Financial Services Alert: New Opportunities for Federal Thrifts

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CLIENT ALERT | 9.25.2018

In a proposal reminiscent of the recent comprehensive changes to Ohio banking law that effectively eliminated legal differences between Ohio-chartered banks, savings banks, and savings and loans, the Office of the Comptroller of the Currency (OCC) on September 10, 2018, issued a proposal to enable federal savings associations (FSAs) with consolidated assets of $20B or less to, in effect, opt in to becoming full national banks with the same rights and privileges as national banks and subject to the same "...duties, restrictions, penalties, liabilities, conditions and limitations that apply to national banks."

Importantly, the proposed rulemaking (NR 2018-95) would enable electing FSAs to take advantage of the expanded lending powers available to a commercial national bank. It would implement Section 206 of the recent Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) which was signed into law in May 2018, and amended the Home Owner's Loan Act (HOLA).

According to the proposal, an FSA electing to operate as a "covered savings association" under EGRRCPA would retain its federal savings association charter and existing governance framework – much like the new Ohio law. New OCC rules and regulations governing covered savings associations will need to be drafted and implemented. The proposal includes a number of potential structural and procedural scenarios for consideration and an opportunity to comment. It is complex and sets forth several options which require careful review and consideration.

Also like Ohio law, the proposal would enable covered savings associations to retain their existing charter and governance structure, as well as branches. OCC rules will be implemented to address a number of operating issues as well as how to deal with nonconforming asset transition matters.

Probably the biggest and most attractive business change for most FSAs would involve the potential opportunity to expand beyond the constraints presently imposed by the "Qualified Thrift Lender" (QTL) restrictions of HOLA. However, there would be a required divestiture of,

or opportunity to restructure for conformance, related to the operation, holding, or conduct of subsidiaries, assets or activities that would not be otherwise permitted for national banks. In addition, covered savings associations electing to remove the QTL restrictions should anticipate additional regulatory scrutiny of credit and lending functions and controls with regard to expanding non-residential lending activity.

For simple institutions the "conversion" is likely to be a relatively straight-forward event. For those institutions with subsidiaries, assets or operations that are dependent on either a national bank charter or a federal savings association charter, the analysis and impact will be different and requires careful examination of which assets and operations may be retained and which must be jettisoned – or what type of subsidiary and what type of assets and operations may be gained by virtue of the "conversion."

The proposal cites that "covered savings associations" will be subject to the same duties, restrictions, penalties, liabilities, conditions and limitations as any other national bank upon conversion. Again, for converting FSAs that may mean limitations would apply post-conversion that do not apply to other FSAs. Examples cited by the proposal include the fact that while FSAs can invest in a service corporation, national banks cannot. Therefore, as noted, a careful examination and analysis of the subsidiaries, assets and operations of an FSA would be necessary for consideration prior to a decision by an FSA to convert to a national bank.

The proposal anticipates a notice procedure by converting institutions, however the actual process will need to be defined by OCC rules and of course the impact of any such proposal by an FSA will require careful review and analysis by its management and board. Shareholder or member approvals may be required depending on existing governance documents as well as a number of other considerations including the impact of the loss of any lines of business, assets or investments arising from the conversion. Under the proposal, a converting institution will operate as somewhat of an anomaly, with changed powers but continued governance documents and treatment by the OCC as an FSA.

The proposal may change as a result of comments received by the OCC during the comment period which ends November 19, 2018**.** Given the complexity of the proposal and the impact on "covered savings associations," the final regulations and rules should provide clear guidance to institutions considering converting conversion.

The proposal is not a "one size fits all" initiative and requires careful consideration. As with any major proposal, and especially one as significant as this, the "devil is in the details" so before taking action, institutions will need to wait until comments are received on the overall proposal and final rules are promulgated by the OCC. However, the proposal is a promising indication of the OCC's flexibility in considering ways to provide additional opportunities for the FSA charter. Boards of FSAs would be wise to carefully review and consider the proposal as further details emerge.