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Preemption of State Law for National Banks and Their Subsidiaries by the Office of the Comptroller of the Currency

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Summary

This report focuses on regulations issued by the Comptroller of the Currency preempting certain state laws. It contains a brief summary of those regulations; a review of the case law setting forth standards of preemption in the banking law area; summaries of various statutes that contain explicit statements as to their effect upon state law; summaries of recent agency interpretations and court decisions on newly enacted state laws; and a general analysis of the proposed regulations.

The question of whether or not a state law applies to a federally chartered banking institution depends upon whether or not the state law has been preempted by federal law. Unless there is an explicit federal statute specifically preempting the particular type of state law, indicating that such state laws are not to be applied to federally chartered banks, thrifts, or credit unions, the issue often turns on interpretation of the applicable federal laws. Generally, if the statutory authority is ambiguous and the courts determine that the statute at issue is one that the federal banking regulators are charged by Congress with administering, the courts will defer to a reasonable, well-reasoned interpretation by the regulator.

With this in mind, the Office of the Comptroller of the Currency (OCC), the regulator of national banks, has recently issued regulations that preempt various state laws that affect national bank real estate lending, other lending, and deposit-taking functions. There is also a regulation that sets a procedure for OCC to preempt other state laws affecting other activities or powers authorized by Congress for national banks. OCC premises these regulations on legal arguments flowing from principles of federal preemption derived from various judicial decisions and on practical argument, which in turn are based on the array of federal regulations addressing functions of national banks, including recent OCC guidance on real estate lending and predatory lending.

State regulators, consumer advocates, and certain Members of Congress have questioned whether OCC has the authority to issue such broad regulations. Some have criticized OCC as going beyond the standard articulated by the Supreme Court in *Barnett Bank of Madison County v. Nelson*, 517 U.S. 25, 31 (1996), when it decided that a state law that would prevent some national banks from exercising insurance powers authorized by federal law was preempted because it would "prevent or significantly interfere with the national bank's exercise of its powers." In recent years, criticism of increased bank fees and entry into new market areas have provoked state legislation aimed at protecting consumers in such areas as insurance sales, insurance licensing requirements, ATM fees, check cashing fees, and credit card warnings. National banks, sometimes supported by *amicus* briefs by the OCC, have challenged this type of legislation. Generally, the courts have been receptive to claims that such laws interfere with the federally authorized powers of national banks to such an extent that they are preempted by federal law.

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Background

Certain state laws defining various responsibilities of financial services providers have been pronounced by federal regulators to be inapplicable to federally chartered banks, thrifts, or credit unions because of federal preemption. The regulators–the Office of the Comptroller of the Currency (OCC) for national banks, the Office of Thrift Supervision (OTS) for federal thrifts and savings associations, and the National Credit Union Administration (NCUA), for federal credit unions–have done this by several means: regulations, informal opinions, guidance, and amicus briefs in litigation. Recently, the issue of federal preemption has arisen in the context of individual state laws addressing such diverse topics as predatory lending, ATM fees, insurance sales by banks, and credit card disclosures.

The federal regulators generally premise preemption on their analysis of the federal legislation under which these institutions have been chartered: the National Bank Act (NBA)[1] for national banks, the Home Owners Loan Act (HOLA)[2] for federally chartered thrifts and savings associations, and the Federal Credit Union Act (FCUA)[3] for federal credit unions. Usually, they can cite no explicit statutory language preempting state law. To find preemption, they look to the general purposes of the federal legislation, the nature of the powers conferred on the institutions, and the effect of state law on the those purposes and powers. They then apply preemption standards derived from federal court decisions, including several Supreme Court cases dealing with national banks, thrifts, or credit unions.

Unlike the OTS, which has well-established preemptive authority and comprehensive regulations providing for preemption of state laws,[4] OCC has

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[1] 12 U.S.C. §§ 1-215.

[2] 12 U.S.C. §§ 1461 et seq.

[3] 12 U.S.C. §§ 1751 et seq.

[4] These have been issued under authority of various federal laws. See e.g., 12 C.F.R. , Part 535, issued under the Federal Trade Commission Act, 15 U.S.C. 57a, defining prohibited credit practices; 12 C.F.R.. §§ 557.11, issued under HOLA, defining the extent to which federal law preempts deposit related state laws; 12 C.F.R. § 560.2, issued under the HOLA, declaring that OTS "occupies the entire field of lending regulations for federal savings associations"; 12 C.F.R., Part 590, issued under HOLA and the Depository Institutions

(continued...)

previously relied heavily on opinion letters and other forms of advice and guidance, rather than rulemaking for preemption.

Before discussing the OCC situation, it might be well to look at how the courts have treated OTS's use of regulations to assert broad preemption. The leading case is *Fidelity Federal Savings and Loan Association v. de la Cuesta*.[5] It involved a conflict between a California Supreme Court ruling which limited the right to enforce "due-on-sale" clauses[6] in mortgage contracts and a regulation issued by OTS's predecessor, the Federal Home Loan Bank Board (FHLBB). The U.S. Supreme Court upheld the regulation, finding the state rule that prohibited due-on-sale clauses to be preempted on the basis of an analysis of the language and history of the HOLA. From this, it discerned that "Congress plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed to be "'best practices.'"[7] Both the OTS and, its predecessor, FHLBB, as the U.S. Supreme Court recognized in *de la Cuesta*,[8] have exerted broad regulatory authority over the federal savings associations, subjecting them to an array of regulations, leading courts to find adequate support for OTS's preemption conclusions.

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[4] (...continued)
Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1725f-7a, preempting state usury laws; and, 12 C.F.R., Part 591, issued under the Thrift Industry Reconstruction Act and the Garn-St Germain Depository Institutions Act of 1872 (12 U.S.C. § 1701-j-3), preempting state due-on-sale clauses.

[5] 458 U.S. 141 (1982).

[6] With respect to mortgage loans, this means requiring the full payment of the remaining balance upon sale of the property.

[7] 458 U.S. 141, 161 (citations omitted). Critical to the decision was the fact that the due-on-sale clause regulation was tied to the core purpose of the HOLA–putting in place a reliable system of institutions to provide sufficient credit for residential mortgages. The purported purpose of the regulation was to permit federally chartered thrifts to have a mechanism for escaping from long- term mortgage commitments that carried interest rates that, at the time, were low in comparison with the market rate, thereby, inhibiting the ability of the thrifts to be profitable and to continue to supply home mortgages in the quantities needed.

[8] "Section 5(a) of the HOLA, 12 U.S.C. § 1464(a) (1976 ed., Supp. IV), empowers the Board, 'under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations."' Pursuant to this authorization, the Board has promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.'" 458 U.S. 141 144-145, citing *People v. Coast Federal Savings & Loan Association*, 98 F. Supp. 311, 316 (S.D. Cal. 1951). The current version of this provision delegates this authority to the Director of OTS. 12 U.S.C. § 1464(a)(1).

OCC's Preemption Regulations

Preemption by Opinion: Georgia Predatory Lending Law.

Generally, to date, OCC has relied less on regulations than on interpretative letters, informal opinions, and other types of guidance to make preemption determinations. These do not provide courts the same groundwork for upholding agency preemptions as would issuing rules intended to have the force of law.[9] Individual opinion letters and guidance issuances are not intended to have the force of law, thereby potentially raising the implication that the agency, itself, is uncertain as to whether it has the authority from Congress to issue substantive regulations on the matter. Establishing a solid record of its authority to issue preemption regulations having the force of law seems to have been one consideration for the OCC 's issuance of proposed amendments to its regulations on bank activities and operations and on real estate lending and appraisals "to identify types of sate laws that are preempted.".[10] At the same time it issued a determination[11] that a Georgia law addressing predatory lending[12] does not apply to the real estate lending activity of national banks and their subsidiaries because it has been preempted by federal law.

Preemption by Regulation: OCC's Proposed Regulations.

The proposed regulations solicited public comments on a regulatory proposal that would define by category state real estate and lending laws that are preempted for national banks and their subsidiaries. It would do the same for state laws affecting deposit-taking and other lending activities and set forth which categories of state laws are not preempted by federal law. There would also be a regulation setting standards that are to be applied to state laws regulating other authorized activities of national banks and their subsidiaries. OCC also raised a query as to whether or not it should issue a determination that OCC regulations, "like those of OTS, should state explicitly that a Federal law occupies the entire field of national

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[9] See, e.g. , *United States v. Mead Corp*, 533 U.S. 218 (2001).

[10] 68 *Fed. Reg.* 46119 (August 5, 2003).

[11] OCC Docket No. 03-17, 68 *Fed. Reg.* 46264 (August 5, 2003). In it, OCC held that federal law (12 U.S.C. §§ 24, 85, and 371) preempted the application of various provisions of the Georgia law to national banks and their subsidiaries. OCC held that 12 C.F.R. § 34.4(a) preempts the Georgia law's provisions limiting prepayment fees and prohibiting acceleration of a loan in absence of default, as well as the provision affording a right to cure a default. Under 12 U.S.C. § 85 and 12 C.F.R. §7.4001, the Georgia provisions limiting interest rates were preempted. Georgia limits on non-interest fees were preempted under 12 U.S.C. § 24 (Seventh) and 12 C.F.R. § 7.4002(a), which authorize incidental powers, which OCC interprets to include the ability to charge fees for services. Under 12 C.F.R. § 34.4(b), OCC applied "recognized principles of Federal preemption" and declared provisions in the Georgia law regarding the following topics to be preempted: restriction on financing of credit insurance, restriction on refinancings, requiring borrower counseling, limiting underwriting standards, restrictions on home improvement loans, and notice requirements.

[12] Ga. Code Ann. §§ 7-6A-1 et seq.

banks' real estate lending activities."[13] The comment period for the proposed rulemaking ended on September 18, 2003.

Specifics of OCC's Preemption Regulations as Proposed.

The proposal first discussed the history of the National Bank Act, federal standards for preemption, and recent court cases finding state laws preempted with respect to their applicability to national banks. Then, OCC listed examples of types of state laws that have been found to be preempted: licensing laws, filing requirements, terms of real estate loans, advertising, permissible interest rates; permissible fees and charges; management of credit accounts; due-on-sale clauses; leaseholds as acceptable security; and mandated statements and disclosures. Some of these have been preempted by federal court decisions; others, by OCC regulations.

After establishing a history of judicial treatment of national banks' relationship with state law setting forth the reasons for issuing the proposals, OCC proceeded to discuss each of the regulatory proposals in turn. It proposed to preempt state laws with respect to real estate lending, deposit-taking, and other lending. It also proposed to provide a standard for preempting state laws affecting other activities authorized for national banks by federal law. Under the proposed standard, state laws that "obstruct, in whole or in part, or condition a national bank's exercise" of powers granted to it would be preempted. Certain types of state laws would be presumptively not preempted but would be subject to preemption should they be found have more than an incidental effect upon national bank powers. With respect to real estate lending, the agency also solicited comments as to whether OCC, should make an explicit statement that its regulations preempt the entire field, similar to the OTS rule.[14]

OCC's Preemption Regulations as Promulgated.

Final rules were promulgated on January 7, 2004.[15] They generally conform to the format of the proposed rules. There is some modification of the preemption standard and of the text of the rules, but no field preemption.[16] There is also a predatory lending provision that prohibits making consumer loans based on the foreclosure or liquidation value of the real property or collateral and a specific rule enforcing section 5 of the Federal Trade Commission Act, declaring unfair methods of competition or unfair or deceptive acts or practices affecting commerce to be unlawful.[17]

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[13] 68 *Fed. Reg.* 46119, 46124, citing 12 C.F.R. 560.2.

[14] 12 C.F.R. § 560.1.

[15] See [http://www.occ.treas.gov/newrules.htm]. 69 *Fed. Reg.* 1904.

[16] This is primarily because OCC indicated that it will deal with issues as they arise under the various statutes that it has cited as providing it with authority to preempt inconsistent state laws.

[17] 15 U.S.C. § 45(a)(1).

OCC had approximately 2600 comments to consider. The material accompanying the final rules assured realtors that the regulations were not a means of authorizing real estate brokerage activities.[18] To the concerns raised by consumer advocates that consumer protections would be weakened, OCC responded by extending the prohibition on practices that might be viewed as predatory lending practices to cover all consumer loans, rather than only real estate loans. Comments were also received from state banking regulators, Members of Congress, various state legislators and attorneys general, and consumer groups, arguing against field preemption and challenging the "obstruct, in whole or in part" standard that OCC had proposed. OCC responded by choosing not to issue a field preemption rule and by slightly modifying the preemption standard. The final rules employ the following preemption standard: "state laws that obstruct, impair, or condition a national bank's ability to fully exercise a ... power." The proposal's standard had read: "state laws that obstruct , in whole or in part, or condition, a national bank's exercise of ... powers."

The commentary accompanying the issuance of final rules discusses the basis and authority of these regulations, expanding upon the material accompanying the proposed regulations. It emphasizes the nature of the national banking system, its Congressionally mandated goals, and the need for it to be responsive to the demands of an increasingly mobile and technologically advanced society. OCC refutes arguments that there is any one particular articulation of the standard that applies to preemption of state law affecting national banks by referring to the variety of formulations used in previous Supreme Court cases.

Statutory Authority for Preempting State Laws.

Under the authority of 12 U.S.C. § 371, which authorizes national banks to engage in real estate lending subject to "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order," the OCC regulation lists state laws by type that are preempted and types that are generally not preempted. Two basic banking functions authorized under 12 U.S.C. § 24, Seventh: deposit-taking and lending other than real estate lending, are covered by separate sections of the regulations. A final section covers all other functions of national banks and their subsidiaries in a general rule preempting state law respecting all powers authorized under federal law, including activities conducted under the incidental powers clause of 12 U.S.C. § 24, Seventh.

OCC appears to be interpreting its rulemaking authority as virtually exclusive under the real estate lending statute, 12 U.S.C. § 371, which includes the phrase, "subject to section 1828(o)[19] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." The other statutory authority that OCC relies on is 12 U.S.C. § 93a , which grants general rulemaking authority to OCC "to prescribe rules and regulations to carry out the

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[18] See CRS Report RS21104, *Should Banking Powers Expand into Real Estate Brokerage and Management?*, by William D. Jackson.

[19] This provision requires all federal banking agencies to issue uniform real estate lending laws with respect to safety and soundness considerations.

responsibilities of the office," subject to the following exception, "[e]xcept to the extent that authority to issue rules and regulations has been expressly granted to another regulatory agency."[20] This OCC interpretation may well be consistent with the way the courts have since the 1970's interpreted such general grants of rulemaking authority as authority to issue substantive regulations.[21]

OCC use of these two statutes to issue preemptive regulations has already been upheld in the context of litigation. In *Conference of State Bank Supervisors v. Conover*,[22] a federal appellate court, relying on the reasoning of *Fidelity*, upheld an OCC regulation allowing national banks to offer or to purchase adjustable rate mortgages and preempting inconsistent state laws. In reaching the conclusion, the court specifically found that the language in 12 U.S.C. § 371 provided such authority and further held, that even without the language added by Garn-St Germain,[23] OCC had the authority to issue such regulations. The court also found that 12 U.S.C. § 93a provided authority to issue such rules and that it was not merely housekeeping authority.[24] According to the court, section 93a provides OCC with power to issue rules that have the force of law to discharge its obligations with respect to overseeing the national banking system. The court stated:

> the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking Act. So long as he does

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[20] In comments submitted to OCC, on October 6, 2003, the Center for Responsible Lending (hereafter, the Center) criticizes the OCC's legal analysis of the authority provided in 12 U.S.C. § 371. It reads the OCC proposal on real estate lending as tantamount to field preemption because it refrains from preempting only those state laws that are beneficial to national banks. It reads OCC's interpretation of amendments to 12 U.S.C. § 371 as misguided because the mere requirement of compliance with safety and soundness regulations promulgated by all banking regulators cannot mean that Congress intended to provide OCC with authority to occupy the field exclusive of state consumer protection laws. There is a similar assertion that OCC's interpretation of *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25 (1996) inaccurately compares 12 U.S.C. § 371 with 12 U.S.C. § 92, at issue in that case. According to the Center, the latter is clearer as to the limit of state authority.

[21] In "Agency Rules with the Force of Law: the Original Convention," 116 *Harvard Law Review* 470, 473 (2002), Thomas W. Merrill and Kathryn Tongue Watts make this point and summarize the current state of the law, with respect to all federal agencies but the Internal Revenue Service, as embracing "the assumption ... that facially ambiguous rulemaking grants always include the authority to adopt rules having the force of law."

[22] 710 F. 2d 878 (D.C. Cir. 1983).

[23] This is the language that OCC relies on in the proposed regulations. It reads: "subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule or regulations," and refers to the power of national banks to make real estate loans.

[24] With respect to the interaction of national bank legislation and the dual banking system, the court opined that "a congressional decision to upgrade the powers of national banks because they were at a competitive disadvantage does not entail the altogether different proposition that Congress intended to compel national banks to move in lockstep with state banks." 710 F. 2d 878, 885.

> not authorize activities that run afoul of federal laws governing the activities of national banks, therefore, the Comptroller has the power to preempt inconsistent state law.[25]

The OCC regulations cover real estate lending, deposit-taking and other lending and specify that state laws that " obstruct, impair, or condition a national bank's ability to fully exercise" the power in question, are inapplicable, except "where made applicable by federal law." Each identifies specific types of state laws that are preempted within the subject area. Each sets forth a list of types of state laws generally not preempted, provided they have no more than an incidental effect on a national bank's exercise of its powers.[26]

There are prohibitions, applicable to consumer loans, both real estate and non-real estate loans, that are designed to preclude predatory lending by national banks and their subsidiaries.[27] Consumer loans based on the foreclosure value of the collateral or property rather than on the lender's ability to pay are forbidden[28] There are also provisions enforcing, with respect to all loans by national banks and their subsidiaries, the unfair or deceptive practices prohibitions of the Federal Trade Commission Act and regulations promulgated thereunder.[29]

With respect to deposit-taking, state laws concerning the following are preempted: dormant accounts, checking accounts, disclosure requirements, funds availability, savings account orders of withdrawal, state licensing requirements (except for service of process), and special purpose services.[30] The list of preempted

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[25] 710 F. 2d 878, 885.

[26] The types of state laws generally preempted for real estate lending and appraisals are: (1) licensing, registration, filings, or reports by creditors; (2) ability of a creditor to require or obtain private insurance; (3) loan-to value ratios; (4) terms of credit; (5) aggregate amount to be loaned on real estate; (6) escrow and similar accounts; (7) security property; (8) access to and use of credit reports; (9) mandated statements, disclosure, and advertising; (10) processing, origination, servicing, sale or purchase of, or investment or participation in mortgages; (11) disbursements and repayments; (12) rates of interest on loans; (13) due-on-sale clauses; (14) covenants and restrictions for lease to qualify as security for a real estate loan. 12 C.F.R. § 34.4.(a). A parallel list of preempted state laws is given for non-real estate lending. 12 C.F.R. § 7.4008(d). Prior to promulgation of these rules, the list of preempted state laws in 12 C.F.R., Part 34, included only: advertising, permissible rates of interest, permissible fees and non-interest charges; management of credit accounts; due-on-sale clauses; leasehold as acceptable security; and mandated statements and disclosures.

For deposit-taking and other authorized activities, the following types of state laws are generally not preempted: (1) contracts; (2) torts; (3) criminal law; (4)certain debt collection; (5) acquisition and transfer of property; (6) taxation; and (7) zoning.

[27] 12 C.F.R. §§ 34.3(b) and 7.4008(b).

[28] 12 C.F.R. §§ 34.3(b) and (c)

[29] 12 C.F.R. §§ 34.3(c) and 7.4008(c). The Federal Trade Commission Act section cited is 15 U.S.C. § 45(a)(1).

[30] State laws on fees and charges are preempted according to the terms of an existing (continued...)

state laws for lending other than real estate lending is similar to that for real estate lending. The types of laws generally not preempted are contracts, torts, criminal law (except those specifically applicable by their terms to national banks),[31] debt collection right, property acquisition, taxation, zoning, and any other law OCC determines to have merely an incidental effect on the deposit-taking or lending operations of a national bank.[32]

Under the general rule applicable to all other authorized activities of national banks, there is a broad preemption of state laws. The rule proclaims that "[a] national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable federal law."[33] It states that, "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition, a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks"[34] There is also a statement that state contract, tort, criminal, certain debt collection, acquisition and transfer of property, tax, zoning and "any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out" apply "to the extent that they only incidentally affect the exercise of national bank powers."[35] In the commentary accompanying this provision as proposed, OCC noted that state laws will apply if federal law directs their application and if state law "has only an incidental effect on a national bank's exercise of its Federally authorized powers or if it is otherwise consistent with national bank's uniquely federal status."[36] The OCC commentary characterizes state laws that would generally be applicable as "types of laws [that] typically ... do not regulate the manner or the content of the business of banking authorized for national banks, but rather establish the legal infrastructure that surrounds and supports the conduct of that business."[37]

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[30] (...continued)
regulation, 12 C.F.R. § 7.4002.

[31] See *Easton v. Iowa*, 188 U.S. 220 (1903).

[32] 12 C.F.R. § 7.4007(c).

[33] 12 C.F.R. § 7.4009(a).

[34] 12 C.F.R. § 7.4009(b).

[35] 12 C.F.R. § 7.4009 c).

[36] 68 *Fed. Reg.* 46119, 46129.

[37] 68 *Fed. Reg.* 46119, 46129.

OCC Preemption and the Dual Banking System.

Some Members of Congress[38] and state banking regulators[39] have voiced concern about the prospect of preemption of state laws by federal banking regulators because of the potential impact on consumer protections and on the dual banking system.[40] Banking trade associations, on the other hand, have taken the view that OCC's regulations "help to preserve the dual banking system against state attempts to restrict or condition the authorized activities of national banks."[41] Of course, one aspect of the dual banking system that permits an OCC ruling to work to the advantage of state-chartered banks vis-a-vis non-bank lenders in a state with predatory lending laws is 12 U.S.C. § 1831d. Under it, a state-chartered bank with branches in more than one state may take advantage of the "most favored lender standard" and operate under the rules applicable to national banks in its home state.[42]

The dual banking system refers to the fact that two separate systems of chartering banks and thrifts exist in this country: federal and state. In the early days, although there was the experience of the First and Second Banks of the United States, banking was generally conducted through state-chartered banks even after the Supreme Court had upheld the authority of Congress to charter banks.[43] In 1863,[44] however, Congress established a system of federally-chartered national banks, as a means of raising funds to finance the Civil War.[45] Ever since, banks–either new banks or those in operation–may choose a federal or a state charter or convert from one charter to another and thereby from one primary regulator to another. Although the chartering authority–OCC for national banks and state bank regulators for state-chartered banks–is the primary regulator, every bank is to some extent subject to regulation by both state and federal governments. Deposit insurance carries with it regulation by the FDIC; Federal Reserve System membership brings Federal Reserve Board regulation. In addition, federal tax, consumer protection, securities, fair housing, anti-money laundering, and bank secrecy laws apply to all banks, thrifts, and

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[38] R. Christian Bruce, "Rep. Kelly to Seek Hearings on OCC Rule, Says Agency May Be Skirting Hill Mandates," 81 *BNA's Banking Report* 681 (Nov. 10, 2003); Karen L. Werner, "Ranking Member Sarbanes at Odds With OCC Proposal to Preempt State Laws," *Daily Report for Executives* A-15 (November 20, 2003). (Text of the letter is available on [http://sarbanes.senate.gov]. It requests that OCC defer this rulemaking procedure.)

[39] Richard Croyden, "Bankers Laud Benefits of State Charters, Seek Defenses Against Federal Preemption," 81 *BNA's Banking Report* 685 (Nov. 10, 2003).

[40] State attorneys general, [http://www.naag.org/issues/20031006-multi-occ.php] and consumer groups, [http://www.predatorylending.org], commented negatively.

[41] R. Christian Bruce, "Trade Groups Back Hawke on Preemption, Question Sarbanes Request to Delay Rules, 81 *BNA' s Banking Report* 918 (December 22, 2003).

[42] *Greenwood Trust Co. v. Massachusetts*, 971 F. 2d 818 (1st Cir. 1993).

[43] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (the power to charter banks is necessary and proper to Congressionally enumerated borrowing and taxing powers).

[44] Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

[45] National banks were required to purchase and hold Treasury securities and were permitted to issue currency, national bank notes, backed by these securities.

credit unions, as do various laws of general applicability. Moreover, there is no question that certain state laws apply to national banks. The preemption issue arises because there is no precise way of identifying each and every state law that may apply to a national bank. OCC's initiative appears to be that agency's attempt to place itself in the position of making an initial determination on that issue.

While some federal laws contain explicit language of preemption, many do not. Under the Supremacy Clause of the U.S. Constitution,[46] Congress may override state laws conflicting with its exercise of delegated powers. When Congress has done so, preempted state laws are unenforceable. That was the ruling in *McCulloch v. Maryland*,[47] a case dealing with the power of Congress to create national banks. In it, the Court found a Maryland law establishing tax rates for notes issued by the first Bank of the United States to be void. In broad language the Court voiced its conviction "that the states have no power by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[48]

A federal statute addresses the procedures that the banking agencies must use in issuing preemption determinations in certain areas. It does not, however, include language curtailing their substantive authority to issue preemption determinations. Section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994[49] requires the OCC, in making preemption determinations as to the application of a state law "regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches" to follow certain procedures. It generally requires a *Federal Register* notice, at least a 80-day comment period, consideration of comments, and publication of the final determination. The Conference Report accompanying this legislation counsels OCC to be cautious rather than aggressive in finding state laws to be preempted.[50] The statutory language, however, contains no such instruction.

Standards for Federal Preemption

Although national banks are federal instrumentalities, much of their daily activity is subject to state law.[51] In matters affecting aspects of banks that are shared

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[46] U.S. Const., Art. VI, cl. 2. It declares that the Constitution and "the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[47] 17 U.S. (4 Wheat) 316, 435.

[48] *Id.*, at 435. Tax on the operations of a nationally chartered bank was distinguished from tax on its real property or on bank interests held by state residents.

[49] P.L. 103-328, tit. 1, § 114, 108 Stat. 2338, 2367; 12 U.S.C. § 43.

[50] See *infra*, at 16 - 18.

[51] "It is certain that, in so far as not repugnant to acts of congress [sic.], the contracts and dealings of national banks are left subject to the state law." *Davis v. Elmira Savings Bank,*

(continued...)

in common with other businesses, the Supreme Court has upheld state authority, often starting from a presumption of the applicability of state law. In *Waite v. Dowley*, 94 U.S. 527 (1877), the Court found that a state statute not in conflict with federal law regarding the place for assessing national bank shares for tax purposes could be enforced. Subsequently, in *First National Bank v. Missouri,* 263 U.S. 640, 656 (1924), it upheld a state law that prohibited banks, including national banks, from forming branches. The principal reason appears to have been its interpretation of federal law as not contemplating branch bank operations. The Court said: "national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purpose of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." It examined the language and purpose of the National Bank Act and determined "that the power sought to be exercised by the bank finds no justification in any law or authority of the United States," and found "the way ... open for the enforcement of the state statute."[52]

The starting point for preemption analysis is the language of the federal legislation. If Congress enacts legislation under one of its delegated powers that includes an explicit statement that state law is preempted, the Supreme Court generally will give effect to that legislative intent.[53] Where there is no language of preemption, the Court is likely to find preemption when it identifies a direct conflict between the federal law and the state law or when it concludes that the federal government has so occupied the field as to preclude enforcement of state law with respect to the subject at hand.[54]

Where there is a direct conflict with federal law relating to national banks, i.e., where complying with the federal and state law is impossible, the Supreme Court has repeatedly upheld the federal law. Often it has used broader language than the facts of the case require. For example, in finding a direct conflict between a New York law setting priorities in the administration of a receivership and the distribution mandated by the National Bank Act, an 1896 Supreme Court opinion, *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283, used very broad language in finding preemption:

> National banks are instrumentalities of the federal government, created for a public purpose.... It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.

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[51] (...continued)
161 U.S. 275, 287 (1896)

[52] 263 U.S. 640, 660.

[53] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).

[54] CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by George Costello.

The most recent Supreme Court case on the issue, *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), employs more precise language, although it, too, favors a reading of Congressional grants of power to national banks as presumptively preemptive. The Court, in *Barnett*, upheld OCC in permitting national banks to sell insurance nationwide from a small town office. The federal statute in question, 12 U.S.C. § 92, authorized national banks in towns of not more than 5,000 to sell insurance. Under the state statute, banks with affiliates could not sell insurance. The Court began its analysis from the premise that Congress had granted national banks a power that was to be free of state interference. It reasoned that since there was no clear statutory language of preemption, preemption was to be determined by an examining the statutory "structure and purpose" for "a clear, but implicit, preemptive intent."[55] It listed three possible ways of finding preemptive intent: (1) finding that the federal law so occupies the regulatory field as to exclude a role for the state; (2) determining that there is an "irreconcilable conflict," i.e., that complying with both the federal and state law is impossible; or (3) finding that complying with the state law would obstruct one of the purposes of the federal legislation.

The Court did not find that federal regulation of national banks is so extensive as to occupy the field; nor did it find that the state statute was in complete conflict with the federal one. Nonetheless, it held that the state statute was preempted as an obstacle to the accomplishment of the congressional intent of permitting all national banks, whatever their affiliation, in towns of not more than 5,000, to sell insurance. In reaching its conclusion, the Court treated earlier decisions requiring interpretations of statutes conferring powers on national banks. Grants of powers by Congress to national banks are to be treated as "grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."[56] The Court generalized:

> In defining the pre-emptive scope of statutes and regulations 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.[57]

Although *Barnett* found a state law that completely prevented some national banks from exercising a statutory power to have been preempted as significant interference, it did not set forth any measuring tool to decipher degrees on interference. This may raise the question as to whether OCC's proposed preemption regulations, although based on *Barnett*, expand its reach by setting forth a method to preempt laws by

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[55] *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, citing *Fidelity Federal Savings & Loan Association v. de la Cuestra*, 458 U.S. 141, 152-153 (1982).

[56] *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 30, citing *First National Bank of San Jose v. California*, 262 U.S. 366 (1923); *Easton v. Iowa*, 188 U.S. 220 (1903); and *Waite v. Dowley*, 94 U.S. 527 (1876).

[57] *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33.

which any state law involving more than mere incidental interference with national bank powers may be subjected to preemption by OCC.

Explicit Statutory Preemption Provisions

Some of the more prominent explicit[58] statutory preemption provisions that provide a backdrop against which OCC preemption regulations have been issued include various lending, deposit-taking, housing, and other consumer protection laws. A sampling of them follows.

Alternative Mortgage Transaction Parity Act of 1982.

The Alternative Mortgage Transaction Parity Act of 1982[59] preempts state laws that require residential mortgages to have a fixed rate, a fixed term, or both. Federally chartered banks, thrifts, and credit unions had been authorized by their regulators to offer alternative mortgage transactions without regard to state prohibitions. This legislation permits all "nonfederally chartered housing creditors" to offer such mortgages provided they follow the regulations issued by the federal regulators.

Depository Institutions Deregulation and Monetary Control Act of 1980.

The Depository Institutions Deregulation and Monetary Control Act of 1980[60] contains provisions preempting state usury interest ceilings on: deposits; residential first mortgages; business and agricultural loans over $25,000; other loans by federally insured banks, thrifts, and credit unions; and loans by small business investment companies. The legislation authorized states to override its provisions.

Electronic Funds Transfer Act.

The Electronic Funds Transfer Act (EFTA), 12 U.S.C. § 1693q, preempts inconsistent state law to the extent of inconsistency, as determined by the Board of Governors of the Federal Reserve Board; it states that "if the protection such law affords any consumer is greater than the protection afforded" by the EFTA, it is not inconsistent. There is also a safe harbor for financial institutions that fail to comply with a state law determined by the Fed to be inconsistent, "notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other

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[58] Providing an explicit statement of the effect upon state law of federal legislation dealing with national banks has not been the norm. A variety of such provisions exists, particularly in the field of consumer law. Many of them employ complex standards that often need interpretation either by a federal agency or by the courts.

[59] 12 U.S.C. §§ 3801, et seq.

[60] P.L. 96-221, § 501 et seq., 94 Stat. 161.

authority to be invalid for any reason."[61] In Regulation E, 12 C.F.R. Part 205, the Fed has listed types of state law provisions that will be deemed inconsistent with the EFTA.[62] The statute specifically permits the Board "on its own motion," as well as upon the motion of a financial institution, a state, or an interested party, to make a preemption determination.[63] There is also a specific provision permitting the Fed to exempt "any class of electronic fund transfers within any State if the Board determines that, under the law of that State, that class of electronic fund transfers is subject to requirements substantially similar to those imposed under ... [EFTA] and that there is adequate provision for enforcement."[64]

Equal Credit Opportunity Act.

The Equal Credit Opportunity Act (ECOA), 16 U.S.C. § 1691(f), preempts inconsistent state laws only to the extent to which they are inconsistent with the federal law and the regulations[65] promulgated thereunder. In addition, there are specific provisions preempting certain types of state law[66] and authorization for the Federal Reserve Board to make determinations as to state law inconsistency. The legislation specifies that there is no inconsistency in a state law that provides greater protection to a credit applicant. The Federal Reserve Board is given authority to exempt "any class of credit transaction within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under" ECOA.[67]

Expedited Funds Availability Act.

The Expedited Funds Availability Act[68] prescribes schedules that banks must meet in making funds deposited to checking and other transaction accounts available to their customers. It preempts state laws except those in effect before September 1, 1989, that require that funds be made available in a shorter time period.[69]

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[61] 15 U.S.C. § 1693q.

[62] 12 C.F.R. § 20.12(b).

[63] 15 U.S.C. § 1693q.

[64] 15 U.S.C. § 1693r.

[65] Regulation B, 12 C.F.R. § 102.

[66] For example, 15 U.S.C. § 1691d(d) preempts, under specified circumstances, state laws that forbid separate grants of credit to each spouse.

[67] 15 U.S.C. § 1691d(f).

[68] 12 U.S.C. §§ 4001 et seq.

[69] 12 U.S.C. § 4007.

Fair Credit Reporting Act.

The Fair Credit Reporting Act (FCRA)[70] has a preemption provision, that preempts state laws relating to the collection, distribution, or use of any information on consumers or for the prevention and detection of identity theft to the extent that they are inconsistent. Amendments to the FCRA in 1996 and 2003[71] explicitly preempt state laws relating to various aspects of consumer reporting, including pre-screening of consumer reports, timelines for disputing accuracy of information in a consumer's report, duties of persons taking an adverse action regarding a consumer, duties of persons using a consumer report in connection with a credit or insurance transaction not initiated by a consumer, information in consumer reports, responsibilities of persons furnishing information to a consumer reporting agency, exchange of information among affiliated entities, measures relating to preventing and ameliorating the effect of identity theft, and annual free consumer reports.

Fair Debt Collection Practices Act.

The Fair Debt Collection Practices Act[72] regulates professional debt collectors collecting debts incurred by natural persons for personal, family, or household purposes. It preempts state laws only to the extent of their inconsistency and specifies that a state law that provides any consumer greater protection is not inconsistent.[73]

Fair Housing Act.

The Fair Housing Act[74] forbids discrimination on the basis of race, color, religion, sex, handicap, family status, or national origin in connection with the sale or leasing of housing or residential real estate-related transactions, such as making or purchasing residential mortgages or home improvement loans or selling, brokering, or appraising residential real estate. It contains a provision stating that it is not to be construed to "invalidate or limit any law of a State or political subdivision of a State ... that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."[75]

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[70] 15 U.S.C. §§ 1681 et seq. For a fuller explication of its preemptions provisions, see CRS Report RS21449, *The Fair Credit Reporting Act: Preemption of State Law*, by Angie A. Welborn.

[71] P.L. 108-159,The Fair and Accurate Credit Transactions Act of 2003.

[72] 15 U.S.C. §§ 1692 et seq.

[73] 15 U.S.C. § 1692n.

[74] 42 U.S.C. §§ 3601 et seq.

[75] 42 U.S.C. § 3615.

Garn-St Germain Depository Institutions Act of 1982.

The Garn-St Germain Depository Institutions Act of 1982[76] preempts state prohibitions on the enforcement of due-on-sale clauses by lenders.

Gramm-Leach-Bliley Act.

The Gramm-Leach-Bliley Act (GLBA)[77] authorizes affiliations among depository institutions, securities firms, and insurance companies and reaffirms that the regulation of the business of insurance is a matter relegated to the states.[78] It preempts state laws prohibiting depository institutions from affiliating with insurance companies and specifies exceptions to this rule that permit states to engage in certain oversight of the process of affiliation, e.g., collecting information on proposed affiliations.[79]

The legislation also preempts states from preventing a depository institution or an affiliate of a depository institution from engaging in any activity authorized by the legislation, and provides separate rules for preempting insurance sales, solicitation, and cross marketing.[80] A state "statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities" in effect before September 3, 1998, is preempted if it "prevents or significantly interferes with" a national bank's exercise of those powers; and OCC's rulings on such statutes should be accorded deference.[81] State laws or regulations enacted after that date are subject to the same "significantly interferes with" standard, but not to the OCC deference. They are also subject to an additional non-discrimination test. That test has four parts each of which seeks to prohibit states from adversely distinguishing depository institutions and their affiliates from other providers of the same services.[82] The legislation singles out 13 safe harbors, provisions which states may enact with respect to depository institution sale, solicitation, or cross-marketing of insurance, without being subject to preemption.[83] These permit states to enact provisions such as those prohibiting the tying of a sale of insurance product to a loan; deceptive advertising that could reasonably be interpreted to link the insurance

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[76] P.L. 97-320, Tit. III, § 341; 12 U.S.C. § 1701j-3.

[77] P.L. 106-102, 113 Stat. 1338 (1999).

[78] 15 U.S.C. § 6701, citing the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq.

[79] 15 U.S.C. § 6701(c).

[80] 15 U.S.C. § 6701(d).

[81] 15 U.S.C. § 6701(d)(2)(C). "Deference" refers to application of the rule in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), by which a court reviewing an agency regulation interpreting an ambiguous statutory provision is required to defer to the agency's interpretation of the statute, if it is reasonable. In the case of an opinion letter, however, the agency's interpretation is to accorded respect, 'but only to the extent those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[82] 15 U.S.C. § 6701(e).

[83] 15 U.S.C. § 6701(d)(2)(B).

product to federal deposit insurance; or paying broker's fees to persons not licensed to sell the insurance product. Other provisions of GLBA address such topics as insurance underwriting in national banks and title insurance activities of national banks and their affiliates.[84]

A separate provision[85] authorizes a federal or state regulator to seek expedited judicial review in a federal appellate court "[i]n the case of a regulatory conflict between a State regulator and a Federal regulator regarding insurance issues, including whether a State law, rule, regulation, order or interpretation regarding any insurance sales or solicitation activity is properly treated as preempted under Federal law." Under Gramm-Leach-Bliley's special rules applicable to conflicts on interpretation between OCC and a state insurance regulator, OCC is to be accorded deference with respect to state laws enacted prior to September 3, 1998, 15 U.S.C. § 6701(d)(2)(C); for subsequent enactments, the courts are to "review on the merits ... all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law without unequal deference."[86]

Title V of GLBA sets rules for financial institutions to safeguard nonpublic personal information of consumers and prohibits them from sharing that information with nonaffiliated third parties unless the customer has been given an opportunity to prevent the sharing (an opt-out). It preempts inconsistent state law and declares that a state "statute, regulation, order, or interpretation" is not inconsistent if, as determined by the Federal Trade Commission, it affords any person greater protection than provided in the legislation.[87]

National Bank Act.

The National Bank Act, 12 U.S.C. §§ 85 and 86, prescribes the interest rates that national banks may charge: (1) the rate permitted state banks in the place where the bank is located; (2) 1% over a specified Fed discount rate; or (3) 7%, when no rate is fixed by state law.

Real Estate Settlement Procedures Act.

The Real Estate Settlement Procedures Act[88] applies to federally-related mortgages on residential property. It requires various disclosures in advance of settlement, forbids certain practices, and prescribes certain procedures. It preempts

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[84] 15 U.S.C. §§ 302 and 303.

[85] 15 U.S.C. § 6714.

[86] 15 U.S.C. § 6714(e). In *Cline v. Hawke*, 51 Fed. Appx 392; 2002 U.S. App. LEXIS 23831 (4th Cir. 2002), *cert. denied* ___ U.S. ___; 124 S.Ct. 63 (2003), this procedure was used by the Insurance Commissioner of West Virginia to challenge an OCC opinion letter that had found provisions of a state insurance sales consumer protection act to be preempted. See *infra*, p. 21.

[87] 15 U.S.C. § 6824.

[88] 12 U.S.C. §§ 2601 et seq.

inconsistent state law to the extent of inconsistency as determined by the Secretary of Housing and Urban Development.[89]

Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994[90] authorized interstate banking through holding companies and through mergers subject to various conditions, including certain specifications respecting the applicability of various types of state law. With respect to interstate branches, for example, state laws relating to community reinvestment, consumer protection, fair lending, and establishment of intrastate branches apply to interstate branches of national banks to the extent they apply to a branch of a state-chartered bank subject to certain exemptions–where preempted by federal law or where the OCC determines that the application of the state law would have a discriminatory effect on the national bank branch as compared with a the branches of a state-chartered bank.[91]

This section also contains a statement that none of its provisions "may be construed as affecting the legal standards for preemption of the application of State law to national banks." 12 U.S.C. § 36(f)(3). Although the legislation, itself, does not expand upon this, the accompanying Conference Report contains a lengthy discussion of the Congressional view of how state laws apply to national banks: It reads, in pertinent part:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies, through their opinion letters and interpretative rules on preemption issues, play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.
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> Under well-established judicial principles, national banks are subject to State law in many significant respects. The laws of the State in which a national bank is situated will apply to the national bank unless those State laws are preempted by Federal law. Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidence Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law. In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts State law. Courts generally use a rule of

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[89] 12 U.S.C. § 2616.

[90] P.L. 103-328, 108 Stat. 2343.

[91] 12 U.S.C. § 36(f).

> construction that avoids finding a conflict between the Federal and State law where possible. The title does not change these judicially established principles.
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> During the course of consideration of the title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result....It is of utmost concern to the Conferees that the agencies issue opinion letters and interpretative rules concluding that Federal law preempts state law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches only when the agency has determined that the Federal policy interest in preemption is clear ....
>
> The Conferees have similar concerns regarding the scope of the OCC interpretative rule that appears at 12 C.F.R. § 7.8000, which broadly asserts that Federal law governing the deposit-taking functions of national banks preempts any State law that attempts to prohibit, limit, or restrict deposit account service charges.....
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> In view of the Congressional concern regarding preemption of State law regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, the Conferees concluded that a more open process for reaching preemption conclusions in these areas, with a clearly structured, meaningful opportunity for interested parties to communicate their views to the agency, was warranted....The Conferees believe that the public notice and openness provided by the new process will be a vital safeguard to ensure that an agency applies the recognized principles of preemption, discussed above, in a balance fashion.
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> This process is not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent in the four areas described, or to change the substantive theories of preemption as set forth in existing law. Rather, it is intended to help focus any administrative preemption analysis and to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear.[92]

Truth in Lending Act.

The Truth in Lending Act (TILA), 15 U.S.C. § 1610(a), preempts state laws "relating to the disclosure of information in connection with credit transactions" to the extent of inconsistency, as determined by the Federal Reserve Board. Regulation Z, promulgated by the Federal Reserve Board, details requirements in state laws that will be deemed to be inconsistent with this legislation as contradicting its terms.[93] Special preemption rules apply to correction of billing errors and correction of credit

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[92] H.Conf. Rep. No. 103-65, 103d Cong., 1st sess. 53-55 (1994).

[93] 12 C.F.R. § 226.28.

reports.[94] TILA provides the Federal Reserve Board with authority to issue regulations and to provide "for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes" of the legislation.[95] Under this authority, the Federal Reserve Board has issued a regulation to establish a procedure for states to seek exemptions from preemption for a class of transactions[96] and the Board has granted certain limited exemptions.[97]

Truth in Savings Act.

The Truth in Savings Act, 12 U.S.C. § 4312, preempts state laws "relating to the disclosure of yields payable or terms for accounts" to the extent of their inconsistency and authorizes the Federal Reserve Board to determine inconsistency.

Preemption by Agency Interpretation

There is a considerable body of decisional law interpreting agency decisions or regulations preempting state laws affecting federally chartered banks. Examining some of these decisions sheds light on what the *Barnett* standard may mean and how OCC is interpreting it. There are so few federal laws respecting the basic lending and deposit-taking activities of banking institutions that explicitly define their effect upon state law that questions of preemption are often determined by litigation. Often the cases focus on explication of statutory terms, rather than the issue of whether the statute, itself, has preemptive effect.[98] Generally, the cases involve a federal regulator interpreting federal law generously to promote what may appear to be policy interests favoring the federally-chartered institutions. Frequently, such regulatory decisions are challenged by state regulators, state-chartered institutions in competition with the federally-chartered institutions, or by trade groups representing other competitors. In one instance, a national bank's ability to charge its home-state's interest rates on credit card balances of customers from a second state was challenged by a national bank located in the second state and, therefore, by the terms of 12 U.S.C. § 85, explicitly subject to the usury laws of the second state.[99] In that case, *Marquette National Bank of Minneapolis v. First Omaha Service Corporation*, 439 U.S. 299 (1974), the Supreme Court ruled that the state usury law was preempted by the National Bank Act's section 85.[100] The Court saw the issue in terms of the

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[94] 12 C.F.R. § 226.28(a); See 12 C.F.R. , Part 226, Supp. I, Official Staff Commentary, § 226.28-5

[95] 12 U.S.C. § 1604(a).

[96] 12 C.F.R. § 226.29(a).

[97] See 12 C.F.R., Part 226, Supp. 1, Official Staff Commentary, § 226.29.

[98] See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 743-744 (1996).

[99] See *supra*, at 17, describing interest rates permissible under the National Bank Act.

[100] 12 U.S.C. § 85. This sets the interest rate that a national bank may charge on the basis of the interest rate allowed on loans by the laws of the state in which the national bank is

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inequalities resulting from the intersection of a national banking system with state law. It examined the legislative history of the 1864 National Bank Act and concluded that Congress had intended that national banks operate their lending business on an interstate basis. Impairment of "the ability of States to enact effective usury laws" was, therefore, "implicit in the structure of the National Bank Act until Congress chose to alter section 85.[101]

In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S.735 (1996), the Supreme Court upheld the authority of the OCC to interpret the word, "interest," in a section of the National Bank Act, 12 U.S.C. § 85, and to include late charges within its meaning. The result was that California credit card holders were lawfully charged late fees on credit cards issued by a South Dakota bank despite a California law prohibiting such fees. In a unanimous opinion, written by Justice Scalia, the Court upheld the OCC interpretation of the National Banking Act. It did so primarily by deferring to the OCC's interpretation of the statute, relying on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that opinion, courts are to defer to an agency interpretation of a statute that Congress has committed to its charge when the statute is ambiguous and the agency's interpretation is a reasonable one. In *Smiley*, the fact that the OCC had promulgated its interpretation by regulation following notice and consideration of public comments strengthened the case for deferring to OCC. That the regulation was issued after the litigation had commenced and that it departed from an earlier position taken by OCC were not controlling because the Court found no arbitrary or capricious change in a former full blown agency position.

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[100] (...continued)
located. The Court found that a national bank is located in the place named in its charter and may not be deemed to be located elsewhere–where its credit card customers reside, or where the merchants enrolled in its credit card business operate. This case built on an early case, *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873), in which the Court held that under § 85 of the National Bank Act, a state law that allowed "natural persons" to charge a higher interest rate than banks would be preempted to the extent that it would confine national banks to the bank rate of interest. National banks could charge the interest permitted the most favored lender. In this case, the Court addressed the issue of the purpose and structure of the National Banking Act:

> National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks....the act of Congress we have been considering ... gives advantages to National banks over their State competitors. It allows such banks to charge such interest as State banks may charge, and more, if by the laws of the State more may be charged by natural persons. 85 U.S. 409, 413.

[101] 439 U.S. 299, 318. The Court stated that "the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." 439 U.S. 299, 319.

Under the *Chevron* reasoning, the OCC, in *Nationsbank v. Variable Annuity Life Insurance Co.*,[102] was been upheld in its interpretation of the meaning of a clause in the powers provision of the National Bank Act, 12 U.S.C. § 24, according to which national banks are authorized "to exercise" "all such incidental powers as shall be necessary to carry on the business of banking."[103] Under the authority of that clause, OCC authorized national banks, through subsidiaries, to sell annuities as "investment products" rather than as insurance. Had they been deemed insurance, under 12 U.S.C. § 92, such sales would have been limited to national bank offices in towns of no more than 5,000. The insurance company challenging the OCC decision to permit the annuity sales argued for a restrictive interpretation of the clause in 12 U.S.C. § 24, limiting national banks to the activities enumerated. The Court looked at the entire section and the legislative history of some of its provisions and embraced a broad view of the section and the OCC position.

Supreme Court cases subsequent to *Chevron* indicate that deferring to an agency's interpretation of an ambiguous statute may require a showing that Congress has delegated authority to the agency to promulgate rules having the force of law and that the rule or regulation for which the agency is claiming deference has actually been promulgated pursuant to that authority. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court held that a United States Customs Service letter ruling that set a tariff classification for a particular form of stationery, day planners, was not entitled to deference because it was not promulgated as a regulation following notice and comment and did not affect rights other than the recipient of the letter.[104] In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court ruled that the Food and Drug Administration (FDA) did not have authority to promulgate regulations covering tobacco products as "drugs" and "devices"under the Food, Drug, and Cosmetic Act. In addition to looking at the entire structure and purpose of the legislation that FDA was citing, the Court looked at a broader statutory context, including Congressional statutes regulating labeling and advertising of cigarettes, and concluded that Congress had never delegated authority to the FDA to regulate tobacco products, but had precluded administrative regulation of tobacco products. The Court distinguished the case from the conventional *Chevron* type of case. Regulation of tobacco products was extraordinary in terms of the breadth of the authority that the FDA was asserting, its economic and political implications, and the long debate about tobacco policy in the United States. The Court reviewed a history of almost forty years of Congressional interest in tobacco issues and delegations of regulatory authority to the Federal Communication Commission and the FTC, but not to the FDA. It reached the conclusion that there was no Congressional intent for FDA to issue rules on tobacco products. The Court was "confident that Congress could not have intended to

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[102] 513 U.S. 251 (1995).

[103] 12 U.S.C. § 24 (Seventh).

[104] In a similar case, *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court refused to apply *Chevron* deference to a Department of Labor opinion letter interpreting a statutory provision respecting the scheduling of county employee use of compensatory time.

delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[105]

Recent Preemption Cases

National banks, through subsidiaries or affiliated companies in a bank or financial services holding company are often able to combine great marketing power and nation-wide presence to offer multi-faceted financial services.[106] Their ability to take advantage of favorable interest rates authorized by their chartering state may have impelled state legislatures to enact consumer protection laws in an attempt to require out-of-state banking concerns to abide by rules applicable to those with in-state charters. With some regularity, OCC, generally at the request of a national bank or a group of national banks, has taken the stand that these state laws are preempted. As the following summaries of some of the recent cases illustrate, the federal courts have tended to agree with OCC and to restrict the areas that states may legitimately address with respect to national bank activity in their jurisdictions.

Insurance Sales.

Cline v. Hawke[107] upheld an OCC preemption of a state law regarding bank sales of insurance by finding OCC's rationale persuasive. Prompted by a request from the West Virginia Bankers Association, after having published a notice and solicited public comments, OCC issued a letter declaring certain provisions of West Virginia's insurance law were preempted. In deciding on a challenge to that ruling, a federal appellate court found that OCC was exercising implicit authority to interpret provisions of the Gramm-Leach Bliley Act's (GLBA) expansion of 12 U.S.C. § 92, authorizing national banks to engage in insurance sales. It also found that because the West Virginia law had been enacted prior to September 3, 1998, OCC's interpretation was entitled to deference,[108] but not the full deference that would be accorded under *Chevron* [109] because what was at issue was not an agency regulation. The deference that was to be accorded was that prescribed by the Supreme Court in *Skidmore v. Swift & Co.*,[110] and *Christensen V. Harris County*.[111] Under that standard, the agency's opinion letter is entitled to deference only if it is persuasive. To determine persuasiveness, the court looked for "thoroughness of the OCC's consideration, the validity of its reasoning, and its consistency with earlier and later

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[105] *FDA v, Brown & Williamson*, 529 U.S. 120, 160.

[106] See CRS Report RS21680, *Affiliates in Banking, Finance, and Commerce: Development and Regulatory Background*, by William D. Jackson.

[107] 51 Fed Appx. 391, 2002 WL 31557392 (4th Cir. 2002).

[108] *Supra* at 16, Gramm-Leach-Bliley Act, text accompanying n. 80-81.

[109] 467 U.S. 837 (1984).

[110] 323 U.S. 134 (1944).

[111] 529 U.S. 576 (2000).

pronouncements."[112] The thoroughness standard was found to be satisfied by the formal notice and comment procedures; OCC's reasoning was found to be valid in light of the OCC findings that the provisions in question would disrupt bank operations and "significantly interfere" with bank insurance sales.

Bowler v. Hawke[113] represents a conflict in the federal circuits because it disagrees with the *Cline* ruling. The case dealt with a Massachusetts insurance sales consumer protection law, similar to that in *Cline v. Hawke*, that OCC had preempted by an informal opinion letter,[114]. The court refused to find a justiciable "regulatory conflict" within the meaning of the GLBA's dispute resolution section.[115] It viewed the OCC letter as an advisory opinion. In rejecting the case, the opinion indicated some discontent with GLBA's vesting the appellate courts with jurisdiction for disputes between federal banking regulators and state insurance commissioners.[116]

Insurance Licensing Requirements.

Association of Banks in Insurance, Inc. v. Duryee[117] involved a conflict between 12 U.S.C. § 92, authorizing national banks to sell insurance in small towns, and an Ohio insurance sales licensing law denying a license to any entity that had as its principal purpose soliciting insurance sales from persons for whom the entity acted as a trustee or agent, including for those for whom it held deposit accounts. OCC filed an *amicus* brief in support of national banks' position that such a requirement was preempted. One part of the law was subject to GLBA's "without unequal deference"[118] standard of review; other parts predated September 3, 1998, and were, therefore, subject to the *Barnett* preemption standard, which accords OCC deference. The evidence showed that the principal purpose test had been enacted as a consumer protection measure and to protect general insurance agents. Its proponents viewed it as non-discriminatory. Those speaking for preemption took the contrary position: that the principal purpose test discriminated against national banks, preventing them from fully developing their most natural source of insurance customers, their banking customers. Against the banks' argument that there would be "significant interference" within the meaning of *Barnett*, the defenders of the state

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[112] *Cline v. Hawke*, 51 Fed. Appx. 392, 396-397, citing *Skidmore*.

[113] 320 F. 3d 59 (1st Cir. 2003).

[114] Comments on the request for preemption of the Massachusetts law were solicited in 65 *Fed, Reg.* 43827 (July 13, 2000).

[115] 15 U.S.C. § 6714.

[116] 320 F. 3d 59, 64. The court said: "The questions Massachusetts's petition seeks to have us adjudicate are unlikely to be purely legal. It is apparent that, in deciding whether state laws are preempted by GLBA § 104(d)(2), courts are going to have to make judgment calls about the extent to which the laws hinder the ability of depository institutions to engage in sales, solicitation, and cross-marketing activities, as a factual matter. Such judgment calls will often be better made on an evidentiary record created in litigation in the trial court."

[117] 270 F. 3d 397 (6th Cir. 2001).

[118] 15 U.S.C. § 6714(e).

law sought the court to construe "significant interference" test to mean "effectively thwart." The court found significant interference and preemption under *Barnett* and under GLBA's non-discrimination standards, finding that the law adversely impacted national banks as compared with "other persons or entities providing the same products or services ... that are not depository institutions...."[119] The court also found other registration provisions of the Ohio law preempted in language that suggests that requirements for a state insurance sales license that go beyond the merely formal would be preempted.

ATM Fees.

Bank of America v. City and County of San Francisco[120] (*Bank of America)* involved municipal ordinances prohibiting ATM fees for non-depositors. The court ruled that such ordinances were preempted by the National Bank Act, the Home Owners' Loan Act, and OCC and OTS regulations that permit the charging of such fees. The court applied the *Chevron* standard, and found reasonable the OCC interpretation that providing electronic services and charging fees for services are incidental powers of national banks under 12 U.S.C. § 24. It also ruled that state laws limiting ATM fees are not within the Electronic Funds Transfer Act's (EFTA) provision preserving more protective state law.[121] A similar ruling on the inapplicability of the EFTA anti-preemption clause was reached by the U.S. Court of Appeals for the Eighth Circuit in *Bank One v. Guttau*,[122] a case that found various state law restrictions on advertising on ATM's preempted as to national banks.

Metrobank v. Foster,[123] upheld the authority of national banks in Iowa to charge non-account holders a fee for using an ATM. The decision relied on the incidental powers clause of the National Bank Act and OCC's implementing regulations. It found the situation analogous to that decided by the Supreme Court in *Barnett*.[124] Having been reversed in *Guttau* on the issue of whether EFTA preempts state ATM fee limits, the court followed up on the Court of Appeals ruling on this issue and held that the ATM Fee Reform Act[125] requirement that ATM providers give users notice of a fee charge before the transaction is completed did not alter the preemption analysis.

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[119] 15 U.S.C. § 6701(e)(2).

[120] 309 F.3d 551 (9th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 2220 (2003).

[121] 12 U.S.C. § 1693q.

[122] 190 F. 3d 844 (8th Cir. 1999), *cert. denied*, 529 U.S. 1087 (2000).

[123] 193 F. Supp. 2d 1156 (D. Iowa 2002).

[124] 517 U.S. 25 (1996).

[125] 15 U.S.C.§ 1693(b)(d)(3).

Check Cashing Fees.

Wells Fargo Bank of Texas, N.A. v. James[126] found a Texas law that prohibited check-cashing fees for any checks presented by non-account holders to the institution on which it is drawn to be preempted under an OCC interpretation of a regulation that permits national banks to charge customers fees.[127] Using a *Chevron* analysis, the court found the National Bank Act ambiguous on the question of which fees national banks may charge, determined that Congress intended the OCC to have the discretion to make such determinations, and, therefore, deferred to what it found to be OCC's reasonable determination. Finally, since the OCC regulation did not speak to the particular type of fee, the court ruled that the OCC's interpretation that the term "customer" included those who presented checks at teller windows was a reasonable one, entitled to deference under the standard applicable to agency interpretations of their own regulations under *Auer v. Robins*.[128]

Bank of America v. Sorrell,[129] a case in which the OCC filed an *amicus* brief, enjoined the enforcement against national banks of Georgia laws that precluded charging non-customers fees for cashing checks. The court found the state laws preempted by the incidental powers clause of the National Banking Act, the regulations issued thereunder, and an OCC General Counsel opinion letter supplementing them.[130]

Subsidiaries.

Wells Fargo Bank, N.A. v. Boutris[131] held that OCC's visitorial powers over national banks–i.e., the power to examine and oversee national banks, which are exclusive under 12 U.S.C. § 484, also applied to an operating subsidiary of a national bank doing mortgage business in California and incorporated under California law. The state banking commissioner was, therefore, preempted from requiring an audit of the mortgage loans made by that subsidiary. OCC regulation, 12 C.F.R. § 7.4006, provides that state laws and regulations apply to national bank operating subsidiaries to the same extent as they apply to national banks.[132] The court found that OCC had

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[126] 321 F. 3d 488 (5th Cir. 2003).

[127] 12 C.F.R.§ 7.4002(a).

[128] 519 U.S. 451 (1997).

[129] 248 F. Supp. 2d 1196 (D. Ga. 2002).

[130] OCC Interpretative Letter No. 933 (August 17, 2002), Avail. In LEXIS, BANKNG Library, ALLOCC file includes an elaboration on the term, "customer," as used in the regulation: "'customer'" simply means any party that obtains a product or service from the bank." The kinds of considerations that might persuade a bank to charge such a fee include: deterrence of check fraud; minimizing of risk to bank; provide better service to account holders by reducing teller lines; avoid passing cost of such check cashing on to account holders.

[131] 265 F. Supp. 2d 1162 (E.D. Cal. 2003).

[132] The court relied on various cases that treated operating subsidiary activities as equivalent
(continued...)

authority under the National Bank Act to promulgate the regulation and that the regulation was a reasonable interpretation of legislation.

Credit Card Minimum Payment Warnings.

American Bankers Association v. Lockyer,[133] a case in which OCC filed an *amicus* brief, held preempted California laws requiring credit card issuers to charge no interest, demand 10% repayment each month, or provide notice to the cardholder of the cost of paying only the minimum payment and the length of time before the balance would be paid. The court ruled that this statute was preempted for all national banks, thrifts, and credit unions. Because the OCC and the NUCA did not have explicit regulations, the court found that the minimum payment warning would not have been preempted, had it been severable.[134] Following the Ninth Circuit Court of Appeals ruling in *Bank of America* that EFTA did not preserve state ATM fee limits, the court found the Truth in Lending Act anti- preemption clause, which is similarly worded, inapplicable. The court held that the California credit card minimum payment warning law was preempted with respect to federally-chartered thrifts, by virtue of the Home Owners' Loan Act and OTS regulations. In one of these regulations, OTS declared that "OTS hereby occupies the entire field of lending regulation for federal savings associations."[135] OCC has no similar assertion in its regulations, although it made a parallel argument in its amicus brief.[136] OCC asserted that the California law clashed with 12 U.S.C. § 85 prescribing interest rates that national banks may charge and 12 U.S.C. § 24, Seventh,[137] granting lending power to national banks, and that complying with it would impose a substantial burden on national banks. The court, using the *Chevron* standard, found the OCC interpretation reasonable; and the burden, substantial, and, thus, found the state law preempted under *Barnett.*

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[132] (...continued)
to activities of the national bank: e.g., *Nationsbank of North Carolina. N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995);Marquette National Bank of Minneapolis v. First Omaha Service Corporation*, 439 U.S. 299 (1978).

[133] 239 F. Supp. 100 (E.D. Cal. 2002).

[134] This finding with respect to OCC was based on an admission by the attorney for OCC in oral argument and on the court's analysis of an OCC opinion letters preempting portions of a West Virginia insurance sales statute, Preemption Opinion, 66 *Fed. Reg.* 51,502 (October 9, 2001). *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000, 1015-1016.

[135] 12 C.F.R. § 560.2(a).

[136] "[T]he terms and conditions of extensions of credit, and the lender's management of credit accounts, are at the heart of the National Bank Act's power to lend money." OCC *Amicus* Brief at 9, quoted in *American Bankers Association v. Lockyer*, 239 F. Supp. 2d 1000 (2002).

[137] This authorizes "loaning money on personal security."

Analysis of Preemption Regulations

Both in proposing and finalizing the regulations on preemption, OCC sets forth legal and practical justifications. The legal argument is based on principles of federal preemption relating to national banks; the history of the National Bank Act and its conferral of powers, particularly the real estate power; and the analysis of the Supreme Court in *Barnett.* The practical arguments center on the fact that there has been no significant history of national bank predatory lending problems and state enforcement efforts have focused primarily on unregulated financial institutions. Even with this record, according to OCC, it has taken steps and has adequate tools to prevent the problem from surfacing in national banks or to deal with it if it does. It issued two advisory letters on predatory lending in 2003. It stands ready to enforce the various federal laws in place, including the Federal Trade Commission Act,[138] to prevent practices that are the target of predatory lending laws. Loan flipping, equity stripping, and refinancing of subsidized mortgages are subject to enforcement actions under the FTC Act as unfair or deceptive practices.

The major criticisms of the OCC position may also be classified as legal and practical–that OCC's legal standard is slanted and that the regulator of national banks has not provided sufficient data for its conclusions about the impact of the various types of state laws at issue on national banks. The basis for the assertion that OCC has extended *Barnett*'s more limited standard[139] may be seen in comparing the two standards. According to OCC, where there is no statute delineating the applicability of state law to a particular situation involving a national bank, state law would be applicable only if it is not "altering or conditioning a national bank's ability to exercise a power that Federal law grants to it." The *Barnett* standard, which OCC cites as authority for the OCC version,[140] reads:

> In defining the pre-emptive scope of statutes and regulations 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 ... doing so does not prevent or significantly interfere with the national bank's exercise of its powers.[141]

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[138] The Federal Trade Commission Act, 15 U.S.C. §§ 41-58, outlaws deceptive acts and practices in or affecting commerce. Under 15 U.S.C. § 57a(f)(3), the federal banking agencies are empowered to enforce this legislation by issuing rules, by investigating complaints, and by using the array of enforcement tools under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818.

[139] According to a comment letter filed with the OCC by the Center for Responsible Lending, dated October 6, 2003, at 2, "the proposed rulemaking subtly, but substantially alters the conflict preemption standard to dramatically lower the threshold for preemption."

[140] 517 U.S. at 33.

[141] Also on the page cited by OCC , *Barnett* cites with approval standards from three other cases: "state statute administering abandoned deposit accounts did not 'uinlawful[ly] encroac[h] on the rights and privileges of national banks'" (*Anderson National Bank v.*

(continued...)

The shorthand for this standard has been: "prevent or significantly interfere" with national bank powers. When Congress incorporated a preemption standard in the Gramm-Leach Bliley Act, it used this formulation.[142] If OCC is broadening the *Barnett* standard, it may be that it is not following the advice of the Conference Committee Report accompanying the enactment of the Riegle-Neal Interstate Branching Efficiency Act of 1994, which set up certain procedural requirements before OCC could promulgate certain preemption determinations as a means, among other things, "to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear.[143]

Since the Supreme Court's preemption rulings concerning national banks predate *FDA v. Brown & Williamson*, that case may provide some arguments to convince courts to impose the more stringent test of that case, rather than a pure *Chevron* analysis, in ruling on challenges to OCC's authority to promulgate these rules or some aspects of them. The potential economic impact of preempting state lending and deposit-taking state laws for national banks is considerable. The contrast between the history of judicial approval of and Congressional acquiescence to OCC preemption rulings over the years and the forty-year history of the refusal of Congress to provide FDA with explicit rulemaking authority over tobacco products seems to preclude any analogy between the two situations. It is true, however, that OCC has no explicit statutory authority to preempt state laws on the covered subjects or with respect to subsidiaries. What the agency relies on is the breadth of the overall purposes of the national banking system, the comprehensive general authority delegated to OCC to regulate national banks, and various specific statutory authorizations to issue rules on subject matters covered by these proposed regulations.

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[141] (...continued)
Luckett, 321 U.S. 233, 247-252 (1944); "application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not 'destroy[y] or hampe[r]' national banks' functions" (*McClellan v. Chipman*, 164 U.S. 347, 358 (1896)); and "national banks subject to state law that does not 'interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government'" (*National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)).

[142] P.L. 106-102, 113 Stat. 1338 (1999). In the section of GLBA dealing with the operation of state law with respect to the applicability of state insurance laws to bank sales of insurance, the legislation applies the *Barnett* standard to state laws and expresses that standard in the following terms: "no State may by statute, regulation, order, interpretation, or other action prevent or significantly interfere with the ability of a depository institution, or affiliate thereof, to engage directly or indirectly, either by itself or in conjunction with an affiliate or another person, in any insurance sales, solicitation, or crossmarketing." 15 U.S.C. § 6701(d)(2).

[143] H.Conf. Rep. No. 103-65, 103d Cong., 1st Sess. 53-55 (1994).