

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 8****[Docket No. 01-08]****RIN 1557-AB90****Assessment of Fees****AGENCY:** Office of the Comptroller of the Currency, Treasury.**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is amending its assessment regulation to clarify that the OCC has authority to charge a national bank when the OCC conducts a special examination of a third party that provides services to the bank. The rule applies in the same way to Federal branches and agencies and District of Columbia banks.

**EFFECTIVE DATE:** June 7, 2001.**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Background**

The OCC charters, regulates, and supervises more than 2,200 national banks, accounting for nearly 60 percent of the nation's banking assets, as well as 58 Federal branches and agencies of foreign banks in the United States. Its mission is to ensure a safe, sound, and competitive national banking system that supports the citizens, communities, and economy of the United States.

The OCC funds the activities it undertakes to carry out this mission through assessments and fees charged to the banks it supervises. The National Bank Act authorizes the OCC to collect "assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office of the Comptroller." 12 U.S.C. 482 (Supp. 1999). The statute requires that our charges "be set to meet the Comptroller's expenses in carrying out authorized activities." *Id.* Under part 8 of our regulations, the OCC currently assesses national banks and Federal branches and agencies according to a formula based on factors that include a bank's asset size, its condition, and whether it is the "lead" bank or "non-lead" bank<sup>1</sup> among national banks in a

<sup>1</sup> A "lead bank" is the largest national bank controlled by a company, based on a comparison of the total assets held by each national bank controlled by that company as reported in each bank's Call Report. 12 CFR 8.2(a)(6)(ii)(A).

holding company.<sup>2</sup> The OCC also has the authority to assess a fee for special examinations and investigations of these banks. 12 CFR 8.6(a).

In its current form, section 8.6(a) refers only to fees for a special examination of a national bank or its affiliate.<sup>3</sup> It does not reflect the OCC's authority to assess a national bank in connection with special examinations of any of the bank's service providers. The Bank Service Company Act provides that performance of services for national banks (or for other entities supervised by the OCC, including subsidiaries subject to examination by the OCC) "shall be subject to regulation and examination by [the OCC] to the same extent as if such services were being performed by the bank itself on its own premises."<sup>4</sup>

Banks historically have used third parties to perform certain activities—payment processing, for example. Some banks, however, have recently entered new lines of business or introduced novel, and potentially high-risk, products, relying substantially on third party service providers to enable the bank to participate in or to conduct those activities. These include, for instance, certain types of credit card programs, sub-prime lending, check cashing, and other specialized types of lending. In many instances, the service provider's interest in, and connection with, these transactions are significantly greater than that of the bank. The bank may nonetheless be exposed to higher than normal levels of risk. This increased reliance on service providers will result in an increased need for the OCC to examine or investigate third party service providers in order to evaluate the effect that third-party activities and relationships have on the safety and soundness of the bank.<sup>5</sup>

On December 1, 2000,<sup>6</sup> we proposed to amend 12 CFR 8.6 to make clear our authority to assess banks for our

<sup>2</sup> Independent trust banks are also assessed based on the amount of trust assets those banks manage. See 65 FR 75859 (December 5, 2000).

<sup>3</sup> 12 CFR 8.6(a) also permits the OCC to assess a fee for fiduciary examinations and examinations made pursuant to 12 CFR part 5.

<sup>4</sup> 12 U.S.C. 1867(c). Thus, as would be the case if the activity were performed by the bank itself, the OCC's authority to examine the activity does not lapse if the activity is not being conducted at the same time the OCC undertakes an examination.

<sup>5</sup> The OCC has recently noted the risks that may be associated with using service providers in a recent Advisory Letter and urged national banks to focus on conducting proper due diligence before entering into third party arrangements and on maintaining effective oversight and controls during the third party relationship. See OCC Advisory Letter No. 2000-9, "Third Party Risk," August 29, 2000.

<sup>6</sup> 65 FR 75196 (December 1, 2000).

supervision of third party servicers. We also proposed to clarify our authority to charge Federal branches and agencies a fee for conducting special examinations. For the reasons described in the following discussion, we adopt the rule substantially as proposed, with a clarification suggested by one commenter.

### Proposed Rule and Comments Received

The proposal stated that the OCC may charge a special examination or investigation fee to national banks when examination or investigation of the activities of a third party service provider is warranted by the high risk or unusual nature of the activities conducted by the service provider for the bank, or when the OCC believes that the bank has insufficient systems, controls, or personnel to adequately monitor, measure, and control the risks associated with the activity. The proposed rule also applied to Federal branches and agencies. In addition, the proposal permitted the OCC to impose the assessment if we examine or investigate third party providers of services to subsidiaries subject to examination by the OCC.

The OCC received two comments on this proposal. The first, from a trade association for community banks, suggested that the OCC identify in advance, in the final rule, those instances in which OCC would conduct special examinations and investigations. The commenter suggested that this approach would provide more predictability as to when the OCC would charge the fee that was proposed.

The circumstances under which the OCC will conduct special examinations or investigations of third parties may differ. Accordingly, the OCC is unable to identify in advance every situation that may warrant use of this authority or imposition of a fee on the bank. The final rule addresses this issue highlighted by the commenter, however, by describing the factors the OCC will consider in determining whether to impose fees for examination of a bank's third party service providers. In addition, the OCC will provide banks with notice before we begin a special examination of a service provider for which the fee will be imposed.<sup>7</sup>

The second commenter, a trade association for check cashing centers, suggested that the proposal might

discourage relationships between their members and national banks. The commenter noted that check cashing organizations serve local communities by making funds available to consumers quickly. This rulemaking does not address the merits of the check cashing business. We note that the Bank Service Company Act provides pre-existing authority for the OCC to examine check cashers that have entered into particular relationships with national banks. The final rule does not alter the nature or extent of that oversight. Rather, it clarifies the OCC's authority to assess banks for OCC's examination of third parties so that the cost associated with examining them is borne principally by the banks with whom they have relationships, rather than by the national banking system as a whole.

### Final Rule

The final rule amends section 8.6(a) to state that the OCC may assess a national bank or a Federal branch or agency a fee for the examination or investigation of an entity that performs services for the institution or its subsidiary and that is subject to OCC examination and regulation pursuant to the Bank Service Company Act (12 U.S.C. 1867(c)). The fees for special exams and investigations will be based on an hourly rate, with the hourly rate provided each year by the OCC in its Notice of Comptroller of the Currency Fees (Notice of Fees).<sup>8</sup> The final rule also states that the factors the OCC will consider in determining whether imposition of a fee for examination of a bank's third party service providers is warranted are (1) the high risk or unusual nature of the activities conducted by the service provider for the banks; (2) the significance to the bank's operations and income of the activities conducted by the service provider for the banks; and (3) the extent to which the bank has sufficient systems, controls, and personnel to adequately monitor, measure, and control risks arising from activities conducted by the service provider for the bank.

The final rule also amends section 8.6(a) to clarify that the OCC may charge a fee for conducting special examinations and investigations of Federal branches and agencies of foreign banks or their affiliates. Federal branches and agencies are subject to the same "duties, restrictions, penalties, liabilities, conditions, and limitations" that apply national banks, except as otherwise specifically provided by statute.<sup>9</sup> Current section 8.6 does not

address the assessment of a fee for the special examination or investigation of Federal branches and agencies or their affiliates. The final rule amends section 8.6 to make our authority to assess such a fee explicit. The OCC will state the amount of these fees in the Notice of Fees.

The final rule amends the title of part 8 to more accurately reflect the scope of the regulation. While part 8 includes Federal branches and agencies within the scope of the rule, only national banks and District of Columbia banks are listed in the title. The final rule removes from the title references to the types of regulated entities covered by the regulation.

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires federal agencies to certify that a final rule will not have a significant impact on a substantial number of small entities. See 5 U.S.C. 603, 605. On the basis of the information currently available, the OCC is of the opinion that this final rule is unlikely to have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. As previously noted, a national bank would be assessed a fee for the examination or investigation of its service provider when the examination or investigation is warranted by the level of risk or unusual or novel nature of the activities conducted by the service provider for the bank, or when the OCC believes that the bank has insufficient systems, controls, or personnel to adequately monitor, measure, and control the risks associated with the activity. As a result, the OCC believes that the fees will not be imposed on a substantial number of small entities.

### Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

### Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and

<sup>7</sup> Banks may indemnify themselves against this cost by including in their contractual arrangements with service providers terms that obligate the service provider to reimburse the bank in the event the OCC conducts an examination or investigation of the service provider and charges the bank the fee described here.

<sup>8</sup> See 12 CFR 8.8.

<sup>9</sup> 12 U.S.C. 3102(b).

consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

#### List of Subjects in 12 CFR Part 8

National banks.

#### Authority and Issuance

For reasons set forth in the preamble, the OCC amends part 8 of Chapter I of title 12 of the Code of Federal Regulations as follows:

#### PART 8—ASSESSMENT OF FEES

1. The authority citation for part 8 is revised to read as follows:

**Authority:** 12 U.S.C. 93a, 481, 482, 1867, 3102, and 3108; 15 U.S.C. 78c and 78l; and 26 D.C. Code 102.

2. The heading of part 8 is revised to read as set forth above.

3. Section 8.6 is amended by revising the section heading and paragraph (a) to read as follows:

#### § 8.6 Fees for special examinations and investigations.

(a) *Fees.* Pursuant to the authority contained in 12 U.S.C. 481 and 482, the Office of the Comptroller of the Currency assesses a fee for:

(1) Examining the fiduciary activities of national and District of Columbia banks and related entities;

(2) Conducting special examinations and investigations of national banks, District of Columbia banks, and Federal branches or Federal agencies of foreign banks;

(3) Conducting special examinations and investigations of an entity with respect to its performance of activities described in section 7(c) of the Bank Service Company Act (12 U.S.C. 1867(c)), if the OCC determines that assessment of the fee is warranted with regard to a particular bank because of the high risk or unusual nature of the activities performed; the significance to the bank's operations and income of the activities performed; or the extent to which the bank has sufficient systems, controls, and personnel to adequately monitor, measure, and control risks arising from such activities;

(4) Conducting special examinations and investigations of affiliates of national banks, District of Columbia banks, and Federal branches or Federal agencies of foreign banks; and

(5) Conducting examinations and investigations made pursuant to 12 CFR part 5, Rules, Policies, and Procedures for Corporate Activities.

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Dated: April 26, 2001.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

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