

OCC issues proposed rule to implement Dodd-Frank preemption

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On May 25, 2011, the Office of the Comptroller of the Currency issued a proposed rule to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act that will become effective on July 21, 2011, including its National Bank Act preemption provisions. Among other things, Dodd-Frank's NBA preemption provisions require application of the conflict preemption standard of the *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), decision to state consumer financial laws purporting to apply to the activities of national banks and federal thrifts.

The proposed rule's approach to NBA preemption is consistent with the May 12, 2011, letter that Acting Comptroller John Walsh issued to Sen. Thomas R. Carper, D-Del., one of the principal authors of the NBA preemption provisions in the Senate version of the legislation that became Dodd-Frank. We previously provided comments on the OCC preemption letter. (See *June 8 issue*, p. 5.)

The proposed rule's NBA preemption-related provisions include:

■ **Application of OCC regulations to federal thrifts.** The proposed rule would add to the OCC's regulations (i) 12 C.F.R. §§ 7.4010(a) and 34.6 to provide that federal thrifts and their subsidiaries are subject to the same preemption standards as national banks and their subsidiaries; and (ii) 12 C.F.R. § 7.4010(b), to subject federal thrifts and their subsidiaries to the same visitorial powers as national banks. The preamble to the proposed rule explains that the Office of Thrift Supervision's preemption regulations are to be repealed.

■ **Repeal of preemption protection for non-federally chartered subsidiaries, agents, and affiliates.** The proposed rule would remove federal preemption protection for non-federally chartered subsidiaries, agents, and affiliates of national banks by rescinding 12 C.F.R. § 7.4006 — the OCC regulation governing the application of state laws to national bank subsidiaries. This restriction will apply equally with respect to thrifts because they will be within OCC's jurisdiction. Thus, going forward, in order to enjoy federal preemption, an entity will need to be federally chartered.

■ **Attempted clarification of preemption standard.** The preamble to the proposed rule explains that Dodd-Frank mandates application of *Barnett's* conflict preemption standard in its entirety. Specifically, preemption "analysis may not simply stop and isolate [the 'prevent or significantly interfere'] term] from the rest of the decision; it is necessary to take into account the whole of the conflict preemption analysis" in *Barnett*.

The OCC further believes that the manner in which Dodd-Frank referenced the *Barnett* decision may signal congressional intent to clarify that decision's preemption standard relative to the current OCC regulations' distillation of *Barnett's* principles through the "obstruct, impair, or condition" language. For this reason, the proposed rule

would remove such language from the OCC's preemption regulations applicable to real estate lending (12 C.F.R. § 34.4), non-real estate lending (12 C.F.R. § 7.4008), and deposit-taking (12 C.F.R. § 7.4007), and would eliminate in its entirety the OCC preemption regulation on bank operations (12 C.F.R. § 7.4009).

However, in the OCC's view, "[t]o the extent any existing precedent cited [the obstruct, impair, or condition] terms ... that precedent remains valid, since the regulations were premised on principles drawn from" *Barnett*. The proposed rule also would amend the OCC's existing preemption regulations (12 C.F.R. §§ 7.4007, 7.4008, 34.4) to add to each regulation's list of the types of state laws that are *not* preempted a specific reference to the *Barnett* decision.

Although the proposed rule seeks to clarify the post-Dodd-Frank preemption standard, several issues remain unclear, including: (i) how does use of the "prevent or significantly interfere" preemption standard differ from using that standard as the "starting point" for preemption analysis?; (ii) will courts agree with the OCC's interpretation of Dodd-Frank's *Barnett*-based preemption standard, particularly given the reduced deference for preemption determinations afforded the OCC under Dodd-Frank?; and (iii) what level of interference constitutes "significant" interference post-Dodd-Frank?

■ **Case-by-case preemption determinations.** The preamble to the proposed rule explains the OCC's view that Dodd-Frank's case-by-case preemption determination requirement only applies to prospective preemption questions, and that existing OCC preemption regulations and existing precedents (including judicial decisions and interpretations) — to the extent based on the *Barnett* analysis — are preserved.

■ **Codification of Cuomo visitorial powers.** The proposed rule would incorporate Dodd-Frank's codification of *Cuomo v. Clearing House Association, L.L.C.*, 129 S.Ct. 2710 (2009), by revising 12 C.F.R. § 7.4000 to provide that an action by a state attorney general (or chief law enforcement officer) to enforce a non-preempted state law against a national bank is not an exercise of visitorial powers pursuant to 12 U.S.C. § 484.

Comments are due on or before June 27, 2011.

Find the proposed rule at www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-62a.pdf. □

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