

OCC Proposes New Bank Preemption Rules Under the Dodd-Frank Act

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On May 25, 2011, the Office of the Comptroller of the Currency (OCC) proposed revisions to its rules on the scope of federal preemption of state laws with respect to national banks.¹ The proposed rules implement critical elements of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or the Act).² Under the OCC's interpretation, the conflict preemption standard in the U.S. Supreme Court's *Barnett Bank* decision, as incorporated in Title X, generally provided the foundation for prior OCC preemption determinations. Accordingly, the proposed rules make no major changes to the OCC's existing preemption rules, except for those changes specifically mandated by the Act. The OCC's restrained reading of the mandate in the Dodd-Frank Act may disappoint States Attorney Generals and consumer groups, who seem likely to argue for a broader rollback of federal banking preemption.

Generally, the Dodd-Frank Act and the proposed rules:

- Eliminate preemption of state laws for national bank subsidiaries, agents and affiliates;
- Conform the preemption and visitorial powers standards for federal savings associations to those applicable to national banks;
- Articulate standards for determining when "state consumer financial laws" are preempted that incorporate the *Barnett Bank* standard for conflict preemption;
- Impose new procedures and consultation requirements for OCC preemption determinations;
- Require the OCC to conduct periodic reviews of its preemption determinations; and
- In accordance with the *Cuomo* decision, provide that a court action by a state law enforcement officer to enforce non-preempted state law is not an exercise of visitorial powers.

Comments on the proposed rules are due by June 27, 2011. The OCC expects to issue final rules effective on or shortly after July 21, 2011. The OCC has not proposed any changes to the broader preemption regulations of the Office of Thrift Supervision that currently apply to federal savings associations, but has stated its intention to propose such changes later in 2011.³ Since the Act requires that preemption rules relating to federal savings associations comply with those applicable to national banks, the rules for federal savings associations will mirror those for national banks.

Preemption of state law for national bank subsidiaries, agent and affiliates

Sections 1044(a) and 1045 of the Dodd-Frank Act eliminate preemption of state law for national bank subsidiaries, agents and affiliates. Accordingly, the proposed rule would rescind the OCC's regulation concerning the application of state laws to national bank operating subsidiaries (12 C.F.R. §7.4006). The proposed rule would also make conforming revisions to §5.34(a) and subsection (e)(3) by expressly referencing the new section 12 U.S.C. 25b adopted by the Act, which provides that Title LXII of the Revised Statutes of the United States and section 24 of the Federal Reserve Act (12 U.S.C. 371) do not preempt, annul, or affect the applicability of any state law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).

Preemption standards applicable to federal savings associations

Section 1046 of the Dodd-Frank Act amends the Home Owners' Loan Act (HOLA) to provide that preemption determinations by a court or by the OCC for federal savings associations must be made in

accordance with the laws and legal standards applicable to national banks regarding the application of state law. Further, Section 1046 stipulates that HOLA does not “occupy the field” in any area of state law.

The proposed rules implement these provisions by adding §§7.4010(a) and §34.6 to provide that state laws apply to federal savings associations and their subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries.

Federal courts and the Office of Thrift Supervision (OTS) previously applied a “field preemption” standard under HOLA, which is now precluded by the amendments in the Dodd-Frank Act. As noted above, the proposed rules do not address the existing OTS preemption regulations which implement the “field preemption” approach, but instead the OCC indicates it will address existing OTS regulations in subsequent rulemakings.

Preemption of “State consumer financial laws”

Among the most important provisions of Title X of the Dodd-Frank Act and the OCC’s proposed rules are those concerning the standards for establishing preemption of “State consumer financial laws.”

Section 1044(a) of the Act amends The National Bank Act (12 U.S.C. 21 et seq.) to provide that a State consumer financial law is preempted only if: (1) application of such a law would have a “discriminatory effect” on national banks compared with state-chartered banks in that state; (2) “in accordance with the legal standard for preemption” in the Supreme Court’s decision in *Barnett Bank*,⁴ the State consumer financial law “prevents or significantly interferes with the exercise by the national bank of its powers”; or (3) the State consumer financial law is preempted by a provision of federal law. For purposes of Section 1044(a), a “State consumer financial law” is a state law that “does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or related account thereto, with respect to a consumer.” Section 1044(a).

In its proposed rule, the OCC takes a narrow view of the substantive changes required to its preemption regulations by the Dodd-Frank Act. As noted above, when referencing the *Barnett Bank* decision, the Act expressly cites only the “prevents or significantly interferes” standard of conflict preemption analysis found in *Barnett Bank*. The OCC reasons in the Supplementary Information to the proposed rule that the *Barnett Bank* decision “references different formulations of conflict to illustrate and explain the nature and level of interference with national bank powers that triggers preemption.” The formulation in Section 1044 “is one exemplary formulation” but not the only formulation used in *Barnett Bank* and is not “set apart” from the other formulations. The formulation thus “may serve as a touchstone or starting point in the analysis, but it takes meaning from the whole of the Supreme Court’s decision.” As support for this proposition, the OCC cites the plain language of Section 1044, other provisions of the Act and its legislative history, similar language in section 104(d)(2)(A) of the Gramm-Leach-Bliley Act of 1999, and the Eleventh Circuit’s decision in *Baptista vs. JPMorgan Chase Bank, N.A.* In *Baptista*, the Court found that the National Bank Act preempted a Florida law, holding that “it is clear that under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes—that is, the test for conflict preemption.”

Having concluded that the *Barnett Bank* standard preemption provision refers “to the legal standard for conflict preemption contained in the whole of the Court’s decision,” the proposed rules would preserve the OCC’s rules and existing precedents (including judicial decisions and interpretations) that are consistent with the overall *Barnett Bank* standard.

Notwithstanding its determination to preserve the existing preemption regulations consistent with the *Barnett Bank* standard, the OCC acknowledges that certain language in its rules “has created ambiguities and misunderstandings.” Specifically, the proposed rule would remove language providing that state laws that “obstruct, impair, or condition a national bank’s ability to fully exercise its federally authorized . . . powers are not applicable to national banks.” (Paragraphs (b) in §7.4007, (d) in §7.4008, and (a) in

§34.4). After noting that the language created confusion about the applicable preemption standard, the OCC then hastens to add that any “existing precedent” that cited those terms in the OCC’s regulations “remains valid, since the regulations were premised on principles drawn from the *Barnett Bank* case.” It is unclear why the precedent remains valid if its underpinnings are removed, but the OCC declines to engage in a detailed analysis of the substance of its remaining preemption rules in the Supplementary Information. (The OCC notes in a footnote that earlier versions of the Dodd-Frank Act legislation would have had retroactive effect and invalidated “an extensive body of national bank ... preemption precedent” by creating new preemption standards.)

The proposed rules would also amend §§7.4007 and 7.4008 to provide that certain state laws are not preempted “to the extent consistent with” the *Barnett Bank* decision, including “any . . . law that the OCC determines to be applicable to national banks in accordance with the [*Barnett Bank* decision], or that is made applicable by federal law.” §7.4007(c)(8); §7.4008(e)(8).

OCC preemption determinations

Section 1044(a) of the Act requires that the OCC make preemption determinations with regard to state consumer financial laws under the *Barnett Bank* standard by regulation or order on a “case-by-case basis” in accordance with applicable law. A “case-by-case basis” refers to “a determination . . . made by the Comptroller concerning the impact of a particular state consumer financial law on any national bank that is subject to that law, or the law of any other state with substantively equivalent terms.” Section 1044(a). The OCC must first consult with and take into account the views of the Consumer Financial Protection Bureau when making a determination that a state consumer financial law has substantively equivalent terms as the law the OCC is preempting.

The OCC notes these procedural requirements in the Supplementary Information to the proposed rules, but does not propose any regulations to implement its obligations. Further, the OCC observes that these requirements will apply “going forward, after the transfer date,” since there is no statement in the Act that Congress intended retroactive application and there is a presumption against retroactive legislation.

Additionally, nothing in the proposed rules implements Section 1044(a) of the Act, which requires that “substantial evidence,” made on the record of the proceeding, exist to support an OCC order or regulation that declares inapplicable a state consumer financial law under the *Barnett Bank* standard.

Periodic review

Section 1044(a) of the Dodd-Frank Act requires the OCC to conduct a periodic review, subject to notice and comment, every 5 years after issuing a preemption determination relating to a state consumer financial law and to publish a list of such preemption determinations every quarter. The OCC’s proposed rules would not change any existing, or add any new, regulations to implement this review requirement.

Visitorial powers

Section 1047 of the Dodd-Frank Act codifies the Supreme Court’s decision in *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (2009), which held that a state attorney general may bring an action in court to enforce a non-preempted state law, but otherwise is restricted in conducting extra-judicial investigations or attempting to exert oversight of a national bank. The proposed rules revise the applicable OCC rule on visitorial powers to provide that such actions by state chief law enforcement officers are not an exercise of visitorial powers prohibited by 12 U.S.C. §484. (§7.4000).

The proposed rules can be found [here](#). The Dodd-Frank Act can be found [here](#).

If you have any comments or would like more information please contact Andrew J. Lorentz, James H.

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FOOTNOTES

¹ 76 Fed. Reg. 30557 (May 25, 2011).

² Pub. L. 111-203, 124 Stat. 1376–2223 (2010).

³ The Dodd-Frank Act abolishes the OTS and transfers certain functions and authorities relating to savings associations to the OCC; hence, a number of the provisions of the proposed rules address the mechanics of the transition.

⁴ *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). In *Barnett Bank*, the Supreme Court applied principles of federal preemption to hold that a state law that prohibited national banks from selling insurance was preempted by a federal law that expressly authorized national banks to sell insurance in small towns.

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