FinReg Round-Up
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As 2024 heads into spring, the stage is set for a potentially pivotal ruling from the U.S. Supreme Court that will clarify the interplay between federal and state banking laws.

At the same time, the federal government is seeking public input on proposed bank merger rules and a plan to apply Bank Secrecy Act requirements to investment advisers.

High Court To Decide If Federal Banking Law Preempts State Statutes

Following oral arguments on Feb. 27 in a case that could have a significant impact on national banks, the U.S. Supreme Court will once again rule on the scope of the National Bank Act's preemption of state law—this time determining whether the application of New York's escrow interest statute to national banks would "significantly interfere" with a national bank's powers and therefore be preempted by the National Bank Act.

The Supreme Court has considered the scope of the National Bank Act's preemption a number of times, most notably in its 1996 decision in *Barnett Bank of Marion County, N.A. v. Nelson,* in which the Court first articulated the "significantly interfere" preemption standard. The 2010 Dodd-Frank Act specifically incorporated the holding in *Barnett* by adding to the National Bank Act a provision that state consumer banking laws are preempted only if they "significantly interfere" with a national bank's powers.

Whether the Dodd-Frank Act revisions narrowed the scope of federal preemption or merely codified the *Barnett* holding has been the source of subsequent debate and litigation.

In the case currently before the Court, *Cantero v. Bank of America,* the Second Circuit reversed a lower court ruling holding that the National Bank Act preempts the state escrow interest law because it significantly interferes with the national bank's incidental powers to provide escrow services. Therefore, Bank of America was not required to pay the minimum 2% interest rate on a mortgage escrow account as required by state statute. A number of states have similar escrow interest rate laws, and the Supreme Court's ruling will determine whether those laws in fact "significantly interfere" with a national bank's exercise of its powers.

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The ruling from the Supreme Court will provide further clarification as to the meaning of "significantly interferes" and will likely have a broader effect on how state laws are applied to national banks.

OCC Seeks Feedback on Bank Merger Proposed Rules, Policy Statement

The Office of the Comptroller of the Currency (OCC) requested feedback on Jan. 29 regarding its proposal to update rules for business combinations involving national banks and federal savings associations. As part of the OCC's effort to increase transparency in its review of transactions under the Bank Merger Act (BMA), the proposed rulemaking includes a policy statement clarifying the OCC's review of applications.

The policy statement would address the general principles for the OCC's review of applications under the BMA, including indicators for applications likely consistent with approval and applications that raise supervisory or regulatory concerns. It would also discuss the OCC's consideration of financial stability; managerial and financial resources; and convenience and needs statutory factors. Significantly, the OCC proposes to eliminate the current provisions that allow, under certain circumstances, for expedited review and for use of a streamlined application.

Comments must be received by April 15.

Proposed FinCEN Rule Would Apply Bank Secrecy Act to Investment Advisers

The Financial Crimes Enforcement Network (FinCEN) proposed a new rule on Feb. 13 in its latest bid to require certain investment advisers to apply Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) requirements under the Bank Secrecy Act (BSA). FinCEN has been attempting to expand the BSA to investment advisers since 2002, resulting in several proposed rules that were subsequently withdrawn. The current proposed rule officially withdraws the last proposed rule from 2015.

The 2024 proposed rule would add investment advisers to the list of businesses classified as "financial institutions" under the BSA, thereby requiring investment advisers to implement risk-based AML/CFT programs, report suspicious activity to FinCEN and fulfill recordkeeping requirements. Further, investment advisers registered with the Securities and Exchange Commission (SEC), as well as those that report to the SEC as exempt reporting advisers, would be required to implement AML/CFT programs. Although many investment advisers have functionally incorporated AML/CFT programs into their operations as a matter of practice, the official expansion of the requirements to investment advisers will have a significant overall impact on those advisers' compliance programs.

Comments on the proposed rule must be submitted by April 15.

Related Professionals

Anthony Pirraglia . . . . . apirraglia@loeb.com
Melissa Hall . . . . . mhall@loeb.com