS CDOs. Under the Interim Final Rule, banking entities may retain an interest in or sponsorship of a TruPS CDO if the following qualifications are met:

- (i) the TruPS CDO was established, and the interest was issued, before May 19, 2010;
- (ii) the banking entity reasonably believes that the offering proceeds received by the TruPS CDO were invested primarily in “Qualifying TruPS Collateral”; and
- (iii) the banking entity’s interest in the TruPS CDO was acquired on or before December 10, 2013.

“Qualifying TruPS Collateral” is defined in the Interim Final Rule as “any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than \$15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.”

The Interim Final Rule was responsive to one type of TruPS capital issue – TruPS CDOs – but did not allow for the consistent application of regulatory dates and thresholds for TruPS issued by entities as an element of their Tier 1 capital. As drafted, the December 31, 2009 date is not relevant under the Interim Final Rule to the definition of “Qualifying TruPS Collateral.”

The \$15 billion total consolidated asset amount can have a profound impact on banking entities’ ability to hold TruPS investments, as well as such entities’ ability to continue including TruPS issued by such entities as an element of Tier 1 capital. Accordingly, it is extremely important that such threshold be applied in a fair and reasonable manner. There does not appear to be any reason why, under the Collins Amendment and the Basel III Final Rule, the threshold for determining whether a banking entity may continue to include TruPS that it issued prior to May 19, 2010 as an element of Tier 1 capital is whether such banking entity had over \$15 billion in total consolidated assets as of December 31, 2009. However, under the Interim Final Rule, a banking entity may continue to hold interests in a TruPS CDO backed primarily by TruPS issued by a banking entity with under \$15 billion in total consolidated assets as of the end of any reporting period within 12 months immediately preceding the issuance of such TruPS (which could have included March 31, 2010, a period after December 31, 2009 and by which time NYPB&T had total consolidated assets of less than \$15 billion). Moreover, unlike the Volcker Rule, which was intended to have a limiting influence on certain activities, the provisions of the Collins Amendment with respect to TruPS were intended to be protective for community banks. Each should clearly be interpreted to give effect to the intended purpose of the provision.

Comments

The 2009 \$15 Billion Threshold

While we believe that a \$15 billion total consolidated asset amount is generally appropriate for determining whether an institution should be treated as a community banking entity or as a larger and more complex banking entity, we believe that banking entities that exceeded the 2009 \$15 Billion Threshold, but subsequently have less than \$15 billion in total consolidated assets, should not be treated differently than banking entities that were below the 2009 \$15 Billion Threshold. Simply stated, while the \$15 billion amount seems appropriate, the inconsistent application of the December 31, 2009 date does not. We believe it is of the utmost importance that community banking entities that should be eligible for the protections of the Collins Amendment (and to continue counting TruPS issued before May 19, 2010 as an element of Tier 1 capital under the Basel III Final Rule) be treated according to their current size and complexity, and a banking entity that exceeded the 2009 \$15 Billion Threshold, but since has decreased below such threshold, should be treated the same as other community banks.

If a banking entity exceeded the 2009 \$15 Billion Threshold, but decreased its total consolidated asset size below \$15 billion thereafter and remains below such threshold, it should not be punished currently for having more than \$15 billion in total consolidated assets as of December 31, 2009 (over four years ago). Rather, in the current environment of risk mitigation, particularly on a systemic level, banking entities have a variety of reasons why they may grow or shrink their asset size over time. Such banking entities should be covered by regulations and guidelines that are based on the asset size and complexity of such banking entities at the time in question, not a date fixed four years ago. There are many business, economic and regulatory reasons that a banking entity may decide to reduce its asset size, including risk-mitigation strategies, and the 2009 \$15 Billion Threshold does not take any of these factors into consideration. For these reasons, we do not believe it is appropriate for banking entities with less than \$15 billion in total consolidated assets currently (particularly those with substantially less than \$15 billion in total consolidated assets for a prolonged period of time) to be treated the same as larger, more complex and riskier banks simply because they were larger at December 31, 2009.

It should be noted that, under the Basel III Final Rule, if a depository institution holding company that was below the 2009 \$15 Billion Threshold makes an acquisition and the resulting organization has total consolidated assets of \$15 billion or more (on a date after December 31, 2009), then its TruPS would be required to be phased out just as if the institution exceeded the 2009 \$15 Billion Threshold, but if the same holding company simply grew organically without an "acquisition" then its TruPS would not be required to be phased out. The prefatory comments to the Basel III Final Rule provide that "the agencies continue to believe these provisions appropriately subject institutions that are larger (or that become larger) to the stricter phase-out requirements for non-qualifying capital instruments [such as TruPS], consistent with the language and intent of section 171 of the Dodd-Frank

Act.” This logic appears one-sided. If it is believed that banking entities that become larger than \$15 billion *after* December 31, 2009 by acquisition should be subject to the stricter phase-out requirements for TruPS that apply to banking entities that exceeded the 2009 \$15 Billion Threshold, it follows that banking entities that decrease *below* the \$15 billion threshold after December 31, 2009 should not be subject to such stricter phase-out requirements and should be treated the same as banking entities that were below the 2009 \$15 Billion Threshold if they have less than \$15 billion in total consolidated assets after December 31, 2009 and continue to remain below such threshold.

In addition, the language of Section __.300(c)(3)(i) of the Basel III Final Rule provides as follows:

(3) *Depository institution holding companies under \$15 billion and 2010 MHCs.* (i) Non-qualifying capital instruments issued by depository institution holding companies under \$15 billion and 2010 MHCs prior to May 19, 2010 may be included in additional tier 1 or tier 2 capital if the instrument was included in tier 1 or tier 2 capital, respectively, as of January 1, 2014.

Although we acknowledge that the term “depository institution holding companies under \$15 billion” is defined in Section __.300(c)(2)(i) to mean “a depository institution holding company with total consolidated assets of less than \$15 billion as of December 31, 2009,” this definition is not included in a specified “definitions” section, as is often the way terms are defined in regulations, and could easily be missed if one did not read Section __.300 in its entirety or Section __.300(c)(2)(i) specifically, which addresses mergers and acquisitions and should not be read by institutions to which such section may appear to be inapplicable. Accordingly, a plain language reading of Section __.300(c)(3)(i) would suggest that TruPS issued prior to May 19, 2010 by a depository institution holding company under \$15 billion (without regard to the December 31, 2009 date) should be included in additional Tier 1 or Tier 2 capital if the TruPS were included in Tier 1 or Tier 2 capital, respectively, as of January 1, 2014, subject to the limitations set forth in Section __.300(c)(3)(ii). This plain reading interpretation would result in a fair application of Section __.300(c)(3) to community banks. Moreover, Section __.300(c)(2)(i) is a special and limited provision dealing with mergers and acquisitions, and the definition in that provision should be limited to mergers and acquisitions.

We also note that this interpretation is still fairly conservative because to be eligible for the protective provisions of the Basel III Final rule for community banks set forth in Section __.300(c)(3)(i), the TruPS would have to (i) have satisfied the Federal Reserve’s long-standing requirements applicable to TruPS, (ii) have been issued prior to May 19, 2010, and (iii) have been included in the holding company’s Tier 1 or Tier 2 capital as of January 1, 2014. Hence, there is no opportunity for abuse or manipulation.

Suggested Actions

Interim Final Rule

With respect to the Interim Final Rule, we suggest that the term “Qualifying TruPS Collateral” should be defined as follows:

any trust preferred security or subordinated debt instrument (a) issued prior to May 19, 2010 by a depository institution holding company that, as of (i) the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument or (ii) March 31, 2014, had total consolidated assets of less than \$15,000,000,000, or (b) issued prior to May 19, 2010 by a mutual holding company.

This change to the definition of “Qualifying TruPS Collateral” would result in more TruPS CDOs being exempted from the definition of “covered funds” under the Interim Final Rule. It would allow banking entities to continue holding interests in TruPS CDOs primarily backed by TruPS issued by banking entities that had total consolidated assets of less than \$15 billion as of the end of any reporting period within 12 months immediately preceding the issuance of such TruPS, but would expand the current Interim Final Rule so that banking entities could also hold interests in TruPS CDOs primarily backed by TruPS issued by a depository institution holding company that had less than \$15 billion in total consolidated assets at March 31, 2014, the day before the final regulations under the Volcker Rule become effective. We believe this change is consistent with the spirit and intent of the Interim Final Rule. Moreover, it is consistent with the concept that the Collins Amendment was intended to be protective of community banks with respect to the inclusion of TruPS in Tier 1 capital, using the \$15 billion asset amount as determinative of what is a community bank.

Collins Amendment and Basel III Final Rule

Similarly, with respect to the Collins Amendment and the Basel III Final Rule, we suggest that an interpretation be issued under the Collins Amendment and that the Basel III Final Rule be revised to provide that neither banking entities that were below the 2009 \$15 Billion Threshold nor banking entities that were above the 2009 \$15 Billion Threshold, but subsequently had less than \$15 billion in total consolidated assets as of the end of any reporting period after December 31, 2009 and continue to have less than \$15 billion in total consolidated assets, be subject to the TruPS phase-out requirements applicable to banking entities that exceeded the 2009 \$15 Billion Threshold and the assets of which remain above \$15 billion. This would be consistent with what a plain language reading of Section __.300(c)(3) of the Basel III Final Rule currently provides, but we would suggest that the language in Section __.300(c)(3) be clarified to make this point explicit. Specifically, we would suggest adding the following sentence to Section __.300(c)(3)(i):

For purposes of this Subsection __.300(c)(3), the phrase ‘depository institution holding companies under \$15 billion’ shall include (a) depository institution holding companies with total consolidated assets of less than \$15 billion as of December 31, 2009 and (b) depository institution holding companies with total consolidated assets of less than \$15 billion as of the end of any reporting period after December 31, 2009 and that continue to have total consolidated assets of less than \$15 billion, even if the depository institution holding companies had more than \$15 billion in total consolidated assets as of December 31, 2009.

In accordance with the spirit and intent of the Collins Amendment and the Basel III Final Rule, which include protections for community banks, at the very least, an interpretation under the Collins Amendment and the Basel III Final Rule should be issued that provides the appropriate bank regulatory agencies the authority to determine, on a case-by-case basis, whether a banking entity, such as NYPB&T, that exceeded the 2009 \$15 Billion Threshold but subsequently decreased its total consolidated asset size below \$15 billion should be required to phase-out TruPS issued by such banking entity on or before May 19, 2010 from Tier 1 capital¹. To do otherwise may lead to unfair results for some community banks, particularly those without ready access to the capital markets, and at a time that capital is even more important to community banks.

We are a good example of why case-by-case determinations would be appropriate. NYPB&T has been under \$15 billion in total consolidated assets for almost all of its existence. However, NYPB&T slightly exceeded the 2009 \$15 Billion Threshold because it was being conservative by taking out a loan from the Federal Home Loan Bank of New York to create “liquidity insurance” for its uninsured deposits during the financial crisis. By March 31, 2010, after the Federal Home Loan Bank of New York loan was repaid and before the Dodd-Frank Act (including the Collins Amendment) was passed in Congress, NYPB&T’s total consolidated assets were well under \$15 billion. NYPB&T does not appear to be the type of large and complex banking entity that were intended to be required to phase-out TruPS from inclusion in Tier 1 capital under the Collins Amendment and the Basel III Final Rule. We are aware of at least one other bank holding company that slightly exceeded the 2009 \$15 Billion Threshold, but is now well below \$15 billion. Rigid application of this rule might adversely affect other holding companies as well.

¹ We have been informed by the Federal Reserve Bank of New York that the Federal Reserve Bank of New York does not have the delegated authority to determine, on a case-by-case basis, that a banking entity that exceeded the 2009 \$15 Billion Threshold but subsequently decreased below \$15 billion may continue to include TruPS issued before May 19, 2010 as an element of Tier 1 capital in the same manner as banking entities that were below the 2009 \$15 Billion Threshold. Accordingly, this is something that would need clarification in the form of an interpretation or a revision to the Basel III Final Rule.

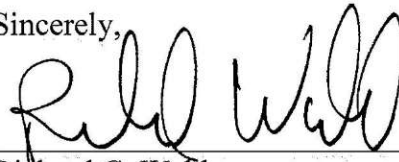
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We suggest that the appropriate agencies use their authority to clarify and interpret the Collins Amendment (as they have with the Volcker Rule), and to clarify, interpret or revise the Basel III Final Rule, to alleviate the concerns set forth in this letter for community banks that exceeded the 2009 \$15 Billion Threshold but have since decreased below \$15 billion in total consolidated assets. We also suggest that the definition of "Qualifying TruPS Collateral" in the Interim Final Rule be revised as set forth herein, which we believe would be in the spirit of the other requested actions and would promote consistency among the provisions of the Collins Amendment, the Basel III Final Rule and the Interim Final Rule with respect to TruPS.

Thank you for the opportunity to comment on the Interim Final Rule. If you would like further information on anything contained in this letter, please call the undersigned at 212-850-4906 or e-mail the undersigned at waldr@emigrant.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard C. Wald", written over a horizontal line.

Richard C. Wald
Vice Chairman