INVESTMENT COMPANY INSTITUTE

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August 24, 2016

OCC Issues Proposal on Stays in Qualified Financial Contracts of OCC-Regulated Banks That Are Part of a Global Systemically Important Banking Organization

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TO: DERIVATIVES MARKETS ADVISORY COMMITTEE No. 44-16
SEC RULES COMMITTEE No. 37-16
FIXED-INCOME ADVISORY COMMITTEE No. 25-16
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 22-16
ICI GLOBAL REGULATED FUNDS COMMITTEE No. 54-16 RE: OCC ISSUES PROPOSAL ON STAYS IN QUALIFIED FINANCIAL CONTRACTS OF OCC-REGULATED BANKS THAT ARE PART OF A GLOBAL SYSTEMICALLY IMPORTANT BANKING ORGANIZATION

The Office of the Comptroller of the Currency ("OCC"), U.S. Department of the Treasury, recently issued proposed rules ("OCC Proposal") that would require OCC-regulated banks and their subsidiaries that are part of a global systemically important banking organization ("GSIB") to include certain restrictions in their qualified financial contracts ("QFCs"). [1] The OCC Proposal is substantively identical to, and would complement, the proposal issued in May by the Board of Governors of the Federal Reserve System ("Board"). [2] The OCC Proposal is summarized briefly below, focusing on those aspects of the Proposal that differ from the Board's proposal. The OCC requests comments on the Proposal by October 18, 2016.

ICI has scheduled a member call to discuss possible comments on the OCC Proposal on September 20, from 2-3 pm ET. If you would like to participate in the member call, please contact Jennifer Odom at jodom@ici.org or (202) 326-5833, and she will send you the dial-in information.

The OCC Proposal would apply to "covered banks," which are excluded from the scope of the Board's proposal. [3] "Covered banks," under the OCC Proposal, would be defined to include subsidiaries of a GSIB holding company or foreign GSIB that are national banks, Federal savings associations, and Federal branches and agencies, and subsidiaries of such entities. [4]

The operative provisions of the OCC Proposal are substantively the same as the Board's proposal. The proposed scope of covered QFCs and default rights is identical to the Board's proposal. Similar to the Board proposal, the OCC Proposal would require QFCs entered into with covered banks to contain contractual provisions that recognize the automatic stay of termination and transfer provisions applicable in resolution proceedings under the Orderly Liquidation Authority provisions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Federal Deposit Insurance Act. [5] It would also generally require QFCs entered into by covered banks to prohibit the QFC counterparty from exercising default rights based on an affiliate of the counterparty becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding, and would limit restrictions on transfer of credit enhancements. [6]

The OCC Proposal, like the Board's proposal, includes a safe harbor based on adherence to the ISDA 2015 Universal Resolution Stay Protocol. [7] The OCC recognizes, as does the Board, that an alternative protocol could be consistent with its proposal. [8] The OCC Proposal also includes a process for approval of enhanced creditor protection conditions that is identical to that under the Board proposal, except that a covered bank would apply to the OCC for review of such enhanced creditor protections. The OCC states that it expects to consult with the FDIC and Board during its consideration of a request under this provision, [9] but it is unclear how identical requests for approval of enhanced creditor protections by a GSIB and its subsidiaries would be handled by the various regulators.

The proposed transition periods for the OCC Proposal are described in the same way as under the Board's proposal. For example, the OCC Proposal would take effect on the first day of the first calendar quarter that begins at least one year after the issuance of a final rule. The OCC Proposal does not address, however, whether the OCC and the Board plan to coordinate the effective dates of their respective rules. [10]

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endnotes

[1] Department of the Treasury, Office of the Comptroller of the Currency, Mandatory Contractual Stay Requirements for Qualified Financial Contracts, 81 Fed. Reg. 55381 (Aug. 19, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-08-19/pdf/2016-19671.pdf ("Proposing Release").

[2] For a description of the Board's proposal, please see ICI Memorandum No. 29916 (May 16, 2016), available at https://www.iciglobal.org/iciglobal/pubs/memos/memo29916. ICI filed a comment letter on the Board's proposal on August 5, 2016. see Letter to Mr. Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, from David W. Blass, General Counsel, Investment Company Institute, dated Aug. 5, 2016, available at https://www.ici.org/my_ici/memorandum/memo30119.

[3] The Board's proposal would apply to: (1) any U.S. GSIB bank holding company; (2) any subsidiary of such a bank holding company that is not a "covered bank;" and (3) the U.S. operations of any foreign GSIB with the exception of any "covered bank."

[4] See proposed section 47.3(a).

[5] See proposed section 47.4.

[6] See proposed section 47.5.

[7] See proposed section 47.6.

[8] The Proposing Release states that “ISDA is expected to supplement the Protocol with ISDA Resolution Stay Jurisdictional Modular Protocols for the United States and other jurisdictions. A U.S. module that is the same in all respect to the Protocol aside from exempting QFCs between adherents that are not covered banks would be consistent with the current proposed rule. Proposing Release, supra note 1, at n.57.

[9] Proposing Release, supra note 1, at 55393.

[10] The OCC acknowledges, however that it “expects that, as a practical matter, the decision of how to comply with this proposed rule and the FRB Proposal with respect to a given counterparty, and its affiliates, will be made in close coordination between the covered bank and its affiliated covered entities.” Proposing Release, supra note 1, at 55395.
