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October 17, 2018

By Electronic Submission

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue NW
Washington, DC 20551

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

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581

Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge
Funds and Private Equity Funds
[OCC: Docket ID OCC-2018-0010]
[Federal Reserve Board: Docket No. R-1608, RIN 7100-AF 06]
[FDIC: RIN 3064-AE67]
[SEC: File Number S7-14-18]
[CFTC: RIN 3038-AE72]

Dear Sir or Madam:

EnerBank USA (“EnerBank”) greatly appreciates the opportunity to provide comments on revisions to the regulations implemented under section 13 of the Bank Holding Company Act (“BHC Act”) that relate to proprietary trading and certain interests in and relationships with covered funds (together, the “Volcker Rule”). As background, EnerBank is an industrial loan company (“ILC”) founded on June 1, 2002 and headquartered in Salt Lake City, Utah. EnerBank provides unsecured home improvement loans to consumers working with strategic business partners and independent home improvement contractors throughout the United States. Strategic partners include manufacturers, distributors, franchisors, and major retailers of home improvement, remodeling, and energy saving products and services.

ILCs, the Bank Holding Company Act, and the Volcker Rule

As you know, ILCs are state-chartered depository institutions that operate with limited powers under state law. They are depository institutions for which there is a special exemption under the BHC Act. Specifically, the exemption provides that a company that controls an ILC is not subject to the BHC Act and supervision by the Federal Reserve. Consequently, such a company is not subject to restrictions on its permissible scope of activities. However, ILC parent companies are subject to examination and supervision by state banking authorities and the FDIC has the authority to examine the affairs of any affiliate as may be needed to disclose the relationship between the ILC and the affiliate, and the affiliate's effect on the ILC.

Notwithstanding the basic statutory structure, one section of the BHC Act, the Volcker Rule ("Rule"), applies to ILCs and their affiliates because of the definition of "banking entities" under the Volcker Rule. Under the Volcker Rule, a "banking entity" is defined broadly to include all FDIC-insured depository institutions, including ILCs and all of their affiliates.¹ Because of the BHC Act definitions of "affiliate" and "control," the Volcker Rule applies to the entire complex to which an ILC belongs, which makes "banking entities" of all entities that control, are controlled by, or are under common control with the ILC. Consequently, even though special-purpose banks, such as ILCs, are specifically excluded from the definition of "banks" under the BHC Act, they and all of their affiliates are "banking entities" for purposes of the Volcker Rule.

Impact of the Volcker Rule on ILCs

Under the BHC Act, an investor owning less than five percent of the voting stock of a bank or bank holding company is presumed not to "control" the bank or company and an investor owning 25 percent or more of the voting stock of the bank or company is determined conclusively to "control" the bank or company. Generally, "control" is presumed at ten percent ownership of the voting stock of a non-financial company but applies to as little as five percent ownership of the voting stock of a bank or bank holding company. Individual facts and circumstances determine whether an investor owning between five and 25 percent of the voting stock of an entity has control.² As a result, an investor owning between five and 25 percent of a company that owns an ILC or other entity excluded from the definition of a "bank" under the BHC Act³ faces uncertainty as to whether or not it indirectly "controls" the ILC or other entity and is, therefore, subject to the Volcker Rule. We note that as a practical matter, only the credit card banks and a very limited number of trust companies, if any, are FDIC-insured and would therefore be "banking entities" as defined under the Volcker Rule. Thus, only the credit card banks and any affected trust companies have the same issue as the ILCs.

Request for Comment

Question 22. Are there any other investment vehicles or entities that are treated as banking entities and

¹ See definition of "affiliate." 12 U.S.C. § 1841(k).

² See FRB Statement on Non-controlling investments. 12 C.F.R. § 225.143.

³ Other entities that are specifically excluded from the definition of a "bank" under the BHC Act include credit card banks, credit unions, certain foreign banks, certain banks that function only in a fiduciary capacity, and Edge Act corporations. 12 U.S.C. § 1841(c)(2).



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for which commenters believe relief, consistent with the statute, would be appropriate? Which ones and why? What form of relief could be provided in a way consistent with the statute?

We note at the outset our basic point: the Volcker Rule applies to the parent companies and affiliates of ILCs, even if they are non-financial companies (e.g. utility company, motorcycle manufacturer, provider of postal services, etc.) for which no other BHC Act prescriptions apply. We believe that relief for these parent companies and affiliates would be consistent with both the Economic Growth, Regulatory Reform, and Consumer Protection Act (“EGRCP Act”) and the BHC Act.

Presently, we believe the scope of the Volcker Rule is too broad. EnerBank’s parent company, CMS Energy, had a large mutual fund shareholder that wanted to increase its ownership above 10% but was advised against it by its legal counsel due to concerns about application of the Volcker Rule. There is a real concern that many more investors are deterred from increasing their investment without CMS Energy ever having knowledge of the situation. CMS Energy is likely not unique. Institutional investors will tend to avoid increasing their investment in the non-financial parents of ILCs above ten percent to avoid the risk of becoming subject to the Volcker Rule.

Requested Relief

We request a narrowly tailored solution to correct this unintended consequence of the Volcker Rule. Currently, various banking statutes set conclusive control at 25% ownership.⁴ Under the BHC Act, there is presumed non-control below five percent.⁵ Between five percent and 25%, there is uncertainty with respect to the determination of control. We recommend setting clear regulatory thresholds or criteria for determining when an investor can be deemed in control or rebut the presumption of control by taking certain passivity measures. We believe our recommendation would encourage capital investments in publicly-traded, non-financial ILC parent companies by eliminating uncertainty over the application of the Volcker Rule.

Our recommendation would be consistent with the purposes of the Volcker Rule and not compromise safety and soundness and financial stability. The Volcker Rule was intended to regulate certain trading and investment activities of banks, bank holding companies, and their affiliates, such as broker-dealers. It restricts so-called proprietary trading—the purchase and sale of financial instruments for purposes of short-term profits—and sponsoring and investing in hedge funds and private equity funds. The Rule is grounded on the theory that it will make banking entities, and therefore the financial system in the country, safer by eliminating risky activities and investments. To the extent that the Volcker Rule applies to companies that are not predominantly engaged in financial activities it fails to serve that purpose. We are not arguing against applying the Volcker Rule restrictions at the ILC level, just at the parent and affiliate level since ILCs’ parents and affiliates do not primarily engage in financial activities.

We also note that ILCs have been an integral part of the U.S. financial system for over a century, providing credit and financial innovation during good times and bad. During the worst years of the financial crisis, when most banks and credit unions were contracting their balance sheets and dramatically reducing lending, ILCs continued to lend and actually grew their assets (loans) year-over-

⁴ See 12 U.S.C. § 1841(a)(2)(A); 12 U.S.C. § 1467a(a)(2)(A)-(B); and 12 U.S.C. § 1817(j)(8)(B).

⁵ See 12 U.S.C. § 1841(a)(3) and 12 C.F.R. § 225.31(e).



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year, providing needed capital for the U.S. economy.

ILCs are a safe and regulated industry. ILCs have the same regulation as all other state chartered depositories. They are chartered and primarily regulated by the state. The FDIC serves as the primary federal regulator, with the authority to examine the depository and, as necessary, the parent organization. In addition, all federal and state banking and consumer protection laws apply to ILCs. Such institutions do not pose the financial risk the Volcker Rule is intended to prevent.

Conclusion

EnerBank appreciates the opportunity to comment on efforts that will ensure a proper balance of regulatory oversight that ensures the safety and soundness of the banking industry without restricting the availability of liquidity and investment capital necessary to foster economic growth.

Please do not hesitate to contact me if we can be helpful. We look forward to working together to create a banking system with risk-appropriate and tailored regulations.

Sincerely,

Kristin Dittmer
Executive Vice President & Chief Financial Officer
EnerBank USA