Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #1132
May 2011

May 12, 2011

The Honorable Thomas R. Carper
United States Senate
Washington, D.C. 20510

Dear Senator Carper:

I am writing in response to the letter of April 4, 2011, from you and Senator Mark Warner regarding the preemption provisions that were added to the National Bank Act by Subtitle D of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). You and Senator Warner express particular interest in the matter because you authored the amendment containing the provisions that was adopted by the full Senate. It was this version, with slight modifications, that was adopted by the Conference Committee and enacted into law.

Your letter states that the House-passed version of the Dodd-Frank Act did not clearly incorporate the preemption principles of the Supreme Court's decision in the Barnett Bank v. Nelson[1] case (Barnett), and would have created an uncertain legal environment in which it would not be clear which state laws applied to national banks. In order to address this problem and provide legal certainty for all parties, you describe your objective in including a direct reference to the Barnett case in the legislation to ensure that the preemption principles in the Barnett case were preserved. In the interest of providing more certainty on these issues, you ask the Office of the Comptroller of the Currency (OCC) to clarify how the OCC would interpret particular aspects of the preemption provisions of the Dodd-Frank Act. I am pleased to have the opportunity to provide our interpretation of those provisions and describe the related changes we plan to propose to our regulations.

Preemption

The Dodd-Frank Act contains several provisions that affect the scope of national bank preemption, effective as of the "transfer date" (July 21, 2011). The Act eliminates preemption of state law for national bank subsidiaries, agents and affiliates.[2] We therefore plan to propose rescission of 12 C.F.R. § 7.4006, which is the OCC's regulation concerning the application of state laws to national bank operating subsidiaries.

[1] Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et. al., 517 U.S. 25 (1996).

[2] Dodd-Frank Act §§ 1044(a), 1045, 124 Stat. 1376, 2016, 2017 (July 21, 2010).

The Act also changes the preemption standards under the Home Owners' Loan Act to conform to those applicable to national banks.[3] We therefore plan to propose amendments to our regulations to make clear that federal savings associations and their subsidiaries are subject to the same preemption standards as apply to national banks and their subsidiaries, respectively.

Section 1044 of the Dodd-Frank Act contains several provisions addressing preemption of "state consumer financial laws."[4] The Act provides for three ways in which "state consumer financial laws" are preempted; namely, only if: (1) application of such a law would have a "discriminatory effect" on national banks compared with state-chartered banks in that state;[5] (2) "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the state consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers" (Barnett standard preemption); or (3) the state consumer financial law is preempted by a provision of federal law other than Title LXII of the Revised Statutes.[6]

Your letter specifically refers to the Barnett standard preemption provision. The language of this provision in the final legislation differs substantially from earlier versions of the legislation, and you explain in your letter that this change was intended to provide consistency and legal certainty by preserving the preemption principles of the Supreme Court's Barnett decision.[7]

The instruction in this provision that preemption must be "in accordance with the legal standard for preemption in the decision of the Supreme Court" in Barnett is, in our view, a directive to apply the conflict preemption standard articulated in the Barnett decision.[8] The provision incorporates the "prevent or significantly interfere" conflict preemption formulation as the touchstone or starting point in the analysis, but since the analysis of those terms must be "in accordance with the legal standard for preemption" in the decision, the analysis may not stop there, and must consider the whole of the conflict preemption analysis in the Supreme Court's decision.[9] Just yesterday, in a decision handed down by the 11th Circuit Court of Appeals, the Court of Appeals cited other formulations of conflict preemption used in the Barnett decision for

[3] Dodd-Frank Act § 1046, 124 Stat. at 2017.

[4] The Dodd-Frank Act defines the term "state consumer financial law" to mean a state law that (1) does not directly or indirectly discriminate against national banks and that (2) directly and specifically (3) regulates the manner, content, or terms and conditions of (4) any financial transaction or related account (5) with respect to a consumer. Dodd-Frank Act § 1044(a), 124 Stat. at 2014-2015. The Dodd-Frank Act does not address the application of state law that is not a "state consumer financial law" to national banks.

[5] Dodd-Frank Act § 1044(a), 124 Stat. at 2015. This is a new basis for concluding that a state consumer financial law is preempted.

[6] Dodd-Frank Act § 1044(a), 124 Stat. at 2015.

[7] See 156 Cong. Rec. S5870-02, 2010 WL 2788025 (July 15, 2010)(colloquy between Senator Carper and Chairman Dodd). See also 156 Cong. Rec. S5889 (July 15, 2010) (statement by Senator Tim Johnson).

[8] Barnett, 517 U.S. at 31-32.

[9] The Barnett decision describes in detail the analysis under the Barnett conflict preemption standard. Barnett, 517 U.S. at 33-34.

the conclusion that under the Dodd-Frank Act, the proper preemption test is conflict preemption.[10]

This result is supported by precedent and other portions of Section 1044 of the Dodd-Frank Act. The Barnett standard preemption provision uses language virtually identical to that used in section 104(d)(2)(A) of the Gramm-Leach-Bliley Act of 1999 (GLBA).[11] The leading case applying that standard similarly treated the phrase "prevents or significantly interferes" as a reference to the whole of the Court's Barnett preemption analysis and referred to the GLBA statutory language as "the traditional Barnett Bank standards."[12] Other portions of Section 1044 similarly convey that the Barnett standard preemption provision refers to the legal standard for conflict preemption contained in the whole of the Court's decision.[13]

Inclusion of the "prevent or significantly interfere" conflict preemption formulation also may have been intended to eliminate uncertainty that had arisen from the OCC's effort to distill principles from Barnett and cases cited in Barnett into an abbreviated regulatory standard for preemption of "obstruct, impair or condition." Elimination of this language from our regulations would remove any ambiguity that the "conflict preemption" principles of the Supreme Court's Barnett decision are the governing standard for national bank preemption. Accordingly, to accomplish this clarification, we plan to propose to remove the "obstruct, impair or condition" formulation from our rules.

Thus, under the Barnett preemption provision, precedents that are consistent with the principles of the Barnett conflict preemption analysis are preserved.[14] These include judicial decisions,

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[10] Baptista v. JPMorgan Chase, N.A., No. 10-13105 (11th Cir. May 11, 2011) (to be published), ("Thus 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.")

[11] See 15 U.S.C. 6701(d)(2)(A).

[12] Association of Banks in Insurance Inc. v. Duryee, 270 F.3d 397, at 405, 408 (6th Cir. 2001).

[13] The related requirement that the OCC must have "substantial evidence" on the record to support adoption of preemption rules or orders under this standard refers to the legal standard of the Barnett decision, not to any single phrase used in that decision, and thus incorporates the entirety of Barnett's preemption analysis upon which the decision was founded. See Dodd-Frank Act § 1044(a), 124 Stat. at 2016 (providing that regulations and orders promulgated under Barnett standard preemption do not affect the application of a state consumer financial law to a national bank unless substantial evidence made on the record of the proceeding supports the specific finding of preemption "in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996).") It would not make sense for this "substantial evidence" requirement to be requiring compliance with a different preemption standard than the standard intended by the Barnett standard preemption provision.

[14] Earlier versions of the legislation would have had a retroactive impact by creating various new standards for preemption under the National Bank Act, invalidating an extensive body of national bank judicial, interpretive and regulatory preemption precedent. See H.R. 4103, 111th Cong. § 4404 (as passed by the House of Representatives Dec. 11, 2009). The final version of the Dodd-Frank Act legislation did not adopt this approach. Section 1043 of the Act, which dated from those early versions of the legislation, was not changed to reflect the final version of the legislation, but remains relevant in connection with changes in the treatment of preemption for national bank subsidiaries, and federal savings associations and their subsidiaries.

interpretations, and the OCC's rules, where preemption was premised on Barnett-based principles of conflict preemption.[15]

Your letter notes that your amendment contained a provision requiring the Comptroller to act on a case-by-case basis in making future preemption determinations. You state that, consistent with your objective of providing legal certainty to all parties, this provision was not intended to repeal OCC preemption regulations adopted in 2004.

The OCC recognizes that going forward, after the transfer date, the Dodd-Frank Act imposes new procedures and consultation requirements with respect to how we may reach future preemption determinations, including the case-by-case requirement noted above, and clarifies the criteria for judicial review of these determinations. Specifically, the Act requires that the OCC make preemption determinations with regard to state consumer financial laws under the Barnett standard by regulation or order on a "case-by-case basis" in accordance with applicable law.[16] The Act defines "case-by-case basis" as a determination by the Comptroller on 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.[17]

When making a determination that a state consumer financial law has substantively equivalent terms as the law the OCC is preempting, the OCC must first consult with and take into account the views of the Consumer Financial Protection Bureau (CFPB) in making that determination. This consultation process synchronizes with the role and authorities granted to the CFPB under the Dodd-Frank Act. It can inform the CFPB's exercise of its authority to enhance federal consumer protection rules, and that rulemaking process, in turn, includes consultation with appropriate prudential regulators.[18]

The Dodd-Frank Act also requires there to be substantial evidence, made on the record of the proceeding, to support an OCC order or regulation that declares inapplicable a state consumer financial law under the Barnett standard. Finally, the 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.[19]

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[15] 12 C.F.R. §§ 7.4007, 7.4008, 34.4; see, 69 Fed. Reg. 1904, 1907, 1908, 1910, 1911 (Jan. 13, 2004). These rules also cover categories of state laws that would not be defined as "consumer financial laws" subject to the Barnett standard preemption provision.

[16] Dodd-Frank Act § 1044(a), 124 Stat. at 2015.

[17] This language was designed "to permit the OCC to make a single determination concerning multiple states' consumer financial laws, so long as the law contains substantively equivalent terms." See S. Rep. 11-176, at 176 (April 30, 2010). The Act contains no statement that Congress intended to retroactively apply these procedural requirements to overturn existing precedent and regulations, and that interpretation would be contrary to the presumption against retroactive legislation. See e.g., Landgraf v. USI Film Products, 511 U.S., 272-73 (1994).

[18] Dodd-Frank Act § 1022(b), 124 Stat. at 1981.

[19] Dodd-Frank Act § 1044(a), 124 Stat. at 2016.

Visitorial Powers

Your letter also notes that other features of the Dodd-Frank Act address the authority of state attorneys general to enforce applicable federal and state laws. The National Bank Act, at 12 U.S.C. 484, vests in the OCC exclusive visitorial powers with respect to national banks, subject to certain express exceptions.[20] On June 29, 2009, the Supreme Court issued its opinion in Cuomo v. Clearing House Association, L.L.C.[21] The Court held that when a state attorney general files a lawsuit to enforce a state law against a national bank, "[s]uch a lawsuit is not an exercise of 'visitorial powers' and thus the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions' in state courts."[22] Conversely, the decision recognized the "regime of exclusive administrative oversight by the Comptroller"[23] applicable to national banks. Accordingly, under Cuomo, a state attorney general may bring an action against a national bank in a court of appropriate jurisdiction to enforce non-preempted state laws, but is restricted in conducting non-judicial investigations or oversight of a national bank.

The Dodd-Frank Act codifies the Supreme Court's decision in Cuomo regarding enforcement of state law against national banks by providing that no provision or other limits restricting the visitorial powers to which a national bank is subject shall be construed to limit or restrict the authority of any state attorney general to "bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law."[24] Accordingly, we plan to propose to revise § 7.4000, to provide that an action by a state attorney general (or other chief law enforcement officer) in a court of appropriate jurisdiction to enforce a non-preempted state law against a national bank and seek relief as authorized thereunder is not an exercise of visitorial powers under 12 U.S.C. 484.

[20] The statute provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."

[21] 129 S. Ct. 2710 (June 29, 2009).

[22] Id. at 2721.

[23] Id. at 2718.

[24] Dodd-Frank Act § 1047(a), 124 Stat. 2018 (to be codified at 12 U.S.C. 25b). The Act also amends HOLA to apply the same visitorial standard that applies to national banks to federal savings associations and their subsidiaries. Dodd-Frank Act § 1047(b), 124 Stat. 2018 (to be codified at 12 U.S.C. 1465). We plan to add a new section to our regulations to make this clear. The Act also contains provisions pertaining to the ability of state attorneys general to enforce certain new regulations promulgated by the CFPB. Dodd-Frank Act § 1042(a)(2)(B), 124 Stat. 2013 (to be codified at 12 U.S.C. 5552. This new authority under federal law does not require a change to 12 C.F.R. § 7.4000.

I hope the foregoing is useful to you regarding the OCC's interpretation and implementation of these provisions of the Dodd-Frank Act. Please do not hesitate to contact me, or John Hardage, Director for Congressional Liaison, at (202) 874-1881, if we can provide further information.

Sincerely,

signed

John Walsh
Acting Comptroller of the Currency