The OCC's Proposed Interest-on-Escrow Preemption Determination & Real Estate Lending Escrow Accounts Rule Exceed the Agency's Power

Comments

to the

Office of the Comptroller of the Currency

regarding

90 Fed. Reg. 61,093 and 90 Fed. Reg. 61,099
Docket IDs OCC-2025-0735 and OCC-2025-0736
RINs 1557-AF45 and 1557-AF46

by the

National Consumer Law Center (on behalf of our low-income clients)

Submitted on January 29, 2026

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1. Introduction

On December 30, 2025, the Office of the Comptroller of the Currency (OCC) requested comment on two proposals:

- a new rule regarding mortgage escrow accounts,[1] and
- a determination that federal law preempts state laws requiring banks to pay interest on mortgage escrow accounts.[2]

The National Consumer Law Center submits these comments on both proposals on behalf of our low-income clients. Because these two proposals are so closely related, we are commenting on them together and submitting these comments to both dockets.

We strongly oppose the OCC's proposals and urge the OCC to withdraw them. They are contrary to federal law, outside of the OCC's authority, do not meet the requirements of the National Bank Act including the preemption standard set forth in *Barnett Bank,* will reduce price transparency, will create an unlevel playing field for competition, and will make homeownership more expensive for consumers.

2. Summary of the OCC's Proposals

The OCC has issued two proposals affecting national banks and federal savings associations. Under the Dodd-Frank Act, the OCC oversees both types of financial institutions, and the Dodd-Frank Act's standards and restrictions regarding preemption of state laws apply equally to both.[3] For convenience, these comments will refer to both as "banks."

2.1 Proposed Escrow Account Rule (90 Fed. Reg. 61,099)

The OCC proposes to amend 12 C.F.R. Part 34, which sets forth standards for real estate-related lending and associated activities by national banks,[4] and Part 160, which governs lending and investment activities by federal savings

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[1] 90 Fed. Reg. 61,099 (Dec. 30, 2025).

[2] 90 Fed. Reg. 61,093 (Dec. 30, 2025).

[3] 12 U.S.C. § 1465(a). *See also* 12 C.F.R. § 34.6 ("Federal savings associations and their subsidiaries shall be subject to the same laws and legal standards, including regulations of the OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.").

[4] 12 C.F.R. § 34.1(a).

associations.[5] The rule would add a new definition of "escrow account" and declare that banks "may establish or maintain escrow accounts."[6] The proposed rule has almost no substance, other than declaring that the terms and conditions of escrow accounts, including how funds are invested, setting fees, and whether to pay interest, would be "business decisions to be made by each [bank] in its discretion." The proposed rule has no qualifiers for any limits in state law, and in essence, the rule would thus assert field preemption in the area of escrow account administration.

2.2 Proposed Preemption Determination (90 Fed. Reg. 61,093)

In conjunction with the proposed amendments to Parts 34 and 160, the OCC proposes to codify the following statement: "The OCC has determined that federal law preempts state laws that eliminate a national bank's or Federal savings association's flexibility to decide whether and to what extent to pay interest or other compensation on funds placed in escrow accounts or assess fees for such accounts . . . ." The statement is followed by a list of twelve specific state laws. Ostensibly, the preemption determination is directed toward N.Y. Gen. Oblig. Law § 5-601, with the other eleven laws being declared "substantively equivalent."[7] But the proposed OCC codification does not differentiate among the state laws.

The New York statute requires "Any mortgage investing institution which maintains an escrow account pursuant to any agreement executed in connection with a [residential, owner-occupied] mortgage" to pay at least 2% annual interest on the account (or such other rate specified by the state regulator). The Superintendent of Banking has since issued an order modifying that to the lesser of 2% or the six month Treasury yield.[8] The statute also prohibits mortgage investing institutions from imposing service charges on escrow accounts.

The OCC largely uses the proposed new escrow rule to justify the accompanying preemption determination.

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[5] 12 C.F.R. § 160.1.

[6] It is unclear, and the OCC does not explain how this relates to existing 12 C.F.R. § 34.4(a)(6) ("A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning: . . . Escrow accounts, impound accounts, and similar accounts;").

[7] 90 Fed. Reg. at 61,094.

[8] N.Y. Dept. of Fin. Serv., Order Issued Under Section 12-A of the New York Banking Law (Jan. 19, 2018).

3. Summary of Argument

The OCC is simultaneously 1) proposing a new rule giving national banks broad, unqualified discretion to set the terms of mortgage escrow accounts without regard to any limits under state law; 2) using that rule to justify a determination that New York's interest-on-escrow law is preempted; and 3) declaring that a list of other states' laws are also preempted because they are substantially similar to the New York law. But the OCC does not have the power to give banks unbridled discretion over escrow accounts and has failed to meet the substantive and procedural requirements for either rule to preempt state law.[9]

The OCC has not presented substantial evidence on the record that state interest-on-escrow laws prevent or significantly interfere with the exercise of national bank powers.[10] To the contrary, in 2010, Congress specifically enacted a law addressing escrow accounts and rebutting the OCC's claim that Congress would support the broad preemption proposed.[11]

The OCC appropriately recognizes that a bank has the power to engage in mortgage lending and protect its collateral. But the OCC makes no case that requiring banks to pay interest on escrow accounts significantly interferes with that power. The OCC cannot simply declare a power to "exercise discretion" and then find a conflict with that power.[12] Such a vaguely defined and broad power is tantamount to field preemption. Congress and the Supreme Court have clearly stated that neither the National Bank Act nor the Home Owners' Loan Act occupy the field in any area of state law.[13]

No reasonable person would believe requiring banks to pay interest on escrow accounts will significantly interfere with the power to make mortgages. The OCC offers only speculation, not any evidence, let alone substantial evidence on the record. The cost of maintaining an escrow account is part of a mortgage servicer's overhead, and likely an insubstantial part at that. To the extent that

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[9] *See* § 5.3.

[10] *See* § 6. It appears that OCC has also failed to consult with the Consumer Financial Protection Bureau, as required by 12 U.S.C. § 25b(b)(3)(B), or submit the regulation to OIRA for review, as required by Executive Order 12866.

[11] *See* § 5.

[12] *See* § 4.

[13] 12 U.S.C. § 25b(b)(4) ("Title 62 of the Revised Statutes does not occupy the field in any area of State law."); 12 U.S.C. § 1465(b). *See* Cantero v. Bank of America, N. A., 144 S.Ct. 1290, 1291, 602 U.S. 205, 206 (2024) ("Dodd-Frank ruled out field preemption.").

the payment of nominal interest has more than a negligible impact on a bank's overhead costs, those costs would be included in the market price of mortgages.

Many mortgages are made by nonbank entities, which are able to operate while complying with state laws requiring interest on escrow accounts, rebutting the claim that these laws significantly interfere with the power to make mortgages. Allowing national banks and federal savings associations to effectively charge a back-end fee by withholding interest on a homeowner's own money reduces transparency in pricing and creates an unlevel field of competition.

4. The applicable bank power is the power to make real estate loans.

4.1 National banks' powers come from statute, not regulations.

The core question addressed in these comments is whether the OCC has properly concluded, both procedurally and as a matter of substance, whether the New York interest-on-escrow law (and other similar laws) is preempted because it "prevents or significantly interferes with the exercise by the national bank of its powers."[14] The power at issue in making this assessment is the power of national banks and savings associations to make loans secured by real estate.

The power to do so comes from federal statutes. The primary provision setting out national bank powers is the National Bank Act, 12 U.S.C. § 24, Seventh, which sets out a number of specific powers as well as the power to exercise "incidental powers" that are "necessary" to carry on the business of banking. Other statutory provisions also give national banks specific powers.

Under 12 U.S.C. § 93a, "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." That statute certainly authorizes the Comptroller to make rules to assist banks in safely implementing their statutory powers, but it would be major stretch to interpret it to allow the Comptroller to expand the statutory powers of national banks.

Nor does 12 U.S.C. § 24, the section of the National Bank Act that lists national bank powers, lend itself to an interpretation that the Comptroller can expand that list of powers. The statute mentions the Comptroller five times, but in all of those instances the statute is *subjecting* a bank's power to regulations that OCC may prescribe, authorizing OCC to *limit* a bank power, or authorizing OCC to define a particular term.

[14] 12 U.S.C. § 25b(b)(1)(B).

The section of the National Bank Act that authorizes banks to make real estate loans, 12 U.S.C. § 371, also expresses the OCC's role as limiting what banks can do: "Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, *subject to* section 1828*(o)* of this title and *such restrictions and requirements* as the Comptroller of the Currency may prescribe by regulation or order."[15]

Moreover, even if the OCC has authority to authorize bank activities that the statute does not enumerate, its authority still comes from its ability to implement statute, and the activities it authorizes must stem from national banks' statutory powers. While the OCC quoted[16] the Supreme Court's footnote in *NationsBank* stating that the OCC may authorize activities that are not "specifically enumerated" in § 24 Seventh,[17] the OCC omitted the second sentence of the *NationsBank* footnote: "The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds."[18] Furthermore, to the extent that *NationsBank* could be read to imply that the OCC has broad discretion to expand bank powers beyond activities central to their enumerated powers, that reading is no longer good law as the *NationsBank* court relied heavily on the now-rejected concept of "*Chevron* deference" to the agency's interpretation. The Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* in 2025.[19]

Notably, *NationsBank* was not a preemption case, and the OCC's power to authorize activities in the absence of federal or state limits is not the same as its ability to preempt state law, especially after Congress's later decision in 2010 to rein in the OCC's preemptive powers. Even if OCC regulations may authorize activities that are integral and incidental to national banks' statutory powers, its regulations may be invoked to preempt state law only if the state law prevents or significantly interferes with the *statutory* power that the regulation implements.

The OCC's reliance on other Supreme Court precedent is misguided. We discuss those cases in § 8 of these comments, below.

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[15] 12 U.S.C. § 371 (emphasis added).

[16] 90 Fed. Reg. at 61,097 n.51.

[17] NationsBank v. Variable Annuity Life Inc. Co., 513 U.S. 251, 258 n.2, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995).

[18] *Id.*

[19] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024) (over-ruling 467 U.S. 837, 842) (1984).

4.2 The OCC cannot give banks the power to exercise broad discretion as an end-run around Dodd-Frank.

As the OCC explains in the proposed Escrow Account Rule, escrow accounts are a "crucial risk mitigation tool that support safe and sound mortgage lending."[20] The ability to hold those accounts stems from the statutory power to make real estate loans and to safely manage the risks of that lending.

We do not dispute that the ability to hold escrow accounts is an incidental power to the statutory power to make mortgages. If a state law were to ban mortgage escrow accounts or restrict them in such a way that they were unworkable, that law might be preempted as significantly interfering with the statutory power to make real estate loans.

As discussed above, the OCC's power to authorize activities is not the same as its ability to preempt state law. The OCC certainly has the power to authorize escrow accounts, and we have no objection to the first sentence of the Escrow Account Rule's proposal for 12 C.F.R. § 34.3(d). But the second sentence, giving national banks the broad, unqualified ability to establish the terms and conditions of accounts in their discretion, is simply an attempt to do an end-run around the Dodd-Frank Act. Banks' discretion over the terms and conditions of their escrow accounts is limited by applicable federal and non-preempted state law. Furthermore, the power to exercise incidental powers "necessary" to the business of banking[21] does not include every conceivable power that is incidental to banking.

The OCC does not have the authority to bestow full discretion through one rule and then to declare in another rule that state laws are preempted because they conflict with that discretion. Congress declared that state laws are preempted "only if" they prevent or significantly interfere with a bank's powers, and those powers are not the power to do whatever they like. The detailed scheme outlined in the Dodd-Frank Act, including the requirement for substantial evidence on the record, would be meaningless if the OCC could simply bestow on banks the power to use their discretion in their activities and to preempt any state law that touches, in however minor a fashion, on that discretion.

The OCC also argues that flexibility about how to structure escrow accounts is the "functional equivalent of national banks' deposit taking powers," and that "it is a fundamental precept of banking that the bank has flexibility in determining

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[20] 90 Fed. Reg. at 61,110.

[21] 12 U.S.C. § 24, Seventh.

what, if any, interest is paid on such accounts."[22] Setting aside the lack of support for that statement, banks do not offer escrow accounts as a deposit taking product for consumers. They may establish the accounts as a by-product of their mortgage lending, with pricing incorporated into the front-end mortgage rate. Or banks may offer escrow services to nonbank mortgage lenders, with the business-to-business terms of those services a separate question from whether the nonbank must pay the consumer interest. In either situation, consumers cannot comparison shop on the open market for the best rate on their escrow account in the way they can with a deposit account.

The OCC only has the power to preempt state escrow interest laws if they prevent or significantly interfere with the statutory power to make real estate loans. They do not, as discussed below.

5. The Dodd-Frank Act shows Congress's intent to rein in the OCC's ability to preempt state law, and requires any OCC preemption determination to be supported by evidence on the record.

5.1 In enacting the Dodd-Frank Act, Congress sought to preserve state laws, put significant limits on the OCC's ability to preempt, and rein in the excessive flexibility that federal bank regulators had purported to grant to banks.

The OCC, in announcing the proposed rule, repeatedly asserts that Congress has consistently insisted on granting great flexibility to national banks.[23] This assertion ignores recent history—specifically the Dodd-Frank Act and the crisis that led up to it. [24]

In the years leading up to the subprime mortgage meltdown in 2008, the OCC, along with the Office of Thrift Supervision, which at the time regulated federal savings associations, asserted preemption powers that went far beyond *Barnett Bank*. The agencies acted aggressively to preempt state laws, including state laws

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[22] 90 Fed. Reg. at 61,102.

[23] 90 Fed. Reg. at 61,101.

[24] *See* Lusnak v. Bank of Am., 883 F.3d 1185, 1189 (9th Cir. 2018); Lei Ding, et al., The Impact of Federal Preemption of State Antipredatory Lending Laws on the Foreclosure Crisis, 31 J. of Pol'y Analysis & Mgmt. 367 (2012); Danyeale L. Hensley, Section 1044 of Dodd-Frank: When Will State Laws Be Preempted Under the OCC's Revised Regulations?, 16 N.C. Banking Inst. 161, 162 (Mar. 2012); Arthur E. Wilmarth, Jr., The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services, 36 J. Corp. L. 893 (2011). See also Kurt Eggert, Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Rule in Mortgage Servicing Regulation, 15 Chap. L. Rev. 171 (2011).

that would have reined in the irresponsible lending that led to the mortgage meltdown and the resulting economic crisis.[25]

The Senate Report on the bill that became the Dodd-Frank Act found:

> This financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures. …
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> [I]nsured depositories and their subsidiaries were heavily involved in these markets. According to data compiled by Federal Reserve Board Economists, 36 percent of all higher-priced loans in 2005 and 31 percent in 2006 were made by insured depositories and their subsidiaries. … This illustrates that being under the supervision of a federal prudential regulator did not guarantee that mortgage underwriting practices were any stronger, or consumer protections any more robust. …
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> Underlying this whole chain of events leading to the financial crisis was the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable, "exploding" adjustable rate mortgages, interest only mortgages, and negative amortization mortgages. These regulators "routinely sacrificed consumer protection for short-term profitability of banks," undercapitalized mortgage firms and mortgage brokers, and Wall Street investment firms, despite the fact that so many people were raising the alarm about the problems these loans would cause. …
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> Where federal regulators refused to act, the states stepped into the breach. … *Unfortunately, rather than supporting these anti-predatory lending laws, federal regulators preempted them*.[26]

The Dodd-Frank Act was a direct response to these failures. It imposed new, rigorous requirements that restrained the OCC's ability to preempt state law. First, it restored the *Barnett Bank* "prevent or significantly interfere" standard that the federal banking regulators had strayed from.[27] The statute specifies that

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[25] S. Rep. No. 111-176 (2010).

[26] S. Rep. No. 111-176, at 11, 14, 16 (2010) (footnotes omitted, emphasis added).

[27] 12 U.S.C. § 25b(b)(1)(B). *See* § 5.2 (outline of *Barnett Bank* standard).

this standard applies when either a court or the OCC considers a claim that a state consumer financial law is preempted.

Second, Congress imposed special additional requirements when the OCC makes a preemption determination—most significantly, a requirement that the determination be supported by "substantial evidence, made on the record of the proceeding."[28] This requirement applies to preemption determinations regarding State consumer financial laws[29] as defined by the statute.[30] The Supreme Court has held that an interest-on-escrow law falls into this definition.[31]

Third, the Dodd-Frank Act explicitly provides that neither the National Bank Act[32] nor the Home Owners' Loan Act[33] "occup[ies] the field in any area of State law."

Fourth, Congress was so concerned about abuse of the regulatory power to preempt state laws that it lowered the standard of review courts use when considering challenges to preemption determinations. At the time Dodd-Frank was enacted, OCC decisions, like those of other agencies, were mostly subject to great deference under the *Chevron*[34] standard. In the Dodd-Frank Act, Congress singled out OCC preemption determinations regarding State consumer financial laws for a lower level of deference, based on the Supreme Court's decision in

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[28] 12 U.S.C. § 25b(c).

[29] 12 U.S.C. § 25b(c) (cross-referencing 12 U.S.C. § 25b(b)(1)(B), which applies to State consumer financial laws).

[30] 12 U.S.C. § 25b(a)(2).

[31] Cantero v. Bank of Am., 602 U.S. 205, 213, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024) (Dodd-Frank established the controlling legal standard for when a 'State consumer financial law,' like New York's interest-on-escrow law, is preempted with respect to national banks").

[32] 12 U.S.C. § 25b(b)(4) (referring to "Title 62 of the Revised Statutes," which, according to a note to this statute in West's United States Code Annotated, encompasses 12 U.S.C. §§ 21, 22–24, 25a, 26–29, 35–37, 39, 51, 52–53, 56–57, 59–62, 66, 71–76, 81–91, 93, 93a, 94, 101a, 102, 104, 107–110, 123–124, 131–138, 141–144, 151–152, 161, 164, 168–175, 181–186, 192–196, 481–485, 501, 541, 548, 582; and 18 U.S.C. §§ 8, 333–334, 475, 656, 709, 1004, and 1005).

[33] 12 U.S.C. § 1465(b).

[34] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Skidmore v. Swift & Co.[35] Congress specified that, in reviewing preemption determinations, courts should:

> assess the validity of [preemption] determinations, depending 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 to its decision.[36]

Finally, and, most dramatically, Congress abolished the Office of Thrift Supervision, which had been particularly aggressive in preempting state laws.

All of these features of the Dodd-Frank Act show an intent by Congress to *restrict* the OCC's preemptive authority, to *reduce* national banks' and federal savings associations' flexibility to determine their business practices in derogation of state law, and to expand the role of states in protecting consumers vis a vis national banks—contrary to the OCC's repeated assertions in its proposals.

As explained in the following sections, the proposed rule and preemption determination will not pass judicial review. The OCC has failed to provide any evidence on the record, and no reasonable person would believe the laws at issue substantially interfere with a bank's powers.

5.2 *Barnett Bank* and *Cantero* require a practical assessment of whether there is significant interference with bank powers.

Barnett Bank v. Nelson[37] is the seminal case regarding preemption of state laws under the National Bank Act. Congress has mandated it as the standard for evaluating whether a state law is preempted.[38] As articulated by *Barnett Bank*, a state law is preempted when it "forbid[s], or impair[s] significantly, the exercise of a power that Congress explicitly granted." But the Supreme Court emphasized that its ruling "is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers."

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[35] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

[36] 12 U.S.C. § 25b(b)(5)(A).

[37] 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996).

[38] 12 U.S.C. § 25b(b).

The Court unanimously reemphasized the *Barnett Bank* standard in 2024 in *Cantero v. Bank of America*.[39] There, the Court rejected a lower court's view that "federal law preempts any state law that 'purports to exercise control over a federally granted banking power,' regardless of 'the magnitude of its effects.' "[40] Instead, the Dodd-Frank Act's incorporation of the *Barnett Bank* standard means that a state law is preempted "only if" it "prevents or significantly interferes" with a bank's exercise of its power.

The *Barnett Bank* preemption standard requires "a practical assessment of the nature and degree of the interference caused by a state law,"[41] using a "nuanced comparative analysis."[42] The Court noted that the *Barnett Bank* standard required by Congress does "not draw a bright line."[43]

5.3 The Dodd-Frank Act imposes requirements beyond the *Barnett Bank* standards when the OCC makes a preemption determination.

The Dodd-Frank Act is explicit that the *Barnett Bank* "prevent or significantly interfere" standard applies to preemption determinations regarding a State consumer financial law, whether made by a court or made by the OCC. However, when the OCC makes a preemption determination, the Act imposes additional procedural requirements. In *Cantero* , the Supreme Court did not need to address these additional requirements, because it was dealing with a preemption determination made by a court, not one made by the OCC.

As noted above, the most significant of these additional Dodd-Frank requirements is § 25b(c), which provides:

> *No regulation or order* of the Comptroller of the Currency prescribed under subsection (b)(1)(B) [relating to State consumer financial laws], shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision

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[39] 602 U.S. 205, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024).

[40] Cantero v. Bank of Am., 602 U.S. 205, 213, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024).

[41] *Id.*, 602 U.S. at 219–220.

[42] *Id.*, 602 U.S. at 220. See Conti v. Citizens Bank, ___ F.4th ___, 2025 WL 2693215, at *4 (1st Cir. Sept. 22, 2025) (holding that district court erred by failing to make a practical assessment of degree of interference caused by state law in question).

[43] *Id.*, 602 U.S. at 221.

> of the State consumer financial law, unless *substantial evidence, made on the record of the proceeding,* supports the *specific* finding.[44]

This provision clearly illustrates Congress's intent to rein in the OCC's preemption authority. By requiring "substantial evidence, made on the record of the proceeding" supporting the "specific finding," Congress rejected OCC preemption determinations that rely on general principles or conjecture. There must be actual evidence supporting a specific finding about significant interference with a bank's exercise of its powers.

Making this provision applicable to OCC determinations makes sense and is consistent with the practice in courts. Courts will have factual allegations before them in the pleadings, and they have a well-established procedure for taking evidence and making findings of fact. There will be an evidentiary record supporting a court's findings that will enable appellate review. Section 25b(c) requires comparable safeguards for OCC determinations.

The Dodd-Frank Act imposes a number of other limitations and requirements on the OCC when it makes a preemption determination regarding a state consumer financial law, beyond the *Barnett Bank* standard:

- The OCC can extend a preemption determination to more than one state only if the other state's law has "substantively equivalent terms."[45]
- The Comptroller cannot extend a preemption determination to more than one state's law without "first consult[ing] with the Bureau of Consumer Financial Protection and tak[ing] the views of the Bureau into account when making the determination."[46]
- The Comptroller cannot delegate preemption determinations to another officer or employee.[47]
- Each OCC preemption determination must be reviewed every five years,[48] and

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[44] 12 U.S.C. § 25b(c) (emphasis added).

[45] 12 U.S.C. § 25b(b)(A).

[46] 12 U.S.C. § 25b(b)(3)(B).

[47] 12 U.S.C. § 25b(b)(6).

[48] 12 U.S.C. § 25b(d).

- All OCC preemption determinations must be published quarterly.[49]

5.4 The "substantial evidence" standard mandates a factual basis for the agency's conclusion.

While the statute does not elaborate on the "substantial evidence" requirement and there is no case law on the standard as applied to the OCC, the same standard is widely used in other legislation, such as in the Social Security Act, 42 U.S.C. § 405(g), the National Labor Relations Act, 29 U.S.C. § 160(e), and the Administrative Procedures Act, 5 U.S.C. § 706(2)(E). "The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency factfinding."[50] It is reasonable to assume that Congress intended to invoke the same standard as used elsewhere.[51]

"Substantial evidence" has been described as "evidence that is enough to justify, if [a] trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury"[52] and "such relevant evidence as reasonable minds might accept as adequate to accept a conclusion."[53] According to the Supreme Court, the substantial evidence standard requires a court to determine whether the administrative record contains sufficient evidence to support the agency's factual determinations.[54] "Evidence is not substantial . . . if it constitutes mere conclusion."[55]

The OCC has not come close to meeting this burden of proof.

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[49] 12 U.S.C. § 25b(e).

[50] Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019) (internal quotation marks omitted).

[51] T-Mobile S., LLC v. City of Roswell, Ga., 135 S. Ct. 808, 815 (2015) (discussing meaning of "substantial evidence" in context of Telecommunications Act of 1996 and holding "There is no reason discernible from the text of the Act to think that Congress meant to use the phrase in a different way.") citing FAA v. Cooper, 566 U.S. 284, 292, 132 S.Ct. 1441, 1449, 182 L.Ed.2d 497 (2012) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken") (internal quotation marks omitted).

[52] Pomona Valley Hospital Medical Center v. Becerra, 82 F.4th 1252, 463 (D.C. Cir. 2023); Kay v. F.C.C., 396 F.3d 1184 (D.C. Cir. 2005).

[53] Jones v. Priebe, 489 F.2d 709 (6th Cir. 1973).

[54] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938).

[55] Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1581 (10th Cir. 1994) ("Evidence is not substantial if it is overwhelmed by other evidence . . . or if it constitutes mere conclusion").

As the Supreme Court has made clear, "It is an axiom of administrative law that an agency's explanation of the basis for its decision must include "a 'rational connection between the facts found and the choice made.' "[56]

Recitation of general principles, such as the benefits of flexibility, or speculation without evidence cannot meet the substantial evidence standard. By requiring "substantial evidence, made on the record of the proceeding" supporting the "specific finding," Congress prohibited OCC preemption determinations that merely rely on general principles or speculation. There must be actual evidence supporting a specific finding about significant interference with a bank's exercise of its powers.

6. The OCC has failed to present substantial evidence that interest-on-escrow laws prevent or significantly interfere with bank powers.

6.1 There is no supporting evidence on the record.

In this proceeding, the OCC has not presented even a scintilla of factual evidence to support its conclusion that the laws at issue prevent or significantly interfere with bank powers. The two Federal Register notices describe the purpose of mortgage escrow accounts, and one cites ten-year-old data estimating the percentage of mortgages with escrow accounts.[57] But the two notices provide nothing more than speculation about how interest-on-escrow laws might actually burden banks.

The rulemaking notice and preemption determination each mention the same hypothetical risk that paying interest could make escrow accounts unprofitable,[58] and the preemption determination refers to an unquantified "nature and degree of interference." Yet, the OCC presents no data or real-life examples that could show whether interest-on-escrow laws will have more than a negligible impact on banks. The OCC discusses neither the costs of handling escrow accounts nor the costs of paying interest. The notices are merely an assertion of political policy and are, therefore, invalid.

The OCC cannot make a rational determination about the impact of such laws without detailed facts regarding the subject matter. Information on at least the

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[56] Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962)).

[57] 90 Fed. Reg. at 61,100.

[58] *Id.*; 90 Fed. Reg. at 61,097.

following topics is necessary to support the proposed preemption determination:

- In practice, who bears the actual cost of paying interest on escrowed funds? Do contracts between the loan servicer, the owner of the loan, and the institution where the funds are deposited allocate this expense to someone other than the bank?

- How often do banks hold escrow accounts for loans that they did not originate and neither own nor service?

- How often do banks hold escrow accounts for loans that they originated but no longer own or service?

- How many mortgages nationally and in affected states have escrow accounts that would be subject to these state laws? State interest-on-escrow laws vary and some have significant exclusions, so it is not even clear how many institutions regulated by the OCC are subject to them.

- What is the median balance in affected escrow accounts and how does that vary over the course of a year?

- How much does it cost to administer an escrow account?

- How do banks generate float income from escrow accounts and how much? Does the float income that banks gain from escrow accounts exceed the costs of administering the account, and, if so, by how much?

- What are the interest rates mandated by state interest-on-escrow laws?

- Do any banks voluntarily pay interest in states where it is not required? And how have they been affected?

- How many banks currently obey interest-on-escrow laws and what has been their experience?

- Have any banks in affected states stopped offering escrow accounts or changed mortgage lending practices as a result of interest-on-escrow laws?

- How many mortgage loans made by banks are subject to 15 U.S.C. § 1639d, which requires banks to follow state interest-on-escrow laws?

- What effect do state interest-on-escrow laws have on the mortgage markets in the states where they are in effect?

The OCC cannot argue that this data is unavailable or too difficult to collect. In its capacity as the nation's primary bank regulator, it has routine access to bank financial records and regularly examines bank lending, investing, and account management activities.

The OCC should also seek information about the experience of mortgage lenders that *are* required to comply with state interest-on-escrow laws, such as non-bank lenders. Is there any evidence that state interest-on-escrow laws affect competition or interest rates on residential mortgages? If non-banks can comply with interest-on-escrow laws, what is different about banks that makes it necessary to preempt such laws?

The OCC's failure to develop any factual record in this docket must be contrasted with the thorough investigation it conducted on the same subject in 1973, in response to a Congressional request. At that time, the OCC produced a 40-page report on the "Feasibility of Escrow Accounts On Residential Mortgages Becoming Interest Bearing."[59] In preparation for the study, the Government Accounting Office surveyed 971 banks on the profitability and other aspects of maintaining escrow accounts. The report provided extensive information on many of the questions raised above. However, that report is not only more than 50 years old, it was also conducted in a completely different regulatory context, before interest rates (both charged and paid) were deregulated and before a significant nonbank mortgage market emerged, not to mention enormous efficiencies from electronic banking. While that report is too old and inapplicable to be relevant today, it shows that the OCC could obtain the evidence needed to properly evaluate its proposals—if it wanted to.

6.2 Interest-on-escrow laws have an *insignificant* impact on bank powers.

The limited information available suggests that any interference with bank powers is *insignificant* and falls short of the *Barnett Bank* standard for preemption. Banks already routinely pay interest on savings accounts, some checking accounts, and other funds that they hold for consumers. So they would not be required to create any new infrastructure to comply with the state laws at issue. In 1975, Fannie Mae unsuccessfully challenged the same New York law at issue here under the Supremacy Clause.[60] While preemption was not mentioned, the court rejected Fannie Mae's argument that the law was burdensome.

[59] OCC, Feasibility of Escrow Accounts On Residential Mortgages Becoming Interest Bearing (June 21, 1973).

[60] Federal Nat. Mortg. Ass'n v. Lefkowitz, 390 F.Supp. 1364 (S.D.N.Y., 1975)

It is important to note on the record of this proceeding, as required by 12 U.S.C. § 25b(c), that some banks regulated by the OCC do, in fact, comply with the disputed laws and have shown none of the ill effects that the OCC predicts. For example, we have been informed by borrowers who have taken out mortgages that Webster Bank, N.A; Wells Fargo Bank, N.A.; Citizens Bank, N.A.; and Camden National Bank all pay interest on escrow accounts. And, as of the date of these comments, all of them continue to offer new residential mortgage loans.

In addition, according to the OCC, the Office of Information and Regulatory Affairs (OIRA) "has determined that this proposed rule is not a significant regulatory action under section 3(f)(1) of Executive Order 12866 . . . "[61] meaning it is unlikely to have an annual effect on the economy of at least $100 million. While the tests for "significant regulatory action" and "significant interference" are different, OIRA's finding is one more indication that requiring banks to pay interest on escrow accounts will only have a small impact.

Similarly, if being required to pay interest would significantly interfere with mortgage lending, as the OCC asserts, why would the OCC still give banks the discretion to voluntarily pay interest,[62] rather than prohibiting such an allegedly dangerous practice?

The difficulty we have experienced in determining how many banks pay interest on escrow and the impact on those banks further illustrates the importance of the OCC building a factual record before attempting to make a preemption determination.

Contrary to the OCC's unsupported speculation, the cost of handling an escrow account is just like any other servicing expense, and likely a minor one at that. Banks that pay interest will simply factor it into the pricing of mortgages and mortgage servicing rights. That is, even if paying interest were a significant expense, it would still not significantly interfere with power to make real estate loans because that expense could be recouped through the pricing of bank services.

[61] 90 Fed. Reg. at 61,109, 61,104. We note, however, that as of January 28, 2026, OIRA's website has no record that this proposed rule has been submitted for review.

[62] 90 Fed. Reg. at 61,100.

6.3 The proposed rule amounts to field preemption, contrary to the Dodd-Frank Act.

Congress and the Supreme Court have clearly stated that neither the National Bank Act nor the Home Owners' Loan Act occupies the field in any area of state law. The Dodd-Frank Act states: "Title 62 of the Revised Statutes does not occupy the field in any area of State law."[63]

The Dodd-Frank Act added a nearly identical provision to the Home Owners' Loan Act: "Notwithstanding the authorities granted under sections 1463 and 1464 of this title, this chapter does not occupy the field in any area of State law.[64]"

As the Supreme Court has noted, these provisions mean that "Dodd-Frank ruled out field preemption."[65] The Dodd-Frank Act's prohibition of OCC preemption determinations without substantial evidence, made on the record of the proceeding, supporting the *specific* finding[66] underscores the prohibition against field preemption. The requirement that there be a specific finding about the state law in question means that an OCC preemption determination cannot purport to preempt all state laws on a subject.

Yet that is exactly what OCC proposes to do. Its proposed Escrow Account Rule, on which it bases its preemption determination, is sweeping:

> The terms and conditions of any such escrow account, including the investment of escrowed funds, fees assessed for the provision of such accounts, or whether and to what extent interest or other compensation is calculated and paid to customers whose funds are placed in the escrow account, are business decisions to be made by each national bank in its discretion.[67]

Promulgating a rule that places all terms and conditions of escrow accounts within the discretion of national banks is field preemption in disguise. The Dodd-Frank Act provides that the NBA and HOLA do not occupy the field in *any*

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[63] 12 U.S.C. § 25b(b)(4).

[64] 12 U.S.C. § 25b(b)(4) ("Title 62 of the Revised Statutes does not occupy the field in any area of State law."). *See* Cantero v. Bank of America, 602 U.S. 205, 209, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024) ("Dodd-Frank ruled out field preemption.").

[65] Cantero v. Bank of Am., 602 U.S. 205, 144 S. Ct. 1290, 1297, 218 L. Ed. 2d 664 (2024).

[66] 12 U.S.C. § 25b(c).

[67] 90 Fed. Reg. at 61,099, 61,105 (proposed amendment to 12 C.F.R. § 34.3).

area of state law. The proposed rule is invalid as an attempt to occupy the field in the area of escrow accounts.

7. 15 U.S.C. § 1639d specifically preserves States' ability to require interest on escrow and regulate the administration of escrow accounts.

The OCC asserts that Congress supports broad preemption of state laws as applied to national banks,[68] and favors giving banks discretion to set their own policies, free of any constraints imposed by state law. Yet the OCC ignores § 1639d of the Truth in Lending Act—a section added by the Dodd-Frank Act—in which Congress spoke to the specific question at hand, the applicability of state interest-on-escrow laws to banks.

Section 1639d(b) provides that a lender is not required to set up an escrow account for a loan secured by a first mortgage on a consumer's principal dwelling except in certain circumstances. The first of these is where "such impound, trust, or other type of escrow or impound account for such purposes is required by Federal *or State law*."[69] If Congress intended to give banks the degree of flexibility over escrow accounts that the OCC describes, Congress would not have given states the right to force banks to set up escrow accounts. The OCC's position is inconsistent with this provision.

Sections 1639d(g)(2) and (3) are even more specific, and make it even clearer that state interest-on-escrow laws are not preempted. In § 1639d(g)(2), Congress provides that the escrow accounts governed by § 1639d "shall be administered in accordance with" RESPA, the Flood Disaster Protection Act, and *"the law of the State,* if applicable, where the real property securing the consumer credit transaction is located."[70] The OCC's two proposals would make § 1639d's reference to State law meaningless. The OCC is, essentially, asserting field preemption in the field of escrow account administration. But § 1639(g)(2)(C) refutes that assertion by expressly stating that State law applies.

Subparagraph (g)(3) is even more relevant. It directs creditors to pay interest on escrow accounts where prescribed by State law and in the manner prescribed by State law:

> (3) Applicability of payment of interest

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[68] *See, e.g.,* 90 Fed. Reg. at 61,101

[69] 15 U.S.C. § 1639d(b)(1).

[70] Emphasis added.

> If prescribed by applicable *State* or Federal law, each creditor *shall pay interest* to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable *State* or Federal law.[71]

According to the legislative history for this section "Servicers must administer [escrow] accounts in accordance with the Real Estate Settlement Procedures Act (RESPA), FDPA [the Flood Disaster Protection Act], and, if applicable, the law of the State where the real property securing the transaction is located, *including making interest payments on the escrow account if required under such laws*."[72]

By enacting this provision Congress expressly recognized that States retain the power to require the payment of interest on escrow accounts. This is directly contrary to the OCC's argument that the NBA and HOLA preempt such laws.

The Federal Register notices say nothing about § 1639d. The only reference to it is a footnote that undermines the OCC's own argument. The OCC asserts that "Congress has largely refrained from interfering with the flexibility of banks in setting the terms and conditions of how escrowed funds are handled by the bank." But a footnote to that sentence states "Congress has left these business decisions to a bank's discretion except in specific limited circumstances" and cites 15 U.S.C. 1639d as an example.[73]

Section 1639d applies to a tremendous number of mortgages, including all mortgage loans guaranteed or insured by a state or federal governmental lending or insuring agency.[74] It applies to national banks and federal savings associations the same as it applies to other mortgage lenders. Congress could have exempted national banks and federal savings associations from § 1639d's requirements regarding state interest-on-escrow laws, but it has not done so. The OCC's proposal is an unlawful attempt to nullify § 1639d.

Congress's mandate that banks follow state interest-on-escrow account laws also makes crystal clear that doing so does not significantly interfere with banks'

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[71] 15 U.S.C. § 1639d(g)(3) (emphasis added).

[72] H.R. Rep. 111-94, 91 (emph. added).

[73] 90 Fed. Reg. at 61,102.

[74] At least 29% of mortgages securitized by Ginnie Mae in Q1 2025 were VA and FHA loans. Ginnie Mae, Global Markets Analysis Report at 17 (July 2025). And that is just a portion of covered loans. The exact number of bank mortgages subject to § 1639d is not readily available to the public, which further illustrates how the record of this proceeding is insufficient to make a preemption determination.

powers. Congress would not have explicitly required the payment of interest if it would have had such a dramatic impact on real estate lending.

8. The OCC's comparison to other preemption cases is flawed.

The OCC attempts to comply with the requirements of *Barnett Bank* by citing Supreme Court cases that it believes justify preemption in this situation. But those cases are distinguishable in significant ways. None of them addressed a law like § 1639d, that specifically recognizes State power to regulate escrow accounts. And all of them addressed direct and narrowly defined conflicts. Here, the OCC is trying to generate a false conflict by creating a "flexibility" power not granted by Congress and much broader than permitted by 12 U.S.C. § 25b.

The OCC also cites a district court decision saying "the level of interference that gives rise to preemption under the National Bank Act is not very high."[75] However, that district court decision relies on cases that pre-date the Dodd-Frank Act and contradict the Supreme Court's directive to preempt only in the case of "significant" interference after a "nuanced comparative analysis" and "a practical assessment of the nature and degree of the interference caused by the state law."[76] The Dodd-Frank Act's specification that State consumer financial laws are preempted "only if" certain conditions are met, and its many other restrictions on preemption, make it clear that statements in these older decisions are no longer good law (if they ever were).

Below we discuss two cases the OCC particularly emphasizes in its proposals.

8.1 *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*[77]

The OCC appears to be modeling its effort here on the facts of *Fidelity*. There, the regulator at issue, the Federal Home Loan Bank Board, was concerned "about the increasing controversy as to the authority of a federal savings and loan association to exercise a 'due-on-sale' clause" in the face of State laws

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[75] 90 Fed. Reg. 61,097 n.57.

[76] Cantero v. Bank of Am., 602 U.S. 205, 220-221, 144 S. Ct. 1290, 218 L. Ed. 2d 664 (2024). *See also* McClellan v. Chipman, 164 U.S. 347, 356-357, 17 S. Ct. 85, 41 L. Ed. 461 (1896) (characterizing preemption as an exception to the general rule that national banks are subject to state laws, a position that would be inconsistent with a presumption that state laws are preempted); Conti v. Citizens Bank, ___ F.4th ___, 2025 WL 2693215, at *9 (1st Cir. Sept. 22, 2025) (finding there to be a presumption in favor of preemption would be contrary to Dodd-Frank Act).

[77] 458 U.S. 141

restricting the ability to do so.[78] In response, the Board issued a regulation saying a bank could exercise such clauses "at its option" and without regard to conflicting State law.[79] The Supreme Court ultimately upheld the regulation. Like the due-on-sale controversy, there now exists a controversy over State authority to regulate escrow accounts. In response, the OCC has issued a regulation declaring that banks have unlimited discretion to set the terms and conditions of such accounts, without regard to State law. The preemption determination is based on that new regulation.

The OCC interprets *Fidelity* as allowing it to preempt State laws in order to preserve a bank's "flexibility."[80] But to the contrary, the Federal Home Loan Bank Board adopted the regulation after finding that the inability to exercise due on sale clauses would have several serious impacts on federal savings associations' ability to make real estate loans: It would endanger the associations' financial security and stability if transferees did not have the ability to repay the loan or maintain the property; cause a substantial reduction in cash flow and net income; and restrict and impair the ability to sell loans on the secondary market, reducing funds for new loans.[81] Moreover, the regulation at issue and the Supreme Court's decision were made in the context of the high inflation of the 1970s and early 1980s, when banks were holding low-rate mortgages but being forced to pay high interest rate on the deposits used to fund new mortgages, making the concerns about the impact on real estate lending all the more acute. The inability to exercise a due-on-sale clause directly restricts the access to capital needed to originate a new mortgage.

In contrast, here, there is no evidence that requiring interest payments will significantly interfere with the origination of mortgages. And by enacting 15 U.S.C. § 1639d(g)(2) and (3), Congress has expressly shown that it intends to let States require interest on escrow.

The Federal Home Loan Bank Board was also acting, among other reasons, to preserve the "financial security and stability" of thrifts by protecting them from what it considered to be equivalent to extending credit without any underwriting to the buyer that assumed the mortgage.[82] Preserving the security and stability of

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78 Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3018 (1982).

79 *Id.* at 3019.

80 90 Fed. Reg. at 61,095.

81 458 U.S. at 145-46.

82 41 Fed. Reg. 6283, 6285 (Feb. 12, 1976).

a financial institution goes more directly to preservation of its statutory powers than the OCC's desire to preserve "flexibility."

The preemption doctrine requires consideration of Congressional intent.[83] The *Fidelity* opinion stressed that "the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law."[84] By contrast, the statutory language in 15 U.S.C. § 1639d(g) shows that Congress expressly contemplated, and preemptively *disapproved*, the OCC's ability to promulgate regulations superseding State interest-on-escrow laws.

8.2 *Franklin National Bank v. People*[85]

In *Franklin*, a New York law prohibited any bank except state-chartered ones from using the word "savings" in its advertising or similar activities. A federally chartered bank used the term and the State sued. The Supreme Court found the State law preempted because federal law granted national banks the power to accept savings deposits and advertise this power. The OCC argues the decision supports making a "holistic assessment" of how a State law may affect bank powers and urges "the view that national banks must be permitted to efficiently and effectively exercise the full range of powers granted to them by Congress." This is part of the OCC's theory that any State law that interferes with a bank's "flexibility" is preempted.

But in *Franklin*, the State law was preempted because the ability to advertise was central to a bank's ability to exercise its statutory power to accept savings deposits: "It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it."[86] The decision was thus about a significant interference with the bank's statutory power, not about any state impact on a bank's flexibility.

Moreover, the OCC ignores a critical sentence that distinguishes *Franklin*. In announcing its decision, the Court said "We find no indication that Congress intended to make this [aspect] of national banking subject to local restrictions, as it has done by express language in several other instances." By doing so, the Court recognized the importance of reference to existing federal law. Since

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[83] Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3022 (1982).

[84] *Id.*, 102 S. Ct. at 3027 (1982).

[85] Franklin Nat. Bank of Franklin Square v. People, 347 U.S. 373, 98 L.Ed. 767, 74 S. Ct. 550 (1954)

[86] *Id.*, , 74 S.Ct. 550, 553.

2010, 15 U.S.C. § 1639d has made the operation of escrow accounts subject to State law. The *Franklin* court also noted that there was no "affirmative indication to justify" the State law.[87] In contrast, § 1639d provides just such an affirmative indication.

Franklin involved a direct conflict and prohibition on the exercise of a specified federal bank power. Here, the OCC has tried to create such a conflict by promulgating a new rule but, as discussed in § 4, "flexibility" is not a core bank power.

8.3 Other cases show that preemption is inappropriate.

The OCC fails to adequately consider other Supreme Court cases that urge a more restricted use of preemption. In *Anderson Nat. Bank v. Lucket,*[88] for example, a Kentucky law required banks to turn over abandoned deposits to the State. The Supreme Court found the law did not "deter" banks from exercising their powers because the law tracked long-standing common law. According to the Court "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an *undue* burden on the performance of banks' functions."[89]

Another case ignored by the OCC is *McClellan v. Chipman.*[90] There, the Court considered a Massachusetts law that prohibited preferential property transfers from an insolvent party. The court held that the law was not preempted. Like the statutes at issue in the current preemption determination, the Massachusetts law limited a national bank's real estate powers, but that was not enough reason for preemption. As the Court observed:

> Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of congress. [91]

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[87] *Id.*, 74 S. Ct. 550, 553.

[88] 321 U.S. 233 (1944)

[89] 321 U.S. 233, 248 (emphasis added).

[90] 17 S.Ct. 85, 164 U.S. 347 (1896)

[91] McClellan v. Chipman, 17 S.Ct. 85, 87–88, 164 U.S. 347, 358 (1896).

The *McClellan* Court held that the law did not "frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States. "[92]

Similarly, In *First Nat'l Bank in St. Louis v. Missouri*, the Court held that a Missouri law prohibiting a bank from establishing branches was not preempted because the law did "not frustrate the purpose for which the bank was created . . . ."[93] And in *National Bank v. Commonwealth*,[94] the Court found that a Kentucky tax on bank shareholders was not preempted because it did not "hinder" the bank's banking operations.

There is no reason to believe that paying interest on a depository account would hinder a bank's operations any more than the laws considered in *Anderson*, *McClellan*, or *First Nat'l Bank*. These cases are also important because the Court emphasized the degree of interference necessary to find preemption. In contrast, under the OCC's interpretation, any State law that merely affects how a bank exercises its discretion should be preempted because it limits the bank's flexibility. Such an overly broad standard would read "prevent or significantly interfere" out of *Barnett Bank* and 12 U.S.C. § 25b.

9. The OCC's proposed preemption rule will put banks at risk.

The OCC's proposed preemption rule may be intended to help banks by allowing them to squeeze out extra revenue from escrow accounts and gain a competitive advantage over non-banks, state banks, and credit unions. However, it is likely to have the opposite effect. It is likely to put banks at risk of litigation and substantial liability.

Under the Dodd-Frank Act, OCC determinations regarding preemption are entitled only to the level of deference set forth in the Supreme Court's decision *Skidmore v. Swift & Co.*[95] The *Skidmore* standards merely require a court to consider "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

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[92] *Id.,* 17 S.Ct. 85, 87, 164 U.S. 347, 357.

[93] First Nat. Bank in St. Louis v. State of Missouri at inf. Barrett, 44 S.Ct. 213, 216, 263 U.S. 640, 659 (1924).

[94] 76 U.S. 353 (1869).

[95] 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

persuasive and relevant to its decision."[96] The Supreme Court's decision in *Cantero* underscores the point that courts can exercise, and will be exercising, their own judgment about whether any particular state law is preempted.

As a result, if the OCC issues the proposed preemption determination, banks will be acting at risk if they act upon it and ignore State interest-on-escrow laws. The banks would gain the competitive advantage of being able to hide some of the cost of a loan, but they would put themselves at significant risk that a court would rule that a particular State law is not preempted.

This is not just a hypothetical risk. *Cantero* vacated a ruling that a State interest-on-escrow law was preempted, and three Circuit decisions have held that these laws are not preempted.[97] The question of the rule's validity could arise either in a direct challenge to the rule or in private litigation brought by borrowers.

If a bank made the mistake of relying on the OCC's determination, it could find itself facing substantial liability. It would be more prudent, and more consistent with the OCC's duties as the regulator of national banks and federal savings associations, for the OCC to minimize these institutions' risks by instructing them to comply with State interest-on-escrow laws.

10. The OCC's proposal will create an uneven playing field and harm consumers.

The current proposal, if adopted, will create an uneven playing field and distort competition. Many segments of the mortgage market will still be required to comply with state interest-on-escrow laws:

- *Non-bank lenders.* The Dodd-Frank Act makes it clear that, even if a State law is validly preempted for a national bank or a federal savings association, the State law continues to apply to non-bank lenders. Non-bank mortgage lenders now originate 53.3% of all home loans.[98]

- *State banks.* While banks originate 30.1% of all home loans,[99] only some of these banks are national banks and federal savings associations to which the OCC's proposed rule would apply. Of the approximately $25 trillion in

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[96] 12 U.S.C. § 26b(5)(A).

[97] Conti v. Citizens Bank, 157 F.4th 10 (1st Cir. 2025); Kivett v. Flagstar Bank, 154 F.4th 640 (9th Cir. 2025); Lusnak v. Bank of Am., 883 F.3d 1185, 1193 (9th Cir. 2018).

[98] NCRC 2025 NCRC Mortgage Market Series, available at https://ncrc.org/mortgage-market-report-series-part-1-introduction-to-mortgage-market-trends/ (last viewed Jan. 28, 2026).

[99] *Id.*

assets held by all FDIC-insured institutions, approximately one-third—$8 trillion—is held by state-chartered institutions.[100] State-chartered banks are therefore likely to make up a substantial percentage—about one-third—of the total mortgage lending by banks. OCC's proposed rule, if adopted, would not apply to state-chartered banks, leaving them subject to state interest-on-escrow laws, except when an out-of-state state bank is lending through a bank branch in a state that has an interest-on-escrow law.[101]

- *Federal credit unions*. Federal and state credit unions have a 16.6% share of the mortgage lending market.[102] While a National Credit Union Administration (NCUA) regulation[103] preempts certain state lending laws as applied to federal credit unions, it does not preempt or even mention state escrow laws. Moreover, a NCUA regulation that mandates escrow of flood insurance premiums for homes in designated flood hazard zones defers to state law if state law requires a broader universe of credit unions to escrow flood insurance.[104]

- *State credit unions*. State credit unions will be entirely unaffected by any OCC rule that purports to preempt state interest-on-escrow laws. State credit unions are bound by interest-on-escrow laws in the states where they lend.

Thus, OCC's rule, if adopted, will apply to well less than half of the mortgage market: perhaps between 20% and 30%.

In the Dodd-Frank Act, Congress acted to support consumer protection by protecting State consumer financial laws that do not significantly interfere with banks. But the result of this regulation would be inconsistent treatment of escrow across the mortgage market and creation of an uneven playing field that will harm consumers and fair competition. It will unfairly advantage national banks and federal savings associations, which will be able to offer interest rates that may appear to be lower than those offered by other mortgage lenders, but

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[100] Federal Deposit Ins. Corp., FDIC State Tables (last updated Nov. 24, 2025), available at https://state-tables.fdic.gov/ (showing $25,113,208,000,000 in assets for all FDIC-insured institutions and $8,381,304,000,000 for state-chartered FDIC-insured institutions).

[101] Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 1831a(j)(1).

[102] NCRC 2025 NCRC Mortgage Market Series, *supra*.

[103] 12 C.F.R. § 701.21.

[104] 12 C.F.R. § 760.5.

have a hidden charge in the form of retention of all the interest earned on the borrower's escrow account. National banks and federal savings associations will not have to price the cost of interest on escrow accounts into their overhead, but other lenders will.

The result will be less transparency for consumers, because part of the cost of a loan from a national bank or federal savings association will be hidden in the way the escrow account is treated. It will undermine consumers' ability to make an apples-to-apples comparison of mortgage interest rates offered by different types of lenders.

Requiring interest to be paid on escrow accounts also protects consumers by countering the servicer's desire to hold more money in an escrow account than necessary, something Congress tried to address in the Real Estate Settlement Procedures Act.[105] Unless the servicer pays interest on the escrow account, the funds in the account are essentially an involuntary, interest-free loan to the servicer until they are disbursed.

The rule could also lead to inconsistencies in treatment of escrow for an individual loan. Mortgage loans are commonly transferred from one financial institution to another. If a non-bank lender originates a mortgage in a State that requires payment of interest on escrow, will interest on escrow no longer be required if the loan is sold to a national bank? Unless the non-bank lender embeds the interest requirement in the loan contract, a bank that purchases the loan may claim that it need not pay interest. Consumers have no control over who their loan servicer is or to what entity a loan is sold. Allowing consumer expectations to be undermined in this way would bring an additional element of unfairness to the mortgage market. In effect, that would change the terms of the mortgage as the loan or servicing is transferred.

11. Conclusion

Thank you for the opportunity to comment on these proposals.[106]

[105] *See* 12 U.S.C. § 2609.

[106] For questions about these comments, please contact NCLC Senior Attorney Andrew Pizor (APizor@nclc.org).