

MEMO# 30279

September 28, 2016

Draft Comment Letter on OCC Proposal on Stays in Qualified Financial Contracts of Certain OCC-Regulated Banks - Your Comments Requested by October 10

[30279]

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TO: DERIVATIVES MARKETS ADVISORY COMMITTEE No. 48-16
FIXED-INCOME ADVISORY COMMITTEE No. 31-16
ICI GLOBAL REGULATED FUNDS COMMITTEE No. 65-16
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 25-16
SEC RULES COMMITTEE No. 45-16 RE: DRAFT COMMENT LETTER ON OCC PROPOSAL ON STAYS IN QUALIFIED FINANCIAL CONTRACTS OF CERTAIN OCC-REGULATED BANKS - YOUR COMMENTS REQUESTED BY OCTOBER 10

The Office of the Comptroller of the Currency (“OCC”) recently issued proposed rules (“OCC Proposal”) which would require OCC-regulated banks and their subsidiaries that are part of a US global systemically important banking organization (“GSIB”) or foreign GSIB that operates in the United States, to include certain restrictions in their qualified financial contracts (“QFCs”).^[1] The OCC Proposal is substantively identical to, and would complement, the proposal (“Board Proposal”) of the Board of Governors of the Federal Reserve System (“Board”) issued in May.^[2]

The OCC requests comments on the proposal by October 18, 2016. ICI has drafted a comment letter, attached and summarized briefly below, to respond to the OCC Proposal. If you have comments on the draft comment letter, please send them to me in writing at sarah.bessin@ici.org by Monday, October 10.

ICI’s draft comment letter acknowledges that, although the OCC Proposal would apply only to “covered banks”, which are excluded from the scope of the Board Proposal, the operative provisions of the OCC Proposal are substantively the same as the Board Proposal. The letter therefore explains that the extensive comments ICI provided on the Board Proposal apply similarly to the OCC Proposal, and would incorporate and submit those comments as an attachment to the letter.^[3]

The comment letter reiterates two key points made in ICI’s letter to the Board. First, while

we support incorporation of provisions in QFCs that recognize the applicability of enforceability protections relating to resolution proceedings and the attendant statutory stay in the cross-border context, we do not support provisions that would require contracting parties to include stay and transfer provisions and a prohibition on cross-default rights in affected QFCs. Second, the letter notes our support for exclusions from the proposed prohibition of a counterparty's exercise of default rights against a direct party or a guarantor. We assert that the exclusion should be extended, however, to permit the exercise of default rights by a counterparty against a direct party or a covered support provider with respect to *any* direct default under the covered QFC, and not just with respect to direct defaults resulting from payment or delivery failure or the direct party becoming subject to certain resolution or insolvency proceedings.

The draft comment letter also makes several points regarding consistency between the OCC Proposal and the Board Proposal:

- The OCC Proposal, like the Board Proposal, includes a safe harbor based on adherence to the ISDA 2015 Universal Resolution Stay Protocol ("2015 Protocol"). Because fund advisers may not lawfully adhere to the 2015 Protocol for fiduciary reasons, we recommended that the Board include as a safe harbor, as an alternative to the 2015 Protocol, a protocol such as the ISDA Resolution Stay Jurisdictional Modular Protocol that would permit market participants to adhere on a jurisdiction-by-jurisdiction, client-by-client, and dealer-by-dealer basis. Our letter urges the OCC to coordinate closely with the Board to broaden its proposed safe harbor in a manner identical to the Board.
- The OCC Proposal includes a process for approval of enhanced creditor protection conditions that is substantially similar to that under the Board Proposal, except that a covered bank would apply to the OCC for review of such enhanced creditor protections. Similar to our comment about the safe harbor, we urge the OCC to develop a single, coordinated process with the Board for review and approval of enhanced creditor protections, when an application is made on behalf of a GSIB and its subsidiaries. Otherwise, QFCs of different entities in the GSIB group could be subject to different creditor protections, raising fairness issues, increasing legal and operational complexity, and impeding the OCC's and the Board's goal of orderly resolution.
- Finally, we urge the OCC to agree with the Board on a uniform set of compliance dates that will be applicable to both regulators' final rules. We remind the OCC that many of the dealers that serve as counterparties to fund transactions under QFCs are national or other banks regulated by the OCC. We also request that the OCC (and the Board) provide asset managers with a compliance period that is at least six months longer than the compliance period provided to covered banks and covered entities under the final rules.

Sarah A. Bessin
Associate General Counsel

[Attachment](#)

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>.

[2] For a summary of the OCC Proposal, please see ICI Memorandum No. 30165 (Aug. 24, 2016), available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30165>. ICI submitted a comment letter on the Board Proposal in August. 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 http://www.federalreserve.gov/SECRS/2016/August/20160815/R-1538/R-1538_081216_130439_377948682013_1.pdf ("August ICI Letter").

[3] See August ICI Letter, *supra* note 2.