H A R V A R D L A W S C H O O L
1525 Massachusetts Avenue
Cambridge, MA, 02138

TO: Professors Considering Adoption of Financial Regulation: Law and Policy (Foundation Press 2016)
FROM: Howell E. Jackson
RE: HLS Case Studies on Financial Regulation
DATE: October 28, 2016

In connection with the publication of *Financial Regulation: Law and Policy* (Foundation Press 2016), my co-authors and I have begun to develop and distribute a series of Harvard Law School (HLS) case studies on financial regulation. The bulk of these case studies explore issues related to the regulation of consumer finance, as I initially developed the materials in connection with a course on consumer finance jointly taught at HLS and Harvard Business School (HBS), but several also touch upon other areas of financial regulation, including activities restrictions, chartering choices, and anti-money-laundering concerns.

To offer a taste of these teaching tools, I am appending to this memo an excerpt of a new case study exploring the OCC's preemption regulations of 2011. Below is a list of all case studies, organized around the structure of our textbook. Most of these studies are available (free of charge) at https://h2o.law.harvard.edu/playlists/27055,[1] although a few are drawn from the Harvard Business School catalog and usually require payment of a royalty charge.[2] The case studies noted in italics are still in process but should be posted this fall.

While these case studies can be used as a supplement to any course on financial regulation, they may also be used to qualify such courses as experiential learning under the ABA's new certification standards.

You are most welcome to make use of these case studies in your courses, and I would be delighted to collaborate with others – regulators as well as practitioners and academics – in the development of, or suggestions as to topics for, new case studies.

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[1] If you go to this website, the case studies are posted in folders labeled "Experiential Learning Materials" under the chapter folders for each of the book's twelve parts. Currently, not all parts have case studies posted.

[2] To register as an authorized educator and gain access to the HBS case study catalog, go to https://cb.hbsp.harvard.edu/cbmp/register/info ."

A Preliminary List of HLS Case Studies on Financial Regulation

Part I: Introduction to Financial Regulation

Preemption Case Study (September 2016) (exploring OCC's preemption regulation of 2011 through the eyes of a public interest lawyer; could be used in connection with Chapter 1.4 or Chapter 5.1).

Unidentified Financial Institutions Exercise (Spring 2010) (exercise on unidentified financial statements; several of the illustrations align with the coverage of Chapter 1.5)

Part II: Insured Depository Institutions

OCC FinTech Charter Problem (September 2016) (exploring the merits of recent proposal for a new national bank charter for marketplace lenders from the perspective of the OCC; could be used in connection with Chapter 2.1)

Lottery-Linked Savings Problem (Spring 2010) (exploring possible charter choices that might have been used to offer lottery-linked savings account and seen from the perspective of a firm seeking to offer this new product; could be used in connection with Chapter 2.1) (Note that amendments to federal law have altered aspects of the legal framework described in this case)

Alternative Strategies Exercise (1999) (exercise exploring the moral hazard implications of risky investments from the perspective of diversified investors; could be used in connection with Chapter 2.2)

First National Bank Corporation (A) (HBS Case 9-192-042) (Apr. 12, 1994) (exploring the appropriate calculation of loan loss reserves and the implication for compliance with capital requirements, viewed from the perspective of management, the bank board, and outside auditors; could be used in connection with Chapter 2.5.) (Note: This is an HBS case study.)

Part III: Insurance

Problem on Usage of Genetic Information in Credit Scoring (Spring 2010) (exploring legal limits on the use of genetic information as seen from the respective of a lender contemplating the use of such risk classifications; could be used in connection with Chapter 3.2)

Part IV: Securities Firms and Capital Markets

Lending Club Case Study (exploring application of securities laws to an early form of marketplace lender as it contemplated a refinement in its business model; could be used in connection with Chapter 4.1) (Note: For an HBS case study providing additional information on the economics of the Lending Club business model prepared at the same time, see Lending Club (HBS Case Study 9-210-052) (Dec. 17, 2010).

Part V. Consumer Protection and the CFPB

Planning the Next Move: PHH v. CFPB (Oct. 28, 2016) (exploring the practical implications of the DC Circuit's recent constitutional ruling on the structure of the CFPB from the perspective of both the Bureau and other government officials)

Four Part Series of Problem on Cost Benefit Analysis at the CFPB (2013) (exploring the implications of the D.C. Circuit's *Business Roundtable* decision of 2011 from the perspective of policy makers at the CFPB; could be used in connection with Chapter 5.1)

Litigating Disparate Impact Claims Under the ECOA (2010) (exploring competing expert reports in a mortgage discrimination case from the perspective of law clerks reviewing a motion to dismiss; could be used in connection with Part V) (note that intervening Supreme Court decisions have substantially complicated class certification in these cases)

Christmas Eve Closing (HBS Case 9-209-043) (Aug. 25, 2010) (case exploring mortgage origination and refinancing decisions made in the years preceding the financial crisis and presented from the perspective of the borrowers; could be used in connection with Chapter 5.2) (Note: This is an HBS case.)

Part VI. Financial Conglomerates

Mobile Banking Case Study (2011) (exploring the legal authority and policy issues associated with the provision of financial services through mobile phone providers, viewed from the perspective of the Treasury Department; could be used in connection with Chapter 6.1)

Walmart Case Study (2010) (exploring efforts on the part of Walmart to establish an ILC, viewed from the perspective of staffers on the Senate Banking Committee; could be used in connection with Chapter 6.1)

Part VII. Payment Systems

Federal Regulation of Stored Value Cards (2009) (exploring limitations on stored value cards imposed under the Credit Card Act of 2009, viewed from the perspective of the Federal Reserve; could be used in connection with Chapter 7.1)

Application of AML Requirements to Blockchain Innovations (forthcoming Fall 2016) (exploring the complexities of applying BSA rules to new financial products, viewed from the perspective of a FinTech entrepreneur; could be used in connection with Chapter 7.1)

Part VIII. Corporate Governance, Supervision, and Enforcement

Banking on Change: Aligning Culture and Compensation at Morgan Stanley (HBS Case Study in progress) (Draft of June 30, 2016) (exploring mechanisms to improve the culture of major financial firms from the perspective of both management and the NY Fed; could be used in connection with Chapter 8.1) (Note: This is an HBS case study.)

Part X. Mutual Funds and Other Investment Vehicles

Target Date Fund Case (2010) (exploring issues associated with disclosure requirements for target date funds from the perspective of the SEC; could be used in connection with Chapter 10.3, which offers a much abbreviate treatment of the topic)

Reforming the Regulation of Closed-End Funds (forthcoming Fall 2016) (exploring potentially regulatory responses to persistent conflicts associated with the distribution of closed-end funds from the perspective of the SEC; could be used in connection with Chapter 10.3)

Part XII. Shadow Banking

Advising on Problematic Securitization Transactions (2006; being updated in the fall of 2016)(exploring the "gatekeeper" liability of a major law firm that signed off on CFS securitization transaction; could be used in conjunction with Chapter 12.1)(Note: Commercial Financial Services (HBS Case Study 9-299-023) (May 14, 1999) examines the CFS business model in the period just before the problematic nature of its underwriting practices became public.)

Responding to the Madden Litigation and Other Recent Court Decisions (forthcoming Fall 2016) (exploring, from the perspective of an industry trade group, the implications and possible responses to recent court decisions that question the efficacy of "rent-a-charter" business models for marketplace lenders and the securitization of financial assets; could be used in conjunction with Chapter 12.1).

HARVARD LAW SCHOOL

Financial Regulation Case Study – Beta Version
Federal Preemption of State Consumer Protection Laws: The Office of the Comptroller of the Currency's Dodd-Frank Act Implementation Rules
September 2016

MEMORANDUM*

TO: General Counsel
FROM: Director, Consumer Advocates of America
RE: Our Lawsuit and the OCC's Dodd-Frank Act Implementation Rules
DATE: September 2016

You are the General Counsel for Consumer Advocates of America ("COFA"), a well-renowned national non-profit consumer advocacy group. A group of dedicated professionals established COFA in 2005 to advocate on consumers' behalf with respect to product safety, auto services, insurance, financial services, and similar issues. COFA's multi-faceted advocacy strategy consists of communicating with federal, state, and local financial regulators; creating and widely distributing consumer guides; operating an online consumer complaint database; and bringing lawsuits to challenge objectionable conduct.

I. Class Action Lawsuit

In November 2015, COFA filed a class action suit against BankofA ("the Bank"). BankofA is a national bank operating in the fictional state of Ames. According to COFA's consumer complaint database, the Bank is soliciting Ames checking account customers by offering tax refund anticipation loans. Tax refund anticipation loans ("RAL") are short-term loans made in anticipation of individuals' income tax returns.

COFA filed suit under Section 26(e) of Ames Consumer Protection Act, which sets written disclosure requirements in order to protect consumers. The provision requires that all banks or non-bank financial institutions that offer tax refund anticipation loans provide written notice to consumers that discloses the cost of an RAL compared to the cost of obtaining alternative sources of credit available in the region to borrowers with similar credit scores. Ames passed the law because RAL products may be significantly more expensive than other sources of credit. Ames also passed the law in order to protect the small subset of consumers who receive actual tax refunds that are lower than the estimated tax refund amounts their RALs were based on.

The Office of the Comptroller of the Currency ("OCC") issued guidance on tax refund related products in 2010.[1] See Appendix, Item 1. Under the OCC's 2010 Policy Statement on

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* This case study was prepared by Melanie Berdecia, Harvard Law School Class of 2015, and Dylan Aluise, Harvard Law School Class of 2017, under the supervision of Professor Howell E. Jackson. This case study is intended for educational purposes only and is not intended to offer legal advice.

[1] Office of the Comptroller, 2010 Policy Statement on Tax Refund-Related Products, *available at* http://www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-7a.pdf.

Tax Refund-Related Products, banks must make several disclosures to consumers interested in tax refund-related products before the consumer applies for the product or pays a nonrefundable fee. Under these disclosure requirements, a bank or other institution offering a tax refund-related product must notify the customer: 1) that the RAL is a loan and not the customer's tax refund; 2) that the customer must repay the entire balance of the RAL, even if the actual tax refund is lower than the total amount borrowed; 3) of the total costs of the tax refund-related product by identifying applicable fees; 4) of low-cost deposit accounts the institution offers and how to obtain more information about them; and 5) that the RAL may cost "substantially more" than other sources credit in a statement included with the RAL, among additional requirements.[2] Ames's law is different in that it requires more of banks and other institutions offering RALs than the federal requirements. Under Ames law, these institutions must not only notify the customer that the RAL may cost more than other credit, but actually include a comparison of costs according to the customer's individualized circumstances.

In January 2016, the Bank filed a motion for summary judgment on preemption grounds. In its motion, the Bank argues that the OCC's preemption rules, specifically Rule 12 C.F.R. 7.4008(d)(8), demonstrate that the state law should be preempted because it is in conflict with federal law. This regulation states that a national bank can make a non-real estate loan without regard to state law limitations concerning "disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents."[3] See Appendix, Item 4.

As COFA's General Counsel, you are in charge of analyzing the arguments for and against preemption. This case is one of the first cases in which we can challenge the OCC's amended preemption rules as inconsistent with the Dodd-Frank Act's purposes. Please weigh the competing arguments and policy considerations below and provide a recommendation as to how COFA should argue the issue in its reply to the defendant's motion for summary judgment.

II. Background on Preemption

National banks are chartered under the National Bank Act, and are supervised by the OCC. The U.S. financial system is a dual banking system in which banks may be chartered and supervised either as a state bank or a national bank. The type of charter a bank has determines not only which financial regulatory agencies have supervisory and regulatory power over the bank's activities, but also which federal and state banking laws apply to the institution. The applicable federal and state laws might overlap in some circumstances and impose different requirements on a bank. When resolving tensions between federal and state laws, the U.S. Supreme Court applies the preemption doctrine. The preemption doctrine is rooted in the Supremacy Clause of the U.S. Constitution.[4] However, because the U.S. Constitution also

[2] *See id.* at 2-3.
[3] 12 C.F.R. 7.4008 (d)(8) (2011).
[4] U.S. Const. Art. VI. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

establishes a federalist system of governance where states possess general powers, the Court employs a presumption against federal preemption of state laws.[5] See Appendix, Item 12.

Generally, there are three categories of preemption: (1) express preemption, where a federal law expressly overrides a state law; (2) conflict preemption, where a state law conflicts with federal law; and (3) field preemption, where a federal law creates a pervasive scheme of federal regulation, demonstrating Congressional intent to leave no room for state regulation, even if the state law is consistent with federal law.[6] Under conflict preemption, a federal law is in conflict with a state law if it would be impossible for the regulated entity to comply with both state and federal law, or, if the state law stands as an obstacle to the execution of Congressional objectives in passing the federal law.[7]

In the financial regulation context, the leading case on preemption is *Barnett Bank of Marion County, N.A. v. Nelson*.[8] As you recall, in *Barnett*, federal law allowed national banks to sell insurance in small towns,[9] but a Florida law prohibited banks that were subsidiaries or affiliates of a bank holding company from selling insurance products.[10] Pursuant to the state law, the Florida State Insurance Commissioner ordered Barnett Bank, an affiliated national bank that bought a Florida licensed insurance agency, to stop selling insurance products. In holding that the federal law preempted Florida's law, the Court relied in part on the fact that the federal statute granted the national bank a power and "contain[ed] no 'indication that Congress intended to subject that power to local restriction."[11] Earlier in its opinion, the Court stated that:

> In defining the preemptive scope of statutes and rules granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here), doing so does not prevent or significantly interfere with the national bank's exercise of its powers.[12]

This language provided the basis for the language in the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act ("the DFA" or "the Act") [13] of 2010.

III. The Dodd-Frank Act

President Obama signed the DFA into law on July 21, 2010. The DFA's main purpose is "to promote the financial stability of the United States by improving accountability and transparency

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[5] *See* Nat'l Consumer Law Ctr., *Restore the States' Traditional Role as "First Responder"* at 4 (Sept. 2009), *available at* https://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.
[6] *See id.* at 3.
[7] *See* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996).
[8] *Id.*
[9] *Id.* at 28. The federal law provided that "In addition to the powers now vested by law in national [banks] organized under the laws of the United States any such [bank] located and doing business in any place [with a population] . . . [of not more than] five thousand . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State . . . to do business [there], . . . by soliciting and selling insurance."
[10] *Id.* at 28–29.
[11] *Id.* at 34–35.
[12] *Id.* at 33 (emphasis added).
[13] Dodd-Frank Wall Street Reform and Consumer Protection Act §§1044–45, 12 U.S.C. §25b (2010).

in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[14]

The DFA contained several provisions related to federal preemption of state consumer financial laws. First, the Act specified that state consumer financial laws can only be preempted under three circumstances: (1) if application of the law would have a discriminatory effect on national banks when compared to state-chartered banks; (2) if, after determining on a case-by-case basis that in accordance with the legal standard for preemption in *Barnett Bank*, the law prevents or significantly interferes with the national bank's exercise of its powers; and (3) if the state law is preempted by another provision of federal law.[15] <u>See</u> Appendix, Item 2. Second, the Act expressly declared that the DFA did not occupy the field in any area of state law.[16] Third, the Act clarified that state laws apply to national bank affiliates and subsidiaries to the same extent that they apply to other entities under state law.[17] Fourth, the Act clarified that the same preemption standards applicable to national banks apply to federal savings and loan associations, which are regulated by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. 461 et seq.[18]

The DFA also included procedures that the OCC must follow when making preemption determinations. For example, when determining that a state law is preempted because it prevents or significantly interferes with a national bank's exercise of its powers, the OCC must analyze the impact of the particular state law, or a state law with substantively equivalent terms, on any national bank that is subject to that law.[19] If the OCC preempts a state law because it has substantively equivalent terms to the state law it is preempting, the OCC Comptroller must "first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination." [20] This implies that the OCC may no longer broadly determine that certain categories of state laws are preempted, as it has done in the past, and it must make individualized determinations as to preemption on a case-by-case basis.

Importantly, the DFA also included specific directives for courts reviewing OCC preemption determinations. First and foremost, courts cannot determine that an OCC regulation or order invalidates a state law or declares it inapplicable without *substantial evidence* to support the specific finding.[21] In addition, courts reviewing OCC preemption determinations must consider several factors when reviewing the determinations, including "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."[22] This language implies that courts are no longer

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[14] *Id.* at H.R. 4173, 111th Cong. §1.
[15] *Id.* at §1044(a)(b)(1)(A)–(C).
[16] *Id.* at §1044(b)(4).
[17] *Id.* at §1044(e).
[18] *Id.* at §1046(a). This Act nullified an explicit field preemption provision in the HOLA statute. *See* David A. Elliott, Richard C. Keller, & Rachel R. Friedman, Burr Forman LLP, *Preemption of State Consumer Protection Laws Under the Dodd-Frank Act* at 3 (2013), *available at* http://www.burr.com/NewsResources/Resources/~/media/18135135CCB3447487A6C19A258F5EF7.ashx.
[19] *Id.* at §1044(a)(b)(3)(A).
[20] *Id.* at §1044(a)(b)(3)(B).
[21] *Id.* at §1044(c).
[22] *Id.* at §1044(b)(5).

congressionally authorized to just defer to OCC interpretations; courts must consider the factors listed above in making their decisions.

The Act expressly provided that it did not "alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established . . .regarding the applicability of State law under Federal banking law to any contract entered into on or before the date of enactment of [the] Act."[23]

IV. The OCC's Preemption Rules

In 2004, the OCC enacted preemption rules that adopted a broad preemption standard. See Appendix, Items 3–4. The regulation declared that "state laws do not apply to national banks if they obstruct, impair, or condition" a national bank's exercise of its federally authorized powers. The "obstruct, impair, or condition" language preempted state consumer financial laws that impermissibly contained a bank's exercise of a federally authorized power. The OCC commented that it relied on the *Barnett* case to formulate its "obstruct, impair, or condition" standard. Under the OCC's 2004 rules, national banks could make loans "without regard to state law limitations" that concerned loan-to-value ratios, terms of credit, escrow accounts, the access to and use of credit reports, and rates of interest on loans.

In 2011, after the DFA's passage, the OCC amended the preemption rules. The OCC maintained that the DFA did not introduce a narrower preemption standard than the standard the OCC had previously applied. The OCC reasoned that, because the DFA was grounded in the *Barnett* decision, and so were the OCC's 2004 preemption rules, its prior preemption determinations were valid. Therefore, the OCC removed the "obstruct, impair, or condition" language from its preemption rules related to real estate lending, non-real estate lending, deposit-taking, and other activities national banks are authorized to engage in. However, the OCC determined that prior preempted state laws continued to be preempted because its 2004 rules relied on Supreme Court cases, including *Barnett*, in formulating the "obstruct, impair, or condition" standard.

V. Arguments Opposing the OCC's Amended Preemption Rules

There are two main arguments opposing the OCC's amended preemption rules. The first is that the OCC's amended rules ignore Congress' intent to repeal the OCC's 2004 preemption rules by its enactment of the DFA. The second is that the OCC's amended rules failed to appreciate the status of states as first responders when problems arise in the financial arena.

A. The DFA Substantively and Procedurally Repealed the OCC's Preemption Rules

Critics of the amended preemption rules argue that the DFA repealed the OCC's 2004 preemption rules by imposing a narrow "prevents or significantly interferes" standard to replace

[23] *Id.* at §1043.

the OCC's broad "obstruct, impair, or condition" standard, which was arguably not based on the *Barnett* decision.

In a letter to John Walsh, the Acting Comptroller of the Currency, dated June 27, 2011, George W. Madison, Chief Legal Officer of the U.S. Department of the Treasury, stated that the Treasury Department had three concerns with regards to the OCC's proposed preemption rules.[24] See Appendix, Item 5. These concerns were that the rules were:

> (1) [N]ot centered on the key language of the Dodd-Frank Act's preemption standard, and instead seeks to broaden the standard;
> (2) even though the proposed rule deletes the OCC's current "obstruct, impair, or condition" standard, the rule asserts that preemption determinations based on that eliminated standard would continue to be valid; and
> (3) the rule could be read to preempt *categories* of state laws in the future, even though Dodd-Frank requires that preemption determinations be made on a "case-by-case" basis, and after consultation with the Consumer Financial Protection Bureau (CFPB) where appropriate.

Madison argued that the preemption standard for national banks in the DFA – the "prevents or significantly interferes" standard – was "strenuously debated" and that Congress chose to enact the new standard as a specific one. Madison contended that the OCC's rules read the "prevents or significantly interferes" language out of the statute. Acknowledging that the DFA expressly referred to the *Barnett* decision, Madison reasoned that "[w]hile it is proper to look to the *Barnett* opinion to interpret the 'prevents or significantly interferes' standard, we believe that Congress intended 'prevents or significantly interferes' (as used in *Barnett*) to be the relevant test, not some broader test encompassing the entirety of the *Barnett* opinion." Madison also noted that the OCC's proposed rules could preempt broad categories of state laws, which does not comport with the DFA's case-by-case mandated approach.

Similarly, the Center for Responsible Lending, Consumers Union, National Consumer Law Center, Public Citizen, and the Sargent Shriver National Center on Poverty Law, wrote a letter to the OCC's Acting Comptroller, dated June 27, 2011, to communicate multiple concerns with the OCC's proposed amended preemption rules. In addition to the points Madison made in his letter, the consumer advocate groups rejected the OCC's argument that the DFA contains no statement that Congress intended to retroactively apply the DFA's procedural and substantive requirements to overturn existing OCC rules.[25] See Appendix, Item 6. They argued that Congress "included a very clear statement of when the old rules apply [pre-existing contracts], and that statement is completely in harmony with traditional rules about retroactivity."[26] The consumer advocate groups reasoned that while the DFA "grandfathered" pre-existing contracts, it did not grandfather pre-existing rules, which it could have done; therefore, Congress intended to undo the OCC's 2004 preemption rules.[27]

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[24] Letter from George W. Madison, Chief Law Officer, U.S. Dep't of the Treasury, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency (June 27, 2011).
[25] Letter from Ctr. for Responsible Lending et al., to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency (June 27, 2011).
[26] *Id.* at 4.
[27] *Id.* at 4–5.

B. **States as First Responders**

Another argument against the OCC's amended preemption rules is that they fail to acknowledge the role of states as first responders. This argument rests on the traditional role of states in protecting consumers and the idea that federal preemption of state consumer financial laws culminated in the financial crisis. When the financial crisis hit, many consumer protection advocates criticized the OCC and other federal financial regulators for failing to enforce consumer protection laws.[28] See Appendix, Item 12. For example, these advocates noted that from 2000 and 2008, the OCC only took two public enforcement actions against banks for unfair and deceptive mortgage practices, despite the mortgage crisis.[29] They further noted that in a ten-year period, from 1997 to 2007, the OCC only took nine enforcement actions against banks under the Truth in Lending Act.[30]

In their letter to Acting Comptroller John Walsh, consumer groups argued that:

> The financial crisis prompted Congress to revisit the preemption rules. Some, including the OCC, claimed that preemption of state consumer protection laws played no role in contributing to the crisis. However, Congress heard testimony detailing the myriad harmful effects that preemption had on consumers – and ultimately on the economy – in a wide spectrum of financial services from mortgage lending and credit cards to deposit accounts . . . . Congress tightened up the grounds on which the OCC could preempt state law by preventing it from misapplying the *Barnett* test as it had in the past. The evolution of [the prevents or significantly interferes] language demonstrates that, like the no field preemption and case-by-case requirements, the amendment was intended to restrict the OCC's preemption activities and undo the 2004 rules.[31]

In sum, the consumer groups took issue with the proposed amended rules because they failed to appreciate the historical context and legislative history surrounding Congress' enactment of the DFA.

VI. Arguments in Favor of the OCC's Amended Preemption Rules

There is one main argument in favor of the OCC's amended preemption rules. Those in favor of the amended rules state that the DFA did not intend to overturn the OCC's 2004 preemption rules; it merely clarified the applicable standards.

For example, the OCC argued that "The [Dodd-Frank] Act contains no statement that Congress intended to retroactively apply these procedural requirements to overturn existing precedent and rules, and that interpretation would be contrary to the presumption against retroactive legislation."[32] Furthermore, in its notice and comment rulemaking, the OCC argued that the "types and terms of laws that are set out in the 2004 preemption rules were based on the OCC's experience with the potential impact of such laws on national bank powers and

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[28] *See* Karen K. Harris, *OCC Rules Against Bank in Preemption Issue* (Oct. 23, 2012), *available at* http://www.theshriverbrief.org/2012/10/articles/asset-opportunity/occ-rules-against-bank-in-preemption-issue/; *see also* NAT'L CONSUMER LAW CTR., PREEMPTION AND REGULATORY REFORM: RESTORE THE STATES' TRADITIONAL ROLE AS "FIRST RESPONDER" (2009).

[29] *See* Harris, *supra* note 28.

[30] *Id.*

[31] *Id.* at 7-8.

[32] *See* NAT'L CONSUMER LAW CTR., *SUPRA* NOTE 28, AT 3.

operations. We have re-reviewed those rules in connection with this rulemaking to confirm that the specific types of laws cited in the rules are consistent with the standard for conflict preemption in the Supreme Court's *Barnett* decision."[33]

The OCC maintained that its proposed preemption rules were in line with the *Barnett* decision because that decision involved more than just the "prevents or significantly interferes" language. It argued that the "prevents or significantly interferes" language was not a part of the *Barnett* Court's decision but a part of its discussion, and that the DFA directs the OCC to make preemption determinations in accordance with the entire *Barnett* decision, not just one specific phrase.[34]

The OCC is not the sole proponent of its amended rules. Two authors, Raymond Natter and Katie Wechsler, agree with the OCC's interpretation of the DFA's statutory provision mentioning the "prevents or significantly interferes with" language.[35] They employ canons of statutory construction and an analysis of the statute's legislative history to support their arguments. First, Wechsler and Natter argue that the plain meaning of the statute supports the OCC's interpretation because the reference to *Barnett* appears in the operative part of the DFA's preemption provision.[36] Wechsler and Natter also argue that congressional action does not necessarily imply congressional intent to change the law since Congress frequently enacts laws for the sole purpose of codifying court decisions, thereby rejecting the argument that by passing the DFA, Congress intended to repeal the OCC's 2004 preemption regulations.[37] Second, they argue that the legislative history of the Act, including a Senate Banking Committee report finding that the OCC's 2004 regulation went beyond the preemption standard in *Barnett* and that the preemption standard would return to the *Barnett* standard,[38] supports the OCC's interpretation of the statute. Third, they argue that the wording of the preemption standard in the Act is similar to the wording to the preemption of state restrictions on national bank insurance sales activities in the Gramm-Leach-Bliley Act. The OCC made a similar analog to the Gramm-Leach-Bliley Act in its notice and comment.[39] The Gramm-Leach-Bliley Act included a provision that nothing in that Act should be construed to limit the applicability of the decision of the Supreme Court in *Barnett*.[40] Therefore, in the Gramm-Leach-Bliley Act, the "prevents or significantly interferes with" language was a shorthand codification of *Barnett*, supporting the argument that the language serves the same function in the Dodd-Frank Act and does not create a new preemption standard.[41]

VII. Conclusion

[33] 76 F.R. 43557 (July 21, 2011).
[34] 76 F.R. 43555.
[35] *See* Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado about Nothing*, 7 Va. L. & Bus. Rev. 301, 340–47 (2012).
[36] *Id.*
[37] *Id.*
[38] *Id.* at 343.
[39] 76 F.R. 43556. The OCC made a slightly different argument than Natter and Wechsler made however, by arguing that the leading case applying the phrase "prevents or significantly interferes" served as a reference to the entire *Barnett* decision.
[40] *See* Natter & Wechsler, *supra* note 35, at 346.
[41] *Id.*

With these arguments in mind, and after a brief review of the items in the appendix, please make a recommendation as to how COFA should proceed. Do we have good enough arguments to continue the case, or should we try to settle?

APPENDIX

I. The OCC's Policy Statement on Tax Refund-Related Products

- Item 1: Office of the Comptroller, 2010 Policy Statement on Tax Refund-Related Products, *available at* http://www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-7a.pdf.

II. The Dodd-Frank Act Statutory Language Regarding OCC/National Bank Act Preemption

- Item 2: Excerpts, Dodd-Frank Wall Street Reform and Consumer Protection Act §1044, 12 U.S.C. §25b (2010).

III. OCC's Amended Final Rule on Preemption Post Dodd-Frank Act

- Item 3: Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549 (July 21, 2011) (codified at 12 C.F.R. pt.7) (OCC's comments in finalizing the 2011 preemption rules).
- Item 4: 12 C.F.R. § 7.4008 (2016)

IV. Letters and Comments on OCC's Final Rule

- Item 5: Letter from George W. Madison, Chief Law Officer, U.S. Dep't of the Treasury, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency (June 27, 2011).
- Item 6: Letter from Ctr. for Responsible Lending et al., to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency (June 27, 2011).

V. Scholarship Published Interpreting the Dodd-Frank Act Preemption Standard

- Item 7: Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 Va. L. & Bus. Rev. 301 (2012).
- Item 8: 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 (2012).

VI. News Articles

- Item 9: David A. Elliot et al., *Preemption of State Consumer Protection Laws Under the Dodd-Frank Act*, BURR FORMAN LLP, Feb. 19, 2013.
- Item 10: Richard M. Segal & Amy L. Pierce, *CA Auto Sales Finance Act Notice Provisions Not Preempted by National Bank Act*, PILLSBURY WINTHROP SHAW PITTMAN LLP, Aug. 18, 2011.
- Item 11: Raymond Natter, *Federal Court Finds Dodd-Frank Does Not Change Preemption Standard for National Banks*, BARNETT SIVON & NATTER P.C., Mar. 2015.

VII. Optional Additional Reading on States' Role as "First Responders"

- Item 12: NAT'L CONSUMER LAW CTR., PREEMPTION AND REGULATORY REFORM: RESTORE THE STATES' TRADITIONAL ROLE AS "FIRST RESPONDER" (2009).