



June 27, 2011

E-Mail rich@fsround.org
www.fsround.org

RICHARD M. WHITING
EXECUTIVE DIRECTOR
AND GENERAL COUNSEL

Office of the Comptroller of the Currency
250 E Street, NW
Mail Stop 2-3
Washington, DC 20219

Re: Docket ID OCC-2011-0006; RIN 1557-AD41; Office of Thrift Supervision
Integration; Dodd-Frank Act Implementation

Dear Sir or Madam:

The Financial Services Roundtable (Roundtable)¹ submits this letter in response to a notice of proposed rulemaking (NPR)² that addresses the transfer of certain functions of the Office of Thrift Supervision (OTS) to the Office of the Comptroller of the Currency (OCC) and the implementation of certain other provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).³ This letter is focused on proposed changes to the OCC's regulations governing the preemption of State law by the National Bank Act and the Home Owners' Loan Act, as amended by the Dodd-Frank Act.

I. The NPR Preserves the Benefits of National Regulation for Consumers and the Economy

The NPR affirms the continued validity of over 150 years of United States Supreme Court decisions upholding the preemptive authority of the National Bank Act over State laws that conflict with the authorized powers of national banks. As such, the NPR provides needed clarity and certainty on the operative legal standard for preemption for national banks and the status of prior OCC regulations and interpretations based upon that standard.

More importantly, the NPR preserves the benefits of national regulation for consumers and the economy. National regulation helps to open markets, reduce the price of credit, increase the availability of credit, and increase the efficiency of national banks.⁴ National regulation also can help to cushion economic downturns, and channel funds to less dynamic sectors and

¹ The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

² Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 30557 (May 26, 2011).

³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Title III and Title X, Subtitle D.

⁴ Joseph R. Mason, Robert Kulick, and Hal J. Singer, "The Economic Impact of Eliminating Preemption of State Consumer Protection Laws," 12 U. Pa. J. Bus. L. 781 (2010).

regions.⁵ Conversely, compliance with a patchwork of State and local regulations hinders the efficiency of national banks, increases the cost of products and services for consumers, and can erode the safety and soundness of the national banking system.

In an economy in which national banks operate nationwide franchises and capital flows across the continent with the speed of an electronic pulse, financial services pricing and product availability should not be dictated by State and local governments. Consumers expect and deserve access to the broad range of options made possible by a national financial services market. A national market that allows individuals to shop and compare to find the financial services product that best meet their personal and family needs supports our companies' commitment to informed customers and increased access to financial services.

Numerous studies have shown that compliance with a multiplicity of State laws can increase costs for consumers. For example, a 2003 study by Professors Anthony Sanders of Ohio State University and Brent Ambrose of the University of Kentucky found that State-level regulations regarding borrower rights can have an impact on expected default losses and that this results in additional credit costs for all borrowers.⁶ This particular study estimated that such State laws add one-third of a percent to the interest rate of mortgage loans.⁷ Similarly, a 2004 paper by Professor James Wilcox of the University of California noted that six banks estimated the total cost of compliance with a California law related to minimum payment warnings would have been \$44 million, and some of this amount would have been passed along to consumers.⁸ Other studies have found that State laws can result in increased loan losses and/or fewer loans being made.⁹

We believe that a multiplicity of State laws, and the disclosures they require, undermines consumer understanding of financial services and complicates financial education. The Consumer Financial Protection Bureau clearly agrees. Fundamental to the CFPB's current initiative to simplify mortgage lending disclosures is the recognition that clarity and consistency are essential to consumer understanding of key terms.

Compliance with a multiplicity of State and local laws also can have an adverse impact on the safety and soundness of our national banking system. For example, in the late 1970s and early 1980s, California and other jurisdictions began to prohibit banks and savings associations from exercising "due on sale" clauses in mortgages. These State actions allowed a consumer to purchase a home and assume the existing mortgage with its old (lower) rate of interest. While

⁵ James A. Wilcox, *The Benefits of Competition in Financial Regulation: Innovation, Choice, and Efficiency*, Kruttschnitt Family Professor of Financial Institutions, Haas School of Business, University of California, Berkeley, June 2004.

⁶ Ambrose and Sanders, *Legal Restrictions in Personal Loan Markets* 4 (April 17, 2003).

⁷ *Id.* at 20.

⁸ *The Benefits of Competition in Financial Regulation: Innovation, Choice, and Efficiency*, James A. Wilcox, Kruttschnitt Family Professor of Financial Institutions, Haas School of Business, University of California, Berkeley, June 2004.

⁹ See, e.g., Claurette and Herzog, *Journal of Money, Credit & Banking*, *The Effect of State Foreclosure Laws on Loan Losses: Evidence from the Mortgage Insurance Industry* (May 1990); Barth, Cordes, and Yezer, *Journal of Law and Economics*, *Benefits and Costs of Legal Restrictions on Personal Loan Markets* 357-80 (1986).

benefiting some consumers, and existing homeowners, the effect of these measures increased losses in the depository institutions, which were funding mortgages at market rates but receiving the lower rate of return specified in the older mortgages. The impact of the mismatch between deposit rates and mortgage rates on existing loans caused significant losses to the savings and loan industry. Eventually these State laws were preempted by the Federal regulator for savings associations, and that action was upheld by the Supreme Court.¹⁰

In sum, national regulation benefits both consumers and the economy, and the NPR preserves those benefits.

II. The NPR Properly Affirms the *Barnett Bank* Case as the Legal Standard for Preemption

In the preamble to the NPR, the OCC concludes that the Dodd-Frank Act codifies the conflict preemption standard described in the *Barnett Bank* case,¹¹ rather than the phrase “prevent or significantly interfere,” which appears in that case. As discussed further below, the OCC’s conclusion is based upon both the text of the Dodd-Frank Act, and the legislative history accompanying that Act. This conclusion recognizes that the holding in the *Barnett Bank* case is not simply the phrase “prevent or significantly interfere.”

The *Barnett Bank* case was decided by the Supreme Court in 1996. The case involved a conflict between a Florida law that prohibited banks that are part of a bank holding company from selling insurance, and a Federal law that authorizes such sales by national banks from towns of 5,000 or less in population. The Supreme Court determined that the Florida law was preempted by the Federal law, and that the national bank could sell insurance even though it was a subsidiary of a bank holding company.

In reaching this decision, the Supreme Court reiterated that, under the United States Constitution’s Supremacy Clause,¹² a State law that conflicts with a Federal law is preempted by the Federal law. The Supreme Court also cited many examples of prior Supreme Court decisions in which *indirect* or *implied* conflicts resulted in the preemption of State law, including cases in which the State law was preempted because the law “hampers” the Federal law, or “interferes with the purposes” of the Federal law, or “stands as an obstacle” to the full purposes and objectives of Congress.¹³ The Supreme Court then concluded that the Florida law at issue in the case was preempted because it stood as an obstacle to the accomplishment of the Federal purpose of allowing national banks to sell insurance from small towns.

Following its explanation of why the Florida law was preempted, the Supreme Court elaborated on its decision. The Supreme Court explained that its holding in *Barnett Bank* did not mean that State law could never apply to a national bank, and gave examples of State laws that were not preempted in prior decisions. During this brief digression, the Supreme Court stated that its holding on preemption does not 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

¹⁰ *Fidelity Federal Savings Assn. v. De La Cuesta*, 458 U.S. 141 (1982).

¹¹ *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996).

¹² U.S. Const., Art. VI, cl. 2.

¹³ *Barnett* at 31, citing *Hines v. Davidowitz*, 312 U.S. 52 (1941).

its powers.¹⁴ The Supreme Court supported this statement by citing cases in which it was held that State law was not preempted because the State law did not “destroy or hamper” national bank functions, did not “interfere or impair” national banks’ efficiency in performing functions, and did not unlawfully “encroach on the rights and privileges of national banks.”¹⁵ Therefore, the Court clearly intended the phrase “prevent or significantly interferes” to include such concepts as “hamper,” “impair the efficiency,” and “encroach upon the rights” of national banks.

III. The Text and Legislative History of the Dodd-Frank Act Support the OCC’s Conclusion that Congress Codified the *Barnett Bank* Case as the Legal Standard for Preemption

The codification of the *Barnett Bank* standard evolved during the course of the Congressional debate over the Dodd-Frank Act. The version of the legislation passed by the House of Representatives on December 11, 2009 did not contain a reference to the *Barnett Bank* case, but instead provided that a State consumer financial protection law would be preempted if it “prevents, significantly interferes with, or materially impairs” the ability of a national bank to engage in the business of banking.¹⁶

The companion bill approved by the Senate Banking Committee on April 15, 2010 specifically cited the *Barnett Bank* case as the legal standard for preemption.¹⁷ The Committee report accompanying this bill explained this reference as follows:

Section 1044 amends the National Bank Act to clarify the preemption standard relating to State consumer financial laws as applied to national banks. ... The standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1966 *Barnett*)....”¹⁸

During the Senate floor debate on the legislation, Senator Carper offered an amendment that retained the *Barnett Bank* preemption standard, but struck from the bill a requirement that the OCC find a Federal standard that covers the same activities and authority that was the subject of the preempted State law. This amendment passed by a vote of 80-18.

Finally, the House-Senate conferees on the legislation retained the Senate-passed version of the preemption standard, but added the phrase “prevents or significantly interferes” to the legislative text. The conference report explains that the provision “codifies the standard in the 1996 Supreme Court case *Barnett Bank of Marion County, N.A. v. Nelson* to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national banks’ exercise of their powers.”¹⁹

¹⁴ Id.

¹⁵ Id at 34.

¹⁶ H.R. 4173.

¹⁷ S. 3217.

¹⁸ S. Rep. No. 111-176, at 175 (2010). The report went on to note that this standard would “undo” broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004. As the preamble to the NPR notes, however, the OCC’s 2004 regulation was based upon the *Barnett Bank* standard, and did not represent any broader standard.

¹⁹ H.R. Rep. No. 111-517, at 879 (2010) (Conf. Rep.).

A colloquy between Senators Carper and Dodd (the Chairman of the Senate Banking Committee) during the Senate debate on the conference report further reinforced the Senate’s intent to codify the entire *Barnett Bank* case as the legal standard for preemption, and not simply the phrase “prevent or significantly interfere:”

Mr. CARPER. One change made by the conference committee was to restate the preemption standard in a slightly different way, but my reading of the language indicates that the conference report still maintains the *Barnett* standard for determining when a State law is preempted.

Mr. DODD. The Senator is correct. That is why the conference report specifically cites the *Barnett Bank* ... case. There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case.

Mr. CARPER. I again thank the Senator. This will provide certainty²⁰ to everyone—those who offer consumers financial products and to consumers themselves. (156 Cong. Rec. 55902 (July 15, 2010))

Senator Johnson, the current Chairman of the Senate Banking Committee, also voiced his support for this reading of the legislation during the floor debate on the conference report:

One change made by the conference committee was to restate the preemption standard in a slightly different way, but it is clear that this legislation is codifying the preemption standard expressed by the U.S. Supreme Court in [the] *Barnett Bank* case. This will provide certainty to consumers and those that offer consumers financial products.²¹

IV. Judicial Interpretations Also Support the OCC’s Interpretation of the Dodd-Frank Act

The OCC’s interpretation of the legal standard for preemption in the Dodd-Frank Act is consistent with the holding by the only court to consider the standard since passage of the Dodd-Frank Act. That court concluded that the Dodd-Frank Act codifies the traditional preemption standard used in the *Barnett Bank* case.²² Additionally, the preemption language used in the Dodd-Frank Act is almost identical to a preemption provision in the Gramm-Leach-Bliley Act, and judicial interpretations of that provision conclude that the use of the words “prevent or significantly interfere” did not create a new legal standard for preemption.²³

V. The NPR Properly Preserves the OCC’s 2004 Preemption Regulations

²⁰ We note that codifying the existing preemption standards, as explained in the *Barnett* decision, would establish “certainty.” Adopting a different standard would have the opposite effect.

²¹ 156 Cong. Rec. S5889 (July 15, 2010).

²² *Baptista v. JP Morgan Chase Bank, N.A.*, 22 Fla. L. Weekly Fed. C 2036 (11th Cir. May 11, 2011).

²³ *Ass’n of Banks in Ins., Inc. v. Duryee*, 270 F. 3d. 397. (6th Cir. 2001).

The NPR properly preserves the continued application of the OCC's 2004 preemption regulation (2004 Regulation).²⁴ When promulgated, the OCC stated that the 2004 Regulation were based upon the *Barnett Bank* case.²⁵ Therefore, it is appropriate for the NPR to preserve the 2004 Regulation.

The 2004 Regulation list specific categories of State law that do not apply to national banks because they fall under the *Barnett Bank* standard. The 2004 Regulation also list specific categories of State law that would generally apply to national banks to the extent that they are consistent with the *Barnett Bank* standard. For example, in the lending area, preempted laws include laws that restrict or prescribe the terms of credit, amortization schedules, permissible security property, escrow accounts, disclosure and advertising, and laws that require a State license as a condition for a national bank to exercise its authority. Without the express preservation of the 2004 Regulation, national banks would face significant uncertainty over the application of State laws that fall within the list of preempted laws.

While the OCC is proposing to retain the 2004 Regulation, it also is proposing to modify the 2004 Regulation in certain respects. First, the OCC is proposing to delete the phrase "obstruct, impair, or condition," as it is used in the 2004 Regulation. We have no objection to this change, but would recommend that the preamble to the final rule explain that this modification does not alter, in any way, the intent or effect of the 2004 Regulation.

The OCC also is proposing to delete 12 C.F.R. § 7.4009, which governs the applicability of State law to bank operations. The elimination of this provision could generate questions about the application of preemption to bank operations, and potentially subject national banks to State requirements related to systems operations and other key bank functions. We recommend that the OCC modify 12 C.F.R. § 7.4009 to provide that State laws that conflict with the operations of national banks under the *Barnett Bank* standard will be preempted.

VI. The NPR Properly Concludes that the Case-by-Case Requirement Applies Prospectively, Not Retroactively

The Dodd-Frank Act provides that preemption determinations made by the OCC be on a case-by-case basis. The NPR properly concludes that this requirement applies prospectively, and not retroactively.

The term "case-by-case" is defined to mean a determination made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank, or the law of any other State with substantively similar terms. The NPR preamble states that there is no evidence of Congressional intent to apply the case-by-case requirement retroactively to overturn existing precedent or regulations, and that such an interpretation would be contrary to the usual presumption against retroactive legislation.

We agree with this interpretation, and note that repealing the 2004 Regulation would, as a practical matter, expose national banks to extensive litigation over whether a State law that was

²⁴ 12 C.F.R. §§FR 7.4007; 7.4008; 7.4009; 34.4.

²⁵ Bank Activities and Operations, Real Estate Lending and Appraisals, 69 Fed. Reg. 1094, 1910 (Jan. 13, 2004).

preempted under the 2004 Regulation now applies to national banks under the preemption framework established by the Dodd-Frank Act. The costs of this litigation likely would be high and the litigation expense could sap funds away from lending and other activities.

The plain meaning of the statute clearly indicates that the case-by-case requirement does not apply to OCC actions, including rulemakings that are finalized prior to the effective date of July 21, 2011. The statute specifies that the case-by-case requirement *only applies* to preemption determinations “*under this subparagraph*,” referring to subparagraph 5136C (b)(1)(B). That subparagraph is not in effect until July 21, 2011, and OCC determinations and rules finalized prior to July 21, 2011 cannot be “made under” that subparagraph. Thus, the case-by-case requirement is not applicable to, and does not affect, the 2004 Regulation.

In short, we believe that the case-by-case requirement only applies to new OCC actions undertaken on or after July 21, 2011. National banks may rely on existing precedents and existing regulations when determining if a State law is preempted. However, if a national bank or other party asks the OCC to make a new preemption determination on or after July 21, 2011, including by making an interpretation of the 2004 Regulation, the OCC determination would be subject to the case-by-case requirement.

VII. The OCC Should Clarify the Preemption Standards for Federal Savings Associations

The NPR proposes to add a new section 7.4010(a) to the OCC's regulations that provides that "state laws apply to Federal savings associations and their subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries." This proposal is consistent with the terms of the Dodd-Frank Act, which provided that federal savings associations be subject to the same laws and legal standards that are applicable to national banks. We believe it is important that federal thrifts be able to operate with the certainty that State laws that are not applicable to national banks will also not be applicable to federal savings associations.

VIII. The OCC Should Clarify That the *Barnett Bank* Standard Applies to Non-Interest Fees and Charges

We believe that State laws related to national bank non-interest fees and charges continue to be preempted under the preemption framework established by the Dodd-Frank Act because they are preempted under any reasonable reading of the *Barnett Bank* standard. We, therefore, recommend that, as part of this rulemaking, the OCC confirm that national bank non-interest fees and charges remain subject to 12 C.F.R. § 7.4002, and not State or local laws.

The OCC regulation found at 12 C.F.R. § 7.4002 states that a national bank's authority to impose charges and fees are business decisions of the bank, to be made by the bank, in its discretion, according to sound banking judgment and safe and sound banking principles.²⁶ The regulation goes on to state that in setting these fees and charges, the bank must consider four factors: (i) the cost incurred in providing the service; (ii) the deterrence of misuse of the service by customers; (iii) the enhancement of the competitive position of the bank in accordance with

²⁶ 12 C.F.R. § 7.4002(b)(2).

the bank's business plan and marketing strategy; and (iv) the maintenance of the safety and soundness of the bank.

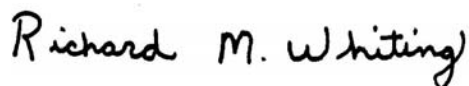
The courts have found in numerous cases that State laws limiting bank fees and charges are preempted under the principles set out in the *Barnett Bank* case. For example, in *Wells Fargo Bank v. James*,²⁷ the Court of Appeals for the Fifth Circuit used a *Barnett Bank* analysis to conclude that State restrictions on check cashing fees directly conflicted with the OCC's regulation (12 C.F.R. § 7.4002) and was therefore preempted. Further, the court noted that this was not "occupation of the field" preemption, but rather preemption based on a direct conflict between the regulation and State law.

In light of this case law and the status of State laws attempting to regulate national bank non-interest fees and charges, we recommend that the OCC should include a statement as part of this rulemaking that fees and other charges remain subject to 12 C.F.R. § 7.4002, and not State law.

IX. Conclusion

The Roundtable appreciates the opportunity to comment on the interpretation of the preemption provisions in the Dodd-Frank Act, and if you have any questions about this submission, please contact Brad Ipema at 202-589-2424.

Sincerely,



Richard M. Whiting
Executive Director & General Counsel

²⁷ 321 F.3d 488 (5th Cir. 2003).