Office of the Comptroller of the Currency

MEMORANDUM

To: Public Comment File

From: Sarah Turney, Counsel, Chief Counsel's Office

Date: September 17, 2020

Subject: Summary of September 15, 2020, meeting with Bank Policy Institute, Covington & Burling LLP and banks

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On September 15, 2020, representatives from the Office of the Comptroller of the Currency (OCC) participated in a call with representatives from the Bank Policy Institute (BPI), Covington & Burling LLP (Covington), and certain banks including Wells Fargo, Citibank, JPMorgan, Bank of America, PNC, U.S. Bank, HSBC, Goldman Sachs, and MUFG (collectively, the Banks) regarding the Activities and Operations of National Banks and Federal Savings Associations notice of proposed rulemaking.[1] The discussion focused on six issues raised in BPI's public comment letter. BPI provided the OCC with a summary of these issues prior to this meeting. (See attached).

First, the Banks discussed the proposed derivative rule. Specifically, the Banks discussed their concern that certain hedging techniques are not captured under the definitions of "perfectly-matched" and "portfolio-hedged," providing several specific examples including hedging a derivative with a physical position. The Banks stated that they did not think the OCC intended to make these hedges impermissible and suggested that instead of defining "perfectly-matched" and "portfolio-hedged," the OCC should instead require that the derivatives are "appropriately hedged." The OCC asked a clarifying question related to whether this concern was limited to financial intermediation rules or also related to the hedging of bank permissible activities. The Banks responded that this concern was limited to the financial intermediation provisions of the proposed rule. The OCC asked a clarifying question related to whether there was distinction between reasonably or appropriately hedged and portfolio-hedged. The Banks responded that the dichotomy of "perfectly-matched" and "portfolio-hedged" creates uncomfortable ambiguity related to certain hedging techniques, providing as an example that a bank purchasing shares to hedge an individual swap does not fit cleanly within either definition and would raise questions as to whether it is permissible under the proposed rule.

Additionally, the Banks suggested that the OCC should provide clarity around when prior notice is required and that such notice should only be required when a bank's hedging techniques will materially change or there is a meaningful difference in the risk management

[1] Activities and Operations of National Banks and Federal Savings Associations, 85 Fed. Reg. 40,794 (July 7, 2020).

associated with the activity. The Banks also suggested that the OCC should not require that there must be a published letter authorizing each particular activity (e.g., corrugated cardboard vs. non-corrugated cardboard). The Banks also suggested that the five percent physical position limitation would be impracticable in many cases and suggested other revisions to loosen the requirements related to physical positions including requiring that a physical hedge be “at least as effective as,” and not more effective than, a cash-settled hedge. Related to the five percent limitation, the OCC stated that the five percent limitation dates back to older interpretive letters and was reflected in OCC Bulletin 2015-35. The OCC inquired whether the difficulty arising out of this requirement is new. The Banks responded that the problem has always existed but has grown for a variety of reasons.

Second, the Banks discussed the proposed tax equity finance (TEF) provisions. The Banks discussed that they focus primarily on renewable energy transactions when reviewing the TEF provisions. The Banks discussed that the proposed rule could be revised to further reduce burden by (1) eliminating the quantitative cap for TEF transactions and (2) eliminating the prior notice requirement. The Banks suggested that the cap is unnecessary considering that these transactions would already be subject to the legal lending limit and concentration management as well as the fact that this is a maturing market. The Banks also suggested that only a small group of banks are able to participate in these transactions and that they would quickly hit the arbitrary five percent cap. The Banks suggested that prior notice for each transaction is overly burdensome and do not understand the value it would provide to examiners. The Banks suggested that if prior notice is absolutely necessary, it should be limited to the time a bank first engages in a TEF transaction and not for each subsequent transaction.

Third, the Banks discussed the proposed payment systems provision. The Banks suggested that the safety and soundness requirements contained in prior interpretive letters and discussed in the preamble should be included in the rule itself. The Banks suggested that instead of requiring a specific legal opinion, the requirement should be more flexible to only require a bank to have a good faith, reasoned basis for making the determination; however, if retained, the OCC should clarify that a new legal opinion would not be needed unless there have been changes affecting liability or indemnification. The Banks also suggested that the OCC clarify that certain aspects of risk management processes may occur after the bank has joined a payment system (e.g., assessing the information technology systems of the payment system). The Banks also suggested that the OCC should include cybersecurity breaches as an example of operational loss. The OCC requested clarity on whether the Banks were suggesting this example of operational loss should be included in regulatory text or in the preamble. The Banks responded that it should be included in the preamble.

Fourth, the Banks discussed the proposed financial literacy program provision. The Banks suggested that in order to simplify the provision, the OCC should incorporate the concepts of the safe harbor into the financial literacy program rule itself. The Banks also indicated that the OCC could provide more clarity around permissibility of a branch employee to bring checks to a branch in a portable lockbox. The Banks also expressed concern that the proposed language indicates that there may need to be some sort of supervisory review for situations involving facts that do not perfectly match the regulatory language.

Fifth, the Banks discussed the proposed finder authority provision. The Banks suggested that this general finder authority provision should be combined with the electronic finder provision. The Banks also suggested that the examples listed should be updated to reflect how this authority is exercised in the modern financial system and should confirm that a finder can accept reasonable fees for referrals to third parties.

Sixth, the Banks discussed the proposed letters of credit and independent undertakings provision. The Banks expressed concern that the safety and soundness considerations included in the provision create confusion as to whether these are mandatory requirements, and if they are not mandatory, the Banks suggested removing them from the rule text.

OCC Attendees:
Jonathan Gould, Senior Deputy Comptroller and Chief Counsel
Ted Dowd, Deputy Chief Counsel
Stuart Feldstein, Bank Advisory, Director
Jamey Basham, Bank Advisory, Assistant Director
Beth Kirby, Bank Advisory, Assistant Director
Valerie Song, Bank Advisory, Assistant Director
Heidi Thomas, Bank Advisory, Special Counsel
Casey Laxton, Bank Advisory, Counsel
Mark O'Horo, Bank Advisory, Counsel
Sarah Turney, Bank Advisory, Counsel
Jean Xiao, Bank Advisory, Attorney

BPI, Covington, and Bank Attendees:
Gregg Rozansky, BPI
Jeremy Newell, Covington
Dan Nelson, Wells Fargo
Curtis Tao, Citibank
Edward Handelman, Citibank
Michael Overmyer, JPMorgan
Phillip Wertz, Bank of America
Ursula Pfeil, PNC
Allira Bailey, U.S. Bank
Anne Davenport, HSBC
Rosemary Spaziani, Goldman Sachs
Joan DaPoint, MUFG