

Corporate & Financial Weekly Digest

July 22, 2011 by [Jeffrey M. Werthan](#)

Office of Comptroller of the Currency Implements Rules Including Transfer of OTS Functions and Preemption and Visitorial Powers

The Office of the Comptroller of the Currency (OCC) on July 20 issued a final rule implementing several provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including changes to facilitate the transfer of functions from the Office of Thrift Supervision (OTS) and revisions to the OCC's rules on preemption and visitorial powers. The OCC issued a notice of proposed rulemaking for this final rule on May 26. Under the Dodd-Frank Act, the OCC assumed responsibility for the ongoing examination, supervision, and regulation of federal savings associations on July 21.

The preamble to the final rule expands the discussion of the preemption and visitorial powers provisions to address more thoroughly certain points raised in public comment letters received by the OCC. In particular, the preamble notes that the OCC has reconsidered its position concerning precedent that relied on the "obstructs, impairs, or conditions" standard. To the extent that an existing preemption precedent relies exclusively on the phrase "obstructs, impairs, or conditions" as the basis for a preemption determination, the preamble states that the validity of the precedent would need to be reexamined to ascertain whether the determination is consistent with the Barnett conflict preemption analysis. There is debate on both sides of the preemption issue as to the true significance of OCC's reconsideration of its position to remove the "obstructs, impairs, or conditions" standard. Those favoring preemption believe that this was a tactical retreat, to be read narrowly. Others, favoring state enforcement, take the position that the agency had no choice but to remove the language and that its removal has broad significance (i.e. diminution of federal preemption for national banks and federal thrifts.) The issue is likely to be played out in the courts over time.

The preemption and visitorial-powers amendments:

- eliminate preemption for operating subsidiaries of national banks and operating subsidiaries of Federal savings associations;
- apply to federal thrifts the same preemption standard – that is, a conflict preemption standard and not an occupation of the field standard – as applies to national banks, and apply to federal thrifts the visitorial powers standards applicable to national banks;

- eliminate ambiguity concerning the preemption standards in OCC regulations by removing language from OCC rules that provides that state laws that "obstruct, impair, or condition" a national bank's powers are preempted; and
- revise the OCC's visitorial powers rule to conform the Supreme Court's Cuomo decision, recognizing the ability of state attorneys general to bring enforcement actions in court to enforce applicable laws against national banks as authorized by such laws.

In response to public comments received, the text of the preemption and visitorial powers amendments was revised to:

- add language to clarify that, going forward, federal savings associations will be subject to the same preemption standards that apply to national banks;
- clarify the definition of "visitorial powers" in Section 7.4000(a)(2)(iv) of the OCC regulations to include direct investigations of national banks, such as through requests for documents or testimony directed to the bank to ascertain the bank's compliance with law through mechanisms not otherwise authorized under the rule; (this definition would not include collecting information from other sources, or from the bank through actions that do not constitute visitations, or as authorized under federal law) and
- modify a new paragraph, Section (b) 7.4000 of the OCC regulations, added in the proposed rulemaking which specifically provides that "[i]n accordance with the decision of the Supreme Court in Cuomo . . . , an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief as authorized by such law is not an exercise of visitorial powers under 12 U.S.C. 484." The phrase "applicable law" was added in place of "non-preempted state law" in order to address concerns expressed by public commenters that the latter could be interpreted more narrowly than the former.

The final rule also revises OCC rules in areas that are central to internal agency functions and operations immediately upon the transfer of supervisory jurisdiction for federal savings associations. These include amendments to the OCC's assessment fee rule to include federal savings associations. Following a transition period, the final rule provides a single assessment schedule for both national banks and federal savings associations. To facilitate the transition of federal thrift supervision from the OTS to the OCC, the OCC will compute assessment fees under both the OCC and OTS schedules for assessments charged in September 2011 and March 2012. Federal savings associations will pay the lesser of the two fees. Beginning with assessments charged in September 2012, the OCC will assess institution fees based on a single fee schedule regardless of charter.

The rule also includes rules related to OCC organization, the availability and release of information under the Freedom of Information Act, and post-employment restrictions for senior examiners.

As part of the integration of the OTS functions into the OCC, the OCC also plans to issue an Interim Final Rule, with a request for comments, that republishes those OTS regulations the OCC has the authority to promulgate and enforce as of the transfer date, renumbered and issued as new OCC rules, with nomenclature and other technical amendments to reflect OCC supervision of federal savings associations. The OCC will consider more comprehensive substantive amendments to these regulations, as appropriate, later this year.

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