

## [Banking and Finance Law Daily Wrap Up, DEPOSIT INSURANCE—OCC proposes framework for receiverships of uninsured banks, \(Sept. 12, 2016\)](#)

Banking and Finance Law Daily Wrap Up

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The OCC has proposed a rule that would create a framework to address the conduct of receiverships for national banks that are not insured by the Federal Deposit Insurance Corporation. The [proposed rule](#) would implement the provisions of the National Bank Act (NBA) that provides the legal framework for receiverships of uninsured banks. Comments are due by Nov. 14, 2016.

**Receivership authority.** Receiverships of national banks were conducted by the Comptroller and by a receiver who was appointed by, and worked under the direction of, the Comptroller until 1933 when the FDIC was established and was designated as the receiver for national banks. Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the FDIC was specified as the mandatory receiver only for insured depository institutions. As of May 2016, the OCC supervises 52 uninsured banks, all trust banks. The OCC may charter national banks whose operations are limited to those of a trust company and related activities.

Although there are only a small number of uninsured banks, the OCC has the authority to grant new charters to these institutions if the OCC determines that the entities have a reasonable chance of succeeding and can operate in a safe and sound manner, among other considerations. The proposed rule aims to create a framework the OCC can use should an uninsured institution weaken and fail, and provides clarity to market participants about how they will be treated in receivership.

**Framework from NBA.** The proposal incorporates the framework set forth in the NBA for the Comptroller to appoint a receiver for an uninsured bank. The uninsured bank may challenge the appointment in court. The OCC will provide the public with notice of the appointment, as well as instructions for submitting claims against the uninsured bank in receivership. The OCC may appoint any person as receiver, including the OCC or another agency. Anyone with claims against an uninsured bank in receivership would file their claims with the receiver for the failed uninsured bank for review by the OCC. Claims are paid solely out of the assets of the uninsured bank in receivership.

The receiver liquidates the assets of the uninsured bank, with court approval, and pays the proceeds into an account as directed by the OCC. The proposed rule also clarifies certain powers held by the receiver, and describes the receiver's duties in winding up the affairs of the uninsured bank.

**Cost implications to OCC.** The OCC is considering how it might cover the cost implications. One approach would be to build resources to defray these costs into its structure for collection of assessments from the uninsured institutions it supervises, in accordance with 12 CFR part 8. Any change to the OCC's assessments would be set forth in a separate notice of proposed rulemaking.

**Notice of appointment of receiver.** Under the proposed rule, the OCC must provide notice to the public of the appointment of a receiver for the uninsured bank. Additionally, this would include providing instructions for creditors and other claimants seeking to submit claims with the receiver for the uninsured bank. The OCC invites comment on the appropriate types of, and channels for, notices of receiverships, as well as how frequently to provide these notices. Commenters are also invited to address whether customized notices should be provided in addition to the requirement for newspaper publication, which would apply in every case.

**Claims.** Under the proposal, a person with a claim against the receivership may submit a claim to the OCC, which would consider the claim and make a determination concerning its validity and approved amount. The Comptroller would establish a deadline for filing claims with the receiver, which could not be earlier than 30

days after the three-month publication of notice. In addition, the proposed rule clarifies that persons with claims against an uninsured bank in receivership may present their claims to a court of competent jurisdiction for adjudication, in addition to, or as an alternative to, filing a claim with the OCC.

The proposed rule provides that if a person with a claim against an uninsured bank in receivership also has an obligation owed to the bank, the claim and obligation will be set off against each other and only the net balance remaining after set-off will be considered as a claim.

The proposed rule includes language referring to claims for set-off. The OCC requests comment on whether there are additional characteristics of set-offs or other situations in which set-off may arise that should be included in the rule.

**Order of priorities.** The order of priorities is set out in the proposal for payment of administrative expenses of the receiver and claims against the uninsured bank in receivership. Under this section, the OCC would pay these expenses and claims in the following order:

- administrative expenses of the receiver;
- unsecured creditors, including secured creditors to the extent their claim exceeds their valid and enforceable security interest;
- creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and
- shareholders of the uninsured bank.

The OCC requests comment on whether there are other federal statutes regarding specific types of claims that may be applicable to a receivership of an uninsured bank under the NBA and that would give certain claims a different priority, such as claims owed to the Federal government.

**Administrative expenses.** Under the proposed rule, all administrative expenses of the receiver for an uninsured bank will be paid out of the assets of the receivership before payment of claims against the receivership. Receivership expenses would include pre-receivership and post-receivership obligations that the receiver determines are necessary and appropriate to facilitate the orderly liquidation or other resolution of the uninsured bank in receivership.

**Receivership powers; fiduciary and custodial accounts.** Under the proposed rule, the receiver has the power to wind up the affairs of the uninsured bank in receivership. The receiver, acting with court approval to make disposition of bank assets, should properly encompass the power to transfer fiduciary or custodial appointments and any associated assets in appropriate circumstances. Transfer of fiduciary appointments may occur under the terms of the instrument creating the relationship, if it provides for transfer, or under a fiduciary transfer statute, if one is applicable.

**Payment of claims.** After administrative expenses of the receivership have been paid, the OCC would make ratable dividends from available receivership funds based on the priority of claims. Payment of dividends is at the discretion of the OCC. The OCC requests comment on alternatives to the proposed rule's approach to distributing dividends, under which the OCC would exercise its discretion to determine the timing of the distributions on established claims. One alternative would be to refrain from paying any dividends until all claims have been submitted and validated, with final allowed claim amounts established. Another option would be to allow ongoing dividends on proven claims, subject to the receiver's retaining a percentage of the funds on hand at the time of the distribution as a pool of dividends for catch-up distributions to a successful plaintiff later.

**Termination of receiverships.** The proposed rule contains provisions for termination of receiverships in which there are assets remaining after all administrative expenses and all claims had been paid as well as for when there are no receivership assets remaining after completion of receivership activities. The OCC requests comment on whether the rule should provide termination procedures for receiverships that are outside these circumstances.

The scope of the proposed rule does not extend to receiverships for uninsured Federal branches. However, the OCC may seek public input on this subject at a later date.

RegulatoryActivity: BankingOperations DepositInsurance