



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

GENERAL COUNSEL

June 27, 2011

**By E-Mail and Messenger**

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

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

Dear Acting Comptroller Walsh:

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

The OCC's proposed rule raises three principal concerns for Treasury: (1) it is not centered on the key language of the Dodd-Frank Act's preemption standard, and instead seeks to broaden the standard; (2) even though the proposed rule deletes the OCC's current "obstruct, impair, or condition" standard, the rule asserts that preemption determinations based on that eliminated standard would continue to be valid; and (3) the rule could be read to preempt *categories* of state laws in the future, even though Dodd-Frank requires that preemption determinations be made on a "case-by-case" basis, and after consultation with the Consumer Financial Protection Bureau (CFPB) where appropriate.

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

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

One of the most strenuously debated provisions of Dodd-Frank was the scope and extent of the preemption standard for national banks. In the end, Congress chose to enact a specific preemption standard. In particular, Dodd-Frank states that a state consumer financial law may be preempted "only if . . . in accordance with the legal standard for preemption in the decision of the Supreme Court . . . in *Barnett Bank of Marion County, N.A. v. Nelson* . . ., the State consumer financial law *prevents or significantly interferes* with the exercise by the national bank of its powers."<sup>1</sup>

---

<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a) (emphasis added).

The OCC rule, however, essentially reads the “prevents or significantly interferes” language out of the statute. Specifically, the rule takes the position that Congress sought to codify the *Barnett* opinion, but not any particular formulation in the opinion.<sup>2</sup> This avoidance of the specific standard is inconsistent with the plain language of the statute and its legislative history.<sup>3</sup>

We believe that, as provided by the plain language of the statute, Congress intended that a state consumer financial law may be preempted only if the law “prevents or significantly interferes” with the exercise of a national bank’s powers, as those terms are used in the *Barnett* opinion. While it is proper to look to the *Barnett* opinion to interpret the “prevents or significantly interferes” standard, we believe that Congress intended “prevents or significantly interferes” (as used in *Barnett*) to be the relevant test, not some broader test encompassing the entirety of the *Barnett* opinion.

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

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

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

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

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

---

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

<sup>3</sup> The House-passed version of the bill contained a specific preemption standard (“prevents, significantly interferes with, or materially impairs”). While the Senate-passed version of the bill only contained a reference to the *Barnett* opinion, without any formulation, the Conference Committee specifically added the “prevents or significantly interferes” standard—further supporting that Congress specifically sought to codify the “prevents or significantly interferes” standard of *Barnett*.

previous determination, and the same logic would apply to any future determination. The notion that the new standard does not have any effect runs afoul of basic canons of statutory construction; it is also contrary to the legislative history, which states that Congress sought to “revis[e] the standard the OCC will use to preempt state consumer protection laws.”<sup>4</sup>

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

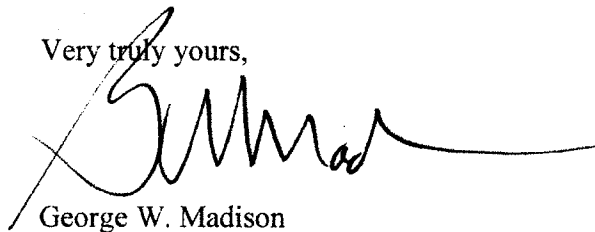
Dodd-Frank requires that each preemption determination be made on a “case-by-case” basis and after consultation with the CFPB where appropriate. Despite this case-by-case requirement, the OCC’s proposal could be read to preempt broad *categories* of state consumer financial laws going forward.

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

\* \* \*

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

Very truly yours,

A handwritten signature in black ink, appearing to read "G. Madison", with a long horizontal flourish extending to the right.

George W. Madison

---

<sup>4</sup> H.R. Rep. No. 111-517, at 875 (Conf. Rep.) (emphasis added).