

# Preemption under the Federal Banking Laws after Dodd-Frank

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# Preemption under the Federal Banking Laws after Dodd-Frank

## Agenda

- Title X and Preemption under the NBA and HOLA
- Back to *Barnett Bank*
- Proposed OCC Preemption Rules

# Title X and Preemption under the National Bank Act and the Home Owners' Loan Act

# Title X and Preemption under the NBA and HOLA

## Section 1044 (“State consumer financial law”)

- “A State 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 any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer”

# Title X and Preemption under the NBA and HOLA

## Section 1044 (Preemption Standard)

- “State consumer financial laws” preempted only if:
  - “application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State”
  - pursuant to “***the legal standard***” set forth in *Barnett Bank*, “the State consumer financial law ***prevents or significantly interferes with the exercise by the national bank of its powers***; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a ***case-by-case basis***, in accordance with applicable law”; or
  - “the State consumer financial law is preempted by a provision of Federal law other than this title”

# Title X and Preemption under the NBA and HOLA

## Section 1044 (OCC Determinations)

- **Case-by-Case Basis** - A determination by the Comptroller (may not be delegated) regarding **(i)** a specific State consumer financial law's impact on a National Bank or **(ii)** a substantively equivalent law of another State
- **Consultation with Bureau of Consumer Financial Protection** – the Comptroller must consult with the Bureau of Consumer Financial Protection, taking its views into account, before determining that there is a substantively equivalent State law to a State consumer financial law that is being preempted by the Comptroller

# Title X and Preemption under the NBA and HOLA

## Section 1044 (OCC Determinations)

- **Substantial Evidence Requirement** – No preemption by OCC “unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of [*Barnett Bank, N.A. v. Nelson*]”
- **OCC to review every 5 years and report findings to Congress**
- **State consumer financial laws apply to non-bank subsidiaries and affiliates to same extent as any person**
- **Preemption determinations by OCC published and updated quarterly**

# Title X and Preemption under the NBA and HOLA

## Section 1045 – Non-Depository Institution Subsidiaries

## Section 1046 – Federal Savings Associations

- Harmonizes preemption standards for federal savings associations with those that apply to national banks
- Provides that HOLA does not “occupy the field in any area of State law” (conflict preemption applicable)

## Section 1047 – Visitorial Standards

- Confirms ability of state attorney generals to bring court enforcement actions against national banks and federal savings associations  
(*Cuomo v. Clearing House Assn., L. L. C.*)

## Section 1048 – Effective Date is the Designated Transfer Date (July 21, 2011)

# Back to *Barnett Bank*

# *Barnett Bank: Statutes and Facts*

*Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996)

- 1916: Amendment to NBA allows national banks to “act as the agent” for insurance sales in small towns
- 1974: FL law bars banks from selling insurance except banks unaffiliated with bank holding companies
- 1993: Barnett Bank, a national bank with branch in small FL town, buys FL-licensed insurance agency

# *Barnett Bank*: Statutes and Facts

- Barnett filed suit in federal court, claiming Florida law is pre-empted by the National Bank Act
- McCarran-Ferguson Act, enacted in 1945, said no preemption of state insurance law *unless* federal law “specifically relates” to insurance
- Trial court held the 1916 NBA amendment did not “specifically relate” to insurance, so it cannot preempt the Florida law
- 11<sup>th</sup> Circuit affirmed on similar grounds
- Supreme Court granted cert.

# *Barnett Bank: Preemption Analysis*

- Which preemption standards should apply?
  - Traditional Conflict Preemption?\*
  - McCarran-Ferguson (preemption only if federal law “specifically relates” to business of insurance)?
- Court considered each, finding that federal law preempted the state law under either analysis
- “In this case we must ask whether or not the Federal and State Statutes are in ‘irreconcilable conflict’”

\* “Field preemption” mentioned in passing.

# *Barnett Bank: Conflict Analysis*

- Absent clear expression of congressional intent, examine “structure and purpose” of statute for “clear implicit preemptive intent” (case-by-case)
- Here, statutes did not impose directly conflicting duties, but the federal law authorized activity the state law expressly forbade
- Florida argued federal law granted authority to sell insurance only to extent state law also allowed it
- Court disagreed

# Barnett Bank: Conflict Analysis

- Florida's argument failed because:
  - Federal law suggested no limitation on authority
  - Grant of authority to sell insurance was "in addition to" existing powers of national banks
  - Prior cases ***"take the view that normally Congress would not want States to ... impair significantly, the exercise of a power that Congress explicitly granted"*** to national banks
  - States may only regulate national banks ***"where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers"***
- Where Congress has not expressly conditioned a power on the grant of state permission, no such condition applies

# *Barnett Bank: Conflict Analysis*

- More conflict formulations sanctioned in *Barnett Bank*:
  - Compliance with state and federal law a “physical impossibility”
  - State “law may stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”
  - State law may “unlawfully encroach on the rights and privileges of national banks”
  - State law may “destroy or hamper national banks’ functions”
  - State law may “interfere with[] or impair national banks’ efficiency in performing the functions by which they are designed to serve the Federal Government”

# *Barnett Bank: McCarran-Ferguson*

- McCarran-Ferguson anti-preemption rule: federal law does not preempt state insurance law unless federal law “specifically relates to insurance”
- The Court found this analysis easy: “In ordinary English, a statute that says banks may act as insurance agents ... ‘relates’ to the insurance business.”
- Consider context of federal law in question: McCarran-Ferguson passed in wake of *U.S. v. South-Eastern Underwriters Assn.*, which applied (non-specific) Sherman Act to insurance.

## *Barnett Bank: Applied in Baptista v. JP Morgan Chase (11th Cir. 2011)*

- Florida statute prohibited “settling any check drawn on it otherwise than at par.”
- OCC regulation allows bank to “charge its customers non-interest charges and fees...”
  - OCC interpreted “customer” as anyone presenting a check for payment
- Under *Barnett* standard, the state prohibition “is in substantial conflict with federal authorization to charge such fees” and is therefore preempted.

# Proposed OCC Preemption Rules

# Proposed OCC Preemption Rules

- OCC explained its position in a Letter to Senator Carper (D-DE) dated May 12, 2011:
  - Preemption triggers (i.e., discriminatory effect on national banks; preempted under *Barnett* standard; or preempted by other Federal law) generally same as before Dodd-Frank.
  - *Barnett* standard is “conflict” preemption. *Barnett* formulation in Dodd-Frank (i.e., “prevent or significantly interfere”) is “starting point” of an analysis under *Barnett*. OCC analysis “must consider the whole of the conflict preemption analysis in the Supreme Court decision.”
  - Example: 11<sup>th</sup> Cir. Decision in *Baptista v. JPMorgan Chase, N.A.* Broad standard: “whether there is a significant conflict between the state and federal statutes.”
  - OCC concludes that precedents that are consistent with the *Barnett* conflict preemption analysis are “preserved,” including judicial decisions, interpretations and the OCC’s existing rules.

# Proposed OCC Preemption Rules

- **Preemption of State Law for National Bank Subsidiaries, Agents and Affiliates**
  - Rescinds the OCC's regulation concerning the application of state laws to national bank operating subsidiaries. (12 C.F.R. §7.4006)
  - Conforms regulations to reference that the Revised Statutes of the United States and the Federal Reserve Act do not preempt, annul, or affect the applicability of any state law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank). (12 C.F.R. §5.34(a) and (e)(3))

# Proposed OCC Preemption Rules

- **Preemption Standards Applicable to Federal Savings Associations**
  - Amends regulations to provide that state laws apply to federal savings associations and their subsidiaries to the same extent and in the same manner as those laws apply to national banks and their subsidiaries. (12 C.F.R. §§7.4010(a) and §34.6)
  - Federal courts and OTS previously applied a “field preemption” standard under HOLA, which is now precluded by Dodd-Frank. OCC will address at some point in the future the existing OTS preemption regulations which implemented the “field preemption” approach.

# Proposed OCC Preemption Rules

- **Preemption of “State consumer financial laws”**
  - Removes language providing that state laws that “obstruct, impair, or condition a national bank’s ability to fully exercise its federally authorized . . . powers are not applicable to national banks.” (12 C.F.R. §§7.4007(b), §7.4008(d), and §34.4(a))
  - Amends regulation to provide that certain state laws are not preempted “to the extent consistent with” the *Barnett* decision, including “any . . . law that the OCC determines to be applicable to national banks in accordance with the [*Barnett* decision], or that is made applicable by federal law.” (12 C.F.R. §7.4007(c)(8); §7.4008(e)(8))
  - Otherwise, generally preserves the OCC’s rules and existing precedents (including judicial decisions and interpretations) consistent with its existing framework of conflict preemption.

# Proposed OCC Preemption Rules

- **OCC Preemption Determinations**
  - No rule proposed at this time to implement Dodd-Frank requirement regarding “case-by-case” determinations, including requirement to consult with CFPB before making such determinations.
  - Proposal notes that these requirements will apply “going forward, after the transfer date” – suggests preservation of existing framework and future reviews to be conducted consistent with *Barnett* analysis.

# Proposed OCC Preemption Rules

- **Periodic Review**

- No rule proposed at this time to implement Dodd-Frank requirement to conduct periodic reviews every 5 years of preemption determinations relating to state consumer financial laws (and to publish a list of such determinations every quarter).

# Proposed OCC Preemption Rules

- **Visitorial Powers**

- Revises rules to provide that actions by state chief law enforcement officers consistent with *Cuomo* are not an exercise of visitorial powers prohibited by 12 U.S.C. §484. (12 U.S.C. §7.4000).
- Specifically, state attorneys general may bring an action in court to enforce a non-preempted state law, but otherwise may not conduct extra-judicial investigations or attempt to exert oversight of a national bank.

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