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By electronic and U.S. mail

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
File No. S7-41-11

Re: Prohibitions and Restrictions on Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds

Ladies and Gentlemen:

General Electric Company ("GE") and General Electric Capital Corporation ("GECC") appreciate the time taken by the staff of the Securities and Exchange Commission (the "SEC") to meet with us on May 23, 2012 to discuss our February 13, 2012 comment letter (the "February 13 Letter"). The February 13 Letter addressed the proposed rule (the "Proposed Rule") included in the notice of proposed rulemaking (the "NPR")[1] issued on November 7, 2011, in order to implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), commonly referred to as the "Volcker Rule."[2]

1 Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pt. 248). The NPR was 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") and the SEC. The text of the Proposed Rule contained therein is substantially the same as in the notice of proposed rulemaking issued on January 11, 2012, by the Commodity Futures Trading Commission (the"CFTC" and together with the OCC, the Federal Reserve, the FDIC and the SEC, the "Agencies").

2 The Volcker Rule is incorporated as a new Section 13 of the Bank Holding Company Act of 1956 (12 U.S.C. § 1851). References in this letter to the Volcker Rule are to Section 619 of Dodd-Frank, not to the Proposed Rule implementing Section 619.

Our comments are not intended to question the legitimacy of Congress' objectives in enacting the Volcker Rule. Moreover, we acknowledge the complexities and challenges the Agencies face in drafting the forthcoming final rules, and we greatly appreciate the Agencies' thoughtful work in this regard. Still, we remain concerned that the unintended consequences resulting from the Proposed Rule would pose genuine risks to the financial markets and to the economy generally, as well as to the ability of many financial and nonfinancial companies to conduct their legitimate business activities. The February 13 Letter conveyed our concern that the Proposed Rule's overbroad definitions of certain key terms, and the correspondingly extensive reach of the Volcker Rule, would result in a set of complex and inflexible restrictions that defeat the underlying purpose of the Volcker Rule: risk reduction.

This letter will elaborate on selected topics in four areas of concern that we discussed in the May 23 meeting:

- the breadth of the "covered funds" definition as applied to joint ventures and securitization vehicles;
- the application of the Volcker Rule provision known as "Super Section 23A";
- the scope of the definition of "banking entity," including its application to nonfinancial companies; and
- the anticipated cost to GE and GECC of ensuring compliance with the Volcker Rule as it is currently proposed to be implemented.

We continue to hold the views that were stated in the February 13 Letter but that are not reiterated here due to the narrower focus of this letter. We respectfully request that the Agencies consider this letter together with the February 13 Letter as they work toward adoption of final rules.

The staff of the SEC specifically inquired about the treatment of joint ventures and securitization vehicles. Our letter begins by discussing these topics. We believe that many of the issues that arise from the Proposed Rule with respect to joint ventures and securitization vehicles stem from the Proposed Rule's emphasis on structural form over the actual function being conducted by the joint venture or securitization vehicle.

I. Treatment of joint ventures and securitization vehicles as "covered funds"

A. *The Volcker Rule should not prohibit firms from structuring their legitimate financial activities using common corporate structures. Joint ventures are a crucial risk management tool for banking entities and the ability to use that structure must be preserved.*

One of our chief concerns is how the Volcker Rule's prohibitions would be applied to joint ventures. Joint ventures are a crucial and well-established risk management tool. They allow banking entities to take only a portion of the risk with respect to a particular investment by allowing a partner to share that risk. Prohibiting the use of joint ventures by banking entities (except in the very limited and uncertain circumstances described in Section __.14(a)(2)(i) of the Proposed Rule) runs counter to the risk reducing aim of the Volcker Rule. This is a consequence of the Proposed Rule that was not intended by Congress. As we explained in the February 13 Letter, it is an unfortunate and problematic side effect of relying on the exceptions in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 (the "1940 Act") to define what constitutes a private equity fund or hedge fund.

The Proposed Rule defines private equity funds and hedge funds (collectively "covered funds") as any entity that would be an investment company under the 1940 Act but for exceptions in sections 3(c)(1) and 3(c)(7) thereof. This definition captures most private equity and hedge funds, but it also captures numerous other corporate structures that are common within financial and nonfinancial firms. The statute provides the Agencies with the authority to tailor the fund definition to avoid overbreadth, and the legislative history specifically contemplates that the Agencies will do so.[3] We argued in the February 13 Letter that the limited exceptions provided in Section __.14 of the Proposed Rule for wholly owned liquidity management companies, acquisition vehicles and certain joint ventures are far too narrow and restrict many common activities and entities that the Volcker Rule was not intended to capture.

As a further illustration of this concern, GECC and four partners participate in a joint venture that conducts a transportation related leasing business.[4] Viewed collectively, the joint venture owns thousands of railcars and leases them to a GECC

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3 In a colloquy that is an important part of the legislative record, Representative Barney Frank, the co-sponsor of Dodd-Frank and the Chair of the House Financial Services Committee, and Representative Jim Himes clarified that the Volcker Rule was not intended to disrupt firms' ownership or control of "subsidiaries or joint ventures that are used to hold other investments, [and] that the Volcker Rule won't deem those things to be private equity or hedge funds and disrupt the way the firms structure their normal investment holdings." Chairman Frank went on to explain that "[w]e do not want these overdone. We don't want there to be excessive regulation ... and we are confident that the regulators will appreciate that distinction, maintain it, and we will be there to make sure that they do." 111 Cong. Rec. H5226 (daily ed. June 30, 2010).

4 This example has been simplified for purposes of clarity in this letter.

subsidiary for sublease to third parties. But the holding company through which GECC and one joint venture partner hold their interests in the joint venture must rely on the commonly used exceptions in Sections 3(c)(1) and 3(c)(7) of the 1940 Act because of the way the joint venture is structured: it owns only a minority interest in the joint venture's primary operating entity, making it presumptively an investment company under the 1940 Act. Therefore, the structure GECC uses to hold its interest in the joint venture is a covered fund under the Proposed Rule. This is a perverse result for two reasons. First, equipment leasing is not the type of business that Congress intended to prohibit when it passed the Volcker Rule. Second, it would be permissible for GECC to own the minority interest in the joint venture's operating entity directly; it is only the joint venture structure that is problematic under the Proposed Rule, not the activity itself.

This type of structural concern recurs frequently as a result of the inflexibility of the Proposed Rule. The requirements of the 1940 Act are extensive and technical. The 1940 Act was not designed to serve as the means of defining crucial terms under an otherwise unrelated statute such as the Volcker Rule. We believe that the commission of technical "foot-faults" under the 1940 Act that arise from the corporate structure rather than the economic substance of an activity should not prevent banking entities from making use of common corporate structures that provide economic benefits to the markets and reduce their own risk.

We continue to believe that the Proposed Rule should be modified not only to exempt all joint ventures from the definition of "covered fund," but also to provide a bright-line test to distinguish joint ventures from traditional hedge fund or private equity fund structures. For example, the Agencies could consider limits on the number of joint venturers. Joint ventures tend to have from two to five parties involved as participants or other equity owners. A rule that exempted all entities with five or fewer equity holders (or debt holders if the debt was used in an evasive manner to capture traditional equity features) would be a clean way of preserving a banking entity's ability to form joint ventures[5] that may inadvertently be labeled as covered funds under the statute. There is no meaningful risk that a true joint venture, or a wholly owned subsidiary formed to make an investment in a joint venture, will be used for purposes of evasion of the Volcker Rule. This is because either entity would also be a banking entity to the extent it is controlled by one or more banking entities. In those cases, joint ventures are therefore subject to the same limits of the Volcker Rule on both proprietary trading and investments in, and relationships with, hedge funds or private equity funds. Restricting the use of joint ventures thus provides little benefit, but does increase the risk to banking entities.

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[5] Such a rule exempting entities with five or fewer equity holders would also resolve the concern discussed in our February 13 Letter that wholly owned subsidiaries of banking entities would be covered funds under the Proposed Rule if they rely on Sections 3(c)(1) or 3(c)(7) of the 1940 Act and do not qualify for one of the limited exceptions in the Proposed Rule. Please refer to our February 13 Letter for a longer discussion of this issue.

B. *The Volcker Rule should not restrict the ability of banking entities to securitize loans.*

Section 13(g)(2) of the Bank Holding Company Act of 1956 (the "BHC Act") expresses Congress's intent that nothing in the Volcker Rule should restrict the ability of banking entities or nonbank financial companies supervised by the Federal Reserve to securitize loans to the extent otherwise permitted by law. We are concerned that the exceptions provided in the Proposed Rule for securitization vehicles are not broad enough to implement fully this statutory mandate to allow securitizations. In practice, there are few pure loan securitizations that do not include at least some ancillary assets or additional vehicles used for structural reasons. Thus, for the Congressional mandate in Section 13(g)(2) to be implemented in a meaningful way, the burden is on the Agencies to ensure that the final rule provides sufficient flexibility for typical loan securitizations with these features to continue to be permissible. In crafting the final rule, it is therefore essential for the Agencies to consider the function these securitization vehicles are serving rather than merely the form.

In general, GECC's domestic securitization activities facilitate lending to and financing for small and midsize enterprises ("SMEs") within the United States in various industries, as well as increasing the availability of credit for individual consumers by securitizing credit card receivables. The SMEs operate in a wide range of domestic industries, including electronics, transportation (including cars, trucks, trailers, and midland marine vessels), printing and publishing, manufacturing, mining and construction, agriculture, distribution and wholesale, retail and services. The private label credit card receivables include cards for companies including some of the largest retailers in the country. We believe that these securitization activities, as well as similar securitizations conducted by others in the industry, are very beneficial to the United States economy because they facilitate lending to SMEs, which are the backbone of the American economic system. Consistent with the Congressional mandate not to interfere with loan securitization, we believe the Agencies should provide the industry with greater comfort that these crucial business activities will not be restricted by the final rule.

As we will explain with greater specificity below, in the typical securitization activities of companies such as GECC, the issuers of asset-backed securities often hold a limited amount of assets that do not fit within the narrow criteria in the Proposed Rule.[6] We believe there is a two-part solution to this problem. First, the Agencies should broaden the scope of eligible assets permissible in excepted securitization vehicles. Second, the Agencies should allow a small bucket of ancillary assets, comprising no more than 15% of the total assets of the securitization vehicle, to be held regardless of whether they otherwise meet the criteria to be eligible assets.

6 The issues discussed in this section are common to multiple banking entities engaged in securitization activities, as further described in the comment letter submitted by the American Securitization Forum.

Sections __.13(d) and __.14(a)(2)(v) of the Proposed Rule create exceptions for securitization vehicles that are "solely comprised" of loans,[7] contractual rights related to the loans, and certain limited hedging products. We recognize that the Agencies are seeking to find the best way to permit legitimate securitizations. The buckets the Agencies have already included in these exceptions collectively capture most of the assets that exist in typical loan securitization vehicles. They do not, however, go far enough. There are some assets that are routinely included in typical securitization vehicles that should also be excepted.

For example, in motor vehicle securitizations, GECC and other companies customarily securitize beneficial interests in titling trusts that own a single truck or auto for administrative and legal reasons. These beneficial interests are not easily classified as a loan, a contractual right related to the loan, or a permissible hedging product. Another example is presented by a true lease securitization in the equipment leasing business. There, the actual equipment being leased is given material credit in the asset base underlying the securitization. The exceptions in the Proposed Rule should be expanded to allow this residual "metal" to be an eligible asset because it is a commercially useful way of securitizing equipment leases.

We believe that the Agencies should expand the scope of the assets eligible to be held by excepted securitization vehicles to include not just loans, but also all instruments that are fixed or revolving financial assets that, by their terms, convert into cash in a finite period of time (including any rights or other assets designed to assure servicing and timely distribution of proceeds to security holders). This standard comes directly from Rule 3a-7 under the 1940 Act, and it is logical to implement the Volcker Rule in a way that is consistent with that exception. An entity that could otherwise rely on Rule 3a-7 would not be a covered fund for Volcker Rule purposes anyway. Eligible asset classes should be at least as broad in scope as those in Rule 3a-7. This approach has the added benefit of reducing the cost of compliance because banking entities would be able to refer to existing interpretations of what assets are eligible for Rule 3a-7 rather than having to approach the SEC or the other Agencies to request relief.

This approach alone will not be sufficient to adhere to the Congressional mandate not to interfere with otherwise permissible loan securitizations. Other types of assets, such as debt securities, are typically held by issuers of asset-backed securities in order to complete a loan securitization. Occasionally additional assets, including repossessed property and equity-like rights, may be held by securitization vehicles in small quantities. The "solely comprised" standard in the Proposed Rule is therefore unworkable for many legitimate securitizations because it leaves no room for ancillary securities that are necessary or desirable in an otherwise permissible securitization vehicle. We are sensitive to the fact that the Agencies are not inclined to permit securitization vehicles to

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[7] "Loan" is a defined term in § __.2(q) of the Proposed Rule, meaning any loan, lease, extension of credit, or secured or unsecured receivable. 12 C.F.R. § 248.2(q).

hold primarily other debt securities. We do not think the Agencies must do so. As we discussed in our February 13 Letter, we believe the Agencies should replace the "solely comprised" standard with one that permits a small bucket of "ancillary" assets to be held in addition to the eligible assets. We believe this bucket should comprise, in the banking entity's discretion, up to 15% of the total assets of the securitization vehicle. Whereas the scope of generally eligible assets should be limited qualitatively, the permissible ancillary assets should be limited only quantitatively. This approach would provide leeway for holding debt securities, repossessed property, equity-like rights, equipment lease residuals and other assets that are merely ancillary to an otherwise permissible securitization.

Finally, like many others in the business, GECC frequently uses a two-step structure for its loan securitizations in which an intermediate special purpose vehicle acquires loans from various originators and eventually transfers the loans to the issuing entity in the securitization structure. This approach is used for a variety of reasons, including ease of administration and to achieve legal true sale of the loans from the originator. The intermediate SPV, however, must rely on Section 3(c)(1) or 3(c)(7) of the 1940 Act and does not appear to be eligible for the securitization exceptions in the Proposed Rule. Yet the only reason the intermediate SPV even exists is to facilitate the securitization of loans. Accordingly, we urge the Agencies to except such intermediate SPVs from the prohibitions of the final rule. A failure to do so would be inconsistent with the Agencies' responsibility to implement Section 13(g)(2) of the BHC Act, which mandates that nothing in the Volcker Rule impair the ability of banking entities to engage in the activity of securitizing loans. Such a failure would privilege the structural form of these vehicles while ignoring the function they serve.

II. Further legal arguments concerning "Super 23A"

Joint ventures, securitization vehicles and other structures that would be covered funds but are excepted from the general prohibitions of Section __.10 of the Proposed Rule are still subject to a flat prohibition ("Super 23A") on certain transactions between a banking entity or its affiliates, on the one hand, and a covered fund that the banking entity manages, advises, sponsors, or organizes and offers, on the other hand. The transactions that would be prohibited are those that would be "covered transactions" under Section 23A of the Federal Reserve Act, which generally includes extensions of credit, certain asset purchases, and certain other transactions.[8] In some cases, such as those hedge funds and private equity funds that are organized or offered by a banking entity pursuant to Section 13(d)(1)(G) of the BHC Act, the prohibition is understandable because such vehicles may be true hedge funds or private equity funds and there is an express statutory requirement to apply Super 23A to such entities. In many other cases, however, such an application creates unintended consequences that defeat the purpose of the exceptions to the general prohibitions of Section __.10 of the Proposed Rule. This problem was

[8] Federal Reserve Act § 23A(b)(7), 12 U.S.C. 371c(b)(7) (2011).

documented in our February 13 Letter and numerous other comment letters, so we will not discuss it further here. Instead, we suggest a possible legal basis for solving this problem.

Section 13(f) of the BHC Act prohibits a banking entity "that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a hedge fund or private equity fund, or that organizes and offers a hedge fund or private equity fund pursuant to paragraph (d)(1)(G)" from entering into covered transactions with such funds. Unlike the general restriction in Section 13(a)—prohibiting the acquisition or retention of any equity, partnership, or other ownership interest in or sponsoring of a hedge fund or private equity fund—this statutory language does not refer to acquiring or retaining ownership interests in hedge funds or private equity funds. This choice of language indicates that Congress' focus in adopting Section 13(a) was not entities in which a banking entity had invested. Instead, Congress had a different focus and a different purpose.

The terms "managing", "advising", "sponsoring" and "organizing and offering" clearly contemplate a relationship with a vehicle that is set up to receive investments by third parties, not ownership interests in the equity of a subsidiary or an operating joint venture. The decision to use these terms in this context demonstrates that Congress intended to apply Super 23A to vehicles that are used by banking entities to manage third party money through the establishment of vehicles that receive investments from third parties. Section 13(f), therefore, should not be interpreted by the Agencies to require the application of Super 23A to subsidiaries, joint ventures or other entities that do not serve this function.

This reading is consistent with the legislative history of the Volcker Rule. Super 23A was designed to protect banking entities by preventing them from bailing out investors in affiliated funds for reputational reasons.[9] This concern does not exist with respect to the other types of entities excepted from the definition of covered fund, such as entities that promote the public welfare or promote safety and soundness. Permitting transactions between the banking entity and these excepted entities may be necessary for them to perform their intended functions.

Canons of statutory construction also require that the Agencies not apply Super 23A to wholly owned subsidiaries, joint ventures and other structures that are not vehicles for managing third party investor monies. First, when possible, statutes should be construed in a way that avoids absurd results.[10] As we argued in the February 13

9 Colloquy between Senators Merkley and Levin, 156 CONG. REC. S5894 (daily ed. July 15, 2010). See also Colloquy between Senators Merkley, Levin and Dodd, *id.* at S5901 ("the intent of [Super 23A]" is "to prohibit banking entities from bailing out funds they manage, sponsor, or advise, as well as funds in which those funds invest").

10 "Although many expressions favoring literal interpretation may be found in caselaw, it is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or

Letter, and as other commenters have pointed out, the Proposed Rule's application of the Super 23A prohibitions to all funds that are exempt under Section __.10 of the Proposed Rule (or Section 13(d)(1) of the BHC Act) would render useless most of the very structures that were supposedly being exempted from the Volcker Rule's prohibitions. That is certainly an absurd result that can be avoided by the Agencies.

Second, the Agencies should also take note of the "whole act" rule, which requires statutes to be read in context rather than as a series of unrelated provisions.[11] The choice of words in Section 13(a) of the BHC Act differs from the choice of words in Section 13(f) for a reason. We also point out that when Congress thought it was necessary to apply the restrictions of Section 13(f) to a fund that was otherwise exempt from the general prohibition in Section 13(a), it knew how to do so. For example, Section 13(d)(1)(G) expressly applies Section 13(f) to the funds excepted thereunder, while the other exceptions in Section 13(d)(1) do not. While we recognize the complex nature of drafting implementation rules, we believe the Proposed Rule should comport with recognized canons of statutory construction.

In light of the plain meaning of the statute, the legislative history of the Volcker Rule, and the dictates of these canons of statutory construction, it is clear that the Agencies are not required to interpret Section 13(f) of the BHC Act to apply to any entities excepted under Section 13(d)(1) (other than Section 13(d)(1)(G)). Consistent with this position, the Agencies should clarify that the definition of "sponsor" is intended

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such interpretation leads to absurd results, the words of the statute will be construed to agree with the intention of the legislature." Sutherland Statutes & Statutory Construction § 46.7 (Norman J. Singer & Shambie Singer eds., 7th ed. 2011); *see also Comm'r Internal Revenue v. Brown*, 380 U.S. 563, 571 ("Unquestionably the courts, in interpreting a statute, have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results." (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941)); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function."); *United States v. Lazarenko*, 624 F.3d 1247, 1251 (9th Cir. 2010) (stating that if a "literal application of the plain text leads to absurd results, the plain text does not control"); *Heppner v. Aleyeska Pipeline Serv. Co.*, 665 F.2d 868 (9th Cir. 1981) (holding that the reach of unambiguous language may be limited by judicial interpretation "[W]hen Congress uses more sweeping language than it would if it were attending carefully to fact situations, outside the scope of its purpose, to which the language might be erroneously understood to apply.").

11 "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole ... It has also been held that the court will not only consider the particular statute in question, but also the entire legislative scheme of which it is a part." Sutherland Statutes and Statutory Construction § 46:5 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2011); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 368 (1988) ("[S]tatutory construction ... is a holistic endeavor."); *U.S. v. Cooper*, 396 F.3d 308, 313 (2005) ("The Whole Act Rule instructs that subsections of a statute must be interpreted in the context of the whole enactment.").

to apply to vehicles that are set up to manage monies for third parties, not ownership interests in the equity of a subsidiary or an operating joint venture.[12]

III. Overbreadth of the term "banking entity"

As we mentioned in our February 13 Letter, the Volcker Rule applies to all "banking entities," which are defined as U.S. insured depository institutions, all companies that control them, and all affiliates and subsidiaries of those companies. The Proposed Rule adopts the very broad definitions of "affiliate" and "subsidiary" embodied in the BHC Act, and therefore would apply to firms in which a banking entity owns 25% or more of any class of voting securities, or even as low as 5% of a class of securities if there are other sufficient indicia of control. For all banking entities, and particularly for nonbank firms that control depository institutions, such as grandfathered savings and loan holding companies ("SLHCs") or firms that own industrial loan companies, this standard captures a large number of companies and enterprises that we believe were not the types of entities that concerned Congress when it adopted the Volcker Rule. These entities include, among others:

- Nonfinancial commercial firms held in the corporate chain of the banking entity;
- Companies in which the banking entity holds a minority investment that does not constitute actual "control" in the common sense of the word; and
- Foreign firms in which the banking entity holds a significant investment, including financial firms regulated by foreign supervisors.

The use of the broad BHC Act definitions of "affiliate" and "subsidiary" creates a vast universe of "affiliates" covered by the Volcker Rule, all of which would be subject to prohibitions that were not meant for nonfinancial firms. The result may be that all affiliates of GECC that engage primarily or exclusively in nonfinancial activities (such as

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12 The explicit grant of authority to the agencies in Section 13(b)(2) of the BHC Act to write the rules implementing the statute gives the Agencies the discretion necessary to interpret the terms of Section 13. The Agencies are directed to coordinate in order to "...protect the safety and soundness of banking entities and non-bank financial companies supervised by the Board." In addition, Section 13(d)(1)(J) allows the agencies to make exceptions for safety and soundness. Explicit grants of rulemaking authority of these types increase the likelihood that the Agencies, in adopting rules implementing the Volcker Rule, will be entitled to broad deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) makes clear that "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." The Agencies should use this heightened standard of deference to adopt final rules that avoid the unintended consequences and absurd results that would stem from the current definitions of "covered fund" and "banking entity".

those that operate primarily in the industrial, technological, manufacturing or healthcare businesses) could be subject to the Volcker Rule's prohibitions. One unintended consequence would be that a third party operating a nonbanking business would need to consider the practical impact of allowing an unaffiliated banking entity, such as GECC, to make an investment in the nonbanking business or one of its subsidiaries.[13] This could have major ramifications for joint ventures. For example, an investment by a banking entity in 25% of a class of voting stock of a joint venture would cause the joint venture (in any industry) to become a banking entity itself and therefore subject to the Volcker Rule. At a minimum this would chill the creation of joint ventures between nonfinancial firms and banking entities, but for nonfinancial firms that are affiliated with banking entities, it also creates potential concerns about whether their hands will be tied with respect to existing joint ventures.

Moreover, the affiliates of GECC that engage primarily or exclusively in nonfinancial activities would appear to be required to implement extensive compliance programs geared for risks that they do not incur, which would also significantly magnify the costs of compliance for organizations similar to GE that have extensive industrial operations. The numerous affiliates of GECC that engage primarily or exclusively in industrial, technological, manufacturing or healthcare activities also may need to restructure or divest certain assets to comply with the Volcker Rule because of the unintended consequences of the covered fund prohibitions of the Proposed Rule. This cannot be the outcome the Volcker Rule was intended to achieve.

Leaving aside the issue of significant and unnecessary compliance costs, in some cases it will be difficult or impossible to force companies that are deemed "affiliates" of a banking entity to comply with the Volcker Rule when the banking entity does not exert actual "control" over such affiliates in the common sense of the word. By adopting the BHC Act definition of "control",[14] the Proposed Rule threatens to implement two standards that are problematic when applied to grandfathered SLHCs and firms that own industrial loan companies. First, a so-called "controlling influence test" is one method used to determine whether one entity controls another. This is a subjective, fact-specific inquiry that introduces a substantial amount of uncertainty. There may be many cases in which GECC would be forced to operate under the assumption that a company is an affiliate on the basis of a supposed "controlling influence." Moreover, there may be companies over which GECC is deemed to exercise a "controlling influence" under the

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13 Conversely, third parties would be dissuaded from making large investments in banking entities covered by the Volcker Rule because such controlling investments would make the third party also subject to the Volcker Rule, thereby eliminating an important source of investment capital from banking entities.

14 This includes three triggers: (1) the ownership or control of 25% or more of any class of voting securities of the company, (2) controlling in any manner the election of a majority of the board of directors or similar body of the company or (3) having a controlling influence over the management or policies of the company, but only if the Federal Reserve determines after notice and an opportunity for a hearing that such a controlling influence exists. See 12 U.S.C. § 1841(a).

Proposed Rule despite the fact that a third party may have greater—or indeed preclusive—control over the company. For example, GECC might own 15% of the voting equity in a joint venture while a third party owns the other 85%. Perhaps as a result of other business relationships with the joint venture, GECC could be deemed to have a controlling influence, even though the third party that controls 85% of the vote can overrule any proposals from GECC.

The second problematic standard arising from the BHC Act definition of "control" is the ownership or control of 25% or more of any class of voting securities of the company. This standard has the benefit of being objective—so it avoids the uncertainty that accompanies the "controlling influence" test—but it suffers from the same problem with respect to entities that are controlled primarily by a third party. Although GECC may be deemed to "control" an entity for BHC Act purposes, functionally it may not have enough actual control over the entity to implement a program to ensure compliance with the Volcker Rule. In certain instances where GECC owns more than 25% of a class of voting securities of, or otherwise is deemed to have a controlling influence over a company, GECC has contractual rights known as "regulatory out" provisions that require the company either to make changes to comply with applicable laws and regulations or to allow GECC to divest its interest in the company. However, GE and GECC alone have, over time, made hundreds of investments in companies that may now be considered affiliates. Not all of these investments include regulatory out provisions and, as we discussed in more detail in our February 13 letter, regulatory out provisions are often difficult to exercise even when they do exist.

We believe that a more realistic and purely objective standard for control is critical to avoiding uncertainty and ensuring compliance. As we have argued previously, the Agencies should, at a minimum, define the term "control" without any subjective test, such as the "controlling influence" test. An objective approach would resolve a substantial amount of the uncertainty surrounding the subjective application of the controlling influence test explained above. In addition, it would minimize the need for non-bank companies to approach the Federal Reserve or the other Agencies for determinations of control or non-control, thus reducing regulatory burden.

There is precedent for this approach. The Federal Reserve has previously made clear that in some circumstances it considers a more objective approach to the concept of "control" to be appropriate. In the proposed regulations implementing the single-counterparty credit limits in Sections 165 and 166 of Dodd-Frank, the Federal Reserve also dropped the "controlling influence" test in favor of more objective definitions, reasoning that "a simpler, more objective definition of control is more consistent with the objectives of single-counterparty credit limits".[15] We submit that the same logic applies in this case.

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[15] Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 Fed. Reg. 594, 614 (Jan. 5, 2012).

For purposes of the Volcker Rule, however, the objective standard should be elevated to a level of control that provides actual control of the entity. We believe that a greater than 50% voting interest or consolidation for accounting purposes would be an appropriate standard because it would allow the banking entity to ensure compliance even if the entity in question is also partly owned by at least one other party. Similarly, the purpose of the Volcker Rule, risk reduction in the banking entity itself, is best served when the rule applies to entities that are consolidated with the banking entity for accounting purposes, rather than covering loosely affiliated entities in which the banking entity owns only a minority share.

IV. Cost of compliance

In our May 23, 2012, meeting with the staff of the SEC, the staff asked us to provide a rough estimate of the costs to GE and GECC of complying with the Proposed Rule. We very much agree that this is an extremely important consideration that the Agencies should continue to consider carefully. Such estimates are by their nature difficult to prepare, but we have tried below to identify some of the factors that we considered in order to arrive at an estimate. We hope that the factors will provide some context. We would also point out that GE and GECC are strongly committed to a culture of compliance and began considering the scope of the Volcker Rule compliance regime that would be required by the Proposed Rule prior to submitting the February 13 Letter. We recognize that there inevitably will be significant but necessary costs that will be appropriately incurred in the process of complying with the Volcker Rule, but we are concerned that the Proposed Rule results in additional costs that relate to restrictions and prohibitions that Congress did not intend to enact when it passed the Volcker Rule. These costs have no corresponding benefit. Fixing the problems in the Proposed Rule would minimize these costs whenever possible, so the Agencies should bear that in mind when adopting a final rule.

GE is among the largest firms in the U.S. We provide an expansive line of products that span many industries, including energy, manufacturing, electronics, finance, healthcare, and software, among others. All told, the operations of GE and GECC involve hundreds of separate structures related to corporate organization and investments. The Proposed Rule in its current form requires a review of each of these entities, which would involve a complex process with at least three steps: (1) GE or GECC would first need to determine whether each separate structure would be a *prima facie* investment company under the 1940 Act based on its activities and its unconsolidated balance sheet, which is an extremely complicated analysis, (2) for those entities that are identified as such, GE or GECC would then need to determine whether one of the many 1940 Act exceptions other than those in Sections 3(c)(1) and 3(c)(7) would apply to the structure in question, and (3) if no other exceptions would apply, someone familiar with the provisions of the Volcker Rule must make a judgment about whether one of the exceptions in the Volcker Rule or the implementing regulations ultimately adopted by the Agencies applies.

Conducting such an analysis on each and every one of GE's subsidiaries or joint ventures, plus the subsidiaries and joint ventures of every affiliate if the low threshold for affiliate status proposed in the draft rule is maintained, would require significant amounts of GE's own time, personnel resources, and capital, and could well necessitate supplemental resources. For example, it is often necessary to consult outside legal counsel, particularly for advice regarding more complicated structures. Forward-looking compliance programs would also have to be implemented. And these compliance reviews would have to be conducted on an on-going (and never-ending) basis (quarterly, if the 1940 Act definition of "value" is the applicable standard) because "covered fund" status could occur at any time as a result of changes in balance sheet composition or the activities of any "controlled" entity. Therefore, this process would be exceedingly burdensome and expensive, is likely to result mostly in identifying "false positives" *(i.e.*, subsidiaries or joint ventures that no one would consider to be genuine hedge funds or private equity funds), and would likely disrupt normal business operations. GE, in particular, will incur costs related to many entities on the nonfinancial side of the business, which was not the intent of the Volcker Rule.

So far we have discussed only the costs of conducting compliance reviews. When those reviews result in a finding that a particular entity or structure is not permitted to be held under the Volcker Rule, the banking entity will have to seek permission to hold it or else divest it. This adds another universe of potential costs. There are costs to applying to the Agencies for relief. Extensive transaction costs could be incurred to find a potential buyer and then negotiating and documenting a sale, including fees paid to legal and financial advisors, not to mention the possibility of taking a loss on an investment that a banking entity was required to sell at an inappropriate time.

The discussion above is limited to the costs of compliance on the fund side of the Volcker Rule. Although this letter is confined to the fund provisions of the Proposed Rule, we note that there are also major expenses that will be incurred to comply with the proprietary trading prohibitions of the Proposed Rule. In our case, fewer companies must be reviewed for compliance with the trading portion of the rule because not all entities in the corporate structure engage in activity that could involve trading. Nonetheless, the costs of the extensive compliance program requirements and the systems and infrastructure that must be put into place in order to gather and process the relevant information may be even greater.

Taking the above considerations into account, our best estimate at this stage is that the annual cost of complying with the Proposed Rule to GE and GECC plus all affiliates of GE and GECC covered by the Rule could reach into the tens of millions of dollars. As noted above, in the context of cost-benefit analysis, virtually all of the costs described above would be related to determining whether common corporate structures inadvertently run afoul of the rule, rather than compliance costs associated with monitoring true private equity or hedge fund investments or trading activity. Thus, these significant costs are not offset by any benefit sought under the Volcker Rule; they create only unnecessary burden.

As we explained in our February 13 Letter, the Proposed Rule could also create unnecessary costs for others by increasing risk, misallocating compliance burdens to non-financial companies, destabilizing firms, and harming the real economy. For example, restrictions on GECC's ability to use traditional securitization structures could increase costs for our customers, including individual consumers and SMEs. Significant adjustments in the final rule are essential to avoid these consequences.

* * * * *

We hope we have provided some additional clarifications that the Agencies will find useful when deciding upon a set of final rules. GE and GECC remain very concerned about the manner in which the Volcker Rule will be implemented. We appreciate that the Agencies are taking the time to consider our comments and we would be pleased to discuss them with the staff of the Agencies in more detail. If there are any questions, please feel free to contact the undersigned at the number provided below.

Respectfully,

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