CSP-024-P

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Financial Regulation Case Study

Case Study

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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

As the new General Counsel for Consumer Advocates of America (“COFA”), you are, I am confident, as proud as I am of our reputation as a leading non-profit consumer advocacy group with national reach. Since our dedicated team of financial and legal professionals started COFA in 2005, we have advocated on behalf of consumers on issues related to product safety, auto services, insurance, financial services, and the like. Our multi-faceted advocacy strategy has served us well: 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.

Right now, I’m concerned about the current class action suit against BankofA. Please read through the background note that your predecessor compiled on this suit. I would like your opinion on next steps as soon as possible.

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 without adequate disclosure to consumers. 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 the Ames Consumer Protection Act, which sets written disclosure requirements that protect consumers. The provision requires all banks and non-bank financial institutions that offer tax refund anticipation loans to provide written notice to

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.

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consumers. This notice must disclose 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 in response to concerns that RAL products may be significantly more expensive than other sources of credit. The law also protects the small subset of consumers who receive actual tax refunds that are lower than the estimated tax refund amounts their RALs were based on.

To clarify banks’ responsibilities relating to RALs, 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 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 of credit in a statement included with the RAL, among additional requirements.2 Ames’s law is different from other state laws of this type in that it requires more of banks and other institutions offering RALs than the federal requirements. Specifically, under Ames law these institutions must not only notify the customer that the RAL may cost more than other credit, but also include a comparison of costs according to the customer’s individualized circumstances. BofA made none of these disclosures when soliciting RALs to customers.

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

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2 See id. at 2-3.
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.” 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 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 respond to the defendant’s motion for summary judgment.

**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. In some circumstances, the applicable federal and state laws might overlap 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. However, because the U.S. Constitution also establishes a federalist system of governance where states possess general powers, the Court employs a presumption against federal preemption of state laws. 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

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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.”
federal regulation, demonstrating Congressional intent to leave no room for state regulation, even if the state law is consistent with federal law.\textsuperscript{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.\textsuperscript{7}

In the financial regulation context, the leading case on preemption is Barnett Bank of Marion County, N.A. v. Nelson.\textsuperscript{8} As you recall, in Barnett, federal law allowed national banks to sell insurance in small towns,\textsuperscript{9} but a Florida law prohibited banks that were subsidiaries or affiliates of a bank holding company from selling insurance products.\textsuperscript{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.’”\textsuperscript{11} Earlier in its opinion, the Court stated that:

\begin{quote}
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.\textsuperscript{12}
\end{quote}

\textsuperscript{6} See id. at 3.


\textsuperscript{8} Id.

\textsuperscript{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.”

\textsuperscript{10} Id. at 28–29.

\textsuperscript{11} Id. at 34–35.

\textsuperscript{12} Id. at 33 (emphasis added).
This language provided the basis for the language on preemption in the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act ("the DFA" or "the Act") of 2010.

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 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 See 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

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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).
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.\textsuperscript{19} If the OCC preempts a state law because the federal law has substantively equivalent terms to the state law it is preempts, 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.”\textsuperscript{20} This provision 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 that 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 \textit{substantial evidence} to support the specific finding.\textsuperscript{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.”\textsuperscript{22} This language implies that courts are no longer 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.”\textsuperscript{23}

\textbf{The OCC’s Preemption Rules}

In 2004—six years prior to enactment of the DFA—the OCC enacted rules that adopted a broad preemption standard. \textit{See Appendix, Items 3–4.} The regulation declared that “state

\begin{itemize}
  \item \textsuperscript{19} \textit{id. at} §1044(a)(b)(3)(A).
  \item \textsuperscript{20} \textit{id. at} § 1044(a)(b)(3)(B).
  \item \textsuperscript{21} \textit{id. at} § 1044(c).
  \item \textsuperscript{22} \textit{id. at} § 1044(b)(5).
  \item \textsuperscript{23} \textit{id. at} § 1043.
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 as were the OCC’s 2004 preemption rules, its prior preemption determinations were valid. While 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 in which national banks are authorized to engage, it stopped short of reversing prior decisions based on this language. 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. In particular, the OCC read the DFA as clarifying, not challenging, rulings based on Barnett: "Important changes were made in the Senate as the [DFA] legislation progressed and sponsors of key language that was ultimately adopted have explained that the changes were intended to provide consistency and legal certainty by preserving the preemption standard of the Supreme Court's Barnett decision." 76 Fed. Reg. 30562 (May 26, 2011). Therefore the OCC determined that prior preempted state laws continued to be preempted under the DFA.

**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.
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 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. Not 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 specifically chose to enact the new standard. 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.\(^{25}\) \textit{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.\(^{27}\)

\textbf{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.\(^{28}\) \textit{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

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{26} Id. at 4.
\item \textsuperscript{27} Id. at 4–5.
\end{itemize}
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 2011 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 regulations.31

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

**Arguments in Favor of the OCC’s Amended Preemption Rules**

There is one main argument in favor of the OCC’s amended preemption rules. Some regulatory experts 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

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29 See Harris, supra note 28.
30 Id.
precedent and rules, and that interpretation would be contrary to the presumption against retroactive legislation.  

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 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.”

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.

The OCC is not the sole proponent of its amended rules. Two authors, Raymond Natter and Katie Wechsler of law firm Barnett Sivon & Natter, agree with the OCC’s interpretation of the DFA’s statutory provision mentioning the “prevents or significantly interferes with” language. 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. 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

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32 See Nat’l Consumer Law Ctr., Supra note 28, at 3.  
33 76 F.R. 43557 (July 21, 2011).  
34 76 F.R. 43555.  
37 Id.
decisions. This rejects the argument that by passing the DFA, Congress intended to repeal the OCC’s 2004 preemption regulations.\textsuperscript{38} 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 \textit{Barnett} and that the preemption standard would return to the \textit{Barnett} standard,\textsuperscript{39} 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 of 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.\textsuperscript{40} 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 \textit{Barnett}.\textsuperscript{41} Therefore, in the Gramm-Leach-Bliley Act, the “prevents or significantly interferes with” language was a shorthand codification of \textit{Barnett}, supporting the argument that the language serves the same function in the Dodd-Frank Act and does not create a new preemption standard.\textsuperscript{42}

\textbf{Conclusion}

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 strong enough arguments to withstand the defendant’s motion for summary judgment? Or should we begin to explore ways to settle the matter?

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 343.
\textsuperscript{40} 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 \textit{Barnett} decision.
\textsuperscript{41} See Natter & Wechsler, \textit{supra} note 36, at 346.
\textsuperscript{42} \textit{Id.}
Appendix

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

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

III. OCC’s Amended Final Rule on Preemption Post Dodd-Frank Act
   - Item 4: 12 C.F.R. § 7.4008 (2016)

IV. Letters and Comments on OCC’s Final Rule
   - 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

VI. News Articles

VII. Optional Additional Reading on States’ Role as “First Responders”
TO: Chief Executive Officers and Compliance Officers of All National Banks, Department and Division Heads, and All Examining Personnel

The attached policy statement sets forth the Office of the Comptroller of the Currency’s (OCC) expectations for national banks involved in providing tax refund-related products, including refund anticipation loans (RAL).

The OCC had previously issued guidance to OCC bank examiners regarding the conduct of RAL lending because the associated products present particular consumer protection and safety and soundness risks due to their unique repayment and cost structures, and banks’ reliance on third-party tax return preparers to offer the products. The OCC is issuing this policy, which is based on that examiner guidance, to enhance, clarify, and increase awareness of the OCC’s expectations for national banks’ involvement with RAL products.

This policy statement updates the prior guidance to examiners of banks offering tax refund anticipation loans and related products and specifies additional new requirements relating to consumer disclosures, contract terms, and compliance verification procedures. The OCC expects implementation to the extent practicable in 2010. For the enhanced consumer disclosures that may necessitate revisions to forms currently in use, implementation is expected for tax refund-related products offered in 2011. National banks are expected to incorporate these terms into any new, renewed, or revised contracts, as appropriate.

FURTHER INFORMATION

For further information concerning this guidance, please contact your supervisory office, the Compliance Policy Department at (202) 874-4428, or the Community and Consumer Law Division at (202) 874-5750.

/signed/
Ann F. Jaedicke
Deputy Comptroller
Compliance Policy

Attachment: Policy Statement
OCC Policy Statement on Tax Refund-Related Products

The Office of the Comptroller of the Currency (OCC) is issuing the following policy statement setting forth the measures national banks are expected to follow if they offer tax refund-related products. These products include refund anticipation loans (RAL), “pay stub loans,” and refund anticipation checks.¹

The OCC previously issued guidance to its examiners regarding issues and expectations regarding these products because they present particular consumer protection and safety and soundness risks due to (1) their unique repayment and cost structures, and (2) banks’ reliance on third-party tax return preparers who interact with consumers. This policy statement is being issued to enhance, clarify, and increase awareness regarding the measures the OCC expects to see in place for tax refund-related products offered by national banks.

PURPOSE

This policy statement addresses the OCC’s expectations of a national bank’s risk management of tax refund-related products. It is intended to promote sound risk management and consumer protections for tax refund-related products and to address related supervisory concerns about legal compliance, consumer protection, reputation, and safety and soundness risks.²

RISK MANAGEMENT ELEMENTS

A national bank’s risk management practices related to tax refund-related products should be appropriate for the complexity and nature of such activity, consistent with safe and sound banking practices and relevant reporting requirements, and be undertaken with appreciation of and capacity to address the consumer protection requirements, legal compliance obligations, and reputation risk considerations associated with the activity. National banks must implement appropriate policies, procedures, and controls to address and ensure compliance with the following standards.

¹ A RAL is a short-term loan made in anticipation of a customer’s income tax refund being approved and paid by the IRS or state tax authority. The loan is made by a bank through third-party tax preparers who offer both tax preparation services and RALs. “Holiday loans” and “pre-file” or “pay-stub loans” also are offered through third-party tax preparers and exhibit more credit risk because funds are advanced based on prior years’ history or a current pay stub, before the customer receives a Form W-2 for the current year. With a “refund anticipation check,” instead of directly transmitting the customer’s tax refund to the customer, the IRS transmits the refund to a limited/special-purpose deposit account at the lending bank. The bank then transmits the refund, less fees associated with tax preparation and/or other deposit services, to the customer.

² This statement replaces the memorandum dated February 23, 2007, from Doug Roeder, Senior Deputy Comptroller, Large Bank Supervision, and Tim Long, Senior Deputy Comptroller, Mid-Size/Community Bank Supervision, to Examiners of Banks Offering Tax Refund Anticipation Loans and Related Products.
I. Board and Management Responsibility

The board should ensure that the bank maintains sound risk management policies, practices, and processes to oversee all tax refund-related products. This should include a comprehensive due diligence process for any new products or material changes to existing products as detailed in prior OCC guidance. The bank’s compliance management program should identify, monitor, and control the consumer protection risks associated with higher fees, compensation incentives, and a general reliance by the customer on the third-party tax preparer for guidance.

II. Consumer Protection Standards

A. Disclosures

Transparency of product terms and costs assists customer understanding of the fundamental characteristics of the product being offered and can help deter inappropriate marketing practices in connection with tax refund-related products. To be effective, clear and prominent disclosure of various aspects of tax refund-related products should be provided in writing to each prospective customer before the customer makes application for such a product or pays a nonrefundable fee. Banks offering these products should have appropriate procedures, such as requirements for written acknowledgments from customers, to verify that these disclosures were properly made.

Disclosures should include the following information, as applicable:

- In the case of a RAL, a statement, clearly more conspicuous than other information set forth, stating that a RAL is a loan, and not the consumer’s tax refund, and that the consumer must repay the entire amount of the loan even if the tax refund is less than the amount that is borrowed.
- In the case of a RAL, a statement that the consumer may:
  o File his or her federal income tax return electronically without obtaining a RAL or other bank product and without any additional costs; and
  o Receive a check or refund deposit directly from the IRS without obtaining a RAL or other bank product or without incurring any additional costs, and an estimate of the average waiting time for an electronic refund to reach a consumer following the approval of an application.

A statement of the total cost of the tax refund-related product, separately identifying fees relating to tax preparation services and tax return filing, and any fees for setting up a deposit account for receipt of the tax refund.

4The OCC expects that national banks will have fully implemented these disclosure requirements no later than January 1, 2011.
For consumers who claim the earned income tax credit (EITC), a statement that the costs of a RAL will be deducted from, and can substantially reduce, their EITC benefits, and that the consumer may obtain the full EITC benefit if they do not take out a RAL.

A statement that a RAL may cost substantially more than other sources of credit and that the consumer should consider whether the loans offered are consistent with their personal needs and financial circumstances.

If applicable, a statement that denied RALs will become refund transfer deposit products and are subject to the fees that apply to those deposit products.

A statement of whether or not any fees imposed in connection with an application for a RAL will be refunded if the loan application is denied.

An explanation of any cross-collection provisions, including, if applicable:
- That the bank can and will determine whether the consumer has an outstanding unpaid RAL with the bank or any other lender identified in the application form;
- That the consumer should determine whether he or she has such outstanding unpaid RAL debt before signing the application, and an explanation of how the consumer can obtain such information (such as by calling a toll-free number before the application is submitted); and
- That, by signing the application, the consumer authorizes the bank to deduct from the consumer’s refund any amounts necessary to repay such outstanding RAL debt.

A statement that the consumer’s application for a RAL will be denied if the consumer has outstanding unpaid taxes or delinquent child support, student loans, or other federal debt.

A description of any low-cost deposit accounts offered by the bank and how to obtain more information from the bank about them.

B. Marketing

The bank should establish effective internal controls and review standards for in-house and third-party developed advertising and solicitations. Guidelines and review processes for advertising and solicitations developed by third-party providers should be clearly stated and be part of the binding agreement between the bank and the provider.

All advertising must comply with the federal laws and regulations governing credit advertising and all relevant IRS advertising standards. All advertising must be factually correct and should state specifically that it is a bank deposit product and/or loan product. If a loan product, advertisements and materials should clearly note that the money provided is a loan and not the actual income tax refund. In addition, RAL marketing should not include misleading statements, such as the following, to suggest that the product is a tax refund or not a loan:

- “Instant tax money”
- “Get your refund fast”
• “Rapid refund”

All advertising copy and video, whether prepared by the bank or by a third party tax preparer, should be reviewed and approved in advance by the bank’s compliance and/or legal personnel to ensure that all relevant terms and conditions are properly disclosed.

III. Third-Party Risk Management

National banks should exercise appropriate diligence and adopt adequate procedures and standards to ensure that tax refund-related products originated by third parties comply with applicable guidance and this policy statement. Prior OCC guidance on third-party relationships established measures that national banks should employ to implement effective risk management processes.5 To manage these risks and to monitor these activities, banks need a sound system of internal controls and comprehensive management information systems.

The system of internal controls should include oversight of third-party providers (e.g., tax preparers and key intermediaries such as servicers and data aggregators) tailored to products offered, size, complexity, and operating infrastructure of the third-party provider. Appropriate controls include:

• Performing substantive due diligence before entering into a business arrangement with a third-party tax preparer. This would include conducting background checks, assessing general competence and business practices and operations, and evaluating counter-party risk (i.e., potential conflicts of interest, reputation, financial capacity and condition, internal controls, record of compliance with applicable licensing, consumer protection and other laws). The reviews should also assess any litigation, enforcement actions, or pattern of consumer complaints.

• Entering into written agreements with third-party tax preparers that specifically and clearly address the rights and responsibilities of each party. In particular, agreements should specifically describe the products and services that the bank is committed to provide, should prohibit the third party from imposing higher fees

for tax preparation services to consumers based on whether they obtain a RAL, prohibit the third party from imposing higher fees for tax preparation services to borrowers who claim the EITC, and should provide that the bank can terminate the agreement if directed by the OCC, based on a written determination by the OCC of unacceptable safety and soundness, regulatory, or consumer compliance risks.6

- Maintaining an oversight program during the tax season to prevent or control potentially abusive practices and noncompliance with policies and procedures. Key components of the program include:
  - A process to collect, review, and appropriately respond to customer complaints on tax refund-related products. The bank should have the necessary systems to capture and monitor customer complaints independent of the third-party provider;
  - Development and monitoring of exception reports designed to identify variances from predetermined acceptable levels of fees and interest charges on bank products and tax preparation services; and
  - Development of customer surveys to assess all facets of product delivery. Surveys should be timely and focus on a statistically representative population of tax preparers as well as a sample of tax preparers identified as high risk through exception reports and other means.

- Performing due diligence regarding the appropriateness of the third-party provider relationships on an ongoing basis. Management should periodically meet with third-party providers to discuss performance and operations issues, periodically monitor the adequacy of training provided to third-party provider employees, especially front line personnel, and regularly review third-party provider audit reports. Management should develop a process in which the third-party provider is required to notify bank management prior to implementation of any critical changes in policies, procedures, or training that would affect product delivery, solicitation, or marketing.

IV. Verification

National banks should have processes and procedures to monitor and verify independently practices of third-party tax preparers who offer products on behalf of the bank to ensure that the practices of these third parties are consistent with this policy statement and with the standards that bank would apply for its direct dealings with customers. This should include testing of transactions at key points in product and service delivery, monitoring of all facets of the product delivery from initial inquiry by the customer to the deposit of funds into the customer’s account or delivery of the refund check, and an appropriately designed mystery shopping program to ensure objectivity and integrity of the process. This audit process may be conducted pursuant to an independent internal process or through the use of independent third parties, but should encompass risk-based factors and appropriate geographic diversity to assure meaningful testing and

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6 The OCC expects that national banks will incorporate these terms into any new, renewed, or revised contracts as appropriate.
verification across a bank’s tax refund-related business. The results of such audits should be documented and available to OCC examiners.

With respect to the mystery shopping element of this verification program, an effective mystery shopping program should:

- Be tailored to assess compliance with procedures and applicable laws;
- Focus on an appropriate sampling methodology of tax preparers as well as a sample of tax preparers identified as high risk because of such factors as length of experience, lack of resources devoted to compliance oversight, complaints, and/or other red flags identified through exception reports and other means;
- Ensure that undue pressure is not brought to bear on the customer to select a tax refund-related product;
- Ensure that the customer is provided with the key information necessary to make an informed decision before the customer applies for a tax refund-related product or pays a nonrefundable fee; and
- Ensure that oral statements made by tax preparation personnel to the customer regarding the product do not contradict or dissuade a customer from considering such information.

V. Fraud and Anti-Money Laundering Compliance

RAL fraud is a common method of consumer loan fraud that typically uses identity theft, falsified electronically filed tax returns, and falsified W-2 forms to obtain a RAL from a bank or other lender, with the proceeds from this type of consumer loan fraud being laundered through the bank.7 Bank management must ensure that the bank’s compliance risk management systems pertaining to the Bank Secrecy Act (BSA) and related regulations cover tax refund loan and deposit products.

Key elements are:

- Risk assessment consideration and documentation;
- Risk-based Customer Information program (CIP);
- Risk-based Customer Due Diligence (CDD), including Enhanced Due Diligence (EDD), as appropriate;
- Risk-based suspicious activity monitoring and reporting; and
- Office of Foreign Assets Control (OFAC) screening.8

In addition to the third-party risk management factors previously discussed, banks should consider on a risk basis, the tax preparer’s customer base, ownership, expected volume of business, financial condition, and references. If the bank processes Automated

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Clearing House (ACH) transactions related to the program, the bank should also implement risk-based CDD/EDD and suspicious activity and reporting systems related to those transactions and OFAC screening. For example, it may be appropriate to monitor transactions for level, trend, amount, and common beneficiaries.

VI. Training

Annual training programs for both bank personnel and tax preparation office personnel are an important component of risk management. Properly trained employees and business partners can significantly reduce the risks inherent in these products. Training should include regulatory requirements (such as consumer and BSA laws, regulation, and guidance) and the bank’s internal policies, procedures, and processes. In addition, the bank, typically, should provide an overview of the regulatory requirements to new staff and temporary employees during employee orientation. This training will need to be customized for temporary employees who are usually hired during the tax season.

Changes to internal policies, procedures, processes, and monitoring systems should also be covered during training. The program should reinforce the importance that the board and senior management place on the bank’s compliance program and should ensure that employees understand their roles in maintaining an effective compliance program.

Training should include an annual certification process. This provides management an assurance that the tax preparers have reviewed and understand the products and materials. Banks and tax preparers should document their training programs. They should maintain training and testing materials, calendars of training sessions, and attendance records and make them available for examiner review.

VII. Management Information Systems (MIS)

National banks should develop timely and accurate MIS for tax refund-related products. MIS could include reports and analysis of the following:

- Production and portfolio trends (such as volume, approval rate, interest and fees) by IRS refund transmittal cycle, by product, originator channel, IRS Debt Indicator (DI), Earned Income Tax Credit (EITC), and credit score (if any);
- Exception (override) tracking;
- Reasons for denial by product and originator channel;
- Delinquency and loss distribution trends by product and originator channel with accompanying analysis of significant underwriting characteristics (such as DI, EITC, and credit score, if any);
- Vintage tracking (IRS payment delinquency by IRS transmission, by IRS e-file refund cycle);
- IRS Payment Analysis segmented by EITC or Non-EITC;
• Conversion of pre-file products to IRS-accepted products by new and existing RAL customers and by originator channel;
• Profitability by product; and
• The performance of third-party originators by tax preparer location. Include volume, profitability (show incentive fees paid), and quality information by product type.

Given the short-term life cycle of the tax refund-related products, most reports, to be relevant and useful, must be generated daily or weekly.

VIII. Loss Recognition

Tax refund-related product lenders are expected, at a minimum, to follow the interagency guidance for retail credit. This guidance requires closed-end retail loans past due 90 cumulative days from the contractual due date to be classified Substandard. Closed-end retail loans that become past due 120 cumulative days from the contractual due date are to be classified Loss and charged off. Lenders are free to adopt a more conservative treatment of delinquent retail loans.

RALs do not have a contractual due date. Therefore, the bank should determine a reasonable date to begin the delinquency calculation. Generally, this will be no more than three e-file refund cycles after the tax return is submitted to the IRS. Other tax refund-related loan products, such as “holiday loans” and “pre-file loans,” have a stated contractual due date. These products should follow the delinquency and charge-off guidelines based on that date.

Some RAL lenders have entered into cross-collection agreements with other RAL lenders. Banks that enter into these agreements must comply with all applicable laws and regulations and accurately disclose the existence and operation of such agreements to their customers.

IX. Capital and Liquidity

The seasonal influx of significant amounts of tax refund-related products may present extraordinary stress on a bank’s capital and liquidity levels. A bank should ensure that reliable contingency plans are in place before engaging in these activities to a material degree. Banks should be mindful that the OCC’s established position on tax refund-related loan products is that they are risk-weighted at 100 percent for risk-based capital purposes.
§ 25b. State law preemption standards for national banks and subsidiaries clarified

(a) Definitions

For purposes of this section, the following definitions shall apply:

(1) National bank

The term “national bank” includes—

(A) any bank organized under the laws of the United States; and

(B) any Federal branch established in accordance with the International Banking Act of 1978 [12 U.S.C. 3101 et seq.].

(2) State consumer financial laws

The term “State consumer financial law” means 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.

(3) Other definitions

The terms “affiliate”, “subsidiary”, “includes”, and “including” have the same meanings as in section 1813 of this title.

(b) Preemption standard

(1) In general

State consumer financial laws are preempted, only if—

(A) 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;

(B) 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; 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

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

(2) Savings clause

Title 62 of the Revised Statutes and section 371 of this title do not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).

(3) Case-by-case basis

(A) Definition

As used in this section the term “case-by-case basis” refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national

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1 So in original. The word “or” probably should appear.
§ 25b

(b) Consultation

When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempts, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) Rule of construction

Title 62 of the Revised Statutes does not occupy the field in any area of State law.

(5) Standards of review

(A) Preemption

A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon 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.

(B) Savings clause

Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

(6) Comptroller determination not delegable

Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

(c) Substantial evidence

No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B) shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, 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 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).

(d) Periodic review of preemption determinations

(1) In general

The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 43 of this title.

(2) Reports to Congress

At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

(e) Application of State consumer financial law to subsidiaries and affiliates

Notwithstanding any provision of title 62 of the Revised Statutes or section 371 of this title, a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

(f) Preservation of powers related to charging interest

No provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of “interest” under such provision.

(g) Transparency of OCC preemption determinations

The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and practices covered by each determination and the requirements and constraints determined to be preempted.

(h) Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks

(1) Definitions

For purposes of this subsection, the terms “depository institution”, “subsidiary”, and “affiliate” have the same meanings as in section 1813 of this title.
(2) Rule of construction

No provision of title 62 of the Revised Statutes or section 371 of this title shall be construed as precluding, annulling, or affecting the applicability of 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).

(i) Visitorial powers

(1) In general

In accordance with the decision of the Supreme Court of the United States in Cuomo v. Clearing House Assn., L. L. C. (129 S. Ct. 2710 (2009)), no provision of title 62 of the Revised Statutes which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other law enforcement officer) of any State 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.

(j) Enforcement actions

The ability of the Comptroller of the Currency to bring an enforcement action under title 62 of the Revised Statutes or section 45 of title 15 does not preclude any private party from enforcing rights granted under Federal or State law in the courts.


REFERENCES IN TEXT

The International Banking Act of 1978, referred to in subsec. (a)(1)(B), is Pub. L. 95–399, Sept. 17, 1978, 92 Stat. 607, which enacted chapter 32 (§ 3101 et seq.) and sections 347d and 611a of this title, amended sections 72, 103a, 103b, 103, 105, 107, and 107a of this title, and enacting provisions set out as notes under sections 124, 125, 126, and 127 of this title, and enacting this title and formerly set out as notes under sections 3101 of this title and formerly set out as notes under sections 3101 of this title and Tables.

(R.S. §5168; Pub. L. 86–230, § 2, Sept. 8, 1959, 73 Stat. 457.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original “‘this Title’” meaning title LXII of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified this section and to sections 16, 21, 22 to 24a, 25a, 25b, 27, 29, 35 to 37, 39, 43, 52, 53, 55 to 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93a, 94, 141 to 144, 161, 164, 181, 182, 192 to 194, 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

AMENDMENTS


Subsecs. (i), (j). Pub. L. 111–203, § 1047(a), added subsecs. (i) and (j).

1 So in original. No par. (2) has been enacted.
were all worked on the day the shift started, or attribute the hours to the calendar days on which the hours were actually worked.  

(iii) Each licensee shall state, in its FFD policy and procedures required by § 26.205(d)(7) for any of the individuals who were performing or directing (on site) the work activities during which the event occurred, if the event occurred while such individuals were performing work under that waiver.  

(d) The licensee may not conclude that fatigue has not or will not degrade the individual’s ability to safely and competently perform his or her duties under that waiver.  

5. Section 26.209 is amended by revising paragraph (a) to read as follows:  


(a) If an individual is performing, or being assessed for, work under a waiver of one or more of the requirements contained in § 26.205(d)(1) through (d)(5)(i) and (d)(7) and declares that, due to fatigue, he or she is unable to safely and competently perform his or her duties, the licensee shall immediately stop the individual from performing any duties listed in § 26.4(a), except if the individual is required to continue performing those duties under other requirements of this chapter. If the subject individual must continue performing the duties listed in § 26.4(a) until relieved, the licensee shall immediately take action to relieve the individual.  

6. Section 26.211 is amended by revising paragraphs (b)(2)(iii) and (d) to read as follows:  

§ 26.211 Fatigue assessments.  

(b) * * * * *  

(ii) Evaluated or approved a waiver of one or more of the limits specified in § 26.205(d)(1) through (d)(5)(i) and (d)(7) for any of the individuals who were performing or directing (on site) the work activities during which the event occurred, if the event occurred while such individuals were performing work under that waiver.  

(d) The licensee may not conclude that fatigue has not or will not degrade the individual’s ability to safely and competently perform his or her duties solely on the basis that the individual’s work hours have not exceeded any of the limits specified in § 26.205(d)(1), the individual has had the minimum breaks required in § 26.205(d)(2) or minimum days off required in § 26.205(d)(3) through (d)(5), as applicable, or the individual’s hours worked have not exceeded the maximum average number of hours worked in § 26.205(d)(7).  

Dated at Rockville, Maryland, this 15th day of July 2011.  

For the Nuclear Regulatory Commission.  

Martin J. Virgilio,  
Acting Executive Director for Operations.
date.’’ The transfer date is one year after the date of enactment of the Dodd-Frank Act, July 21, 2011. The Dodd-Frank Act also abolishes the OTS ninety days after the transfer date.

Specifically, the Dodd-Frank Act transfers to the OCC all functions of the OTS and the Director of the OTS relating to Federal savings associations. As a result, the OCC will assume responsibility for the ongoing examination, supervision, and regulation of Federal savings associations.

The Act also transfers to the OCC rulemaking authority of the OTS relating to all savings associations, both state and Federal. The legislation continues in effect all OTS orders, resolutions, determinations, agreements, regulations, interpretive rules, other interpretations, guidelines, procedures and other advisory materials in effect the day before the transfer date, and allows the OCC to enforce these issuances with respect to Federal savings associations, unless the OCC modifies, terminates, or sets aside such guidance or until superseded by the OCC, a court, or operation of law.

Title III also transfers OTS employees to either the OCC or FDIC, allocated as necessary to perform or support the OTS functions transferred to the OCC and FDIC, respectively.

II. OCC Regulatory Actions To Integrate OTS Functions

As described in the preamble for the proposed rule, the OCC is undertaking a multi-phased review of its regulations, as well as those of the OTS, to determine what changes are needed to facilitate the transfer of supervisory jurisdiction for Federal saving associations to the OCC. This final rule, described in detail below, is part of the first phase of this review and includes provisions revising OCC rules that will be central to internal agency functions and operations immediately upon the transfer date, such as providing for the OCC’s assessment of Federal savings associations and adapting the OCC’s rules governing the availability and release of information to cover information pertaining to the supervision of those institutions. This final rule also amends OCC regulations necessary to implement certain revisions to the banking laws that either took effect on the enactment of the Dodd-Frank Act or are effective as of the transfer date.

As part of this first phase of our review of OTS and OCC regulations, the OCC also will issue an interim final rule with a request for comments, effective on publication, that repudiates those OTS regulations the OCC has the authority to promulgate and will enforce as of the transfer date, with nomenclature and other technical changes.

These republished regulations will supersede the OTS regulations in Chapter V for purposes of OCC supervision and regulation of Federal savings associations, and for certain rules for purposes of the FDIC’s supervision of state savings associations. OTS regulations that will be unnecessary following the transfer of OTS functions to the OCC, or that are superseded as of the transfer date by provisions of the Dodd-Frank Act, will be repealed at a later date.

In future phases of our regulatory review, the OCC will consider more comprehensive substantive amendments, as necessary, to these regulations. For example, we may propose to repeal or modify provisions in cases where OCC and former OTS rules are substantively identical or substantially overlap. In addition, we may propose to repeal or modify OCC or former OTS rules where differences in regulatory approach are not required by statute or warranted by features unique to either charter. We expect to publish these amendments in one or more notices of proposed rulemaking, the first of which we expect to issue later in 2011. This substantive review also will provide an opportunity for the OCC to ask for comments suggesting revisions to the rules for both national banks and Federal savings associations that would remove provisions that are “outmoded, ineffective, insufficient, or excessively burdensome,” consistent with the goals outlined in an executive order recently issued by the President.

III. Description of the Proposal and Comments Received

The NPRM contained amendments to OCC rules at 12 CFR part 4 pertaining to its organization and functions, the availability of information under the Freedom of Information Act (FOIA), the release of non-public OCC information, and restrictions on the post-employment activities of senior examiners; and at 12 CFR part 8, pertaining to assessments. This NPRM also proposed to amend 12 CFR parts 5 and 28, pertaining to change in control of credit card banks and trust banks and deposit-taking by uninsured Federal branches, respectively, and 12 CFR parts 5, 7 and 34, pertaining to preemption and visitorial powers, pursuant to the Dodd-Frank Act. The public comment period closed on June 27, 2011, and the OCC received a total of 45, including comments from consumer advocacy groups, government agencies, representatives of Congress, associations of state officials, industry trade groups, Federal and state banks and thrifts, and law firms. Set forth below is a detailed description of these comments and the resulting final rule.

IV. Section-by-Section Description of Final Rule

A. Part 4

The NPRM contained a number of amendments to part 4 to incorporate the supervision of Federal savings associations within the OCC. We received no substantive comments on the proposed amendments to part 4 and therefore adopt them as proposed, with one technical correction to §4.14 to include cites to OCC rules applicable to savings associations.

1. Organization and Functions (Part 4, Subpart A)

Subpart A describes the organization and functions of the OCC and provides the OCC’s principal addresses. The final rule amends subpart A to reflect the organizational and functional changes resulting from the transfer of the powers and duties of the OTS to the OCC on the transfer date. Other changes conform this subpart to additional provisions in the Dodd-Frank Act, including the Comptroller’s membership on the Financial Stability Oversight Council.

2. Freedom of Information Act (Part 4, Subpart B)

Subpart B contains the OCC’s rules for making requests for agency records and documents under the FOIA. The final rule amends subpart B to apply these rules to FOIA requests relating to Federal savings associations received by the OCC as of the transfer date, ensures...
that records of the OTS are subject to the OCC’s FOIA regulations, and makes various technical changes to part 4 to correct technical errors and to update appropriate references to OCC units charged with handling FOIA requests. The final rule also provides that the OTS’s former rules will continue to govern requests received by the OTS prior to the transfer date.

3. Non-Public Information (Part 4, Subpart C)

Subpart C contains OCC regulations and procedures for requesting access to various types of nonpublic information and the OCC’s process for reviewing and responding to such requests. It also clarifies the persons and entities with which the OCC can share non-public information. The final rule amends subpart C to cover OTS nonpublic information transferred to the OCC and, going forward, OCC nonpublic information related to Federal savings associations. The final rule also provides that nonpublic information in the possession of former employees or officials of the OTS will remain subject to confidentiality safeguards and procedures for requesting access to such information. As with FOIA requests, the final rule provides that the OTS’s former rules will continue to govern requests for nonpublic information received by the OTS prior to the transfer date.

4. One-Year Restrictions on Post-Employment Activities of Senior Examiners (Part 4, Subpart E)

Subpart E sets forth the employment restrictions placed on senior examiners for one year after these individuals leave the employment of the OCC. During this period, a former senior examiner of a national bank is prohibited from accepting compensation from the bank or from an entity that controls the bank. The OTS adopted nearly identical rules. The final rule amends subpart E to include senior examiners of savings associations.

B. Dodd-Frank Act Amendments Affecting Approval of Change in Control Notices and Acceptance of Deposits by Federal Branches (Parts 5 and 28)

This final rule contains amendments to 12 CFR part 5 to implement section 603 of the Dodd-Frank Act. Section 603 provides for a three-year moratorium (with certain exceptions) on the approval of a change in control of credit card banks, industrial banks and trust banks, if the change in control would result in a commercial firm controlling (directly or indirectly) such a bank. The moratorium took effect on the date of enactment of the Act, i.e., July 21, 2010. The proposal amended 12 CFR 5.50(f) to conform OCC regulations to this section of the Act. We received no comments on this amendment and adopt it as proposed.

Section 6 of the International Banking Act, 12 U.S.C. 3104(b), provides that uninsured Federal branches of foreign banks may not accept deposits in an amount of less than the standard maximum deposit insurance amount (SMDIA). The SMDIA is defined in 12 U.S.C. 1821(a)(1)(E) to mean $100,000, subject to certain adjustments provided for in the statute. Section 335 of the Dodd-Frank Act, which takes effect on the transfer date, amends 12 U.S.C. 1821(a)(1)(E) to change the amount from $100,000 to $250,000. Section 28.16(b) of the OCC’s regulations states that an uninsured Federal branch may accept initial deposits of less than $100,000 only from certain persons. In order to conform this section of the OCC’s regulations to the statutory changes and to prevent the need to continually amend this section for changes in the SMDIA, the proposal amended 12 CFR 28.16(b) to refer to 12 U.S.C. 1821(a)(1)(E), rather than the obsolete reference to $100,000. We received no comments on this amendment and adopt it as proposed.

C. Preemption and Visitation Powers (Parts 5, 7, and 34)


The Dodd-Frank Act contains provisions, effective as of the transfer date (July 21, 2011), that affect the scope of preemption for operating subsidiaries, Federal savings associations, and national banks. The Act also sets forth procedural requirements for future preemption determinations and codifies the Supreme Court’s visitorial powers decision in *Cuomo v. Clearing House Association, L.L.C.*

The Act precludes preemption of state law for national bank subsidiaries, agents and affiliates. The Act also changes the preemption standards applicable to Federal savings associations to conform to those applicable to national banks. The Act specifically provides that, as of the transfer date, determinations by a court or by the OCC under the Home Owners’ Loan Act (HOLA) with respect to Federal savings associations must be made in accordance with the laws and legal standards applicable to national banks regarding the application of state law.

The Act further provides that “state consumer financial laws” may be preempted only if: (1) Application of such a law would have a “disadvantageous effect” on national banks compared with state-chartered banks in that state; (2) “in accordance with the legal standard for preemption in the decision of the Supreme Court in” *Barnett Bank of Marion Country, N.A. v. Nelson,* the state consumer financial law “prevents or significantly interferes with the exercise by the national bank of its powers” (Barnett standard); or (3) the state consumer financial law is preempted by a provision of Federal law other than Title I or any other state with substantively equivalent terms. When making a determination under this provision that a state consumer financial law has substantively equivalent terms as the law the OCC is preempting, the OCC

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6 *Dodd-Frank Act, sections 1044–1046, 124 Stat. at 2014–2017 (to be codified at 12 U.S.C. 25b, 1465).* Section 1044, which amends chapter 1 of title LXII of the Revised Statutes by inserting a new section 5136C (to be codified at 12 U.S.C. 25b), contains the principal national bank preemption provisions. 7 *Id. at section 1044(o), 124 Stat. at 2015–2016 (to be codified at 12 U.S.C. 25b).* 8 120 S. Ct. 2710 (June 29, 2009). 9 *Dodd-Frank Act, sections 1044(a), 1045, 124 Stat. at 1376, 2016, 2017 (to be codified at 12 U.S.C. 1465).* 10 *Id. at section 1046, 124 Stat. at 2017 (to be codified at 12 U.S.C. 1465).* 11 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. *Id. at section 1044(a), 124 Stat. at 2014–2015 (to be codified at 12 U.S.C. 25b).* The Dodd-Frank Act does not address the application of state law that is not a “state consumer financial law” to national banks.

must first consult with and take into account the views of the Consumer Financial Protection Bureau (CFPB).16 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.17 Finally, the Act requires the OCC to conduct a periodic review, subject to notice and comment, every five years after issuing a preemption determination relating to a state consumer financial law and to publish a list of such preemption determinations every quarter.18

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.19 On June 29, 2009, the Supreme Court issued its opinion in Cuomo.20 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.”21 Conversely, the decision recognized the “regime of exclusive administrative oversight by the Comptroller”22 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.23

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 “of this title”24 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.”25 In addition, the Act provides that these visitorial powers provisions shall apply to Federal savings associations and their subsidiaries to the same extent and in the same manner as if they were national banks or national bank subsidiaries.26

2. Description of the Proposal

The proposal amended provisions of the OCC’s regulations relating to preemption (12 CFR 7.4007, 7.4008, 7.4009, and 34.4) (2004 preemption rules), operating subsidiaries (12 CFR 5.34 and 7.4006), and visitorial powers (12 CFR 7.4000) to implement the provisions of the Dodd-Frank Act that affect the scope of national bank and Federal thrift preemption and codify Cuomo.

First, we proposed rescission of 12 CFR 7.4006, which is the OCC’s regulation concerning the application of state laws to national bank operating subsidiaries. The proposal also made conforming revisions to the OCC’s operating subsidiary rules at 12 CFR 5.34(a) and paragraph (ej)(3) to refer to new 12 U.S.C. 25b, which includes the codification of the Dodd-Frank Act preclusion of operating subsidiary preemption.27

which permits such subpoenas in connection with his investigation of “repeated fraudulent or illegal acts * * * in the carrying on, conducting or transaction of business.” See N.Y. Exec. Law Ann. § 60(12) (West 2002). That is not the exercise of the power of law enforcement “vested in the courts of justice” which 12 U.S.C. 484(a) exempts from the ban on exercise of supervisory power. Accordingly, the injunction below is affirmed as applied to the threatened issuance of executive subpoenas by the Attorney General for the State of New York, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions. Cuomo, 129 S. Ct. at 2721–2722 (emphasis added).

Dodd-Frank Act, section 1047(a), 124 Stat. at 2018 (to be codified at 12 U.S.C. 25b) (referring to Title LXII of the Revised Statutes).

24 Id. at section 1047(b), 124 Stat. at 2018 (to be codified at 12 U.S.C. 25b).

25 Id. at section 1045, 124 Stat. at 2017 (to be codified at 12 U.S.C. 25b) provides that Title LXII of the Revised Statutes and section 24 of the Federal Reserve Act (12 U.S.C. 371) do not preempt, annul, or affect the applicability of 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).

To implement the Act’s changes to the preemption standards under the HOLA to conform to those applicable to national banks, we proposed adding new §§ 7.4010(a) and 34.6 to our regulations. The new sections 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, respectively. The proposal also added § 7.4010(b) to similarly subject Federal savings associations and their subsidiaries to the same visitorial powers provisions in the Dodd-Frank Act that apply to national banks and their subsidiaries.

In addition, the proposal made conforming changes to the 2004 preemption rules at 12 CFR 7.4007 (concerning deposit-taking), 7.4008 (non-real estate lending), and 34.4 (real estate lending) to reflect the Act’s provisions concerning preemption of state consumer financial laws. Those rules had provided that “[s]tate laws that obstruct, impair, or condition a national bank’s ability to fully exercise its Federally authorized * * * powers are not applicable to national banks.” The proposal noted that, while the phrase “obstruct, impair or condition” had been drawn from and was intended to be consistent with the standards cited by the Supreme Court in Barnett, the terminology had resulted in misunderstanding and confusion. Accordingly, the proposal removed that phrase from these preemption rules. The proposal further clarified that a state law is not preempted to the extent that result is consistent with the Barnett decision. The proposal also deleted § 7.4009, which had provided only that “state laws that obstruct, impair, or condition a national bank’s ability to fully exercise its powers to conduct activities under Federal law do not apply to national banks” without identifying any types of state laws that would be preempted.

Finally, the proposal made several changes to the OCC’svisitorial powers regulation, 12 CFR 7.4000, to conform the regulations to the Supreme Court’s decision in the Cuomo case as adopted by the Dodd-Frank Act. First, it added a reference to 12 U.S.C. 484 in the general rule, set forth § 7.4000(a)(1), that only the OCC may exercise visitorial powers with respect to national banks subject to certain exceptions. Second, to incorporate the Cuomo Court’s recognition that nonjudicial investigations of national banks

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generally constitute an exercise of visitorial powers, the proposal revised the definition of “visitorial powers” in § 7.4000(a)(2)(iv) to clarify that those powers include “investigating or enforcing compliance with any applicable Federal or state laws concerning those activities.” Third, the proposal added a new paragraph (b) to provide that “[i]n accordance with the decision of the Supreme Court in *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce a non-preempted state law against a national bank and to seek relief as authorized thereunder is not an exercise of visitorial powers under 12 U.S.C. 484.”

3. Comments on the Proposal

Commenters who disagreed with the preemption provisions of the proposal generally relied on several principal arguments:

- First, that the *Barnett* standard preemption provision is a new statutory “prevent or significantly interfere” standard that the proposal impermissibly seeks to broaden. These commenters referred to portions of the language of the statute and legislative history in support of their assertion that the Dodd-Frank Act adopts a new preemption standard, narrower than the *Barnett* decision’s “conflict” preemption analysis.

- Second, that the “obstruct, impair, or condition” language introduced in the 2004 preemption rules, which the OCC proposed to delete, is inconsistent with *Barnett* and with the “prevent or significantly interfere” preemption standard. Many of these commenters asserted that the preemption rules adopted by the OCC in 2004 were impliedly repealed by the Dodd-Frank Act. Therefore, these commenters disagree with the OCC’s conclusion that any portions of the 2004 preemption rules and precedents based on those rules remain applicable.

- Third, by retaining, rather than repealing, rules that preempt categories of state laws, that the proposal would circumvent the Dodd-Frank Act procedural and consultation requirements. These commenters asserted that the preemption of categories and/or terms of state laws is equivalent to “occupation of the field,” rather than conflict, preemption. These commenters also believe that the Dodd-Frank Act procedural requirements apply to, and therefore (retroactively) invalidate, certain precedents, including

the 2004 preemption rules, adopted prior to the Dodd-Frank Act.

In addition, some of these commenters objected to preemption of state and local laws on grounds that preemption is bad public policy and asserted that preemption had resulted in predatory lending to vulnerable consumers and the financial and subprime mortgage lending crises. A few commenters also asserted that the Dodd-Frank Act limits the OCC’s preemption authority to state consumer financial laws only.

Some of these commenters further asserted that the proposed visitorial powers amendments:

- Could be construed as prohibiting all types of investigative activities by state officials, including collecting complaints from consumers or researching public records.

- Do not reflect the authority of state attorneys general to enforce compliance with certain Federal laws and regulations to be issued by the CFPB.

- Incorrectly narrow the definition of visitorial powers to the investigation and enforcement of “non-preempted,” rather than “applicable” law.

Commenters who supported the preemption and visitorial powers portions of the proposal expressed agreement with the analysis of the Dodd-Frank Act preemption provisions and legislative history set out in the preamble to the proposal. In the view of these commenters, the *Barnett* standard preemption provision adopts the conflict preemption standard that is the fundamental legal standard of the *Barnett* decision. Some commenters agreed that the “obstruct, impair, or condition” phrasing used in the 2004 preemption rules was a distillation of this conflict preemption standard. These commenters agreed with the position stated in the preamble to the proposal that eliminating this language does not impact the continued applicability of precedents based on those rules.

In addition, supporting commenters argued that a contrary position would also have negative consequences for national banks because it would eliminate legal certainty concerning which laws apply to their operations. These commenters asserted that consumer loans and deposit products are subject to comprehensive regulation, and preemption has served to provide clarity and certainty as to which regulatory requirements and standards apply to national banks. These

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27 *Id. at section 1042(a)(2)(B), 124 Stat. at 2013 (to be codified at 12 U.S.C. 5552) (pertaining to the ability of state attorneys general to enforce certain new regulations promulgated by the CFPB).*

28 One commenter noted that a bank operating across state lines could find itself subject to the law of the state where it provides the service, the law of the state where its branch is located, or the law of the state where the customer is located. The bank could also be subject to laws at the county, municipal, or other level in any or all of these states. The laws of these locations could be different, and failure to comply with each state and local law could subject the bank to fines, penalties, and litigation, and as a result cause it to discontinue activities in certain states to the potential detriment of its customers.

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commenters also suggested that the final rule include additional provisions to: clarify that the OCC’s regulations concerning non-interest fees and charges (12 CFR 7.4002), adjustable rate mortgages (12 CFR 34.21) and debt cancellation contracts (12 CFR 37.1) remain in effect; revise, rather than eliminate, 12 CFR 7.4009 to conform with §§7.4007, 7.4008, and 34.4; clarify that the abrogation of 12 CFR 7.4006 will not be given retroactive effect.\(^{29}\) confirm that the 2004 preemption rules will also apply to Federal savings associations, to the same extent that those rules apply to national banks; and confirm that all prior OTS preemption actions that are consistent with the holding in Barnett, including those based on the HOLA, also continue to be effective.

4. Discussion

The OCC has carefully considered all of the points raised by all of the commenters. As described in detail in the next section and for the reasons next discussed, the OCC is issuing a final rule that is substantially the same as the proposal with additional instructive commentary and certain modifications to the visitatorial powers provisions to address specific concerns that commenters raised and a clarifying change to §§ 7.4010(a) and 34.6 regarding the applicability of state law to Federal savings associations.

a. The Role of Preemption in the U.S. Banking System

As noted above, in addition to comments on specific aspects of the proposed rule, some commenters urged general disfavor of the concept of Federal preemption as applied to the powers of national banks, and some also contended that preemption in the context of national banks contributed to predatory lending practices, which, in turn contributed to the recent financial crisis. Both of these concerns are important to address as threshold matters.

When Congress established the fundamental structure of the U.S. banking system in 1863, it created national banks and a national banking system to operate in parallel with the existing state banking system—a “dual banking system.” Congress did not abolish state banking, but it did include explicit protections in the new framework so that national banks would be governed by Federal standards administered by a new Federal agency—the Office of the Comptroller of the Currency—and not by state authority.

Perhaps not surprisingly, the independence of national banks from state authority over their banking business has produced tensions and disputes over the years. Yet, a long series of Supreme Court decisions beginning in the earliest years of the national banking system have confirmed the fundamental principle of Federal preemption as applied to national banks: that the Federally-granted banking powers of national banks are governed by national standards set at the Federal level, subject to supervision and oversight by the OCC. These characteristics are fundamental to the duality of the “dual banking system.” Thus established, the twin pillars of the national and state banking systems have been fundamental to the structure—and success of the U.S. banking system for nearly 150 years. The Supreme Court’s Barnett decision was a particularly thorough treatment of this background, applying a conflict preemption standard consistent with over a century of Supreme Court precedent as the yardstick for determining when state law applied to a national bank.

With this design, the state and national banking systems have grown up around each other in this “dual banking system.” Encompassing both large institutions that market products and services regionally, nationally and globally, and smaller institutions that focus their business on their immediate communities, this dual system is diverse, with complex linkages and interdependencies. In this context, and over time, a benefit has been that the “national” part of the dual banking system, the part that has allowed large and small banks to operate under uniform national rules across state lines, has helped to foster the growth of national products and services and multi-state markets. And the system also has supported the contributions of the state systems, allowing states to serve as a “laboratory” for new approaches applicable to their state-supervised institutions.

Throughout our history, uniform national standards have proved to be a powerful engine for prosperity and growth. National standards for national banks have been very much a part of this history, benefiting individuals, business and the national economy. In the 21st Century, the Internet and the advent of technological innovations in the creation and delivery of financial products and services has accentuated the geographic seamlessness of financial services markets, highlighting the importance of uniform standards that attach based on the product or service being provided, applying wherever and however the product or service is provided. However, the premise that Federally-chartered institutions would be subject to standards set at the Federal, rather than state-by-state level, does not and should never mean that those institutions are subject to lax standards. National banks are subject to nonbank lenders and at the Federal level—which is being considerably enhanced by many provisions of the Dodd-Frank Act—and to regular, and in some cases, continuous examination of their operations.

Because of the degree of regulation and supervision to which national banks are subject, national banks—and other Federally-regulated depository institutions—have had limited involvement in subprime lending and the worst subprime loans were originated by nonbank lenders and at the state level: where national bank preemption was not applicable. National bank preemption did not and does not prevent regulation of nonbank mortgage lenders and brokers, and going forward, the CFPB’s authority in this area will bring a new level of Federal standards, oversight and enforcement over this “shadow banking system.” Concerns that have been expressed that Federal consumer protection rules were not sufficiently

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29 One commenter also requested clarification that the Dodd-Frank elimination of agent preemption does not apply to employees of national banks and Federal thrifts. Employees of national banks and Federal thrifts acting within the scope of their employment are not acting as agents of these institutions. Therefore, the elimination of preemption for agents has no affect on these employees.

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robust should be addressed by the CFPB’s authority and mandate to write strong Federal consumer protection standards, and its research-based and consumer-tested rulemaking processes envisioned under the Dodd-Frank Act.

b. The Barnett Standard Preemption Provision

With respect to the specifics of the proposal, the OCC concludes that the Dodd-Frank Act does not create a new, stand-alone “prevents or significantly interferes” preemption standard, but rather, incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court’s Barnett decision. This result follows from the language of the statute; is supported by language of other, integrally-related portions of the Dodd-Frank Act preemption provisions; was so described by its sponsors at the time of enactment as intending that result; is consistent with the interpretation Federal courts have accorded virtually identical preemption language in the Gramm-Leach-Bliley Act of 1999 (GLBA); and subsequently has been explained as embodying the intent of the sponsors of the language.

As described in the preamble to the proposal, the language of the Barnett standard preemption provision differs substantially from earlier versions of the legislation. Its sponsors have explained that this change was intended to provide consistency and legal certainty by preserving the preemption principles of the Supreme Court’s Barnett decision, while specifying a process for preemption determinations, and integrating that process with other reforms implemented by the Dodd-Frank Act, prospectively. For example, when asked by Senator Carper to confirm that Section 1044 retained the Barnett standard for determining preemption of state consumer financial law passed by the Senate, Chairman Dodd confirmed that was so.31

31 As passed by the Senate on May 20, 2010, the legislation incorporated the “Carper Amendment,” which provided that a state consumer financial law could be “preempted in accordance with the legal standards of the decision of the Supreme Court of the United States in Barnett Bank v. Nelson [517 U.S. 265 (2000)].” 156 Cong. Rec. S3886 (daily ed. May 18, 2010). The final version of Section 1044 enacted by Congress reflects the revision to the Carper Amendment made by the Conference Committee. When discussing that revision, Senator Carper and Senator Dodd had the following exchange:

Senator Carper: Mr. President, I am very pleased to see that the conference committee * * * retained my amendment regarding the preemption standard for State consumer financial laws with only minor modifications. I very much appreciate the effort of Chairman Dodd in fighting to retain the amendment in conference.

Senator Dodd: I thank the Senator. As the Senator knows, his amendment received strong bipartisan support on the Senate floor and passed by a vote of 80 to 18. It was therefore a Senate priority to retain his provision in our negotiations with the House of Representatives.

Senator 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.

Senator Dodd: The Senator is correct. That is why the conference report specifically cites the Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, 517 U.S. 265 (1996) case. There should be no doubt the legislation codifies the preemption standard stated by the U.S. Supreme Court in that case.

Senator Carper: I again thank the Senator. This will provide certainty to everyone—those who offer consumers financial products and to consumer[s] themselves.


Some commenters assert, however, that the Barnett standard provision and the colloquy between Senators Carper and Dodd point to an intention to adopt a new “prevent or significantly interfere” preemption test for state consumer financial law. However, this assertion fails to take account of both the context and entirety of the colloquy and is not sustained by the language of the statute, or by the Barnett decision itself. Section 1044 of the Dodd-Frank Act provides in pertinent part that a state consumer financial law as applied to a national banking association “only if, in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [Barnett], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.”32

The “legal standard for preemption” employed in the Court’s decision is conflict preemption, applied in the context of powers granted national banks under Federal law.33 “Prevent or significantly interfere” is not “the legal standard for preemption in the decision”; it is part of the Court’s discussion of its reasoning; an observation made describing other Supreme Court precedent that is cited in the Court’s decision.34

Therefore, in order to apply the Barnett standard preemption provision in section 1044, the first step is that the preemption analysis must be “in accordance with the legal standard for preemption in the decision of the Supreme Court” in Barnett. Thus, the analysis should be a conflict preemption legal standard, and the analysis should be in accordance with the Court’s reasoning applying that standard in the Barnett decision. The “prevent or significantly interfere” phrase that follows then provides a touchstone to that conflict preemption standard and analysis.35 The phrase cannot be a new, stand-alone standard, divorced from the reasoning of the decision without ignoring the language that precedes it, which directs that the legal standard be the standard for preemption “in the decision” of the Court. That standard is conflict preemption, as supported by the reasoning of the decision, which includes, but is not bounded by, the “prevent or significantly interfere” formulation. If Congress had intended a different preemption analysis than the conflict preemption analysis in Barnett, it would have been rejecting not just Barnett, but also, as described above, well over a century of judicial precedent upon which the decision was founded. We decline to infer that result from legislative language that begins by stating that preemption would be determined “in accordance with the legal standard for preemption in the decision of the Supreme Court” in Barnett.

This result is supported by other portions of the Dodd-Frank Act and relevant precedent.36 Specifically, in the same section 1044, the related requirement that the OCC must have “substantial evidence” on the record to support adoption of preemption rules or orders refers to “the legal standard of the decision of the Supreme Court in” the Barnett decision, not to any single phrase used in that decision.37

32 517 U.S. at 33–34.
33 31 As passed by the Senate on May 20, 2010, the legislation incorporated the “Carper Amendment,” which provided that a state consumer financial law could be “preempted in accordance with the legal standards of the decision of the Supreme Court of the United States in Barnett Bank v. Nelson [517 U.S. 265 (2000)].”. 156 Cong. Rec. S3886 (daily ed. May 18, 2010). The final version of Section 1044 enacted by Congress reflects the revision to the Carper Amendment made by the Conference Committee. When discussing that revision, Senator Carper and Senator Dodd had the following exchange:

Senator Carper: Mr. President, I am very pleased to see that the conference committee * * * retained my amendment regarding the preemption standard for State consumer financial laws with only minor modifications. I very much appreciate the effort of Chairman Dodd in fighting to retain the amendment in conference.

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This result is supported by other portions of the Dodd-Frank Act and relevant precedent.36 Specifically, in the same section 1044, the related requirement that the OCC must have “substantial evidence” on the record to support adoption of preemption rules or orders refers to “the legal standard of the decision of the Supreme Court in” the Barnett decision, not to any single phrase used in that decision.37
not make sense for this “substantial evidence” requirement to require compliance with a different preemption standard than the standard intended by the Barnett standard preemption provision.

Other textual support is found in the Dodd-Frank Act section providing that Federal savings associations are to be subject to the same preemption standards applicable to national banks. Subsection (a) of section 1046 states that preemption determinations for Federal savings associations under the Home Owners’ Loan Act “shall be made in accordance with the laws and legal standards applicable to national banks regarding preemption of state law.” The heading of subsection (b), which immediately follows, is “Principles of Conflict Preemption Applicable,” which can only refer to the national bank preemption standards to which Federal savings associations are made subject by subsection (a).

The Barnett standard preemption provision also uses language virtually identical to that used in section 104(d)(2)(A) of the GLBA.38 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.”39

Accordingly, we conclude that the Dodd-Frank Act preserves the Barnett conflict preemption standard, precedents consistent with that analysis—which include regulations adopted consistent with such a conflict preemption justification—are also preserved.40 Further, as of July 21, 2011, those rules and predecessors will apply to Federal savings associations to the same extent that they apply to national banks.

c. Deletion of “Obstruct, Impair, or Condition” Preemption Formulation and Retention of the 2004 Preemption Rules

Some commenters asserted that the “obstruct, impair, or condition” phrasing in the 2004 preemption rules was not only inconsistent with Barnett but also inconsistent with the narrower “prevents or significantly interferes” standard that they assert is imposed by the Dodd-Frank Act. As discussed above, we conclude that the Dodd-Frank Act Barnett standard is the conflict preemption standard employed in the Court’s decision, not a new test. The question remains, however, of the relationship between that standard and the “obstruct, impair or condition” formulation. As we noted in the preamble to the proposal, the words “obstruct, impair or condition” as used in the 2004 preemption rules were intended to reflect the precedents cited in Barnett, not to create a new preemption standard. Nevertheless, we acknowledge that the phrase created confusion and misunderstanding well before enactment of the Dodd-Frank Act. We also recognize that inclusion of the “prevents or significantly interferes” conflict preemption formulation in the Barnett standard preemption provision may have been intended to change the OCC’s approach by shifting the basis of preemption back to the decision itself, rather than placing reliance on the OCC’s effort to distill the Barnett principles in this manner.41

For these reasons, the OCC is deleting the phrase in the final rule.42 Eliminating this language from our regulations will remove any ambiguity that the conflict preemption principles of the Supreme Court’s Barnett decision are the governing standard for national bank preemption. In response to concerns raised by commenters about Dodd-Frank Act legislative intent, misunderstanding and potential misapplication of the “obstructs, impairs or conditions” formulation, and the relevant legislative history, the OCC also has reconsidered its position concerning precedent that relied on that standard. To the extent that an existing preemption precedent is exclusively reliant on the phrase “obstructs, impairs, or conditions” as the basis for a preemption determination, we believe that validity of the precedent would need to be reexamined to ascertain whether the determination is consistent with the Barnett conflict preemption analysis as discussed above.43

Some commenters also asserted that the preemption rules promulgated by the OCC in 2004 are not consistent with the Dodd-Frank Act, or with Barnett, because they identify categories and/or terms of state laws that are preempted; some of these commenters equated listing of categories of preempted state laws with field preemption. However, these rules are not based on a field preemption standard.44 They were based on the OCC’s conclusion that the listed types and terms of state laws would be preempted by application of the conflict preemption standard of the Barnett decision.

The essence of the Barnett conflict preemption analysis is an evaluation of the extent and nature of an impediment posed by state law to the exercise of a power granted national banks under Federal law.45 The “conflict” that is analyzed in conflict preemption is the nature and scope of that impediment. Where the same type of impediment exists under multiple states’ laws, a single conclusion of preemption can apply to multiple laws that contain the same type of impediment—that generate the same type of conflict with a Federally-granted power. Accordingly, a conflict preemption analysis can be state law-specific, or it can apply to provisions or terms in more than one law that present the same type of conflict.46 But in all cases,47 there must

41 As we noted in note 31, the colloquy between Senators Carper and Dodd clearly demonstrates that Congress did not intend to change the Barnett standard. But the final language in section 1044 could be read as a rejection of the “obstruct, impair, or condition” formulation used in the 2004 preemption rules.

42 We decline commenters’ request that we also delete this language from the OCC’s bank operations rule at 12 CFR 7.4009 rather than eliminating the rule in its entirety. We have not had occasion to apply this rule to particular types of state laws and therefore do not create uncertainty about the validity of prior precedent. The application of state consumer financial laws to national bank operations continues to be subject to a Barnett conflict preemption analysis.

43 Under some circumstances, however, the preemptive effect of the former regulation could be preserved under Section 1043 of the Dodd-Frank Act. See Dodd-Frank Act, section 1043, 124 Stat. at 2014 (to be codified at 12 U.S.C. 5553). The OCC has not identified any OCC-issued preemption precedent that rested only on the “obstruct, impair, or condition” formulation.


45 As noted by the Court in Barnett, these Federal powers granted national banks may be “both enumerated and incidental.” 517 U.S. at 32.


47 The Barnett standard preemption provision of Dodd-Frank applies to questions concerning the applicability of state consumer financial laws to national banks; the principles of preemption articulated in the Barnett decision apply to
be a conflict that triggers preemption under the standard articulated in the Barnett decision. As detailed below, the Dodd-Frank Act’s case-by-case procedural requirement applicable to future determinations regarding preemption of state consumer financial laws allows categorical determinations where multiple state laws are identified. The Act defines “case-by-case basis” as a determination by the Comptroller as to the impact of a “particular” state consumer financial law on “any national bank that is subject to that law” or the law’s consistency with other state laws with substantively equivalent terms.

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 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. For example, in the lending area, based upon our assessment as the primary Federal supervisor of national banks, state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets, such as laws concerning the protection of collateral value, credit enhancements, risk mitigation, loan-to-value standards, loan amortization and repayment requirements, circumstances when a loan may be called due and payable, escrow standards, use of credit reports to assess creditworthiness of borrowers, and origination, managing, and purchasing and selling extensions of credit or interests therein, would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks.

Similarly, disclosure laws that impose requirements that predicate the exercise of national banks’ deposit-taking or lending powers on compliance with state-dictated disclosure requirements clearly present a significant interference, within the meaning of Barnett, with the exercise of those national bank powers. This type of law falls squarely within the precedent recognized in the Supreme Court’s Barnett decision, notably the Franklin Nat’l Bank decision, specifically discussed and relied upon in Barnett.

And state laws that would alter standards of a national bank’s depository business—setting standards for permissible types and terms of accounts and for funds availability, similarly would significantly interfere with management of a core banking business. Moreover, the imposition of state-based standards on national banks’ depository activities implicates aspects of a bank’s overall risk management and funding strategies, including liquidity, interest rate risk exposure, funding management, and fraud prevention. State and local law directives or instructions affecting these areas are significant, within the meaning of Barnett, since they affect whether and how the bank may offer a core banking product and manage some of its most basic funding functions in operating a banking business.

Several commenters identified particular types of laws in the foregoing categories and explained how they impaired or otherwise burdened their operations. Those commenters also emphasized that to the extent that multiple state requirements may be asserted, the significance of the interference is magnified. Based upon the OCC’s supervisory experience, these concerns are valid.

d. Dodd-Frank Act Procedural and Consultation Requirements

Some commenters asserted that maintaining any of the preemption rules contravenes the new Dodd-Frank Act preemption procedures. These commenters contend that OCC can preempt only on a “case-by-case basis” if a “particular” state law, or an equivalent one, prevents or significantly interferes with the exercise of bank powers, after consultation with the CFPB. However, these provisions clearly apply to determinations made under the Barnett standard provisions of the Dodd-Frank Act that are not effective until July 21, 2011. Actions and regulations in effect prior to the effective date are not subject to the case-by-case requirement, but, as discussed above, the continued validity of those precedents applicable to state consumer financial laws is subject to the standards of section 1044(b)(1). Future preemption determinations would be subject to the new Dodd-Frank Act procedural provisions. Where Congress wanted to make wholesale changes to existing preemption standards, it clearly did so, as it did by eliminating field preemption for Federal thrifts and preemption for operating subsidiaries, and those standards operate prospectively.

e. Visitorial Powers Amendments

As explained above, some commenters voiced concern about the proposed revision to the definition of visitorial powers at § 7.4000(a)(2)(vi) to include “[i]nvestigating or enforcing compliance with any applicable Federal or state laws concerning those activities.” This addition, consistent with the concept of visitation, was intended to include direct investigations of national banks such as through requests for documents or testimony directed to the bank to ascertain the bank’s compliance with law through mechanisms not otherwise authorized under the rule. It would not include collecting information from other sources or from the bank through actions that do not constitute visitations or as authorized under Federal law. In response to commenters and to better reflect the Cuomo decision, we have revised the final rule to clarify this point.

Commenters also opined that the proposed definition does not reflect the authority of state attorneys general to

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51 Barnett, 517 U.S. at 33; Franklin Nat’l Bank of Franklin Square v. New York, 347 U.S. 373 (1954). See also American Bankers Ass’n v. Lockyer, 239 F. Supp. 2d 1000, 1014–1018 (E.D. Cal. 2002) (the monetary and non-monetary costs of a mandatory disclosure scheme constituted a significant interference with national banks’ powers under the National Bank Act); Rose v. Chase Bank, N.A., 513 F.3d 1032 (9th Cir. 2008) (a state mandate of by statute attach civil liability to the offer of conversion checks that do not carry state-mandated disclosures.) Lockyer and Rose cited and relied on the preemption standard in Barnett.

52 See Dodd-Frank Act, sections 1046(a), 1044(a). 124 Stat. at 2017, 2015 (to be codified at 12 U.S.C. 1465, 25b). 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. 4173, 111th Cong. § 4404 (as passed by the House of Representatives on Dec. 11, 2009). The final version of the Dodd-Frank Act legislation enacted by Congress did not adopt this approach. See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 272–73 (1994) (recognizing presumption against retroactive legislation).
enforce certain Federal laws and certain regulations to be issued by the CFPB. We believe this authority is addressed in current § 7.4000(a)(3), which provides that the OCC has exclusive visitorial powers “[u]nless otherwise provided by Federal law,” and in § 7.4000(b)(1).

Finally, some commenters asserted that the phrase “non-preempted state law” used in the proposal could be interpreted more narrowly than the “applicable law” phrasing used in the Dodd-Frank Act. We intended the authority addressed in current § 7.4000(a)(3) in combination with the phrase “non-preempted state law” to have the result sought by these commenters, but we understand the commenters’ concern regarding the clarity of this result. Accordingly, we have changed the language of the final rule to simply use the term “applicable law.” We note, however, that this is an exception from a prohibition of certain visitorial actions by an attorney general (or other chief state law enforcement officer) to perform any authorization. In the case of both non-preempted state law and Federal law, the law in question still must provide authority for the attorney general to enforce and seek relief as authorized under that applicable law.

5. Description of the Final Rule

For the reasons set forth in this preamble, the final rule amends provisions of the OCC’s regulations relating to preemption (12 CFR 7.4007, 7.4008, 7.4009, and 34.4), operating subsidiaries (12 CFR 5.34 and 7.4006), and visitorial powers (12 CFR 7.4000) as follows:

• The final rule adds §§ 7.4010(a) and 34.6 to provide that Federal savings associations and their subsidiaries are subject to the same laws and legal standards, including OCC regulations, as are applicable to national banks and their subsidiaries regarding the preemption of state law. The final rule also adds § 7.4010(b) to subject Federal savings associations and their subsidiaries to the same visitorial powers provisions in the Dodd-Frank Act that apply to national banks and their subsidiaries.

• The final rule makes conforming changes to §§ 7.4007, 7.4008, and 34.4. It revises paragraphs (b) in § 7.4007, (d) in § 7.4008, and (a) in § 34.4 by removing “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.” The final rule further clarifies that a state law is not preempted to the extent consistent with the Barnett decision.

• The final rule deletes § 7.4009.

• The final rule deletes § 7.4006, which governs applicability of state laws to national bank operating subsidiaries. The final rule also makes conforming revisions to 12 CFR 5.34(a) and paragraph (e)(3) by expressly referencing the new section 12 U.S.C. 25b adopted by the Dodd-Frank Act.

• The final rule makes a number of changes to § 7.4000 to conform the regulations to the Supreme Court’s decision in the Cuomo case as adopted by the Dodd-Frank Act. First, it adds a reference to 12 U.S.C. 484 in § 7.4000(a)(1). Second, it revises paragraph (a)(2)(iv) to read “[e]nforcing compliance with any applicable Federal or state laws concerning those activities, including through investigations that seek to ascertain compliance through production of non-public information by the bank, except as otherwise provided in paragraphs (a), (b) and (c).” Third, it adds a new paragraph (b), which specifically provides that “[i]n accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L.L.C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief as authorized by such law is not an exercise of visitorial powers under 12 U.S.C. 484.” Fourth, it redesignates paragraphs (b) and (c) as new paragraphs (c) and (d) and makes conforming revisions to §§ 7.4000(c)(2), which provides an exception from the general rule in § 7.4000(a)(1) for such visitorial powers as are vested in the courts of justice.

We did not propose changes to 12 CFR 7.4002, 34.21, and 37.1 and therefore make no changes to these provisions in this final rule. However, we agree with commenters that these rules remain in effect.

D. Assessments (Part 8)

1. Background

The Dodd-Frank Act transfers authority to collect assessments for Federal savings associations from the OTS to the OCC. This authority is effective as of the transfer date, July 21, 2011. The Dodd-Frank Act also provides that, in establishing the amount of an assessment, the Comptroller may consider the nature and scope of the activities of the entity, the amount and type of assets it holds, the financial and managerial condition of the entity, and any other factor that is appropriate.

Prior to the transfer date, the OCC and the OTS assessed banks and savings associations, respectively, using different methodologies, although the agencies’ methodologies generally resulted in similar levels of assessments. Under the OTS assessment system, assessments were due each year on January 31 and July 31, and were calculated based on an institution’s asset size, condition, and complexity.

The asset size component of the assessment was calculated using a table and formula contained in the OTS’s regulation. The OTS set specific rates that apply to the table through a Thrift Bulletin on assessments and fees.

The condition component in the OTS’s regulation applied to savings associations with Uniform Financial Institutions Rating System (UFIRS) ratings of 3, 4, or 5. The condition surcharge is determined by multiplying a savings association’s size component by 50%, in the case of any association that receives a composite UFIRS rating of 3, and 100% in the case of any association that receives a composite UFIRS rating of 4 or 5. Under the OTS regulation, there was no cap on the condition surcharge.

The assessment for complexity was based on a savings association’s trust assets and on certain non-trust assets. The OTS charged a complexity component for trust assets if a savings association had more than $1 billion in one of three components: trust assets managed by the savings association, the outstanding principal balance of assets that are covered by recourse obligations or direct credit substitutes, and the principal amount of loans that the institution services for others. The OTS charged the complexity component for these categories of assets above $1 billion under tiers and rates set out in a Thrift Bulletin.

HOLA to authorize the Comptroller to assess savings associations and affiliates of savings associations for the cost of examinations as the Comptroller “deems necessary or appropriate.”

55 See Dodd-Frank Act, section 318(b), 124 Stat. at 1526–1527 (to be codified at 12 U.S.C. 16) (authorizing the Comptroller to collect assessments, fees, or other charges from entities for which it is the appropriate Federal banking agency). See also id. at section 312(c), 124 Stat. at 1522 (to be codified at 12 U.S.C. 1813) (amending the Federal Deposit Insurance Act to designate the OCC as the appropriate Federal banking agency for Federal savings associations); section 369, 124 Stat. at 1563 (to be codified at 12 U.S.C. 1467) (amending the Federal Deposit Insurance Act to designate the OCC as the appropriate Federal banking agency for Federal savings associations).

56 Id. at section 318(b), 124 Stat. at 1521 (to be codified at 12 U.S.C. 5412).

57 Id. at section 318(b), 124 Stat. at 1526–1527 (to be codified at 12 U.S.C. 16).

58 12 CFR part 502.

If a savings association administers trust assets of $1 billion or less, the OTS could assess fees for its examinations and investigations of those institutions. The OTS also could assess a savings association for examination or investigation of its affiliates. Again, these fees were set in a Thrift Bulletin.

Under the OCC’s assessment regulation, set forth at 12 CFR part 8, assessments for each national bank are due on March 31 and September 30 of each year. The semiannual assessment for each national bank is based on an institution’s asset size and is calculated using a table and formula in the OCC’s regulation. The OCC sets the specific rates for the table each year in the Notice of Comptroller of the Currency Fees (Notice of Fees). The OCC may provide a reduced semiannual assessment for each non-lead bank within a bank holding company.

In addition to the semiannual assessment, the OCC applies a separate assessment for its examination of “independent credit card banks” and “independent trust banks.” A bank is an independent credit card bank if it engages primarily in credit card operations and is not affiliated with a parent holding company. The OCC sets the specific rates for the table each year in the Notice of Comptroller of the Currency Fees (Notice of Fees). The OCC may provide a reduced semiannual assessment for each non-lead bank within a bank holding company.

In addition to the semiannual assessment, the OCC applies a separate assessment for its examination of “independent credit card banks” and “independent trust banks.” A bank is an independent credit card bank if it engages primarily in credit card operations and is not affiliated with a parent holding company. The OCC sets the specific rates for the table each year in the Notice of Comptroller of the Currency Fees (Notice of Fees). The OCC may provide a reduced semiannual assessment for each non-lead bank within a bank holding company.

An “independent trust bank” is a national bank with trust powers that has fiduciary and related assets, does not primarily offer full-service banking, and is not affiliated with a full-service national bank. The independent trust assessment is made up of a minimum amount, set in the Notice of Fees, and an additional amount for banks with over $1 billion in fiduciary and related assets. The specific rate applicable to fiduciary and related assets above $1 billion is also set in the annual Notice of Fees.

The OCC applies a condition-based surcharge to the semiannual assessment of national banks. The condition surcharge applies to national banks with UFIRS ratings of 3, 4, or 5. The condition surcharge is determined by multiplying the general semiannual assessment by a factor, which is the sum of the two assessment cycles after the transfer date. The OCC is adopting the final rule as proposed.

The final rule amends part 8 to assess Federal savings associations using the same methodologies, rates, fees, and payment due dates that apply currently to national banks. The OTS’s existing assessment regulation is no longer in effect and will be repealed at a later date. As a result, the next assessment for savings associations will occur in September 2011, and not July 2011.

Under the OCC’s assessment system, some savings associations will pay marginally more assessments than in the past, while others will pay lower assessments. However, during the first two assessment cycles after the transfer date, the OCC will base savings association assessments on either the OCC’s assessment regulation (as amended to include Federal savings associations) or the former OTS assessment structure, whichever yields the lower assessment for that savings association. After the March 2012 assessment, all national banks and Federal savings associations will be assessed using the OCC’s assessment structure. The OCC intends to implement this phase-in through an amended Notice of Fees. The OCC believes that this phase-in will allow savings associations sufficient time to adjust to the OCC’s assessment program.

One commenter suggested that the OCC add the phase-in period for Federal savings associations to the regulatory text. The OCC believes that the amended Notice of Fees discussed above, as well as the discussion of the phase-in included in the proposed rule and this preamble, provide sufficient guidance to Federal savings associations concerning the OCC’s intention to delay application of higher assessments for affected Federal savings associations for two assessment cycles. Given the temporary nature of the phase-in, we decline to include a reference to the phase-in period in the regulatory text.

This commenter also suggested that the OCC provide an alternate assessment statement to Federal savings associations to show savings associations what the assessment would have been under the OCC’s assessment structure, had it been applied. The commenter stated that this will assist those Federal savings associations that will pay marginally more under the OCC’s assessment structure better prepare for the shift to OCC assessments in 2012. We agree that such notice would be helpful and plan to notify those Federal savings associations that will pay a lower assessment during the phase-in of the amount their assessments would have been under the OCC’s assessment structure.

The final rule also implements section 605(a) of the Dodd-Frank Act, which provides the OCC (and other appropriate Federal banking agencies) with authority to conduct examinations of depository-institution permissible activities of nondepository institution subsidiaries of depository institution holding companies. Section 605 provides specific authority for the OCC and other regulators to assess such nondepository institution subsidiaries for the costs of examination. The final rule implements this new statutory assessment authority.

V. Effective Date

This final rule is effective on July 21, 2011, except as noted in the DATES section. A final rule may be published with an effective date that is less than 30 days from publication if an agency finds good cause and publishes such with the final rule. The purpose of a delayed effective date is to permit regulated entities to adjust their behavior before the final rule takes effect. As described above, the OCC is amending its rules to implement various provisions of the Dodd-Frank Act.
including the Act’s transfer of functions of the OTS to the OCC, the Act’s provisions regarding preemption and visitorial powers, and the Act’s amendments relating to the change in control of credit card banks and trust banks and deposit-taking by uninsured Federal branches. The changes relating to the transfer of the OTS’s functions to the OCC are essential to facilitating a seamless transition when the OCC assumes responsibility for supervising Federal savings associations on the transfer date (July 21, 2011) and must be in effect on that date in order to ensure that the appropriate regulatory structure is in place. Specifically with regard to the preemption and visitorial powers rules, it is important for the industry to have guidance by the effective date of the relevant Dodd-Frank Act amendments, July 21, 2011. Finally, the amendments relating to the change in control of credit card banks and trust banks and deposit-taking by uninsured Federal branches simply implement statutory changes made effective upon the enactment of the Dodd-Frank Act on July 21, 2010. For these reasons, the OCC finds good cause to dispense with a delayed effective date. Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4802) (RCDRIA) requires that regulations imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of the calendar quarter after publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time. The RCDRIA does not apply to the amendments to parts 4, 5, 7, 8, 28 and 34 of this final rule because these amendments do not impose any additional reporting, disclosure, or other requirements.

VI. Regulatory Analysis

1. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the Federal Register along with its rule. We have concluded that the final rule does not have a significant economic impact on a substantial number of small entities currently supervised by the OCC (i.e., national banks and Federal branches and agencies of foreign banks). In addition, although the final rule will directly affect all Federal savings associations, we have concluded that it does not have a significant economic impact on a substantial number of small Federal savings associations. Specifically, the amendments to part 4 do not contain new compliance requirements. Any costs that may be associated with integrating the functions of the two agencies, and other changes to part 4, will be borne by the OCC. In addition, there are no costs directly associated with the amendments to 12 CFR 5.50(f) and part 28, implementing sections 603 and 335 of the Dodd-Frank Act, respectively, or with the amendments necessary to apply national bank preemption standards to Federal savings associations. Furthermore, we have determined that the amendments to the preemption and visitorial powers provisions affecting national banks will not have a significant economic impact on a substantial number of small entities. Lastly, although the amendments to part 8, assessments, will economically impact a substantial number of small savings associations, this impact will not be significant. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a final regulatory flexibility analysis is not needed.

2. Paperwork Reduction Act

The rule contains several currently approved collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520). The amendments adopted today do not introduce any new collections of information into the rules, nor do they amend the rules in a way that substantively modifies the collections of information that OMB has approved. Therefore, no PRA submissions to OMB are required, with the exception of non-substantive submissions to OMB to adjust the number of respondents.

3. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by state, local, and Tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this final rule is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects

12 CFR Part 4
National banks, Savings associations, Organization and functions, Reporting and recordkeeping requirements, Administrative practice and procedure, Freedom of Information Act, Records, Non-public information, Post-employment activities.

12 CFR Part 5
Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

12 CFR Part 7
Computer technology, Credit, Insurance, Investments, National banks, Savings associations, reporting and recordkeeping requirements, Securities, Surety bonds.

12 CFR Part 8
National banks, Savings associations, Reporting and recordkeeping requirements.

12 CFR Part 28
Foreign banking, National banks, Reporting and recordkeeping requirements.

12 CFR Part 34
Mortgages, National banks, Savings associations, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS

1. The authority citation for part 4 is revised to read as follows:

2. Revise § 4.2 to read as follows:

§ 4.2 Office of the Comptroller of the Currency.

The OCC is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction. The OCC examines, supervises, and regulates national banks, Federal branches and agencies of foreign banks, and Federal savings associations to carry out this mission. The OCC also issues rules and regulations applicable to state savings associations.

§ 4.3 [Amended]

3. Amend § 4.3 in the third sentence by adding “a member of the Financial Stability Oversight Council,” after “Federal Deposit Insurance Corporation,”.

4. Revise § 4.4 to read as follows:

§ 4.4 Washington office and Web site.

The Washington office of the OCC is the main office and headquarters of the OCC. The Washington office directs OCC policy, oversees OCC operations, and is responsible for the direct supervision of certain national banks and Federal savings associations, including the largest national banks and the largest Federal savings associations (through the Large Bank Supervision Department); other national banks and Federal savings associations requiring special supervision; and Federal branches and agencies of foreign banks (through the Large Bank Supervision Department). The Washington office is located at 250 E Street, SW., Washington, DC 20219. The OCC’s Web site is at http://www.occ.gov.

5. Amend § 4.5 by:

a. Revising paragraph (a); and

b. In paragraph (b), adding “and savings association” after “support the bank”.

The revision reads as follows:

§ 4.5 District and field offices.

(a) District offices. Each district office of the OCC is responsible for the direct supervision of the national banks and Federal savings associations in its district, with the exception of the national banks and Federal savings associations supervised by the Washington office. The four district offices cover the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. The office address and the geographical composition of each district follows:

<table>
<thead>
<tr>
<th>District</th>
<th>Office address</th>
<th>Geographical composition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central District</td>
<td>Office of the Comptroller of the Currency, One Financial Place, Suite 2700, 440 South LaSalle Street, Chicago, IL 60605</td>
<td>Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas.</td>
</tr>
<tr>
<td>Western District</td>
<td>Office of the Comptroller of the Currency, 1225 17th Street, Suite 300, Denver, CO 80202</td>
<td></td>
</tr>
</tbody>
</table>

6. Amend § 4.6 by:

a. Revising the section heading;

b. In paragraph (a):

i. Adding in the first sentence “and Federal savings associations” after “examines national banks”; “(with respect to national banks) and 1463(a)(1) and 1464 (with respect to Federal savings associations)” after “12 U.S.C. 481” and “(with respect to national banks and Federal savings associations)” after “12 U.S.C. 1820(d)”;

ii. Adding in the second sentence “and Federal savings association” after “every national bank”;

iii. Adding in paragraph (b)(1), (b)(2), (b)(4), and (b)(5) “or Federal savings association” after “bank” each time it appears; and

iv. In paragraph (b)(3) removing “, the OCC” in the introductory text and revising paragraphs (b)(3)(i) and (b)(3)(ii); and

v. In paragraph (b)(4), adding “, OTS” after “OCC”.

vi. In paragraph (c), adding “and Federal savings associations” after “national bank”.

The revisions read as follows:

§ 4.6 Frequency of examination of national banks and Federal savings associations.

*b * * * *

(b) * * *

(i) The bank or Federal savings association was assigned a rating of 1 or 2 for management as part of the bank’s or association’s rating under the Uniform Financial Institutions Rating System; and

(ii) The bank or Federal savings association was assigned a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System.

*b * * *
§ 4.7 [Amended]  
7. In paragraph (a) of § 4.7, remove the phrase “(b) and (i)” and add in its place “(g) and (h)”;  
8. Amend § 4.11 by:  
a. In paragraph (a), removing “industry” and adding in its place “and savings association industries” after the word “banking”;  
b. Adding paragraph (b)(4).  
The addition reads as follows:  

§ 4.11 Purpose and scope.  
* * * * *  
(b) * * *  
(4) This subpart does not apply to FOIA requests filed with the Office of Thrift Supervision (OTS) before July 21, 2011. These requests are subject to the rules of the OTS in effect on July 20, 2011.  
9. Amend § 4.12 by:  
a. Removing “and” at the end of paragraph (b)(8) and removing the period and adding “; and” at the end of paragraph (b)(9); and  
b. Adding paragraph (10).  
The addition reads as follows:  

§ 4.12 Information available under the FOIA.  
* * * * *  
(b) * * *  
(10) Any OTS information similar to that listed in paragraphs (b)(1) through (9) of this section, to the extent this information is in the possession of the OCC.  
10. Amend § 4.14 by:  
a. Adding in paragraph (a)(7), footnote 1, first sentence, “and Federal savings associations” after “banks” and removing “, such as the Consolidated Report of Condition and Income (FFIEC 031–034).”;  
b. Removing the phrase “part 11 or 16” in paragraph (a)(9) and adding in its place the phrase “parts 11, 16, 194 or 197”;  
c. Removing “and” at the end of paragraph (a)(10);  
d. Removing the period at the end of paragraph (a)(11) and adding in its place “; and”  
e. Adding paragraph (a)(12); and  
f. Revising paragraph (c).  
The additions and revision read as follows:  

§ 4.14 Public inspection and copying.  
(a) * * *  
(12) Any OTS information similar to that listed in paragraphs (a)(1) through (a)(12) of this section, to the extent this information is in the possession of the OCC.  
* * * * *  
(c) Addresses. The information described in paragraphs (a)(1) through (10) and (a)(11) of this section is available from the Disclosure Officer, Communications Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219. The information described in paragraph (a)(11) of this section in the case of both banks and Federal savings associations is available from the Licensing Manager at the appropriate district office at the address listed in § 4.5(a), or in the case of banks and savings associations supervised by Large Bank Supervision, from the Large Bank Licensing Expert, Licensing Department, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.  
11. Amend § 4.15 by:  
a. Adding in paragraph (b)(1) “through the OCC’s FOIA Web portal at https://appsec.occ.gov/publicaccesslink/palMain.aspx or” after “must submit the request or appeal”; and  
b. Adding in paragraph (b)(1)(vi) “OCC’s Director of Communications or that person’s” and adding in its place “Comptroller or the Comptroller’s”.  
12. Amend § 4.16:  
a. Adding in paragraph (b)(1)(i) introductory text by adding “or to the Federal Home Loan Bank Board, the predecessor of the OTS,” after “OCC”;  
b. In paragraph (b)(1)(i)(C) by removing “OCC” and adding “from the OCC or the Federal Home Loan Bank Board, the predecessor of the OTS” after “confidentiality”;  
c. In paragraph (b)(1)(ii) introductory text by adding “or to the OTS (or the Federal Home Loan Bank Board, its predecessor agency)” after “OCC”;  
d. In paragraph (b)(1)(ii)(B) by adding “or the OTS (or the Federal Home Loan Bank Board, its predecessor agency)” after “OCC”; and  
e. In paragraph (b)(2)(iv) by adding “or the OTS (or the Federal Home Loan Bank Board, its predecessor agency)” after “OCC”.  
13. Revise § 4.18 to read as follows:  

§ 4.18 How to track a FOIA request.  
(a) Tracking number. (1) Internet requests. The OCC will issue a tracking number to all FOIA requesters automatically upon receipt of the request (as described in § 4.15(g)) by the OCC’s Communications Department via the OCC’s Freedom of Information Request Portal, https://appsec.occ.gov/publicaccesslink/palMain.aspx. The tracking number will be sent via electronic mail to the requester.  
(2) If a requester does not have Internet access. The OCC will issue a tracking number to FOIA requesters without Internet access within 5 days of the receipt of the request (as described in § 4.15(g)) in the OCC’s Communications Department. The OCC will mail the tracking number to the requester’s physical address, as provided in the FOIA request.  

(b) Status of request. FOIA requesters may track the progress of their requests via the OCC’s Freedom of Information Request Portal, https://appsec.occ.gov/publicaccesslink/palMain.aspx. Requesters without Internet access may continue to contact the Disclosure Officer, Communications Division, Office of the Comptroller of the Currency, at (202) 874–4700 to check the status of their FOIA request(s).  
14. Amend § 4.31 by:  
b. Adding in paragraph (b)(3) “or state savings association” after “state bank”; and  
c. Adding paragraph (b)(5).  
The addition reads as follows:  

§ 4.31 Purpose and scope.  
* * * * *  
(b) * * *  
(5) This subpart does not apply to requests for non-public information filed with the Office of Thrift Supervision (OTS) before July 21, 2011. These requests are subject to the rules of the OTS in effect on July 20, 2011.  
15. Amend § 4.32 by:  
a. Revising paragraph (b)(1)(i);  
b. In paragraph (b)(1)(ii) adding “the OTS” after “OCC”, removing “the OCC’s”, and adding “either agency’s” after “with”;  
c. Adding in paragraph (b)(1)(iii) “or OTS” after “compiled by the OCC”;  
d. Revising paragraph (b)(1)(v);  
e. Adding in paragraph (b)(1)(vi) “, Federal savings associations, and savings and loan holding companies” after “national banks”;  
f. Removing the second sentence in paragraph (b)(2); and  
g. Revising paragraph (e).  
The revisions read as follows:  

§ 4.32 Definitions.  
* * * * *  
(b) * * *  
(1) * * *  
(i) A record created or obtained:  
(A) By the OCC in connection with the OCC’s performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a national bank, a Federal savings
association, a bank holding company, a savings and loan holding company, or an affiliate; or

(B) By the OTS in connection with the OTS’s performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a Federal savings association, a savings and loan holding company, or an affiliate;

* * * * *

(v) Testimony from, or an interview with, a current or former OCC employee, officer, or agent or a former OTS employee, officer, or agent concerning information acquired by that person in the course of his or her performance of official duties with the OCC or OTS or due to that person’s official status at the OCC or OTS; and

* * * * *

(e) Supervised entity includes a national bank or Federal savings association, a subsidiary of a national bank or Federal savings association, or a Federal branch or agency of a foreign bank licensed by the OCC as defined under 12 CFR 28.11(g) and (h), or any other entity supervised by the OCC.

* * * * *

16. Revise § 4.35(a)(5) to read as follows:

§ 4.35 Consideration of requests.

(a) * * *

(5) Notice to subject national banks and Federal savings associations. Following receipt of a request for non-public OCC information, the OCC generally notifies the national bank or Federal savings association that is the subject of the requested information, unless the OCC, in its discretion, determines that to do so would advantage or prejudice any of the parties in the matter at issue.

* * * * *

17. Amend § 4.37 by:

a. In paragraph (a):

i. Adding in the paragraph heading “after “national bank,”” and “after a Federal savings association,” after “Federal savings association,” after “national bank,””;

ii. Adding “or former OTS employee or agent” each time that phrase appears;

iii. Adding at the end of paragraph (a)(2)(ii), “and former OTS employees or agents”;

b. In paragraph (b):

i. Adding in paragraph (b)(1)(i) introductory text “Federal savings association,” after “national bank,””;

ii. Revising paragraph (b)(2) introductory text;

iii. Adding at the end of paragraph (b)(2)(ii) “Federal savings association”;

iv. Adding in paragraph (b)(3) introductory text “Federal savings association,” after “national bank,””;

c. In paragraph (c), adding in the first sentence “and state savings association” after “state bank”.

The revision reads as follows:

§ 4.37 Persons and entities with access to OCC information; prohibition on dissemination.

* * * * *

(b) * * *

(2) Exception for national banks and Federal Savings and Loan Associations. When necessary or appropriate for business purposes, a national bank, Federal savings association, or holding company, or any director, officer, or employee thereof, may disclose non-public OCC information, including information contained in, or related to, OCC reports of examination, to a person or organization officially connected with the bank or Federal savings association as officer, director, employee, attorney, auditor, or independent auditor. A national bank, Federal savings association, or holding company or a director, officer, or employee thereof, may also release non-public OCC information to a consultant under this paragraph if the consultant is under a written contract to provide services to the bank or Federal savings association and the consultant has a written agreement with the bank or Federal savings association in which the consultant:

* * * * *

§ 4.39 [Amended]

18. In § 4.39(a), add “OCC or OTS” after “former”.

Appendix A to Subpart C of Part 4 [Amended]

19. In Appendix A to subpart C of part 4:

a. In I. Model Stipulation, second paragraph, add “, 1463(a)(1), 1464(a)(1), and 1464(d)(1)[B][i]” after 12 U.S.C. 481”;

b. In II. Model Protective Order, add “, 1463(a)(1), 1464(a)(1), and 1464(d)(1)[B][i]” after 12 U.S.C. 481” in the second paragraph.

20. Amend § 4.73 by:

a. In the definition of “Consultant”:

i. Adding “savings association,” after “national bank,””;

ii. Adding “savings and loan holding company,” after “bank holding company,” each time it appears; and

iii. Adding “savings association,” after “such bank,””;

b. In the definition of “Control” adding “or in section 10 of the Home Owners’ Loan Act (12 U.S.C. 1467a), as applicable under the circumstances” after “1841(a)”;

c. Adding definitions of “Savings association” and “Savings and loan holding company” in alphabetical order; and

d. Revising the definition of “Senior examiner”.

The additions and revision read as follows:

§ 4.73 Definitions.

* * * * *

Savings association has the meaning given in section 3 of the FDI Act (12 U.S.C. 1813(b)(3)).

Savings and loan holding company means any company that controls a savings association or any other company that is a savings and loan holding company (as provided in section 10 of the Home Owners’ Loan Act (12 U.S.C. 1467a)).

Senior examiner. For purposes of this subpart, an officer or employee of the OCC is considered to be the “senior examiner” for a particular national bank or savings association if—

(1) The officer or employee has been authorized by the OCC to conduct examinations on behalf of the OCC or had been authorized by the Office of Thrift Supervision (OTS) to conduct examinations on behalf of the OTS;

(2) The officer or employee has been assigned continuing, broad, and lead responsibility for examining the national bank or savings association; and

(3) The officer’s or employee’s responsibilities for examining the national bank or savings association—

(i) Represent a substantial portion of the officer’s or employee’s assigned responsibilities; and

(ii) Require the officer or employee to interact routinely with officers or employees of the national bank or savings association, or its affiliates.

21. Effective July 21, 2012, in § 4.73, revise the definition of Senior examiner to read as follows:

§ 4.73 Definitions.

* * * * *

Senior examiner. For purposes of this subpart, an officer or employee of the OCC is considered to be the “senior examiner” for a particular national bank or savings association if—

(1) The officer or employee has been authorized by the OCC to conduct examinations on behalf of the OCC;

(2) The officer or employee has been assigned continuing, broad, and lead responsibility for examining the national bank or savings association; and
§ 4.74 One-year post-employment restrictions.

An officer or employee of the OCC who serves, or former officer or employee of the OTS who served, as the senior examiner of a national bank or savings association for two or more months during the last twelve months of such individual's employment with the OCC or OTS may not, within one year after leaving the employment of the OCC or OTS, knowingly accept compensation as an employee, officer, director or consultant from the national bank, savings association, or any company (including a bank holding company or savings and loan holding company) that controls the national bank or savings association.

■ 22. Revise § 4.74 to read as follows:

§ 4.75 Waivers.

The post-employment restrictions set forth in section 10(k) of the FDI Act (12 U.S.C. 1820(k)) and § 4.74 do not apply to any officer or employee of the OCC, or any former officer or employee of the OCC, if the Comptroller of the Currency certifies, in writing and on a case-by-case basis, that granting the individual a waiver of the restrictions would not affect the integrity of the OCC's supervisory program.

■ 26. Amend § 4.75 by revising paragraph (a) to read as follows:

§ 4.76 Penalties.

(a) Penalties under section 10(k) of FDI Act (12 U.S.C. 1820(k)). If a senior examiner of a national bank or savings association, after leaving the employment of the OCC or OTS, accepts compensation as an employee, officer, director, or consultant from that bank, savings association, or any company (including a bank holding company or savings and loan holding company) that controls that bank or savings association in violation of § 4.74, then the examiner shall, in accordance with section 10(k)(6) of the FDI Act (12 U.S.C. 1820(k)(6)), be subject to one of the following penalties—

(1) An order—

(i) Removing the individual from office or prohibiting the individual from participating in the affairs of the relevant national bank, savings association, bank holding company, savings and loan holding company, or other company that controls such institution for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any insured depository institution for an insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than $250,000.

PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

■ 28. The authority citation for part 5 continues to read as follows:


■ 29. Amend § 5.34 by revising paragraph (a) and the first sentence of paragraph (e)(3) to read as follows:

§ 5.34 Operating subsidiaries.

(a) * * *

Authority. 12 U.S.C. 24 (Seventh), 24a, 25b, 93a, 3101 et seq.

(e) * * *

(3) Examination and supervision. An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank, except as otherwise provided with respect to the application of state law under sections 1044(e) and 1045 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b) * * * * *

■ 30. Amend § 5.50 by redesignating paragraph (f)(6) as paragraph (f)(7) and adding a new paragraph (f)(6) to read as follows:

§ 5.50 Change in bank control; reporting of stock loans.

(f) * * *

(6) Disapproval of notice involving credit card banks or trust banks. (i) In general. The OCC shall disapprove a notice if the proposed change in control occurs before July 21, 2013 and would result in the direct or indirect control of a credit card bank or trust bank, as
defined in section 2(c)(2)(F) and (D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(F) and (D)), by a commercial firm. For purposes of this paragraph a company is a “commercial firm” if the annual gross revenues derived by the company and all of its affiliates from activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k))) and, if applicable, from the ownership or control of one or more insured depositary institutions, represent less than 15 percent of the consolidated annual gross revenues of the company.

(i) Exception to disapproval. Paragraph (f)(6)(i) of this section shall not apply to a proposed change in control of a credit card bank or trust bank that:

(A)(1) Is in danger of default, as determined by the OCC;

(2) Results from the merger or whole acquisition of a commercial firm that directly or indirectly controls the credit card bank or trust bank in a bona fide merger with or acquisition by another commercial firm, as determined by the OCC; or

(3) Results from the acquisition of voting shares of a publicly traded company that controls a credit card bank or trust bank, if, after the acquisition, the acquiring shareholder (or group of shareholders acting in concert) holds less than 25 percent of any class of the voting shares of the company; and

(B) Has obtained all regulatory approvals otherwise required for such change of control under any applicable Federal or state law, including review pursuant to section 7(f) of the Federal Deposit Insurance Act (12 U.S.C. 1817(f)) and 12 CFR 5.50.

§ 7.4000 Visitorial powers.

(a) * * *

(1) Under 12 U.S.C. 484, only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks. * * * * *(2) * * *

(iv) Enforcing compliance with any applicable Federal or state laws concerning those activities, including through investigations that seek to ascertain compliance through production of non-public information by the bank, except as otherwise provided in paragraphs (a), (b), and (c) of this section.

(b) (b) Exclusion. In accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L. L. C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief as authorized by such law is not an exercise of visitorial powers under 12 U.S.C. 484.

(c) * * *

(2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary.

§ 7.4006 Deposit-taking.

■ 34. Remove and reserve § 7.4006.

■ 35. Amend § 7.4007 by:

■ a. Removing paragraph (a)(1);

■ b. Redesignating paragraph (d)(2) introductory text as paragraph (d) introductory text;

■ c. Redesigning former paragraphs (b)(2)(i) through (vii) as paragraphs (b)(i) through (7), respectively;

■ d. Revising paragraph (c) introductory text;

■ e. Revising footnote 5 in paragraph (c)(3); and

■ f. Revising paragraph (c)(8).

The revisions read as follows:

§ 7.4007 Deposit-taking.

(c) State laws that are not preempted. State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996):

* * * * *

(3) Criminal law;

■ But see the distinction drawn by the Supreme Court in Easton v. Iowa, 188 U.S. 220, 238 (1903), where the Court stated that “[i]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction.” But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.” Id. at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

* * * * *

(8) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996), or that is made applicable by Federal law.

36. Amend § 7.4008 by:

■ a. Removing paragraph (d)(1);

■ b. Redesignating paragraph (d)(2) introductory text as paragraph (d) introductory text;

■ c. Redesigning former paragraphs (d)(2)(i) through (x) as paragraphs (d)(1) through (10), respectively; and

■ d. Revising paragraphs (e) introductory text, footnote 7 in paragraph (e)(3), and paragraph (e)(8).

The revisions read as follows:

§ 7.4008 Lending.

* * * * *

(e) State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996):

* * * * *

(3) Criminal law;

7 See supra note 5 regarding the distinction drawn by the Supreme Court in Easton v. Iowa, 188 U.S. 220, 238 (1903).

* * * * *

(8) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S.
§ 7.4009 [Removed and Reserved]
- 37. Remove and reserve § 7.4009.
- 38. Add § 7.4010 to read as follows:

§ 7.4010 Applicability of state law and visitorial powers to Federal savings associations and subsidiaries.

(a) In accordance with section 1046 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b), Federal savings associations and their subsidiaries shall be subject to the same laws and legal standards, including regulations of the OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.

(b) In accordance with section 1047 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C.

PART 8—ASSESSMENT OF FEES

39. The authority citation for part 8 is revised to read as follows:


40. Section 8.1 is revised to read as follows:

§ 8.1 Scope and application.

The assessments contained in this part are made pursuant to the authority contained in 12 U.S.C. 16, 93a, 481, 482, 1467, 1831c, 1867, 3102, and 3108; and 15 U.S.C. 78c and 78l.

The semiannual assessment is:

\[
\text{Assessments} = C + \left[\frac{\text{Assets (dollars)} - E}{\text{Marginal rate}}\right] \times D.
\]

(1) Every national bank and every Federal savings association falls into one of the asset-size brackets denoted by Columns A and B. A bank’s or Federal savings association’s semiannual assessment is composed of two parts. The first part is the calculation of a base amount of the assessment, which is computed on the assets of the bank or Federal savings association up to the lower endpoint (Column A) of the bracket in which it falls. This base amount of the assessment is calculated by the OCC in Column C.

(2) The second part is the calculation of assessments due on the remaining assets of the bank or Federal savings association in excess of Column E. The excess is assessed at the marginal rate shown in Column D.

(3) The total semiannual assessment is the amount in Column C, plus the amount of the bank’s or Federal savings association’s assets in excess of Column E times the marginal rate in Column D:

\[
\text{Assessments} = C + \left[\frac{\text{Assets (dollars)} - E}{\text{Marginal rate}}\right] \times D.
\]

(4) Each year, the OCC may index the marginal rates in Column D to adjust for the percent change in the level of prices, as measured by changes in the Gross Domestic Product Implicit Price Deflator (GDPIPD) for each June-to-June period. The OCC may at its discretion adjust marginal rates by amounts less than the percentage change in the GDPIPD. The OCC will also adjust the amounts in Column C to reflect any change made to the marginal rate.

(5) The specific marginal rates and complete assessment schedule will be published in the “Notice of Comptroller of the Currency Fees,” provided for at § 8.8 of this part. Each semiannual assessment is based upon the total assets shown in the national bank’s or Federal savings association’s most recent “Consolidated Reports of Condition and Income” (Call Report) or “Thrift Financial Report,” as appropriate, preceding the payment date. Each bank or Federal savings association subject to the jurisdiction of the Comptroller of the Currency on the date of the second or fourth quarterly Call Report or Thrift Financial Report, as appropriate, required by the Office under 12 U.S.C. 161 and 12 U.S.C. 1464(a) is subject to the full assessment for the next six month period.

(6)(i) Notwithstanding any other provision of this part, the OCC may reduce the semiannual assessment for each non-lead bank or non-lead Federal savings association by a percentage that it will specify in the “Notice of Comptroller of the Currency Fees” described in § 8.8.

(ii) For purposes of this paragraph:

(A) Lead bank or lead Federal savings association means the largest national bank or Federal savings association...
controlled by a company, based on a comparison of the total assets held by each national bank or Federal savings association controlled by that company as reported in each bank’s or Federal savings association’s Call Report or Thrift Financial Report, as appropriate, filed for the quarter immediately preceding the payment of a semiannual assessment.

(B) Non-lead bank or non-lead Federal savings association means a national bank or Federal savings association that is not the lead bank or lead Federal savings association controlled by a company that controls two or more national banks or Federal savings associations.

(C) Control and company with respect to national banks have the same meanings as these terms have in sections 2(a)(2) and 2(b), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)(2) and (b)).

(D) Control and company with respect to Federal savings associations have the same meanings as these terms have in section 10(a) of the Home Owners’ Loan Act (12 U.S.C. 1467a(a).

(b)(1) Each Federal branch and each Federal agency shall pay to the Comptroller of the Currency a semiannual assessment fee, due by March 31 and September 30 of each year, for the six month period beginning on January 1 and July 1 before each payment date. The Comptroller of the Currency will calculate the amount due under this section and provide a notice of assessments to each national bank no later than 7 business days prior to March 31 and September 30 of each year.

(2) The amount of the semiannual assessment paid by each Federal branch and Federal agency shall be computed at the same rate as provided in the Table in 12 CFR 8.2(a); however, only the total domestic assets of the Federal branch or agency shall be subject to assessment.

(3) Each semiannual assessment of each Federal branch or agency is based upon the total assets shown in the Federal branch or agency’s Call Report most recently preceding the payment date. Each Federal branch or agency subject to the jurisdiction of the OCC on the date of the second and fourth Call Reports is subject to the full assessment for the next six-month period.

(iv) Full-service national bank is a national bank that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of permissible banking activities.

(v) Full-service Federal savings association is a Federal savings association that generates more than 50% of its interest and non-interest income from activities other than credit card operations or trust activities and is authorized according to its charter to engage in all types of activities permissible for Federal savings associations.

(vi) Independent credit card bank is a national bank that engages primarily in credit card operations and is not affiliated with a full-service national bank.

(vii) Independent credit card Federal savings association is a Federal savings association that engages primarily in credit card operations and is not affiliated with a full-service Federal savings association.

(viii) Receivables attributable is the total amount of outstanding balances due on credit card accounts owned by an independent credit card bank or an independent credit card Federal savings association (the receivables attributable to those accounts) on the last day of the assessment period, minus receivables retained on the bank’s or Federal savings association’s balance sheet as of that day.

(4) Reports of receivables attributable. Independent credit card banks and independent credit card Federal savings associations will report receivables attributable data to the OCC semiannually at a time specified by the OCC.

(d) Surcharge based on the condition of the bank or Federal savings association. Subject to any limit that the OCC prescribes in the “Notice of Comptroller of the Currency Fees,” the OCC shall apply a surcharge to the semiannual assessment computed in accordance with paragraphs (a) through (c) of this section. This surcharge will be determined by multiplying the semiannual assessment computed in accordance with paragraphs (a) through (c) of this section by—

(1) 1.5, in the case of any bank or Federal savings association that receives a composite rating of 3 under the Uniform Financial Institutions Rating System (UFIRS) and any Federal branch or agency that receives a composite rating of 3 under the ROCA rating system (which rates risk management, operational controls, compliance, and
asset quality) at its most recent examination; and
(2) 2.0, in the case of any bank or
Federal savings association that receives a composite UFIRS rating of 4 or 5 and any Federal branch or agency that
receives a composite rating of 4 or 5 under the ROCA rating system at its most recent examination.

42. Section 8.6 is revised to read as follows:

§ 8.6 Fees for special examinations and investigations.

(a) Fees. Pursuant to the authority
contained in 12 U.S.C. 16, 481, 482, 1467, and 1831c, the Office of the
Comptroller of the Currency may assess a fee for:

(1) Examining the fiduciary activities
of national banks and Federal savings
associations and related entities;

(2) Conducting special examinations
and investigations of national banks,
Federal branches or agencies of foreign
banks, and Federal savings associations;

(3) Conducting special examinations
and investigations of an entity with
respect to its performance of activities
described in section 7(c) of the Bank
Service Company Act (12 U.S.C.
1867(c)) if the OCC determines that
assessment of the fee is warranted with
regard to a particular bank or Federal
savings association because of the high
risk or unusual nature of the activities
performed; the significance to the bank’s
or Federal saving association’s
operations and income of the activities
performed; or the extent to which the
bank or Federal savings association has
sufficient systems, controls, and
personnel to adequately monitor,
measure, and control risks arising from
such activities;

(4) Conducting special examinations
and investigations of affiliates of
national banks, Federal savings
associations, and Federal branches or
agencies of foreign banks;

(5) Conducting examinations and
investigations made pursuant to 12 CFR
part 5, Rules, Policies, and Procedures
for Corporate Activities; and
(6) Conducting examinations of
depository-institution permissible
activities of nondepository institution
subsidiaries of depository institution
holding companies pursuant to section
605(a) of the Dodd-Frank Wall Street
Reform and Consumer Protection Act
(12 U.S.C. 1831c).

(b) Notice of Comptroller of the
Currency fees. The OCC publishes the
fee schedule for fiduciary activities,
special examinations and investigations,
examinations of affiliates and
examinations related to corporate
activities in the “Notice of Comptroller
of the Currency Fees” described in § 8.8.

(c) Additional assessments on trust
banks and trust Federal savings
associations—(1) Independent trust
banks and independent trust Federal
savings associations. The assessment of
independent trust banks and
independent trust Federal savings
associations will include a fiduciary and
related asset component, in addition to
the assessment calculated according to
§ 8.2 of this part, as follows:

(i) Minimum fee. All independent
trust banks and independent trust
Federal savings associations will pay a
minimum fee, to be provided in the
“Notice of Comptroller of the Currency
Fees.”

(ii) Additional amount for
independent trust banks and
independent trust Federal savings
associations with fiduciary and related
assets in excess of $1 billion.

Independent trust banks and
independent trust Federal savings
associations with fiduciary and related
assets in excess of $1 billion will pay an
amount that exceeds the minimum fee.
The amount to be paid will be
calculated by multiplying the amount
of fiduciary and related assets by a rate or
rates provided by the OCC in the
“Notice of Comptroller of the Currency
Fees.”

(iii) Surcharge based on the condition
of the bank or of the Federal savings
association. Subject to any limit that the
OCC prescribes in the “Notice of
Comptroller of the Currency Fees,” the
OCC shall adjust the semiannual
assessment computed in accordance
with paragraphs (c)(1)(i) and (ii) of this
section by multiplying that figure by 1.5
for each independent trust bank and
independent trust Federal savings
association that receives a composite
rating of 3 under the Uniform Financial
Institutions Rating System (UFIRS) at its
most recent examination and by 2.0 for
each bank that receives a composite
UFIRS rating of 4 or 5 at such
examination.

(2) Trust banks affiliated with full-
service national banks and trust Federal
savings associations affiliated with full-
service Federal savings associations.
The OCC will assess a trust bank and a
trust Federal savings association in
accordance with paragraph (c)(1) of this
section, notwithstanding that the bank is
affiliated with a full-service national
bank, or that the Federal savings
association is affiliated with a full-
service Federal savings association, if
the OCC concludes that the affiliation is
intended to evade the assessment
regulation.

(3) Definitions. For purposes of this
paragraph (c) of this section, the
following definitions apply:

(i) Affiliate, with respect to a national
bank, has the same meaning as this term
has in 12 U.S.C. 221(a);

(ii) Affiliate, with respect to Federal
savings associations, has the same
meaning as in 12 U.S.C. 1462(b).

(iii) Full-service national bank is a
national bank that generates more than
50% of its interest and non-interest
income from activities other than credit
card operations or trust activities and is
authorized according to its charter to
generate in all types of permissible
banking activities.

(iv) Full-service trust Federal savings
association is a Federal savings
association that generates more than
50% of its interest and non-interest
income from activities other than credit
card operations or trust activities and is
authorized according to its charter to
generate in all types of activities
permissible for Federal savings
associations;

(v) Independent trust bank is a
national bank that has trust powers,
does not primarily offer full-service
banking, and is not affiliated with a full-
service national bank;

(vi) Independent trust Federal savings
association is a Federal savings
association that has trust powers, does
not primarily offer full-service banking,
and is not affiliated with a full-service
Federal savings association;

(vii) Fiduciary and related assets for
national banks are those assets reported
on Schedule RC–T of FFIEC Forms 031
and 041, Line 10 (columns A and B) and
Line 11 (column B), any successor form
issued by the FFIEC, and any other
fiduciary and related assets defined in
the “Notice of Comptroller of the Currency Fees”; and

(viii) Fiduciary and related assets for
Federal savings associations are those
assets reported on Schedule FS of OTS
Form 1313, Line FS21, any successor
form issued by the OCC, and any other
fiduciary and related assets defined in
the “Notice of Comptroller of the Currency Fees.”

43. Effective December 31, 2011, add
the word “and” at the end of paragraph
(vi), revise paragraph (c)(3)(vi), and
remove paragraph (c)(3)(viii).

The revision reads as follows:

§ 8.6 Fees for special examinations and
investigations.

* * * *

(c) * * * *

(3) * * *

(vii) Fiduciary and related assets are
those assets reported on Schedule RC–
T of FFIEC Forms 031 and 041, Line 10
§ 34.6 Applicability of state law to Federal savings associations and subsidiaries.

In accordance with section 1046 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 25b), Federal savings associations and their subsidiaries shall be subject to the same laws and legal standards, including regulations of the OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.

Dated: July 14, 2011.

John Walsh.

Acting Comptroller of the Currency.

[FR Doc. 2011–18231 Filed 7–20–11; 8:45 am]

BILLING CODE 4810–33–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–HQ–2011–1]

12 CFR Chapter X

Identification of Enforceable Rules and Orders

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final list.

SUMMARY: Section 1063(i) of the Consumer Financial Protection Act of 2010 (“Act”) requires the Bureau of Consumer Financial Protection (“CFPB”) to publish in the Federal Register not later than the designated transfer date a list of the rules and orders that will be enforced by the CFPB.

FOR FURTHER INFORMATION CONTACT:

Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1801 L Street, NW., Washington, DC 20036, 202–435–7275.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Act, on the designated transfer date, July 21, 2011, certain consumer financial protection authorities will transfer from seven transferor agencies to the CFPB, and the CFPB will also assume certain new authorities. Subject to the limitations and other provisions of the Act, the CFPB will be authorized to enforce, inter alia, rules and orders issued by the transferor agencies under the enumerated consumer laws.

The CFPB will also have authority to enforce in some circumstances the Federal Trade Commission’s Telemarketing Sales Rule and its rules under the Federal Trade Commission Act, although the Federal Trade Commission will retain full authority over these rules.

Section 1063(i) of the Act provides that, not later than the designated transfer date, the CFPB “(1) shall, after consultation with the head of each transferor agency, identify the rules and orders that will be enforced by the CFPB; and (2) shall publish a list of such rules and orders in the Federal Register.” The CFPB consulted with each transferor agency pursuant to section 1063(i) and developed an initial list of rules. After consultation, neither the transferor agencies nor the CFPB identified any orders for inclusion in the list.

2 The Secretary of the Treasury designated this date pursuant to section 1062 of the Act. See 75 FR 57252–02, Sept. 20, 2010.

3 Section 1061(a)(2) of the Act defines the terms “transferor agency” and “transfer agencies” to mean, respectively, “(A) the Board of Governors (and any Federal reserve bank, as context requires), the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development, and the heads of those agencies, and (B) the agencies listed in subparagraph (A) collectively.”

4 “Enumerated consumer laws” is defined in section 1002(12) of the Act and section 1400(b) of the Mortgage Reform and Anti-Predatory Lending Act, Tit. XIV, Public Law 111–203.

5 These rules are listed as items 1 and 6 through 12 in section F (“Federal Trade Commission”) of the list below.

6 Section 1063(i) requires the CFPB to list only the rules and orders issued by transferor agencies that will be enforceable by the CFPB.
§ 7.4008

(l) Abandoned and dormant accounts; 3
(2) Checking accounts;
(3) Disclosure requirements;
(4) Funds availability;
(5) Savings account orders of withdrawal;
(6) State licensing or registration requirements (except for purposes of service of process); and
(7) Special purpose savings services; 4
(c) State laws that are not preempted.
State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996):
(1) Contracts;
(2) Torts;
(3) Criminal law; 5
(4) Rights to collect debts;
(5) Acquisition and transfer of property;
(6) Taxation;
(7) Zoning; and
(8) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996), or that is made applicable by Federal law.


§ 7.4008 Lending by national banks.

(a) Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) Standards for loans. A national bank shall not make a consumer loan subject to this §7.4008 based predominantly on the bank’s realization of the foreclosure or liquidation value of the borrower’s collateral, without regard to the borrower’s ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower’s ability to repay, including, for example, the borrower’s current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) Unfair and deceptive practices. A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this §7.4008.

(d) Applicability of state law. A national bank may make non-real estate loans without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under
which a loan may be called due and payable upon the passage of time or a
specified event external to the loan;
(5) Escrow accounts, impound accounts, and similar accounts;
(6) Security property, including leaseholds;
(7) Access to, and use of, credit reports;
(8) Disclosure and advertising, including laws requiring specific state-
ments, information, or other content to be included in credit application
forms, credit solicitations, billing statements, credit contracts, or other
credit-related documents;
(9) Disbursements and repayments; and
(10) Rates of interest on loans.6
(e) State laws that are not preempted. State laws on the following
subjects are not inconsistent with the non-real estate lending powers of national
banks and apply to national banks to the extent consistent with the decision
of the Supreme Court in Barnett Bank
of Marion County, N.A. v. Nelson, Florida
Insurance Commissioner, et al., 517 U.S.
25 (1996):
(1) Contracts;
(2) Torts;
(3) Criminal law;7
(4) Rights to collect debts;
(5) Acquisition and transfer of prop-
erty;
(6) Taxation;
(7) Zoning; and
(8) Any other law that the OCC deter-
minds to be applicable to national
banks in accordance with the decision
of the Supreme Court in Barnett Bank
of Marion County, N.A. v. Nelson, Florida
Insurance Commissioner, et al., 517 U.S.
25 (1996) or that is made applicable by
Federal law.
[69 FR 1916, Jan. 13, 2004, as amended at 76
FR 43565, July 21, 2011]

6The limitations on charges that comprise
rates of interest on loans by national banks
are determined under Federal law. See 12
U.S.C. 85; 12 CFR 7.4001. State laws pur-
port to regulate national bank fees and
charges that do not constitute interest are
addressed in 12 CFR 7.4002.
7See supra note 5 regarding the distinction
drawn by the Supreme Court in Easton v.
Iowa, 188 U.S. 220, 228 (1903).
June 27, 2011

By E-Mail and Messenger

The Honorable John Walsh
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

Re: Docket ID OCC-2011-0006
Agency: OCC

Dear Acting Comptroller Walsh:

On behalf of the Treasury Department, I am writing to comment on the Office of the Comptroller of the Currency’s (OCC) proposed rule relating to the federal preemption of state consumer financial law.

The OCC’s proposed rule raises three principal concerns for Treasury: (1) it is not 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.

1. The OCC’s proposed rule is not centered on the key language of Dodd-Frank’s preemption standard and seeks to broaden the standard.

Although Congress adopted a specific preemption standard in Dodd-Frank, the OCC’s rule articulates a preemption standard that is broader than the language of the Dodd-Frank standard.

One of the most strenuously debated provisions of Dodd-Frank was the scope and extent of the preemption standard for national banks. In the end, Congress chose to enact a specific preemption standard. In particular, Dodd-Frank states that a state consumer financial law may be preempted “only if... in accordance with the legal standard for preemption in the decision of the Supreme Court... in Barnett Bank of Marion County, N.A. v. Nelson... the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.”

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1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a) (emphasis added).
The OCC rule, however, essentially reads the "prevents or significantly interferes" language out of the statute. Specifically, the rule takes the position that Congress sought to codify the Barnett opinion, but not any particular formulation in the opinion. This avoidance of the specific standard is inconsistent with the plain language of the statute and its legislative history.

We believe that, as provided by the plain language of the statute, Congress intended that a state consumer financial law may be preempted only if the law "prevents or significantly interferes" with the exercise of a national bank's powers, as those terms are used in the Barnett opinion. While 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.

2. The proposed rule validates all prior preemption determinations, including those based on its deleted "obstruct, impair, or condition" standard.

The OCC rule asserts that all prior preemption determinations continue to be valid, including those that were based on the OCC's previous "obstruct, impair, or condition" standard. In our view, this position is not in accordance with Dodd-Frank.

The proposed rule acknowledges that the "obstruct, impair, or condition" standard was not drawn directly from the Barnett opinion, and it proposes the deletion of that standard. Nonetheless, the rule maintains that this deleted standard was "an amalgam of prior precedents relied upon in [Barnett]" and, therefore, argues that determinations based on it are consistent with the new Dodd-Frank standard. According to the preamble of the rule: "To the extent any existing precedent cited those terms in our regulations, that precedent remains valid, since the regulations were premised on principles drawn from the Barnett case."

In our view, this position is contrary to Dodd-Frank. As discussed above, Congress chose a specific preemption standard—"prevents or significantly interferes"—from the Barnett opinion. To the extent that a prior preemption determination was based on the "obstruct, impair, or condition" standard—and is not congruent with the "prevents or significantly interferes" standard—such prior determination does not satisfy the preemption standard enacted in Dodd-Frank.

The rule seems to take the position that the Dodd-Frank standard has no effect: the proposed rule expressly argues that the new Dodd-Frank standard would not change the outcome of any

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2 Although the preamble of the rule discusses this specific standard, it argues that Congress intended to codify the entirety of the Barnett opinion, and not any particular standard. And, significantly, the text of the rule does not cite the "prevent or significantly interferes" language at all. Rather, the proposed rule articulates the relevant test as "consistent with the decision of the Supreme Court in Barnett."

3 The House-passed version of the bill contained a specific preemption standard ("prevents, significantly interferes with, or materially impairs"). While the Senate-passed version of the bill only contained a reference to the Barnett opinion, without any formulation, the Conference Committee specifically added the "prevents or significantly interferes" standard—further supporting that Congress specifically sought to codify the "prevents or significantly interferes" standard of Barnett.
previous determination, and the same logic would apply to any future determination. The notion that the new standard does not have any effect runs afoul of basic canons of statutory construction; it is also contrary to the legislative history, which states that Congress sought to "revis[e] the standard the OCC will use to preempt state consumer protection laws."\textsuperscript{4}

3. The OCC’s proposed rule may not comport with the “case-by-case” requirement.

Dodd-Frank requires that each preemption determination be made on a “case-by-case” basis and after consultation with the CFPB where appropriate. Despite this case-by-case requirement, the OCC’s proposal could be read to preempt broad categories of state consumer financial laws going forward.

The OCC’s intent on this issue is unclear: the proposed rule addresses the case-by-case requirement in the preamble (i.e., acknowledging the requirement), but not in the text of the proposed rule; as a result, it is unclear how the OCC intends to apply the case-by-case requirement going forward. Nonetheless, the language of the proposed rule could be read to preempt categories of state laws in the future. To the extent that the OCC seeks to preempt categories of state consumer financial laws going forward, rather than through a case-by-case approach (and after consulting with the CFPB in appropriate instances), that would not comply with Dodd-Frank. Thus, we recommend that you clarify the rule to state that any future determination will be made only on a case-by-case basis, and after consultation with the CFPB to the extent required by Dodd-Frank.

*   *   *

On behalf of the Treasury Department, thank you for your careful consideration of these comments.

Very truly yours,

George W. Madison

June 27, 2011

Acting Comptroller John Walsh
Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 2-3
Washington, DC 20219

Re: OTS Integration; Dodd-Frank Implementation
Docket IS OCC-2011-0006
RIN 1557-AD41

Dear Comptroller Walsh:

We respectfully submit the following comments in response to the Office of the Comptroller of the Currency’s proposed Dodd-Frank Act Implementation regulations, in particular the provisions relating to preemption of state law and the OCC’s exclusive visitorial powers.

The proposed rules would continue the OCC’s broad preemption of state laws governing mortgages, credit cards, bank accounts, and other banking products. Continuation of those rules ignores the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which restored the important role of states in protecting consumers. The visitation regulations also impermissibly narrow the range of enforcement actions states may take. We therefore respectfully urge that the OCC withdraw the current proposal, repeal the current preemption regulations, amend the visitation regulations, and proceed in accordance with the procedural and substantive requirements of the Dodd-Frank Act.

I. State Laws Play an Important Role In Protecting Consumers from Harmful Banking Practices

Consumer protection in the financial world has been dramatically weakened in the last several years by preemption of state consumer protection laws. Broad preemption of state law is a recent phenomenon. For most of the nearly 150 years since national banks were created, they have complied with state law. Preemption has harmed states’ ability to respond to financial abuses in both the banking and the nonbank world. Restoring the states’ role as “first responders” and as additional “cops on the beat” was an essential element of financial reform.

For most of this nation’s history, consumers have depended on states, not the federal government, to protect them. Even in the banking world, national banks were expected to
comply with state law. Only in the last decade or so have federally chartered depositories been able to ignore state laws with impunity.

The preemption of state laws in the mortgage area was a significant contributor to the mortgage crisis. In 2006, the peak year of irresponsible lending, national banks, federal thrifts, and their subsidiaries made 32% of subprime loans, 40% of Alt A loans, and 51% of interest-only and option ARM loans. A total of over $700 billion in risky loans were made by entities that states could not touch. Until reversed by the Dodd-Frank Act, states were also preempted from regulating any mortgage lender (bank or nonbank) on the very terms that made many mortgages dangerous: balloon payments, negative amortization, variable rates, and other nontraditional terms. Even where they retained some authority over nonbank mortgage lenders, states were reluctant to create an uneven playing field and to disadvantage their home state industries with rules that did not apply to national banks.

The credit card abuses that eventually led to a federal crackdown – bait and switch rate increases, abusive fees, payment manipulations – were allowed to take off and grow due to preemption. States were powerless to address credit card problems. Even simple, common-sense state rules – such as allowing payment without a late fee on Monday when the due date falls on a Sunday – were held preempted by federal bank regulations.

Similarly, the preemption of state laws governing bank practices designed to induce overdraft fees permitted the banking industry to get ever more aggressive in designing intricate tricks and traps. The result was so-called “overdraft protection” – an unfair and inequitable back-end method of paying for bank account services and a $28 billion tax on the very consumers who need those funds the most.

States are our nation’s first responders when new threats target consumers. States see abuses sooner, react more quickly, and can address local problems before they become national ones.

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1 Even the NBA’s usury preemption requires that national banks “borrow” the state law applicable to their home state’s “most favored lender.” 12 U.S.C. §85.


3 See id.


State laws also provide the models for federal law. When new problems arise and the solutions are not clear, states can experiment with different approaches. Typically, states copy and improve on each other’s responses and then coalesce around a particular solution. Eventually, federal rules are adopted that provide uniform protection that benefitted from that process of experimentation.

The creation of the Consumer Financial Protection Bureau (CFPB) was designed to remedy some of the consumer protection failures of federal regulators, but the CFPB cannot do the work alone. The CFPB will not and should not adopt new nationwide rules unless a problem is or threatens to become big enough to warrant a national solution. States also bolster the resources of the CFPB and the federal banking agencies. The states have a crucial role to play and that is why Congress reaffirmed and reinvigorated the states’ role as part of financial reform.

II. The Proposed Preemption Rules are Inconsistent with the State Role Authorized by the Dodd-Frank Act

In 2004, the OCC adopted broad regulations preempting state laws aimed at abusive bank practices involving mortgages, credit cards, and other areas. The OCC’s proposal would effectively continue those regulations without complying with the mandates of the Dodd-Frank Act.

Dodd-Frank specified the limited circumstances under which existing OCC preemption pronouncements may have continued viability, and the proposal exceeds those circumstances (section II-a below). Congress rejected the OCC’s existing preemption standards, specified what standard must be used, and set up procedural safeguards to enforce that standard (section II-b). The proposal ignores the directives in the Dodd-Frank Act, both substantive and procedural (section II-c). Finally, the OCC exceeds its authority with respect to preemption of state laws of general applicability (section II-d).

a. Dodd-Frank Did Not “Grandfather” Preexisting Regulations: The OCC Must Repeal Its Regulations Because They Violate Dodd-Frank

The OCC asserts that it can reaffirm its broad preemption regulations without subjecting them to the Dodd-Frank requirements because:

The [Dodd-Frank] 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).

For simplicity, references throughout these comments to “national banks” and the “National Bank Act” apply also to those standards as applied to federal savings associations through the Home Owners Loan Act. See Dodd-Frank § 1047.
This statement is wrong on several counts. First, Congress included a very clear statement of when the old regulations apply, and that statement is completely in harmony with traditional rules about retroactivity. Second, while Dodd-Frank “grandfathered” pre-existing contracts, it by no means grandfathered pre-existing regulations. Third, the Dodd-Frank Act contains both substantive and procedural requirements, and the OCC must comply with both.

In Section 1043 of the Dodd-Frank Act, Congress addressed the “Preservation of Existing Contracts”:

This title, and regulations, orders, guidance, and interpretations prescribed, issued, or established by the [Consumer Financial Protection] Bureau, shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the Comptroller of the Currency or the Director of the Office of Thrift Supervision regarding the applicability of State law under Federal banking law to any contract entered into on or before the date of enactment of this Act, by national banks, Federal savings associations, or subsidiaries thereof that are regulated and supervised by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, respectively. (emphasis added)

This provision is quite clear: Title X of Dodd-Frank does not affect the applicability of the OCC’s or OTS’s otherwise valid preemption regulations as to contracts entered into on or before July 21, 2010, but it does affect the applicability of preemption regulations to new contracts. State laws are applicable to new contracts unless they are preempted under the provisions of Title X and any regulations adopted consistent with those requirements.

Section 1043 is consistent with the retroactivity rule of the Landgraf case. In Landgraf, the Supreme Court held that the damages and jury trial provisions of the Civil Rights Act of 1991 did not apply to a case that was pending on appeal when the statute was enacted. Under both Landgraf and Section 1043, a new law does not apply to conduct before enactment of that law. The Court did not in any way indicate that old regulations were somehow preserved as to future conduct notwithstanding their inconsistency with a new statutory standard.

8 The Supreme Court’s decisions in Watters v. Wachovia Bank, 550 U.S. 1 (2007), and Cuomo v. Clearing House Assoc’n, 129 S. Ct. 2710 (2009), did not address, much less resolve, the ongoing dispute over the validity of substantive preemption standards articulated in the 2004 preemption regulations. The extent to which they articulate a valid conflict preemption standard was an open question as of the date of enactment of Dodd-Frank, and remains so today. See e.g. Amy Quester and Kathleen Keest, Looking Ahead After Watters v. Wachovia Bank: Challenges for Lower Courts, Congress, and the Comptroller of the Currency, 27 Rev. of Banking and Financial Law, 187, 221-227 (2008). The grandfather clause in Dodd-Frank does not retroactively validate those rules, but simply says it does not “alter or affect” the applicability of the rules – whatever their ultimate validity might be as courts continue to have occasion to evaluate them.

9 Indeed, it is likely that section 1043 grandfathered only contracts entered into prior to July 21, 2010, before the preemption amendments take affect, precisely to avoid a race to more preemption activity in the interregnum.
The OCC characterizes the Dodd-Frank amendments as merely imposing “new procedural and consultation requirements” that have no impact on existing preemption determinations. The agency implies that the new “procedures” need only be applied to new regulations.

But the Dodd-Frank preemption provisions are not merely procedural; they include a new substantive standard along with procedural and judicial review provisions intended to enforce that standard. The ban on field preemption, the prevent/significantly interfere standard, and the “case-by-case” requirement all are substantive changes. They are a statement that, as a general rule, state laws are not preempted except for particular laws that are shown, through substantial evidence on the record, to prevent or significantly interfere with bank powers.

The OCC implicitly acknowledges some change in the substantive standard through the proposed changes to its regulations, but it assumes that it can ignore the aspects of the law that it deems procedural. But there is nothing in the statute or legislative history that indicates that the OCC can cherry pick which of the Dodd-Frank amendments to apply to its regulations. Congress passed the entire package of amendments to undo the broader preemption standards that the OCC had been applying and to ensure that the OCC was faithful to the new preemption standard.

The Dodd-Frank preemption changes would be meaningless if they preserved the prior preemption determinations. Maintaining them in the wholesale manner that OCC now proposes would leave virtually no need for future preemption determinations. Doing so would be inconsistent with Congress’s directive, which restores the role of state law in protecting consumers by mandating that the OCC follow a prescribed standard along with prescribed procedures in the limited circumstances where it purports to override state law.

b. Congress Intended to Undo the OCC’s 2004 Preemption Regulations

The Dodd-Frank preemption amendments were the result of the ongoing controversy over the OCC’s preemption activities in the past decade culminating in the 2004 preemption regulations. The role that preemption played in the financial crisis gave Congress added impetus to rein in preemption. While the preemption amendments were a compromise, both the plain language of the statute and the legislative history show that Congress intended to undo the 2004 regulations and the OCC’s past (and continuing) misinterpretation of the Barnett standard.

(i) Background: The OCC’s 2004 Rules as Stealth Field Preemption

In 1996, the Office of Thrift Supervision (OTS) asserted that the Home Owners Loan Act (HOLA) preempted the field of lending regulation for federal savings associations.10 The OTS promulgated a regulation preempting all state laws affecting lending, including a long list of “illustrative examples” of types of lending laws that were preempted.11

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10 The OTS asserted that its enabling statute, HOLA, “occupies the field,” thus granting field preemption to federal thrifts. 12 C.F.R. § 560.2(a).

11 12 C.F.R. § 560.2(b).
In the years that followed, the OCC competed with the OTS by becoming increasingly aggressive in asserting that the National Bank Act, like HOLA, preempted state laws. The OCC began with opinion letters, amicus briefs and orders aimed at individual laws.\textsuperscript{12}

In order to attract more banks to the national bank charter and to compete with the thrift charter, the OCC eventually adopted the 2004 regulations that, in practice if not in word, adopted field preemption as the functional standard for the NBA.\textsuperscript{13} The OCC did not explicitly claim field preemption, which would have been inconsistent with 140 years of Supreme Court decisions interpreting the NBA as providing a less sweeping conflict preemption standard.\textsuperscript{14} Nonetheless, the broad preemption of entire categories of state laws had the same overall effect.

To accomplish this wide degree of preemption, the OCC effectively read out the words of limitation and degree that repeatedly appear in the Supreme Court’s description of the scope of NBA conflict preemption. The Supreme Court consistently uses words that require a certain magnitude of interference: “forbid, or to impair significantly, … prevent or significantly interfere with the national bank’s exercise of its powers,” \textit{Barnett Bank v. Nelson}, 517 U.S. 25, 33 (1996); “prevent or significantly interfere… significantly impair,” \textit{Watters v. Wachovia Bank}, N.A. 550 U.S. 1, 12 (2007) (describing the \textit{Barnett} standard); “unduly burdensome and duplicative,” \textit{id} at 11; “significantly burden” \textit{id} at 13; “impose an undue burden,” \textit{Anderson National Bank v. Luckett}, 321 U.S. 233, 248 (1944). Words like “significantly” are, in fact, significant. It is implausible to consider that a standard that requires “significant” interference is really meant to also encompass a standard that imposes only a modicum of interference.\textsuperscript{15}

Yet in the 2004 rules, the OCC, in its “distillation” of the Supreme Court decisions, eliminated all words requiring some threshold degree of magnitude. Instead, the OCC asserted that state laws that “obstruct, impair or condition” federal bank powers are preempted.\textsuperscript{16} It then went on to assert that entire categories of laws covering virtually every

\begin{itemize}
\item \textsuperscript{12}See National Consumer Law Center, \textit{The Cost of Credit}, § 3.4.6.2 (4th ed. 2009 and Supp.).
\item \textsuperscript{13}As to the effect (and goal) of the 2004 regulations as bestowing field preemption, see generally, National Consumer Law Center, \textit{The Cost of Credit}, § 3.4.6.3 (4th ed. 2009 and Supp.); Kathleen C. Engel and Patricia A. McCoy, \textit{The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps}, 158, 159 (2011) (OCC was “hungrily eyeing the OTS, eager to give the same competitive advantage to national bank”; by offering preemption, the OCC hoped it could keep national banks from converting to thrift charters).
\item \textsuperscript{15}On the rare occasions when the Supreme Court has used looser language, it has been in the context of cases that upheld state law or in which the interference was quite substantial.
\item \textsuperscript{16}69 Fed. Reg. 1904, 1910 (January 13, 2004).
\end{itemize}
aspect of deposit taking and lending were preempted (regardless of the extent to which they interfered with bank powers).

By eliminating the limiting language, the OCC also eliminated the limiting principles. The broad preemption language together with the broad categories of laws preempted effectively created field preemption. Indeed, the supplemental information to the 2004 preemption rules explained that the OCC was not asserting field preemption of real estate lending rules – and beyond to other authorized bank powers – because the agency concluded “that the effect of labeling of this nature is largely immaterial in the present circumstances.” The OCC even parroted the OTS’s standard – explicitly based on field preemption – for what state laws survive.

The 2004 rules were a controversial, dramatic change in NBA preemption standards and were the subject of Congressional hearings. Congressman Barney Frank, then ranking minority member of the House Financial Services Committee, introduced the “Preservation of Federalism in Banking Act” to reverse both the OTS’s and OCC’s overly broad preemption regulations. That proposal was the seed for the Dodd-Frank preemption provisions ultimately adopted.

(ii) Dodd-Frank Mandates a Roll Back of the 2004 Rules to the Prevent/Significantly Interfere Standard

The financial crisis prompted Congress to revisit the preemption regulations. Some, including the OCC, claimed that preemption of state consumer protection laws played no role.

17 Id. at 1910-1911.

18 Compare, e.g., 12 C.F.R. § 7.4008(c) (OCC lending preemption regulation: state laws are not preempted “to the extent that they only incidentally affect the exercise of national banks’ non-real estate lending powers”), with 12 C.F.R. § 560.2(c) (OTS lending preemption regulation: state laws are not preempted “to the extent that they only incidentally affect the lending operations of Federal savings associations….”).

19 See, e.g. Testimony of Roy Cooper Before the Committee on Banking, Housing and Urban Affairs, Hearings on the Office of the Comptroller of the Currency’s Rules on National Bank Preemption and Visitorial Powers, 4 (April 7, 2004) (“The OCC has been explicit about trying to entice federal thrifts and state banks to switch their charters to that of a national bank. Eliminating any role for the states is evidently a selling point in their competition with other regulators.”); Testimony of Arthur Wilmarth Before the Committee on Banking, Housing and Urban Affairs, Hearings on the Office of the Comptroller of the Currency’s Rules on National Bank Preemption and Visitorial Powers, 2-3 (April 7, 2004) (“The OCC has deliberately crafted its rules to accomplish a sweeping preemption of state laws that is equivalent to the ‘field preemption’ regime established by the Office of Thrift Supervision….”); cf. Opening Statement of Congresswoman Sue Kelley, Subcommittee on Oversight and Investigations, H.R. Committee on Financial Services, Congressional Review of OCC Preemption, (“...for a regulator to single-handedly preempt a State’s ability to both determine and enforce laws without public debate or explicit direction from Congress is not only troublesome, but I believe it is careless. ... Given the overreaching nature of these regulations, which appears to be larger than just this one issue, I hope my colleagues in the Subcommittee on Housing and Financial Institutions will continue their own investigations into predatory lending to address these specific concerns.”) (Transcript, p. 3, available at http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0.HTM) (emphasis added)

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.21

The various proposals to resolve the preemption controversy ran the gamut. At one end of the spectrum, state laws would have been preempted only if they discriminated against national banks or were inconsistent with federal law other than banking statutes, and the OCC would have been given no role in preempting state laws.22 At the other end of the spectrum, amendments offered by preemption proponents either would have made no change to the banking statutes or would have ratified the OCC’s ability to broadly preempt state consumer protection laws.23

Compromises narrowed the distance between these extremes. The final bill permitted a limited amount of preemption by the banking statutes and a limited role for the OCC but refused to codify the OCC’s preemption approach.

First, Congress explicitly denied both federal banking charters field preemption: neither the NBA nor HOLA “occup[ies] the field in any area of State law.”24 Thus, Congress overturned both the explicit field preemption by OTS and the de facto field preemption by the OCC.

Second, Congress dictated that the OCC could preempt state laws only on a “case-by-case basis” by making “a determination … concerning 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

21 See, e.g., Testimony of Prof. Patricia A. McCoy Before the U.S. Senate Committee on Banking, Housing and Urban Affairs, Hearing on Consumer Protections in Financial Services: Past Problems, Future Solutions at 14, 14-24 (Mar. 3, 2009) (banks lobbied OCC to “clothe them with the same federal preemption as federal savings associations”, and succeeded with the 2004 preemption rules”); Q&A of Chairman Frank to Witness Michael C. Calhoun, House Committee on Financial Services, Perspectives on the Consumer Financial Protection Agency, (September 30, 2009) (Frank notes that it wasn’t until 2004 that the OCC engaged in field preemption, and that the burden is on those who want to “maintain broad field preemption” to show there were serious problems before 2004.); Testimony of Lauren Saunders Before the Subcommittee on Monetary Policy, Committee on Financial Services, U.S. House of Representatives, Hearing on Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve at 21-26 (July 16, 2009); Testimony of Kathleen Keest, Center for Responsible Lending, Travis Plunkett, Consumer Federation of America, and Edmund Mierzwinski, U.S. PIRG, Before the Committee on Financial Services, U.S. House of Representatives, Hearing on Regulatory Restructuring: Enhancing Consumer Financial Products Regulation (June 24, 2009).

22 H.R. 3126, 111th Cong., Sec. 143 (Introduced July 8, 2009).

23 For example, Amendment #141, defeated December 9, 2009 in the House Committee on Rules, would, inter alia, have preempted a state law that “impairs, or hampers” the business of banking. Other proposals would have eliminated any change to preemption.

24 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), § 1044, to be codified at 12 U.S.C. § 25b(b)(4). It is made applicable to federal thrifts by Dodd-Frank §1047.
with substantively equivalent terms.” The case-by-case requirement was a direct reversal of the OCC’s 2004 regulations, which preempted broad categories of state laws without examining the impact of particular state laws.

Third, 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 this 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 regulations.

The financial reform bill that passed the House Financial Services Committee used the language of Barnett -- “prevents or significantly interferes” – without identifying the case. On the floor, the House explicitly rejected an amendment to give the OCC authority to preempt a state law that merely “impairs or hampers” bank powers, an amendment that would have effectively codified the OCC’s weak preemption test. The final compromise language passed in the House version set the standard as “significantly interferes with or materially impairs” the ability of a national bank to exercise its powers.

The bill that passed the Senate Banking committee and the full Senate simply adopted the Barnett standard by reference to the case itself, without identifying any particular language from that case. Yet the Senate Committee report made clear that it interpreted Barnett as being a roll-back of the OCC’s overly aggressive preemption stance. The report explained that “[t]he standard for preempting State consumer financial protection laws would return to what it had been for decades, those recognized by the Supreme Court in Barnett Bank v. Nelson, 517 U.S. 25 (1996), undoing broader standards adopted by rules, orders and interpretations issued by the OCC in 2004.”

The final bill includes the reference to the Barnett case but gives Congress’s interpretation of the standard required by that case and it is Congress’s understanding of that standard that governs. The result is a law that allows the OCC some role in preemption, but “only if … in


26 HR 3126 Committee Print (October, 28, 2009).

27 A proposed amendment to use language preferred by the OCC and introduced by Congresswoman Bean (“prevents, significantly interferes with, impairs or hampers... ” was explicitly defeated in the House Rules Committee. Bean Amendment # 141 (December 9, 2009).

28 H.R. 4173 (Dec. 11, 2009). In a post-passage floor statement, Congresswoman Bean explained her view that the addition of the “materially impairs” language was added to reflect the multiple standards that she (as well as the OCC) views as the Barnett test. Remarks by Melissa L. Bean, 155 Cong Rec E 3029, December 16, 2009. Other parties to that compromise had different views of the meaning of “materially impairs,” and the language did not survive the final bill.

29 S. 3217 (April 15, 2010); H.R. 4173 (May 20, 2010).

accordance with the legal standard for preemption in [Barnett], the State consumer financial law prevents or significantly interferes with the exercise of the national bank of its powers . . . .”31 Congress unambiguously specifies only one “standard” drawn from Barnett.

In the conference committee statement on the final bill, Congress once again made clear its view that “prevent or significantly interfere” is the Barnett standard. The conference report noted that “[the Committee] 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 bank’s exercise of their powers.”32

Finally, in order to further ensure that the OCC did not misapply the new preemption standard, Congress put in a number of safeguards:

- To ensure that the OCC conduct true case-by-case review and not preempt broad categories of state laws that are “substantively equivalent,” Congress dictated that “the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination” that laws are equivalent.33
- To ensure that the OCC did not misapply the preemption test, Congress provided that “No regulation or order” of the OCC shall be applied to invalidate state law “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 the Barnett decision.34
- To subject any OCC preemption determinations to further scrutiny, Congress provided that courts should review them using the less deferential Skidmore judicial review standard rather than the Chevron standard under which courts generally defer to agencies.35

Together, these substantive and procedural requirements add up to a complete repeal of the OCC’s preemption regulations.

**c. The OCC’s Proposed Regulations Violate the Requirements of the Dodd-Frank Act**

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32 Joint Explanatory of the Committee of Conference, H. Rept. 111-517 at 875 (June 29, 2010).
34 Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(c) (emphasis added).
Evaluating the OCC’s proposal in light of Dodd-Frank Act requirements is telling. The proposed regulations violate numerous provisions of the Act.

(i) The Proposed Regulations Violate the Ban on Field Preemption and the Requirement for Case-by-Case Preemption Determinations

The OCC’s proposal to continue its broad preemption regulations with only modest changes violates the ban on field preemption and the requirement for case-by-case preemption determinations.

The deposit-taking regulation would continue to state that a “national bank may exercise its deposit-taking powers without regard to state law limitations concerning” the identical list of categories that are currently preempted: abandoned and dormant accounts; checking accounts; disclosure requirements; funds availability; savings account orders of withdrawal; state licensing or registration requirements (except for purposes of service of process); and special purpose savings services. While the OCC proposes to delete an introductory sentence to this provision, the OCC makes no changes to the substance of what is preempted and continues to effectively preempt the field of laws affecting deposit-taking.

The non-real estate lending regulation would continue to state that a “national bank may make non-real estate loans without regard to state law limitations concerning” an unchanged list of categories: licensing, registration and reports; creditor requirements for insurance for collateral or other credit enhancements or risk mitigants; loan-to-value ratios; the terms of credit; escrow and impound accounts; security property, including leaseholds; access to, and use of, credit reports; disclosure and advertising; disbursements and repayments; and rates of interest on loans. Except for the deletion of the introductory sentence, this regulation too is identical to the broad field preemption regulation currently in effect.

The real-estate lending regulation would also continue to state that a “national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning” the identical list of categories as before. Those categories are similar to the non-real estate lending regulation, and include mortgage servicing.

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36 Proposed 12 C.F.R. § 7.4007(b).

37 The OCC proposes to delete the introductory sentence: “Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.” 12 C.F.R. § 7.4007(b)(1). The impact of the removal of that sentence is discussed in the next section.

38 Proposed 12 C.F.R. § 7.4008(d).

39 Proposed 12 C.F.R. § 34.4(a).
The OCC’s proposal would repeal in its entirety only one of the 2004 preemption rules – the one applicable to “incidental” bank powers.\(^{40}\) We strongly support this repeal, but the OCC must likewise repeal the broad deposit-taking and lending field preemption regulations.

By proposing to continue the broad preemption of state laws affecting deposit-taking and lending, the OCC would violate several Dodd-Frank requirements:

- The OCC continues to preempt the field;
- The OCC has failed to conduct a case-by-case review of particular state laws;
- The OCC has failed to conduct a proceeding with substantial evidence on the record;
- The OCC has failed to analyze what state laws are substantively equivalent to particular ones that are preempted;
- The OCC has failed to consult with the CFPB in extending preemption beyond particular state laws to equivalent ones.\(^{41}\)

As discussed in the next section, the OCC also fails to explain how the state laws that are being preempted prevent or significantly interfere with bank powers or otherwise are preempted under the *Barnett* case.

In sum, the OCC ignores every element of the NBA amendments that dictate when the OCC can and cannot preempt state law. Consequently, the continuation of the 2004 preemption regulations, as amended, is outside of the OCC’s authority except as authorized by section 1043’s grandfather clause. The OCC’s regulations are completely inconsistent with the Dodd-Frank Act requirements, which were adopted for the purpose of “undoing broader [preemption] standards adopted by rules, orders and interpretations issued by the OCC in 2004.”\(^{42}\)

**(ii) The OCC Has Failed to Apply the Prevent or Significantly Interfere Standard, and the OCC’s Application of Barnett Distorts the Congressional Standard**

The OCC proposes modest changes to two sections of its regulations: those governing laws that are preempted, and those governing laws that are not preempted. Neither set of changes is sufficient to comply with the requirements of Dodd-Frank. The OCC makes no pretense of applying the prevent/significantly interfere standard, or even the *Barnett* case as interpreted by the OCC, to state laws governing deposit-taking or lending. While it purports to apply the *Barnett* standard to general laws, it fails to incorporate the entire congressional standard.

\(^{40}\) 76 Fed. Reg. at 30571, removing 7.4009.

\(^{41}\) Dodd-Frank, § 1044, to be codified at 12 U.S.C. § 25b((b)(1)(B), (b)(3). Though there is a delayed implementation date for specified functions, the CFPB was created as of the date of enactment, Dodd-Frank, §1018, and the Treasury Department has been exercising its early powers until a Director is in place. The OCC could have, but did not, consult with the Treasury CFPB Implementation Team.

Taken together, the OCC’s inadequate changes leave the preemption regulations largely untouched, in violation of the new preemption standard.

First, the OCC proposes to delete one sentence in the introductory paragraph of the deposit-taking, lending, and real-estate lending preemption regulations. That sentence currently provides that state laws that “obstruct, impair or condition” a bank’s activities are preempted.\(^{43}\)

Although we support the deletion of these words from the rule, Dodd Frank requires more. The OCC has continued to assert both its ability and intention to apply the broader preemptive concepts those words describe. The OCC asserts that precedent based on the “obstruct, impair or condition” language “remains valid.”\(^{44}\) The OCC’s explanation for deleting those words is not that they stated an overbroad standard in light of Dodd-Frank, but rather that they “created ambiguities and misunderstandings.”\(^{45}\)

As discussed above, the rules would continue to preempt the same broad categories of state laws. The OCC merely asserts, with no justification or explanation: “We have reviewed [the OCC preemption rules] … to confirm that the specific rules are consistent with the standard for conflict preemption in the Supreme Court’s Barnett decision.” The OCC has no basis to categorically pronounce that any state law in the listed categories (including, for example, mortgage servicing laws) prevents or significantly interferes with bank powers.\(^{46}\) The OCC does not even include any basis to support its assertion that its standards are consistent with the Barnett decision.

Second, the OCC proposes to amend the language governing state laws that are not preempted. Currently, those regulations provide that general laws such as contract and torts laws, and any other law that the OCC determines, are not preempted to the extent that they have only an “incidental” affect on bank powers.\(^{47}\) The OCC proposes instead that such laws would not be preempted to the extent consistent with the Barnett decision.

\(^{43}\) The OCC proposes to delete 12 C.F.R. § 7.4007(b)(1) (deposit taking), § 7.4008(d)(1) (non-real estate lending) and § 34.4(b) (real estate lending).

\(^{44}\) The OCC claims: “This language was drawn from an amalgam of prior precedents …. To the extent any existing precedent cited those terms in our regulations, that precedent remains valid, since the regulations were premised on principles drawn from the Barnett case.” 76 Fed. Reg. at 30563.

\(^{45}\) 76 Fed. Reg. at 30563.

\(^{46}\) For example, the OCC continues to assert that any state law governing abandoned and dormant accounts is preempted. The OCC drops a footnote to exclude state laws of the type upheld by the United States Supreme Court in Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944), which obligate a national bank to “pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business.” Id. at 248-249. But there would be no need for that footnote if the general rule were consistent with Supreme Court caselaw. The Supreme Court has reviewed very few state laws and the OCC cannot preempt every state law that has not been upheld by the Court.

\(^{47}\) See 12 C.F.R. §§ 7.4007(c), 7.4007(c)(8), 7.4008(e), 7.4008(e)(8), 34.4(b), 34.4(b)(9).
While we support the removal of “incidental” effect test, the reference to the *Barnett* case alone is insufficient; the proposed regulation nowhere adopts the specific “prevents or significantly interferes” language mandated by Dodd-Frank. Critically, in explaining the omission of the mandatory language from the proposed rules, the agency essentially repeats the same interpretation of *Barnett* that it invoked in promulgating the weaker standard in 2004.

In the Supplementary Information, the OCC denies that “prevents or significantly interferes” is the test to be applied, although the statute expressly and unambiguously states that it is. Instead, the agency asserts that *Barnett* allows for “different formulations” and that the specified language is merely “one exemplary formulation.” OCC claims that, while that articulation of the prevent/significantly interfere test “may serve as a touchstone or a starting point in the analysis….the analysis may not simply stop and isolate those terms from the rest of the decision.” Instead, the OCC claims it is appropriate to look at what it terms as “the whole” of *Barnett* and to consider other formulations of conflict preemption.

The OCC’s proposal makes clear that the agency intends to preserve the same degree of power to preempt state laws – whether state consumer financial laws, or laws of general applicability – that the OCC assumed in the past. This approach is not permitted by Dodd-Frank.

Congress directed the OCC to apply *Barnett* as interpreted and directed by Congress, not to parse *Barnett* for alternative formulations. Congress was reacting to the OCC’s 2004 claim that the “obstruct, impair or condition” language reflected the “variety of formulations” that the Supreme Court quoted in *Barnett*. Read against the backdrop of the 2004 rulemaking, the OCC’s current statement of intent to apply “the whole” of *Barnett* in making its future preemption determinations sounds like a declaration that it will continue to use the same standard it has in the past irrespective of what Congress says. In Dodd-Frank, Congress rejected the OCC’s prior reading of the *Barnett* standard. Congress has instructed the agency to use the “prevents or significantly interferes” standard stated in Act, and the agency must now do so.

Statutes must be interpreted to “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” In deliberating dropping the words "prevent or

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49 Id.

50 As discussed in section II(d) below, the Dodd-Frank Act does not give the OCC any preemption power over general state laws.


significantly interfere” from the Barnett reference, the OCC would violate the rule against “rendering superfluous” any statutory language. It was no accident that Congress included that phrase, and it was no accident that it referred to it as “the legal standard” in the singular case.

The OCC has no authority to defy the explicit mandate reflected in the law. The regulation should codify the statutory standard. The final rule, when promulgated in accord with all of Dodd-Frank’s procedural requirements, should drop all discussion in the explanatory material that claims or suggests that weaker standards under the OCC’s versions of alternative formulations have any continuing validity, except as applied to pre-existing contracts within the scope of Section 1043’s grandfather clause.

d. The OCC Has No Authority To Preempt State Laws of General Applicability

The OCC’s proposed rules continue to list laws of general applicability, such as contracts and torts, as applicable to national banks. But the regulation appears to assert that state laws, other than those specifically listed, are preempted unless the OCC determines them to be applicable to national banks. As amended, the list of generally non-preempted state laws includes specified categories of general laws, such as contracts, torts, plus

[...]

However, the OCC has no authority to determine preemption of state laws other than state consumer financial laws.

In Dodd-Frank, Congress clarified where and on what terms state laws are preempted. Apart from the explicit usury preemption provision in the NBA and state laws that discriminate against national banks, the new provisions governing “state consumer financial laws” are the only place in the NBA where Congress specified that state law is preempted or gave the OCC any authority to issue preemption regulations.


54 See 12 C.F.R. 7.4007(c) (deposits); 7.4008(e) (non-real estate lending); 34.4(b) (real estate lending) for categories of state laws that are presumptively not preempted, and therefore applicable to national banks, except as the OCC deems otherwise.


57 General principles of statutory construction strongly suggest that Congress’ decision to make the scope of OCC’s preemptive authority explicit as to only one category of state laws reflects an intent not to extend authority beyond those circumstances. This conscious decision by Congress is especially important against the
Dodd-Frank’s silence on laws other than state consumer financial laws cannot be construed as an implicit delegation of authority to preempt such laws. Congress did not address general state laws because the OCC has generally not asserted preemption of those laws. Congress’s silence about any preemption of state laws other than consumer financial laws, coupled with its awareness that even the OCC has taken the position that such laws are generally not preempted, is “powerful evidence” that the NBA does not preempt such laws.58

State laws other than state consumer financial laws may only be preempted under traditional Supremacy Clause principles. Congress gave the OCC no role in applying those principles. It would be an absurd result to read Dodd-Frank’s silence on laws of general applicability to make them more vulnerable to preemption, without the substantive and procedural protections that state consumer financial protection laws receive, when there was – and still is – a consensus that banks should comply with such laws.

III. The Visitation Regulations Must Be Revised

The proposed regulations make changes to the visitorial powers regulation, section 7.4000, in response to the changes in Section 1047 of Dodd-Frank. That section addresses the circumstances under which states may take enforcement actions against national banks. Here again, the proposed rule inappropriately changes Congress’s terminology, deviating from the statutory meaning. It further fails to make more extensive changes to section 7.4000 that are necessary to conform to the Cuomo decision59 and Dodd-Frank.

The OCC proposes to continue the portion of Section 7.400’s general rule that reads: “State officials may not exercise visitorial powers with respect to national banks, such as … prosecuting enforcement actions, except in limited circumstances authorized by federal law.” However, Cuomo makes clear that “the Comptroller erred by extending the definition of ‘visitorial powers’ to include ‘prosecuting enforcement actions.’”60 State enforcement actions are simply not a visitorial power. Therefore, the visitorial powers rule cannot restrict state enforcement actions to limited circumstances.

The proposed regulation also adds to the lists of visitorial powers: “investigating or enforcing compliance with any applicable federal or state laws concerning those activities.” Although the Supreme Court in Cuomo held that states may not enforce pre-litigation

backdrop of the debate over administrative agency preemption generally, see, e.g. Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Northwestern U. L. Rev. 695 (2008), and the Supreme Court’s recent decisions in Wyeth v. Levine, 129 S. Ct. 1187 (2009), and Cuomo, both rejecting administrative preemption in those cases.


60 Id. at 2721.

investigative subpoenas against national banks, it did not hold that every possible type of investigation is prohibited visitation. For example, states could collect complaints from consumers or research the public records without running afoul of the exclusive visitation provision of the NBA. Consequently, a broad rule prohibiting states from investigating compliance with applicable laws is unwarranted and section 7.4000(a)(2)(iv) should be removed in its entirety.

These problems are not cured by adding, as a permissible activity, the following exception to the general rule:

In accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L. L. C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce a non-preempted state law against a national bank and to seek relief as authorized thereunder is not an exercise of visitorial powers under 12 U.S.C. 484.62

Dodd-Frank amends the NBA to permit states “to enforce an applicable law and to seek relief as authorized by such law.”63 The OCC changes the word “applicable” to “non-preempted state law.”64 While the claim at issue in Cuomo involved state law, the OCC’s past efforts to undermine states’ rights to enforce federal law were in mind when Congress specifically chose not just to codify the Cuomo case but to use the term “applicable” law, rather than refer solely to non-preempted state laws.65 The OCC has no authority to change the words that Congress used to narrow the type of state enforcement that Congress authorized. The OCC should replace the words “non-preempted state” with “applicable” to conform its regulation to the statute.

Finally, OCC should delete section 7.4000(a)(2)(iii), which prohibits “regulation and supervision of activities authorized or permitted pursuant to federal banking law.” The regulation already bars supervisory activities such as examination of a bank, but the broad bar on any regulation or supervision could be read to preempt state laws and regulations that do not constitute visitation and are not preempted under the Dodd-Frank standard.

62 76 Fed. Reg. at 30564 (proposed 12 C.F.R. § 7.4000(b)).


64 76 Fed. Reg. at 30564 (proposed 12 C.F.R. § 7.4000(b).

IV. The OCC Appropriately Repeals the Subsidiary Preemption Provision

Congress reversed the Supreme Court and the OCC by directing that operating subsidiaries of national banks are fully subject to state law. The OCC’s proposal to repeal 12 C.F.R. § 7.4006 is consistent with that directive and we support it.

V. Conclusion

The OCC’s insistence on continuing its broad preemption of state law ignores the mandate of the Dodd-Frank Act. State laws that protect consumers from abusive bank conduct without preventing or significantly interfering with national bank powers are not preempted under the Dodd-Frank preemption standard. The OCC cannot preempt state laws as applied to contracts entered into after July 21, 2010 without following the standards and procedures of the Dodd-Frank Act. The OCC’s reaffirmation of its broad preemption regulations without regard to any of the Dodd-Frank limitations cannot withstand scrutiny.

Yours very truly,

Center for Responsible Lending
Consumers Union
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Sargent Shriver National Center on Poverty law
Item 7
Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing

Item 8
Section 1044 of Dodd-Frank: When Will State Laws Be Preempted under the OCC’s Revised Regulations

Item 9
Preemption of State Consumer Protection Laws under the Dodd-Frank Act

Item 10
CA Auto Sales Finance Act notice provisions not preempted by National Bank Act

Item 11
Federal Court Finds Dodd-Frank Does Not Change Preemption Standard for National Banks

Item 12
Restore the States' Traditional Role as “First Responder”