

May 27, 2011

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Federal Issues

OCC Issues Proposed Rule to Implement Numerous Dodd-Frank Provisions. On May 25, the Office of the Comptroller of the Currency (OCC) issued a proposed rule to implement numerous provisions from the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) that become effective on July 21, 2011, including the transfer of the Office of Thrift Supervision's (OTS) functions to the OCC, changes to federal preemption for national banks and federal savings associations and their operating subsidiaries and affiliates, and visitorial authority. The proposed rule would:

- Revise OCC rules that are central to internal agency functions and operations immediately upon the OTS's transfer of supervisory jurisdiction for federal savings associations (e.g., rules related to OCC organization, the availability and release of information, and post-employment restrictions for senior examiners);
- Amend the OCC's assessment fee rule to utilize the same assessment schedule for national banks and federal savings associations. To synchronize payment due dates, the thrift assessments normally due on July 31, 2011 would be deferred until September 30 (using June 30 data). Federal savings associations would pay the lesser of the OCC and OTS schedules for assessments charged in September 2011 and March 2012; however, effective September 2012, the same assessment fees would be payable regardless of charter;
- Implement a moratorium on changes in control of credit card banks and trust banks;
- Revise federal branch and agency rules to reflect the permanent increase in deposit insurance coverage;
- Apply national bank and national bank subsidiary preemption standards, as well as the visitorial powers standards applicable to national banks, to federal thrifts and their subsidiaries; Eliminate preemption for national bank and federal thrift operating subsidiaries and affiliates;
- Remove language from OCC rules providing 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 to the holding of *Cuomo v. Clearing House Ass'n.*, 129 S.Ct. 2710 (2009), as incorporated by Dodd-Frank, recognizing the ability of state attorneys general to bring enforcement actions in court to enforce non-preempted state laws against national banks.

In connection with the integration of the OTS functions into the OCC, the OCC also plans to issue an interim final rule with a request for comments, effective on July 21, 2011, that republishes those OTS regulations the OCC believes it has the authority to promulgate and enforce as of July 21, renumbered and issued as new OCC rules, with nomenclature and other technical amendments to reflect OCC supervision of federal thrifts. The OCC plans to consider more comprehensive substantive amendments to these regulations, as appropriate, after July 21.

With respect to federal preemption issues, the preamble to the proposed rule generally aligns with the OCC's May 12 letter to Senator Carper, as previously reported in *InfoBytes* ([Special Alert, May 16, 2011](#)). Among other things, it explains the OCC's views that, under Dodd-Frank, (i) although the "prevent or significantly interfere" standard from *Barnett Bank of Marion County, N. A. v. Nelson*, 517 U.S. 25 (1996) (*Barnett*), is the starting point for conflict preemption analysis, the analysis must also consider the whole of the conflict preemption analysis from that decision; and, (ii) preemption determinations that are consistent with the *Barnett* conflict preemption analysis are preserved, including judicial determinations, interpretations, and OCC rules based on *Barnett's* analysis.

The proposed rule was published in the *Federal Register* on May 26, 2011. Comments are due to the OCC by June 27, 2011. [For a copy of the proposed rule, please click here.](#)

SEC Issues Proposed Rule Regarding Exemptions from the Privacy Act for Certain Investigatory Materials Contained in New SEC Records Systems. On May 24, the Securities and Exchange Commission ("SEC") issued a proposed rule to exempt portions of three new systems of records from provisions of the Privacy Act of 1974, as amended ("Privacy Act" or "Act"), to the extent that the records contain investigatory materials compiled for law enforcement purposes. The Privacy Act allows government agencies to exempt certain records from the notification, access and amendment provisions of the Act. Among the materials contained in such records systems may be records related to complaints, inquiries, requests from members of the public and others; tips, complaints, referrals of misconduct, or related information about actual or potential violations of the federal securities laws; investor harm; conduct of public companies; securities professionals; regulated entities; and associated persons and related investigatory materials. Such material may consist of unsolicited and often unverified statements concerning individuals, information received from confidential sources, as well as reports from the SEC's investigators and other law enforcement personnel. Disclosure of such information could undermine effective enforcement of the federal securities laws. The SEC will accept comments until June 23, 2011. [For a copy of the proposed rule, please click here.](#)

VA Eliminates Prior Loan Validation Requirement. On May 20, the Veterans Benefits Administration, Department of Veterans Affairs (VA), announced that a Prior Loan Validation (PLV) is no longer required for VA Interest Rate Reduction Refinance Loans (IRRRLs). The PLV was the

primary means for lenders and VA to verify eligibility of veterans seeking IRRRLs. Obtaining a PLV is no longer necessary because the loan originating functions of The Appraisal System were transferred to WebLGY, which automatically determines if an active VA loan exists in the system. To satisfy internal and/or investor requirements, lenders are still able to obtain a PLV in WebLGY notwithstanding its automatic determination. Circular 26-11-08 announcing the elimination of the PLV requirement is effective immediately and will be rescinded on July 1, 2013. [For a copy of the circular, please click here.](#)

State Issues

Texas Amends Payoff Statement Requirements. On May 5, Texas enacted H.B. No. 558 ("the Act") amending the Texas Finance Code and requiring the Finance Commission of Texas ("Finance Commission") to adopt rules "governing requests by title insurance companies for payoff information from mortgage servicers related to home loans and the provision of that information..." The Finance Commission is required to adopt required rules as soon as practicable after the Act takes effect on September 1, 2011, and mortgage servicers are given a 90-day grace period to comply following adoption of the rules. The rules must prescribe a standard payoff statement form that states a proposed closing date for transactions involving the payoff of a home loan, and a payoff amount that is valid through that date. If a payoff statement is issued that complies with the rules, then the mortgage servicer or mortgagee may not demand that the mortgagor pay any amount in excess of the stated amount until the proposed closing date has elapsed. The Act also requires the Finance Commission to adopt rules prescribing specific remedial procedures in the event that a mortgage servicer or mortgagee provides an incorrect payoff statement to a title insurance company. [Click here for a copy of the legislation.](#)

Washington Adds Provisions Regarding Lien Holder Requirements for Certain Foreclosures. On May 17, Washington enacted new legislation that would require a senior beneficiary of a deed of trust to respond to a seller's written offer that the senior beneficiary accept the entire net proceeds of the sale when those proceeds are insufficient to pay the full obligation owed within 120 days. The statute applies only when the senior beneficiary receives the written offer from the seller prior to the issuance of a notice of default. The seller must include a copy of the purchase and sale agreement with the offer, and the senior beneficiary's response must include either an acceptance, rejection, or counter-offer of the seller's offer. The new requirements do not apply to deeds of trust securing a commercial loan, securing obligations of a grantor who is not the borrower or a guarantor, or securing a purchaser's obligations under a seller-financed sale. The provisions take effect July 22. [Click here for a copy of the legislation.](#)

Utah Revises Regulations Concerning Qualifications for Principal Lending Manager Licensing and Registration Procedures. Effective May 10, 2011, the Utah Division of Real Estate revised its rules to prohibit a principal lending manager from simultaneously serving as a branch lending manager, and to prohibit an individual from serving as the branch lending manager for more than one branch at any given time. In addition, Utah Admin. Code r. 162-2c-202 was revised to include additional language under which a person may not be granted a mortgage loan officer or lending

manager license. [Click here for a copy of the revisions to R162-2c-201](#). [For a copy of the revisions to R162-2c-202](#).

Firm News

[Andrew Sandler](#) will be speaking at the Women in Housing & Finance Regulatory Taskforce Brown Bag Lunch: "Fair Lending: An Area of Increasing Scrutiny" on Wednesday, June 1.

[James Parkinson](#) will be speaking on the Foreign Corrupt Practices Act at two International Bar Association training sessions as part of the IBA's "Anti-Corruption Strategy for the Legal Profession." The first will be in Seoul, Korea on June 3, and the second in Tokyo, Japan, on June 6.

[Kirk Jensen](#) will be the featured speaker on SCRA Developments at the Women in Housing and Finance luncheon on June 8.

[Andrew Sandler](#) will be speaking at the ABA Regulatory Compliance Conference on Sunday, June 12 and Monday, June 13, in Washington, DC. Mr. Sandler's panels will focus on Fair Lending Hot Topics.

[Andrew Sandler](#) will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14, at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

[James Parkinson](#) will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15-16.

[Kirk Jensen](#) will be speaking on Litigation Developments at the AFSA State Government Affairs & Legal Issues Forum on June 22.

[Jonice Gray Tucker](#) will moderate a panel on Fair Servicing Analysis at the 6th Annual Strategic Markets and Diversity Conference on June 23 in Arlington, Virginia.

[Andrew Sandler](#) will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

[Andrew Sandler](#) and [Jonice Gray Tucker](#) will speak at an American Bar Association webinar on mortgage servicing issues on July 21 at 1 pm. The program entitled, "Mortgage Servicing Under Fire: Regulatory, Litigation, and Enforcement Trends Stemming from the Foreclosure Crisis and More" will also feature Terry Goddard, the former Arizona Attorney General, as a speaker.

[Andrew Sandler](#) will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26, in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

[Jonice Gray Tucker](#) will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Mortgages

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