Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

December 21, 2011

Interpretive Letter #1136
March 2012

Re: Conversion from Federal Savings Bank to State Savings Bank Charter and
Section 612(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear **[ ]**:

I am writing in response to your letter of December 5, 2011 regarding the Office of the Comptroller of the Currency's (OCC) interpretation of Section 612 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[1] as it applies to a capital maintenance agreement (CMA) entered into in connection with the approval by the Office of Thrift Supervision (OTS) of a merger of the former **[** ***Bank, City, State*** **]** (***Bank***) with and into, **[** ***FSA, City, State*** **]** (***FSA***) on **[** ***date*** **]** .[2] ***FSA***, the survivor of the merger, subsequently changed its name to **[** ***FSA2, City, State*** **]** (***FSA2***). ***FSA2*** has now applied to convert from a federal savings association to a **[** ***State*** **]** -chartered stock savings bank. In evaluating that application, OCC has determined that Section 612 applies to the CMA.

[1] Section 612(c) of the Act provides that:

> (c) CONVERSION OF A FEDERAL SAVINGS ASSOCIATION.-
> Section 5(i) of the Home Owners' Loan Act (12 U.S.C. 1464(i)) is amended by adding at the end the following:
>
> (6) LIMITATIONS ON CERTAIN CONVERSIONS BY FEDERAL SAVINGS ASSOCIATIONS.- A Federal savings association may not convert to a State bank or State savings association during any period in which the Federal savings association is subject to a cease and desist order (or other formal enforcement order) issued by, or a memorandum of understanding entered into with, the Office of Thrift Supervision or the Comptroller of the Currency with respect to a significant supervisory matter."

[2] Pursuant to Title III of the Dodd-Frank, all functions of the OTS related to Federal savings associations were transferred to the OCC on July 21, 2011.

Background

[ ]
[ ] OTS required that **[*FSA*]** (now ***FSA2***), and its holding companies enter into a CMA with the OTS. As you also note, the CMA expressly states that the "Agreement is a 'written agreement' entered into with an agency within the meaning and for the purposes of Section 8 of the Federal Deposit Insurance Act." This clearly makes the CMA an enforceable agreement under Section 8.

You make a number of arguments why the written agreement at issue is not within the reach of Section 612(c). First, you note that "written agreement" does not fall within the express language of the provision. You also argue that a "written agreement" is only a "supervisory tool" and not an "enforcement action." Finally, you state that the CMA was not published by the OTS or OCC as required by 12 U.S.C.§1818(u).

The structure of the statute, applicable legislative history, established federal banking regulatory practice and further analysis of the application of Section 612 demonstrate that the CMA, as a written agreement within the meaning of, and enforceable pursuant to12 U.S.C. §1818(b), does appropriately fall within the purview of Section 612(c) of Dodd-Frank.

Analysis

While you are correct that the statute does not explicitly reference enforceable written agreements, it is apparent from the statutory scheme and its legislative history that Congress intended to include them within the purview of Section 612. The statute explicitly references "a cease and desist order (or other formal enforcement order)" and a "memorandum of understanding." It would make no sense for the provision to apply only to one type of formal enforcement action (formal enforcement orders) and to an informal action (memoranda of understanding) and not other types of formal enforcement actions.

In your letter, you correctly state that a memorandum of understanding is not enforceable on its own terms and therefore does not rise to the level of a written agreement. You further observe that "when a party violates an MOU, the agencies often escalate the level of supervisory action to the formal written agreement." Nonetheless, you argue that Congress chose to exclude a written agreement, such as the CMA, from Section 612, while otherwise including MOU's. This is both contrary to logic and misapprehends the Congressional intent to protect the complete spectrum of the enforcement process, including the use of enforceable written agreements as formal enforcement actions to accomplish supervisory ends.

In fact, the Senate Report discussing the precise language included in Section 612(c) of Dodd-Frank specifically notes that the section is intended to apply at any time a savings association is "subject to a cease and desist order, other formal enforcement action, or memorandum of

understanding."[3] (emphasis added). The Report goes on to stress that this provision was included in the legislation to codify the FFIEC Statement on Regulatory Conversions and eliminate the possibility that regulatory conversions will undermine the supervisory process. *Id.*

Indeed, the failure to cover the full range of formal enforcement actions would create a loophole that would allow an institution, through a charter conversion, to avoid the impact of an enforcement or supervisory action taken by its current regulator – the very form of regulatory charter arbitrage that Section 612 and the FFIEC Statement on Regulatory Conversions were designed to prevent.

You claim, however, that a written agreement is not a "formal enforcement action." This argument is contradicted by longstanding federal banking regulatory practice and is simply wrong. The OTS Examination Handbook specifically includes formal written agreements pursuant to 12 U.S.C.§1818 in its list of formal enforcement actions.[4] Similarly, the OCC Enforcement Action Policy states that "formal actions against a bank include: orders and formal written agreements within the meaning of 12 U.S.C.§1818(b)."[5]

Finally, you argue that the CMA was not published as required by 12 U.S.C.§1818(u). To the contrary, an unexecuted copy of the final CMA was published as an attachment to the public release of the Director's Order approving the Bank Merger Act application in conformance with the statutory requirement.[6] The Director's Order made clear that the transaction was consummated upon the effective date of the execution of the Agreement in the form attached to the Director's Order. *Id.* Thus, the CMA was published by the OTS.

Conclusion

[ ]
[ ]. Failure to find that Section 612 applies in these circumstances would allow those obligations to be avoided without further consideration by the successor federal regulator. Given that fact, we believe that the OCC is appropriately construing Section 612 of Dodd-Frank to conclude that the CMA, a written agreement entered into within the meaning and for the purposes of Section 8 of the FDIA, is the type of enforcement action within the supervisory process that Section 612 was enacted to protect.

[3] Senate Report 111-176, April 30, 2010, at pp.87-88.
[4] OTS Examination Handbook Section 080, Enforcement Actions, July 2008, at 080.7.
[5] OCC PPM 5310-3 (REV), September 9, 2011, at 5.
[6] **[**]

If you have any questions concerning the foregoing, please contact James Hendriksen, Assistant Director of Enforcement & Compliance, at 202-874-7061.

Sincerely,

/s/

Daniel P. Stipano
Deputy Chief Counsel
Office of the Comptroller of the Currency