EnerBankUSA®
America's home improvement lender of choice

1245 Brickyard Rd | Suite 600
Salt Lake City, UT 84106

March 22, 2019

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

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

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

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

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

Re: Proposed Revisions to Prohibitions Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds
[OCC: Docket ID OCC-2018-0029]
[Federal Reserve Board: Docket No. R-1643, RIN 7100-AF 33]
[FDIC: RIN 3064-AE88]
[SEC: File Number S7-30-18]
[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") pursuant to the Economic Growth, Regulatory Reform, and Consumer Protection Act ("EGRRCP 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.

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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 makes all entities that control, are controlled by, or are under common control with the ILC "banking entities," thereby subjecting the ILC's entire complex to the Volcker Rule's restrictions. 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 Act[3] 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

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[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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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

We believe that the rule rule's scope is overbroad because the application of the Volcker Rule to the parent companies and affiliates of ILCs, even though 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 ("EGRRCP Act") and the BHC Act.

The overbreadth of this rule is and will continue to discourage investment in the parent companies and affiliates of ILCs. 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. Labeling companies like CMS Energy as banking entities severely restricts their ability to raise capital.

Requested Relief

We urge you to consider addressing this issue for these investors as doing so would be consistent with both the EGRRCP Act and the BHC Act. Specifically, 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 do not argue for an exemption for ILCs or their parents from the Volcker Rule. Rather, just an exemption for investors in the ILC parent companies that do not primarily engage in financial activities. 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.

Moreover, this would tailor the Volcker Rule to the types of risks it is intended to prohibit by focusing the Rule on the activities and investments by entities predominately engaged in financial activities (ILCs) rather than entities not predominately engaged in such activities (ILC parent companies and affiliates). To the extent that the Volcker Rule applies to companies that are not predominantly engaged in financial activities it fails to serve that purpose.

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,

Charlie Knadler
President & Chief Executive Officer
EnerBank USA