

OCC Ignores Dodd-Frank Act's Repeal of 2004 Preemption Regulations

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In 2004, the Office of the Comptroller of the Currency (OCC) adopted sweeping regulations preempting state laws aimed at abusive bank practices involving mortgages, credit cards, and other areas. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 effectively overturned those regulations and limited the OCC's ability to preempt state laws.

On May 25, 2011, the OCC responded by proposing only superficial changes to the 2004 regulations and by continuing to give unfair bank practices immunity from state consumer protection laws.¹ The OCC ignored numerous provisions of Dodd-Frank that prohibit the OCC from continuing its preemption regulations:

- The National Bank Act “**does not occupy the field** in any area of State law.”² The OCC's 2004 NBA regulations achieve field preemption by broadly preempting all state laws that impose any limitations in the fields of deposit-taking, lending, and other areas.³ *OCC's proposal leaves these provisions substantively unchanged, so that state consumer protection laws will continue to be broadly preempted.*
- OCC can preempt “**only if,**” in accordance the Supreme Court's 1996 *Barnett Bank* case, a state consumer financial law⁴ “**prevents or significantly interferes** with the exercise by the national bank of its powers.”⁵ *The proposed regulations would still categorically preempt broad areas of state laws without regard to whether they prevent or significantly interfere with bank powers in accordance with Barnett.*
- Congress **rejected** the OCC's asserted right to preempt state laws that merely “**obstruct, impair or condition**” bank operations.⁶ *The OCC has proposed to remove those words from its regulations but claims that state laws that meet that weaker standard will still be preempted.*⁷
- OCC can preempt **only** on a “**case-by-case basis**” if a “**particular**” state law, or an equivalent one, prevents or significantly interferes with the exercise of bank powers, after consultation with the Consumer Financial Protection Bureau.⁸ Only contracts entered into **before July 22, 2010** can rely on the old regulations.⁹ *Yet the OCC has proposed to keep the across-the-board 2004 regulations in place for new contracts without making any case-by-case determination or consulting the CFPB.*
- “No regulation or order” of the OCC may preempt state law “unless **substantial evidence, made on the record** of the proceeding” supports the OCC's finding of significant interference.¹⁰ This is a strong and rare congressional limitation on an agency's authority. *The OCC has not made any finding of significant interference and has no record and no evidence to support continuation of the 2004 regulations.*
- **Courts** reviewing OCC regulations **cannot defer to the OCC's views** under the deferential *Chevron*¹¹ standard but instead must conduct a more rigorous *Skidmore*¹² review that depends “upon the thoroughness evident in the consideration of the

agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant.”¹³ *Congress gave a stinging rebuke to the OCC’s preemption activities by revoking the deference that agencies normally receive.*

The significantly interfere/*Barnett* standard is a rollback to 1996, when the *Barnett* case was decided, **before** the OCC’s preemption activities began, a time when few state laws were preempted.¹⁴ The state law that *Barnett* itself preempted was a rare example of a law that completely forbade an activity that federal law specifically authorized for national banks: acting as an insurance agent in towns of less than 5,000. The Supreme Court emphasized that its ruling “*is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.*”

The OCC ignores Congress’s rebuke and the mandate of the Dodd-Frank Act. State laws that merely protect consumers from abusive bank conduct are not preempted under the Dodd-Frank preemption standard. The OCC’s reaffirmation of its broad preemption regulations without regard to any of the Dodd-Frank limitations cannot stand scrutiny.

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¹Notice of Proposed Rulemaking on Office of Thrift Supervision Integration; Dodd-Frank Act Implementation (“Preemption NPR”), 76 Fed. Reg. 30557 (May 26, 2011). The OCC did propose to remove the regulation extending preemption to operating subsidiaries and made changes to reflect the changes to the National Bank Act’s visitorial provisions.

² Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), § 1044, to be codified at Revised Stat. § 5136C(b)(4). The same rule now applies to federal thrifts under the Home Owners Loan Act. See Dodd-Frank § 1046, to be codified at 12 U.S.C. § 1461(6).

³ See generally NCLC, *The Cost of Credit* § 3.4.6.3 (4th ed. 2009 and Supp.).

⁴ Dodd-Frank restricts when the OCC can preempt consumer financial laws and gives the OCC no power to preempt general state laws.

⁵ Dodd-Frank § 1044, to be codified at Revised Stat. § 5136C(b)(1)(B). In addition, state laws that discriminate against national banks or federal thrifts or conflict with another federal law are preempted.

⁶ For example, Congress refused to permit preemption of a state law that “impairs, or hampers” the business of banking. Amendment 141 to H.R. 4173 at 6 (Offered by Mrs. Bean Dec. 9, 2009).

⁷ OCC claims: “This language was drawn from an amalgam of prior precedents To the extent any existing precedent cited those terms in our regulations, that precedent remains valid, since the regulations were premised on principles drawn from the *Barnett* case.” Preemption NPR at 25.

⁸ Dodd-Frank, § 1044, to be codified at 12 U.S.C. § 25b(b)(1)(B), (b)(3).

⁹ Dodd-Frank, § 1043.

¹⁰ Dodd-Frank § 1044, to be codified at 12 U.S.C. § 25b(c).

¹¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹² *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹³ Dodd-Frank, § 1044.

¹⁴ See Lauren Saunders, National Consumer Law Center, *Restore The States’ Traditional Role As “First Responder”* (Sept. 2009), available at <http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf>. Dodd-Frank also largely repealed a law that preempted state laws governing alternative mortgage terms. Dodd-Frank § 1083.