American Bankers Association
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June 27, 2011

Mr. John G. Walsh
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, D.C. 20219

RE: Office of Thrift Supervision Integration; Dodd-Frank Act lmplementation; 76 Federal Register 30557; May 26, 2011; Notice of Proposed Rulemaking; **OCC:** Docket ID OCC-2011-0006

Dear Comptroller Walsh:

The American Bankers Association[1] appreciates the opportunity to comment on the Office of the Comptroller of the Currency's (OCC) request for comments on the Notice of Proposed Rulemaking (NPR) "Office of Thrift Supervision (OTS) Integration; Dodd-Frank Act Implementation".[2] The NPR proposes a number of amendments to OCC regulations, including providing for the fee assessment of transferred savings associations, adding savings associations to a number of structural OCC regulations and clarifying the OCC regulations on preemption of state laws. ABA's comment letter addresses preemption first, followed by assessments, and finally structural integration.

Preemption

ABA appreciates the importance that the OCC attaches to addressing the issue of preemption. The system of national standards made possible by federal preemption has significance for all banks, large or small, national or state chartered.

As noted in the preamble to the NPR, the Dodd Frank Act (DFA) amended the National Bank Act (NBA) and the Home Owners' Loan Act (HOLA) with respect to preemption procedures and standards. ABA supports and agrees with the view that these amendments codify the *Barnett Bank* case.[3] The OCC, as the agency responsible for implementing the NBA, and after July 21, the HOLA, is the appropriate authority to issue definitive guidance to the public and to the industry. Clarity with regard to the application of national standards is vital to the smooth

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.
[2] 76 *Fed. Reg.* 30557 (May 26, 2011).
[3] *Barnett Bank v. Nelson*, 517 U.S. 25 (1966) (*Barnett Bank*).

functioning of the nation's economy, because it provides the predictability that businesses and banks need to provide products and services effectively and efficiently.

Without such guidance, national banks and many state banks (through the application of parity statutes) will not have the necessary certainty regarding the applicability of State laws to their operations. Banks and savings associations that make the wrong "guess" could be subject to significant regulatory and litigation liability.

Importance of Preemption in Our Economy

In today's world, markets for credit, deposits, and many other financial products and services are national and often international in scope. The imposition of an overlay of 50 State and an indeterminate number of local government rules on top of Federal requirements has a costly consequence that can materially affect national banks and their ability to serve consumers efficiently and effectively across the nation. This point has often been recognized by courts and policymakers, including two U.S. Courts of Appeals. Quoting from one of those decisions -

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions. [4]

A recent study published in the University of Pennsylvania Journal of Business of Law[5] found that preemption generates many clear economic benefits for banks and their customers. Uniform national laws, and the court and regulatory determinations pursuant to them, have been used as a device to open markets, redress local protectionist measures, reduce the price of credit, increase the availability of credit, and increase the efficiency of banks. Consumers, small businesses, and the U.S. economy in general are numbered among the more significant beneficiaries.

The DFA Codifies Barnett

The preamble to the NPR concludes that the DFA amendment is a codification of the standard for the preemption of state law articulated in the *Barnett Bank* case and its progeny. ABA agrees with this conclusion based on its review of the statutory language, legislative history of the DFA, other relevant language in the DFA, principles of statutory construction, and judicial interpretation of the DFA.

[4] *National City Bank v. Turnbaugh*, 463 F.3d 325, 332-33 (4th Cir. 2006), quoting with approval from OCC's regulation at 69 *Fed. Reg*. 1904, (2004). *See also, Wachovia Bank v. Burke*, 414 F.3d 305, 320-321 (2nd Cir. 2005).
[5] J. Mason, R. Kulick and H. J. Singer "The Economic Impact of Eliminating Preemption of State Consumer Protection Laws," 12 U.of Pa. J.of Bus.Law 781 (2009).

The House-Senate Conference Committee report specifically states that the language in the DFA is "codifying" the *Barnett Bank* case.[6] During the Senate debate on the Conference report, Senator Tom Carper and Senator Christopher Dodd agreed that the language was a codification of the *Barnett Bank* decision,[7] as did Senator Tim Johnson, who added that such a codification will provide "certainty" to both consumers and providers of financial products.[8]

Further, the language used in DFA is almost identical to the preemption language used in the Gramm-Leach-Bliley Act (GLBA) with respect to the preemption of State insurance laws.[9] The legislative history of GLBA shows that Congress did not intend the use of the words "prevent or significantly interfere" to create a new standard.[10] For example, the Senate Banking Committee report associated with GLBA states that the "prevent or significantly interfere" standard is a codification of the *Barnett Bank* decision and all of the case law embodied in that decision.[11] Judicial interpretation of this almost identical language in GLBA is consistent with the view that it was intended as a codification of the *Barnett Bank* case.[12] Thus, in light of the fact that the provision in the DFA uses almost the identical words as the preemption provision in GLBA, it is eminently reasonable to conclude that Congress wanted these words to have the same effect, that is, to be viewed as a codification of the entire *Barnett Bank* case.

In addition to the legislative history, the language used in other parts of the DFA directly supports the view that a codification of the *Barnett Bank* case was intended. Section 5136C(c), as added by Section 1044 of the DFA, states that a regulation or order issued by the Comptroller that determines that a State law is preempted should be upheld by a court only if, "substantial evidence, made on the record of the proceeding, supports the specific finding regarding … preemption … *in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank*…." [Emphasis added]. It would not make any sense for a court to review the sufficiency of an OCC preemption decision for compliance with the *Barnett Bank* case if the applicable standard is anything but the *Barnett Bank* case.

We also note that the courts have repeatedly disfavored statutory interpretations that would result in the *implicit* reversal of judicial decisions. As stated by the U.S. Supreme Court, "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[13] Further, the U.S. Supreme Court has held that when Congress wants to override a judicial concept, its "intention would be clearly expressed, not left to be collected or inferred …."[14] In making this determination, the courts will pay close attention to the legislative history of the provision.[15]

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[6] H. Rep. No. 111-517, at 875 (2010) (Conference Report).
[7] Cong. Rec. page S5902 (July 15, 2010).
[8] *Id*.
[9] Public Law 106-102 (1999) at §104(d).
[10] Senate Banking Committee Rep. 106-44 at 13 (1999); House Financial Services Committee Rep. No. 106-434 at 156-57 (1999) (Conference Committee).
[11] Senate Rep. 106-44 at 13 (1999).
[12] *Association of Banks in Insurance v. Duryee*, 270 F.3d 397 (6th Cir. 2001)
[13] *See*, e.g. *Noland v. United States*, 517 U.S. 535, 541 (1996).
[14] *Kelly v. Robinson*, 479 U.S. 36, 46 (1986) quoting from *Midlantic National Bank v. New Jersey Dep't. of Environmental Protection*, 474 U.S. 494, 501 (1986).
[15] *See*, e.g., *Henning v. Union Pacific Railroad Company*, 530 F.3d 1206 at 1216 (10th Cir. 2008).

Finally, the first decision construing the impact of the preemption provisions of DFA has concluded that the substantive standard for determining whether state law conflicts with the National Bank Act remains firmly grounded in the traditional "conflict" preemption analysis articulated by the *Barnett Bank* decision. In *Baptista v. JPMorgan Chase*[16] the U.S. Court of Appeals for the Eleventh Circuit determined that under the DFA state laws would be preempted under the traditional preemption rules described in the *Barnett Bank* case. In other words, no change in the court's preemption analysis was required under the DFA.

ABA notes that there would be many practical consequences for banks if the existing application of federal preemption did not remain in effect. Banks would face substantially increased upfront and ongoing legal and compliance costs. At a minimum, banks would have to undertake an analysis of state and local laws to determine their applicability in light of any new preemption standard, as well as set up processes to do so on an ongoing basis. Compliance with any newly applicable state laws would require revisions to processes, policies, staff training initiatives, customer documentation and disclosures, as well as the consequent changes to long-standing business models and customer relationships. Customers would be inconvenienced by changes to their banking relationships and the necessity to enter into new agreements with their banks as well as considering additional relevant disclosures. Our members inform us that, based on their preliminary review of potentially applicable state laws, customer relationships would need to be changed to accommodate new requirements relating to account disclosures, non-interest fee restrictions, and use of third-party agents and customer agreements, for example. Overlaying all of these potential changes would be the risk and related costs of litigation regarding the interpretation and application of any new requirement. Our thrift members would face a similar burden.

Proposed Clarifications to the OCC Preemption Regulation

The OCC's 2004 preemption regulation (2004 Regulation) provides that State laws that "obstruct, impair, or condition" a national bank's exercise of powers granted under Federal law are preempted.[17] The preamble to the NPR explains that the phrase "obstruct, impair, or condition" was a distillation of the principles described in the *Barnett Bank* case, and therefore entirely consistent with the DFA. Nevertheless, in order to reduce potential misunderstanding or ambiguity about the intent and effect of the 2004 Regulation, the OCC is proposing to remove the phrase "obstruct, impair, or condition" from the 2004 Regulation's text, while noting that this change is "clarifying" and not substantive.

ABA agrees that the 2004 Regulation was a codification of the *Barnett Bank* preemption principles as derived from the relevant case law and is therefore not overturned by the DFA. The preamble to the 2004 Regulation makes it clear that it is codifying applicable case law and did not adopt a new or different standard:

[16] *Baptista v. JP Morgan Chase Bank, N.A.*, 2011 U.S. App. LEXIS 9568 (11th Cir. May 11, 2011).
[17] 69 *Fed. Reg.* 1904 (Jan. 13, 2004).

> The phrasing used in the final rule – "obstruct, impair, or condition" – differs somewhat from what we proposed. This standard conveys the same substantive point as the proposed standard, however; that is, that state laws do not apply to national banks if they impermissibly contain a bank's exercise of a federally authorized power. The words of the final rule, which are drawn directly from applicable Supreme Court precedents, better convey the range of effects on national bank powers that the Court has found to be impermissible. The OCC intends this phrase as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in *Hines* and *Barnett*, and not as a replacement construct that is in any way inconsistent with those standards. [18]

Comptroller John Hawke testified before the Senate Banking Committee that the 2004 Regulation did nothing more than "distill the various phrases the Supreme Court has used in its preemption decisions."[19] In a letter Comptroller Hawke wrote to Congressman Ron Paul following a House Financial Services Committee hearing[20] the Comptroller stated that the "key to determining the applicability to national banks of State laws … is not the phrase "obstruct, impair, or condition" but *rather the case law that underlies and supports that phrase*."[21] The courts have also construed the words "obstruct, impair. or condition" in a manner that is equivalent to and interchangeable with the standard articulated in *Barnett Bank* and its progeny, and that does not create a new standard.[22]

ABA agrees with the cited authorities – the 2004 Regulation is entirely consistent with the *Barnett Bank* case, and the 2004 Regulation continues to be valid. ABA recommends that, in the preamble to the final regulation, the OCC emphasize this fact and reaffirm that the proposed deletion of the words "obstruct, impair, or condition" is not intended to suggest that there has been any substantive change in the law.

Listing of Types of Laws Preempted

The 2004 Regulation lists various types of State laws that are, or are not preempted. In the lending area preempted laws include laws that restrict or prescribe the terms of credit, amortization schedules, permissible security property, escrow accounts, disclosure and advertising, and laws that require a State license as a condition for a national bank to exercise its authority. With respect to deposit-taking activities the regulation lists laws that deal with disclosure, advertising, licensing and registration, checking accounts, and funds availability. In the case of both lending and deposit-taking activities the listed types of State laws are preempted either by longstanding OCC or OTS determinations, opinion letters, or regulations, or by court decision. Thus, longstanding precedent exists

[18] *Id*. at 1910.
[19] Hearings Before the Senate Banking Committee, "Review of the National Bank Preemption Rules," 108th Cong. 2d Sess. (2004), Testimony of Comptroller John Hawke.
[20] Hearing Before the House Committee on Financial Services, "Oversight of the Office of the Comptroller of the Currency: Examination of Policies, Procedures and Resources," 108th Cong. 2d Sess. (2004).
[21] Letter from Comptroller Hawke to Congressman Ron Paul, dated July 27, 2004.
[22] *See*, e.g. *Rose v. Chase Bank USA*, 513 F.3d 1032 (9th Circuit, 2008); *Martinez v. Wells Fargo Home Mortgage, Inc*. 598 F.3d 549 (9th Cir. 2010).

recognizing that these types of laws prevent or create substantial interference with national banks' or savings associations' conduct of Federally-authorized activities.

A review of the types of laws listed as preempted indicates that many of these laws directly prevent or otherwise affect a bank's exercise of its federal authority to establish underwriting standards, to price its products and services, or to hedge risks and protect its exposures. Other laws on the list relate to requirements that singly may not *appear* problematic, such as a simple disclosure requirement, but that could be burdensome in application, especially if different versions of the requirement are adopted by numerous jurisdictions. In sum, it is clear why these types of laws have been preempted through precedents that pre-date the 2004 Regulation, and ABA supports the way that the OCC now proposes to amend the relevant text of its regulation in the NPR.

Section 7.4009

Section 7.4009 relates to the applicability of State law to the full panoply of national bank operations and provides that State laws that obstruct, impair or condition national bank operations generally are preempted. The NPR proposes to delete this section in its entirety. ABA is concerned that such deletion could result in a negative inference, and that opponents to preemption will argue that the deletion indicates that there is no preemption of State laws that interfere with bank operations generally. To avoid that result, ABA recommends that the OCC retain this section, and substitute a reference to the *Barnett Bank* standard in lieu of the phrase "obstruct, impair, or condition."

Case by-Case-Requirement

The preamble to the NPR states that after the transfer date, or July 21, 2011, preemption determinations made by the OCC will be made on a case-by-case basis. The ABA acknowledges this new requirement and is persuaded by the lack of explicit Congressional intent, the presumption against retroactive application of legislation, and the text of the DFA that this case-by-case requirement only applies to OCC preemption determinations made on or after the transfer date. Similarly, ABA notes that existing preemption for national bank operating subsidiaries continues to be in effect until July 21, 2011.

The DFA added subparagraph 5136C (b) (1) (B) to the National Bank Act. This subparagraph contains the applicable preemption standard discussed above. This subparagraph goes on to provide that any preemption determination *under this subparagraph* may be made by the OCC by regulation or order on a case-by-case basis. The term case-by-case is defined by the DFA[23] to mean a determination made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank, or the law of any other State with substantively similar terms.

The NPR preamble states that there is no evidence of Congressional intent to apply the case-by-case requirement retroactively to overturn existing precedent or regulations, and

[23] *See* DFA section 1044(a).

that such an interpretation would be contrary to the usual presumption against the retroactive application of legislation. ABA agrees and further notes that such an interpretation would, as a practical matter, expose national banks to extensive litigation over whether a State law that was preempted under the 2004 Regulation has become applicable. The costs of this litigation would be high.

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

In short, we believe that the case-by-case requirement only applies to new OCC actions undertaken after July 21, 2011. Any other reading would be unnecessarily disruptive and economically damaging. It should be recognized that national banks may rely on existing precedents and existing regulations when determining if a State law is preempted. However, if a national bank or other party asks the OCC to make a new preemption determination, including by making an interpretation of the 2004 Regulation, the OCC determination would be subject to the case-by-case requirement. ABA recommends that the OCC confirm in the preamble to the final regulation that the case-by-case requirement only applies beginning July 21, 2011, and that operating subsidiaries of national banks may continue to rely on existing preemption precedent until that date.

Preemption Standards for Federal Savings Associations

Federal savings associations were established by Congress in 1933 in order to carry out Federal purposes and goals. As early as 1938 the courts have ruled that State laws that hamper the accomplishment of these goals are preempted.[24] Since that time, Federal savings associations have relied on court decisions, agency determinations, and agency regulations to determine the applicability of State law to the activities authorized to them by the HOLA. We believe that to the extent consistent with the *Barnett Bank* case, these precedents will continue to apply to Federal savings associations.

In section 1046 of the DFA, Congress amended the Home Owners' Loan Act to provide that any determination by a court or the OTS (or the OCC after July, 21, 2011) regarding the applicability of State law to a Federal savings association "shall be made in accordance with the laws and legal standards applicable to national banks." The NPR proposes to add a new section 7.4010(a) to the OCC's regulations that would provide that "state laws apply to Federal savings associations and their subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries."

[24] *First Federal Savings and Loan of Wisconsin v. Loomis*, 97 F. 831 (7th Cir. 1938).

ABA supports the proposed regulatory amendment, and notes that it will provide certainty that State laws not applicable to national banks will also not be applicable to Federal savings associations. Further, ABA recommends that the OCC confirm that all prior OTS preemption actions that are consistent with the holding in *Barnett Bank*, including those based on the HOLA, also continue to be effective. Simply voiding such prior OTS regulatory actions throws business models and practices into flux and causes significant disruptions. ABA does not believe that this was the intent of Congress, and such a result would not be in the best interests of the national economy and the many communities served by Federal savings associations.

Fees and Charges

State laws regulating permissible national bank non-interest fees and charges are not covered by the 2004 Regulation. Rather, the OCC regulation found at 12 C.F.R. § 7.4002 has been held to preempt State restrictions on such bank fees and service charges.[25] This regulation states that a national bank's authority to impose charges and fees are business decisions of the bank to be made by the bank, in its discretion, according to sound banking judgment and safe and sound banking principles.[26] The regulation goes on to state that in setting these fees and charges the bank must consider four factors: (i) the cost incurred in providing the service; (ii) the deterrence of misuse of the service by customers; (iii) the enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and (iv) the maintenance of the safety and soundness of the bank.

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

In light of this case law ABA recommends that the OCC include a statement as part of this rulemaking that fees and other charges remain subject to 12 C.F.R. § 7.4002, and not State or local law.

Assessments

The NPR also amends the OCC's regulations in Part 8 to add federal savings associations to the OCC schedule and methodology for assessments. The preamble states that for the "first two assessment cycles … the OCC will base savings association assessments on either the OCC's assessment regulation … or the former OTS assessment structure, **whichever yields the lower assessment for that savings association."**[28] (Emphasis added.) ABA appreciates the OCC's efforts to provide a transition assessment period and supports its inclusion in the rulemaking. It

[25] *See*, e.g., *Martinez v. Wells Fargo Home Mortgage, Inc*., 598 F.3d 549 (9th Cir. 2010).
[26] 12 C.F.R. § 7.4002(b) (2).
[27] 321 F.3d 488 (5th Cir. 2003).
[28] 76 *Fed. Reg.* 30565.

is unclear where that transition phase is reflected in the actual regulatory language. ABA recommends that the OCC make the transition provision explicit. ABA also recommends that during the transition period federal savings associations which are assessed under the OTS methodology, because it yields the lower amount, receive a report of the amount that would have been assessed under the OCC methodology. This will permit federal savings associations expecting to experience increased assessments to plan better for those increases.

Structural Amendments

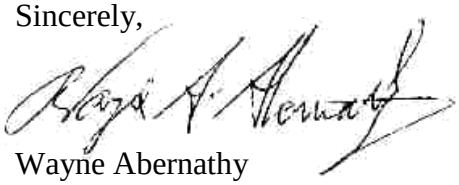
The NPR makes a number of structural amendments that ABA supports including amending its mission statement, description of offices, frequency of examinations, post-employment restrictions for senior examiners, and Freedom of Information Act (FOIA) implementing regulations to add federal savings associations as appropriate. With regard to the FOIA items ABA supports providing directors, officers, and others with clarity on their ability to use and have in their possession documents needed to carry out their responsibilities and duties.

Conclusion

ABA appreciates the work of the OCC to provide for clarification of its regulations and orderly integration of Federal savings associations into the OCC structural regulations. The further clarifications that ABA recommends in this comment letter will, we believe, ease transition and allow Federal savings associations an improved degree of certainty in their operations as well as provide more certainty in the application of preemption rules to national banks and Federal savings associations.

Please contact the undersigned at (202) 663-5223 if you have any questions. Thank you for considering our comments and recommendations.

Sincerely,



Wayne Abernathy
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