



OCC PROPOSES RULES TO IMPLEMENT TRANSFER OF OTS FUNCTIONS AND CONFORM PREEMPTION REGULATIONS TO DODD-FRANK ACT

The Office of the Comptroller of the Currency (OCC) has issued a proposed rule implementing several provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010) (Dodd-Frank Act). Under the Dodd-Frank Act, the OCC will assume responsibility for the ongoing examination, supervision and regulation of federal savings associations on July 21, 2011, so a number of the proposed changes relate to the transfer of functions from the Office of Thrift Supervision (OTS), such as rules related to OCC organization, the availability and release of information and assessment fees.

The proposal also makes changes to the OCC's preemption and visitorial powers regulations at 12 C.F.R. §§ 7.4000 *et seq.*, including, but not limited to, the following:

- Revising Section 7.4000 (regarding visitorial powers) to incorporate the holding of the U.S. Supreme Court in *Cuomo v. Clearing House Assn., L.L.C.* that state attorneys general may bring enforcement actions in court to enforce non-preempted state laws against national banks, as provided by Section 1047 of the Dodd-Frank Act.
- Revising Section 7.4007 (regarding deposit-taking powers) and 7.4008 (regarding lending powers) to remove language providing that state laws that "obstruct, impair or condition" a national bank's powers are preempted and rescinding Section 7.4009 (regarding applicability of state law to national bank operations). According to the OCC, these changes will "eliminate any ambiguity concerning the preemption standards in OCC regulations."
- Rescinding Section 7.4006 (regarding applicability of state law to national bank operating subsidiaries) to reflect the elimination of preemption for national bank operating subsidiaries by Section 1045 of the Dodd-Frank Act.
- Adding a new Section 7.4010 to clarify that preemption and visitorial powers standards applicable to national banks also apply to federal thrifts, as provided by Section 1047 of the Dodd-Frank Act.

These changes are consistent with the changes described in a May 12, 2011 letter from Acting Comptroller John Walsh to Senator Carper outlining the OCC's interpretation of the Dodd-Frank Act preemption provisions. Both the May 12 letter and the Supplementary Information to the proposed rule stress that the OCC reads the Dodd-Frank Act preemption provision to establish conflict preemption—as articulated in the *Barnett Bank of Marion County, N.A. v. Nelson* decision as a whole, and not merely the phrase "prevent or significantly interfere"—as the new legal standard for preemption. The OCC further posits that the Dodd-Frank Act's preservation of the *Barnett* conflict preemption standard also results in preservation of most of the OCC's rules and existing precedents because the specific types of laws cited in the rules are consistent with the standard for conflict preemption in the *Barnett* decision. Thus, the OCC is taking the position that the Dodd-Frank Act requires just a few changes around the edges of its preemption rules. This position is likely to be controversial.

The OCC plans to issue other rules relating to the transition from the OTS to the OCC soon and may consider more comprehensive substantive amendments to OCC and OTS regulations in the future.

The proposed rule will be published in the Federal Register on May 26, 2011, with comments due by June 27, 2011.

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