



August 23, 2011

OCC Interim Final Rule republishing OTS Regulations: Highlights of Provisions related to Savings Associations' Mortgage Lending Activities

By Marissa Aquila Blundell, Esq.
Vice President & Senior Counsel
marissa@bankersadvisory.com

On August 9, 2011, the Federal Register published the Office of the Comptroller of the Currency (OCC) interim final rule republishing certain Office of Thrift Supervision (OTS) regulations. This rule is one in a series of interim final rules being issued on the heels of the July 21, 2011 transfer date marking several significant transitions of power pursuant to the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd Frank). One such transition was the transfer of responsibility for the ongoing examination, supervision, and regulation of federal savings associations from the OTS (which will be abolished 90 days from the July 21, 2011 transfer date) to the OCC, thus necessitating this rulemaking.

Although Dodd Frank transferred OTS rulemaking authority for all savings associations (federal and state) to the OCC, the FDIC retains certain rulemaking authority with respect to state savings associations and a separate FDIC republication of OTS rules is also expected. Where the FDIC lacks independent rulemaking authority for state savings associations, the FDIC will enforce applicable OCC regulations as necessary. Therefore some, but not all, of the OCC's republished OTS regulations contained in this interim final rule will apply to state savings associations.

In addition, the OCC has chosen not to republish certain OTS consumer-related rules including, for example, rules issued pursuant to the SAFE Act, Privacy, and certain sections of the FCRA. Although the OCC possesses the authority to enforce such rules for federal savings associations and national banks with less than \$10 billion in total assets, Dodd Frank transferred rule-writing authority for those rules to the Consumer Financial Protection Bureau (CFPB); therefore, the CFPB rules will supersede the corresponding former OTS regulations.

Industry comments regarding this proposed interim rule may be submitted until October 11, 2011. Below are highlights of the OCC republication of the OTS regulations which specifically relate to savings associations' mortgage lending activities.

continued on next page

Nondiscrimination Requirements in Lending and Other Services, Applications, and Advertising

- Savings associations may not deny a loan or other service, discourage or refuse to allow, receive, or consider any application, request or inquiry on the basis of: age or location of the dwelling, race, color, religion, sex, handicap, familial status, marital status, age, national origin of the prospective borrower. A savings association shall inform every inquirer of his or her right to file a written application and to receive a copy of the association's underwriting standards.
- Association advertising may not imply or suggest a policy of discrimination or exclusion and must contain the required equal housing lender logo. Use of the Equal Housing Lender Poster is also required.
- Associations must file a Home Mortgage Disclosure Act Loan Application Register with the OCC and must enter the reason for denial with respect to all loan denials.

The OCC nondiscrimination regulations bar arbitrary refusals to consider loan applications on prohibited bases and prohibit discrimination in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of housing-related loans. In furtherance of its nondiscrimination goals, the OCC provides supplementary guidelines to aid the development and implementation of nondiscriminatory lending policies which address: loan underwriting standards, discriminatory practices on the basis of sex or marital status, discrimination on the basis of language, income of husbands and wives, supplementary income, applicant prior histories, income level or racial composition of area, age and location factors, and marketing practices.

Real Estate Lending Standards

Associations must also adopt and maintain written policies establishing limits and standards for extensions of credit secured by liens on or interests in real estate. Policies must establish loan portfolio diversification standards, prudent underwriting standards, loan administration procedures, and documentation, approval and reporting requirements to monitor compliance with the association's policies.

The Interagency Guidelines for Real Estate Lending Policies are incorporated in this rule and an association's establishment of real estate lending standards should reflect consideration of the following as set forth in the guidelines:

- Underwriting standards such as: capacity of the borrower, value of mortgaged property, borrower overall creditworthiness, equity invested, secondary repayment source and additional collateral;
- Levels of acceptable risk, based on maximum loan amounts, maturities, and loan to value limits; and
- Excludable transactions, such as loans guaranteed or insured by the US government or its agencies as well as exceptions to general lending policies.

Fair Credit Reporting - Identity Theft Red Flags

Associations must establish and maintain a plan to identify, detect and respond to Red Flags. These identity theft prevention programs must be evaluated and updated periodically and must reflect consideration of the Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation.

Flood Disaster Protection Act

Associations are not permitted to make, increase, extend, or renew any loan secured by a building or mobile home that is located in a special flood hazard area in which flood insurance is available under the National Flood Insurance Act, unless the security is covered by flood insurance for the term of the loan.

Lenders must provide borrowers whose security is located in a special flood hazard area, and servicers of such loans, with a written notice which includes: a FEMA warning that the building or mobile home is or will be located in a special flood hazard area; a description of the flood insurance purchase requirement; and statements regarding the availability of flood insurance and federal disaster relief assistance. This notice must be provided to the borrower within a reasonable time before the completion of the transaction and to the servicer as promptly as practicable, but no later than, the association provides similar notices to the servicer concerning hazard insurance and taxes.

Federal Preemption

In accordance with the provisions of Dodd Frank holding that the Home Owner's Loan Act does not "occupy the field" in any area of state law, the OCC removed OTS regulation language which incorporated "occupation of the field" statements regarding federal preemption. In this rule, the OCC has also incorporated the Dodd Frank requirement that federal savings associations and national banks be subject to the same federal preemption standards. The preemption standards applicable to national banks were set forth in an earlier OCC final rule which was published in the Federal Register on July 21, 2011.

The August 9, 2011 OCC interim final rule also republished OTS regulations applicable to: examination and hearing procedures; association incorporation, organization, conversion, mergers, dissolution; fiduciary powers; deposits; insurance sales, federal stock associations; capital requirements; recordkeeping requirements for securities transactions; and safety and soundness guidelines, which were not addressed in this article. The entire interim rule may be viewed here: <http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-33a.pdf>