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OCC issues first interpretation of Dodd-Frank preemption provisions, but questions remain

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After press time, on May 25, 2011, the OCC issued a Proposed Rule to implement provisions of the Dodd-Frank Act, including the Act's National Bank Act preemption provisions. Although the Proposed Rule generally aligns with the OCC's May 12, 2011, preemption letter to Senator Carper (discussed below), this article does not address the Proposed Rule.

As the July 21, 2011, effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act's National Bank Act preemption provisions approaches, questions remain regarding the future of preemption for national banks and federal thrifts. On May 12, Acting Comptroller John Walsh responded to a request from Senators Thomas R. Carper, D-Del., and Mark Warner, D-Va. — the principal authors of the NBA preemption provisions in the Senate version of the legislation that became Dodd-Frank — that the Office of the Comptroller of the Currency clarify its interpretation of such provisions by delivering a letter to Senator Carper regarding the OCC's interpretation of Dodd-Frank's NBA preemption provisions (the "OCC preemption letter"). As a letter to lawmakers without the formalities and process involved in an Interpretive Letter, Order, or rulemaking, the OCC preemption letter is a relatively informal statement of the agency's position, marking the first step by the OCC to define the parameters of federal preemption under Dodd-Frank.

The OCC preemption letter commented on several of Dodd-Frank's federal preemption provisions, including:

■ **Application of OCC regulations to federal thrifts.** Dodd-Frank amends the preemption standards under the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.*, to conform to those applicable to national banks. The OCC preemption letter explains that the OCC plans to amend its regulations to clarify that federal savings associations and their subsidiaries are subject to the same preemption standards as national banks and their subsidiaries.

■ **Repeal of preemption protection for operating subsidiaries, agents, and affiliates.** Dodd-Frank effectively overrides the Supreme Court's decision in *Watters v. Wachovia Bank*, 550 U.S. 1 (2007), by removing preemption protection for subsidiaries, agents, and affiliates of national banks and federal thrifts. The OCC preemption letter explains the OCC's plan to rescind 12 C.F.R § 7.4006 — the regulation concerning the application of state laws to national bank operating subsidiaries — in response to Dodd-Frank's revocation of preemption protection.

■ **Articulation of preemption standard.** Dodd-Frank broadly defines a state "consumer financial law" as a 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 a financial transaction or related account with respect to a consumer. Under Dodd-Frank, federal law preempts a state consumer financial law only if: 1) its application would have a discriminatory effect on national banks in comparison with its effect on state-chartered banks; 2) a federal consumer financial law other than Title LXII preempts the law; or 3) "in accordance with the legal standard for preemption that the U.S. Supreme Court set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the state consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."

The OCC preemption letter took the position that Dodd-Frank's *Barnett Bank* preemption standard is a directive to apply *Barnett Bank's* conflict preemption standard in its entirety, meaning that the recitation of the "prevent or significantly interfere" standard in the statute is only the starting point for the analysis. In other words, the OCC interprets Dodd-Frank as requiring a preemption analysis that looks beyond the "prevent or significantly interfere" language to also consider the *Barnett Bank* decision's broader discussion of conflict preemption analysis.

In reaching this interpretation, the OCC noted the 11th U.S. Circuit Court of Appeals' recent decision in *Baptista v. JPMorgan Chase, N.A.*, No. 10-13105 (11th Cir. 05/11/11) (*see summary beginning on page 1*), in which the court cited other formulations of conflict preemption used in the *Barnett Bank* decision to arrive at the conclusion that, under Dodd-Frank, the proper preemption test is conflict preemption.

The OCC also noted that Dodd-Frank's preemption provision uses language virtually identical to that used in section 104(d)(2)(A) of the Gramm-Leach-Bliley Act of 1999, and that the leading case applying that standard, *Association of Banks in Insurance Inc. v. Duryee*, 270 F.3d 397 (6th Cir. 2001), similarly treats the phrase "prevents or significantly interferes" as referencing the entire *Barnett Bank* preemption analysis. Thus, in the OCC's view, Dodd-Frank's recitation of the "prevent or significantly interfere" standard from *Barnett Bank*, in addition to the direct reference to *Barnett Bank*, affirms *Barnett Bank* without creating a new emphasis or gloss on which state laws may meet the "significantly interfere" standard.

(See **INTERPRETATION** on page 6)

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The OCC also opined that Dodd-Frank's inclusion of the "prevent or significantly interfere" standard may signal Congress's dissatisfaction with the OCC's attempt to distill the *Barnett Bank* standard in its regulations through the use of the term "obstruct, impair, or condition." Therefore, in order to eliminate any ambiguity regarding the OCC's reliance on *Barnett Bank*, the OCC announced its plan to remove the "obstruct, impair, or condition" language from its preemption regulations.

■ **Case-by-case preemption determinations.** Under Dodd-Frank, preemption determinations may be made by a court or by OCC regulation or order on a "case-by-case" basis or in accordance with applicable law, and only after the OCC has determined that "substantial evidence" supports the OCC's application of the *Barnett Bank* standard. When making a case-by-case determination, the OCC must first consult the Consumer Financial Protection Bureau.

The OCC preemption letter articulated the view that Dodd-Frank preserves pre-Dodd-Frank preemption determinations that are consistent with the *Barnett Bank* conflict preemption analysis. Under the OCC's interpretation, Dodd-Frank's case-by-case analysis requirement only applies to prospective preemption questions — existing OCC preemption regulations, to the extent based on the *Barnett Bank*analysis, remain operative.

■ **Codification of *Cuomo* visitorial powers.** Dodd-Frank attempts to clarify the ability of states to enforce laws against national banks and federal thrifts, including by expressly codifying the holding in *Cuomo v. Clearing House Ass'n*, 129 S.Ct. 2710 (2009), that the NBA's preemption of "visitorial powers" does not preclude the ability of a state attorney general to enforce a state law against a national bank. The OCC preemption letter explains that the OCC plans to incorporate Dodd-Frank's codification of *Cuomo* by revising 12 C.F.R. § 7.4000 to provide that an action by a state attorney general (or chief law enforcement officer) to enforce a non-preempted state law against a national bank is not an exercise of visitorial powers pursuant to 12 U.S.C. § 484.

Unresolved issues

Although the OCC preemption letter provides insight into the agency's current thinking on preemption, it will not be the last word on the subject.

■ ***How does the "prevent or significantly interfere" standard differ from the "whole" conflict preemption analysis in* Barnett Bank?** Although the OCC preemption letter explains that Dodd-Frank makes the "prevent or significantly interfere" standard the starting point for NBA preemption analysis and that *Barnett Bank*'s "whole" conflict preemption analysis must be employed, the letter does not explain how this differs from the "prevent or significantly interfere" standard itself. Also unclear is whether courts will agree that Congress intended that the "prevent or significantly interfere" standard be a mere starting point for conflict preemption analysis, as opposed to being the standard itself.

■ ***Did Dodd-Frank change the level of interference required to constitute "significant" interference?*** Dodd-Frank does not address the level of interference constituting "significant" interference, and it is unclear how courts will interpret this term going forward. Prior to Dodd-Frank, courts typically set a low threshold for "significant" interference with a bank's exercise of its core or incidental powers. However, future courts assessing preemption determinations may read Dodd-Frank as imposing a heightened standard.

■ ***Will past and future preemption determinations continue to pass court scrutiny?*** Under Dodd-Frank, the OCC has responsibility for making preemption determinations, but these are entitled to less deference than that to which agencies typically are entitled under the *Chevron U.S.A v. NRDC*, 467 U.S. 837 (1984), standard. Under *Chevron*, if Congress' intent is not clear on the face of a federal statute, a court must defer to the agency interpretation, if that interpretation is based on a "permissible construction" of the statute. *Chevron* is the standard under which past courts have judged pre-Dodd-Frank OCC preemption determinations.

However, Dodd-Frank departs from the *Chevron* standard, directing courts to assess the OCC's preemption determinations with a level of deference similar to that set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Specifically, Dodd-Frank requires courts to weigh the following factors: the thoroughness of the OCC's consideration, the validity of the OCC's reasoning, the consistency of the preemption determination at issue with other valid preemption determinations, and other relevant factors. The OCC preemption letter did not address — nor can the OCC predict — how courts will implement the new Dodd-Frank deference standard going forward. As a result, the extent to which courts will use the new standard to overturn past OCC and court preemption determinations remains unclear. Similarly unclear is whether the new deference standard will result in courts upholding future OCC preemption determinations.

■ ***Will a future Comptroller maintain the interpretation of Dodd-Frank's preemption provisions in the OCC preemption letter?*** The OCC preemption letter was authored by Acting Comptroller Walsh, who was appointed to this temporary position in August 2010. It is unclear whether the next Comptroller will adhere to the principles set forth in the OCC preemption letter. Given the current political environment and the possibility that the OCC's current determinations could change following public notice and comment, the positions articulated in the letter represent the first step in defining the scope of federal preemption for national banks and federal thrifts post-Dodd-Frank.

Although the OCC preemption letter provides some indication of the OCC's current thinking on the Dodd-Frank NBA preemption provisions, it certainly is not the last word on the subject. It may be years — and require the fallout from post-July 21, 2011, OCC and court preemption determinations — to resolve the issues arising from Dodd-Frank's preemption changes. ❑

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