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Governance and Authority of the Basel Committee on Banking Supervision

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When it comes to prudential financial regulation—and particularly capital regulation—there is no single body more influential than the Basel Committee on Banking Supervision. The Basel Committee describes itself as "the primary global standard setter for the prudential regulation of banks,"[1] and domestic regulators in the United States and elsewhere are loath to stray from Basel standards.

This note describes the process by which this supranational organization largely determines the capital and liquidity rules that are applied to U.S. banks.

What is the Basel Committee?

The Basel Committee on Banking Supervision is a group of 45 bank supervisory institutions from 28 jurisdictions whose representatives meet at the Bank for International Settlements in Basel, Switzerland. The committee, which usually meets four times each year, includes one representative from each member institution. The Basel Committee charter states that representatives should be "senior officials of their organisations and should have the authority to commit their institutions,"[2] but the identity of committee representatives is secret.

In the United States, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) are each members of the Basel Committee, but there is no public record of who has represented those institutions on the committee.

Who established and oversees the Basel Committee?

A group of 10 central bank governors founded the Basel Committee in 1974. Today, a group of central bank governors and non-central bank heads of supervision from the Committee's members known as the Group of Governors and Heads of Supervision, or "GHOS", oversee the committee's work.[3] The GHOS approves the Basel Committee's charter, determines whether to endorse major Basel Committee decisions and provides general oversight of and guidance for the committee's work.[4] The GHOS has no public charter or bylaws, so it is unclear how it makes decisions.

How does the Basel Committee develop standards?

In addition to the Committee itself, various groups, working groups, virtual networks, task forces and a committee secretariat participate in developing the committee's standards and other outputs.[5] In addition to this cadre of hundreds of regulators, the committee's charter provides that it must "seek[] input from all relevant stakeholders

[1] Charter of the Basel Committee on Banking Supervision, para. 1, https://www.bis.org/bcbs/charter.htm (hereinafter, "BCBS Charter").
[2] BCBS Charter, para. 8.3.
[3] *See* History of the Basel Committee, https://www.bis.org/bcbs/history.htm?m=3076; Basel Committee organisation and governance, https://www.bis.org/bcbs/organ_and_gov.htm?m=3073.
[4] BCBS Charter, para. 6.
[5] Policy development and implementation review, https://www.bis.org/bcbs/review_process.htm?m=3075.

on policy proposals" by publicly inviting interested parties to provide written comments.[6] However, neither the charter nor any other public governance document requires the use of any specific procedural or substantive safeguards to ensure that the committee meaningfully considers such feedback. Furthermore, due to the opacity of the committee's deliberation process, discussed further below, the public has no ability to understand and assess whether, how and why the committee accepts or rejects the public comments it receives.

Are deliberations about Basel Committee standards public?

No. The Basel Committee's charter generally states that it makes decisions based on group consensus,[7] but there is no public record of any voting or other positions taken by various members in connection with the adoption of a proposed or final standard. We are not aware of any publicly available minutes or other materials regarding the Basel Committee's internal proceedings, so consultation documents are often the only insight stakeholders have into the committee's work before it is final. Unless committee representatives decide to disclose additional information, there is no transparency about the positions each committee member took, how or why the committee negotiated particular points, or what changes, if any, the GHOS requested prior to endorsement (if applicable).

Who votes on Basel Committee standards on behalf of the United States?

As noted above, the Basel Committee operates by consensus, and the GHOS "endors[es] major decisions."[8] The Board of Governors of the Federal Reserve System, the OCC, the FDIC and the Federal Reserve Bank of New York are all members of the Basel Committee, and, although we are not aware of a public version of the list of GHOS members, we understand that the Chairman of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency and the Chairman of the FDIC sit on the GHOS.[9] Thus, to the extent GHOS has endorsed a major Basel Committee decision (as it typically does for any decision of consequence, including the 2017 Basel changes),[10] it appears that these three regulators have at least conceded to such endorsement. There is no record of the full Board of Governors considering or being asked to approve the work of the Basel Committee, nor is there any record of the Board delegating authority to the Chairman of either body.

What legal status does a Basel Accord have in the United States?

The committee has no founding treaty, does not possess any formal supranational authority and does not issue binding decisions. Instead, it formulates supervisory standards, guidelines, and recommended best practices, which committee members "commit" to promoting and implementing.[11] Implementation in each member's jurisdiction, whether by law or regulation, must occur according to the requirements of each domestic political system, which has led to varying levels of willingness to deviate from the agreed standards across jurisdictions.

In practice, Basel Committee members, including those in the United States, are reluctant to deviate from committee standards. This is, at least in part, due to the IMF's Financial Sector Assessment Program (FSAP), which includes assessment of jurisdictions' compliance with the Basel Committee standards. The FSAP evaluates compliance on a standard-by-standard basis, rather than holistically. U.S. regulators typically go to great lengths to

[6] BCBS Charter, para. 17.
[7] BCBS Charter, para. 8.4.
[8] BCBS Charter, para. 6.
[9] We also understand, although this is not formally publicized, that the chair of the Financial Stability Board typically attends GHOS meetings, so the Vice Chair for Supervision of the Board of Governors of the Federal Reserve System attends meetings when holding this position.
[10] Governors and Heads of Supervision finalise Basel III reforms (Dec. 7, 2017) https://www.bis.org/press/p171207.htm.
[11] BCBS Charter, para. 5.

ensure that they are assessed as "fully compliant," which therefore requires close adherence to details of each Basel standard. In addition, in recent years, the Basel Committee has increasingly emphasized assessing the extent of members' compliance with the Basel standards through its Regulatory Consistency Assessment Programme (RCAP). RCAP "seeks to ensure full, timely and consistent implementation" of the Basel III capital standards by evaluating each jurisdiction and publicly grading the extent to which it complies with the standards.[12]

How is the Basel Accord implemented as a legal matter?

As described above, standards adopted by the Basel Committee are not in themselves legally binding; thus, in order to be implemented in member jurisdictions, such standards must be proposed and adopted through each member's respective national legal and administrative procedures. The European Union, for example, implements Basel Committee standards through the legislative process, which requires approval of both the European Parliament and the Council of the European Union. In contrast, Basel Committee standards have never been considered by Congress but instead have been adopted through rulemaking by the federal banking agencies.

In undertaking these rulemakings, the agencies must adhere to the requirements of the Administrative Procedure Act, which requires public notice and comment, when enacting new (or revised) regulations for the purpose of implementing new (or revised) Basel Committee standards. Unlike the Basel Committee consultative process, the APA prescribes in detail the process and standards that U.S. agencies must follow when enacting rules. This includes a requirement that regulators "consider[] the relevant matter presented" by commenters; in practice, this means that U.S. regulators must address and respond to any comments received in connection with finalizing a rule.

Although the U.S. regulators have ostensibly followed this notice-and-comment process when implementing rules that implement Basel Committee standards, there is considerable tension between the Basel implementation process and the APA. The APA was intended, among other things, to give the public a meaningful opportunity to participate in the agency rulemaking process; however, when it comes to Basel standards, there is often little—if any—willingness on the part of regulators to deviate from the Basel standard, particularly if the deviation is a loosening of a standard. Indeed, as noted above, the Basel Committee charter requires that each member "commit" to promoting and implementing the committee's decisions, and the Basel Committee maintains an active program to police compliance with this commitment.[13] Thus, the APA process appears to have become, in practice, more of a box-ticking exercise than a meaningful opportunity for public input and debate, given that such debate often occurred years prior under very different political circumstances and with an entirely different set of policymakers.[14]

What positions did the U.S. regulators take in recent Basel Committee work to revise the Basel capital standards?

Unknown. U.S. regulators have generally not provided the public with any details concerning the positions they have taken at the Basel Committee, aside from occasional and generic statements of support for the Committee's work. As noted above, there are no minutes of Basel Committee meetings, and the positions of specific committee members are never made public unless voluntarily divulged. A domestic regulator, then, who wants to implement

[12] Implementation of the Basel standards, https://www.bis.org/bcbs/implementation.htm?m=3080.
[13] BCBS Charter, para. 5.
[14] This has not always been the case. In 2003, the agencies sought public comment on the positions they should take in negotiating the Basel Committee's Basel II proposal. *See* 68 Fed. Reg. 45900 at 459000, 45901 (Aug. 4, 2003).

a policy despite the possibility of public criticism can simply support the policy as part of a Basel standard, then implement it at home and attempt to deflect criticism by pointing to the 45-member Basel Committee.

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The Basel process is unique in American regulation, as it has in practice had the force and effect of a treaty but has never been ratified by the Congress; is not negotiated by the Office of the U.S. Trade Representative or the Department of the Treasury, and is not even approved by the boards of the banking agencies and non-governmental entity who participate in its drafting. While the agencies publish each Basel agreement for notice and comment rulemaking under the APA, it is highly unusual for the U.S. agencies to deviate from the accord except to make it more stringent.

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