



January 6, 2021

OCC ISSUES INTERPRETATIVE LETTER ON PREEMPTION UNDER THE DODD-FRANK ACT

On December 18, 2020, the chief counsel of the Office of the Comptroller of the Currency (“OCC”) published a letter detailing the OCC’s comprehensive interpretation of the federal preemption standard and related procedural requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (codified at 12 U.S.C. § 25b, “Section 25b”). See OCC Chief Counsel’s Interpretation: 12 U.S.C. § 25b, Interpretation Letter No. 1173 (Dec. 18, 2020).

The Dodd-Frank Act placed specific limitations on when certain state laws, specifically “state consumer financial laws,” could be preempted by federal law. “State consumer financial laws” may be preempted in three scenarios including when such state law prevents or significantly interferes with a national bank’s exercise of its powers under the legal standard set forth in *Barnett Bank of Marion County v. Nelson*. The Dodd-Frank Act also sets forth (i) procedural requirements that the OCC must follow when making certain preemption decisions and (ii) a deference standard that courts must apply when reviewing any OCC determination that the National Bank Act (“NBA”) or 12 U.S.C. § 371 preempts a state law.

The OCC’s letter addresses various aspects of Section 25b’s preemption standard. First, the OCC focused on the meaning of the term “preemption determination” under the *Barnett Bank* preemption prong of Section 25b (see above). The OCC views “preemption determination” to include only a regulation or order issued by the OCC that concludes that a state consumer financial law is preempted pursuant to the *Barnett Bank* standard. According to the letter, an OCC action that has only indirect or incidental effects on a state consumer financial law is not a “preemption determination” subject to the *Barnett Bank* standard and certain procedural requirements in Section 25b. The OCC also makes no “preemption determination” when (i) a state consumer financial law is preempted by its discriminatory effect or other federal law or (ii) a state law other than a state consumer financial law is preempted.

Next, the OCC provided its view on the application of Section 25b’s preemption procedural requirements to different preemption decisions. For example, the OCC stated that the requirement to have substantial evidence to support a preemption

finding applies only when the OCC makes a “preemption determination” (*i.e.*, issues a preemption order or regulation involving the *Barnett Bank* standard). Whereas, the requirement to periodically review preemption determinations and report to Congress on the preemption review applies to any conclusion by the OCC that federal law preempts a state consumer financial law (not just “preemption determinations” involving the *Barnett Bank* standard).

The OCC’s letter clarifies that a national bank’s interest rate authority in Section 85 of the NBA and the OCC’s interpretations of Section 85 are outside the scope of Section 25b’s preemption standard and procedural requirements.

The letter concludes by outlining the different deference standards that the OCC believes courts must apply when reviewing the OCC’s determinations. The OCC interprets Section 25b to require *Skidmore* deference (a higher level of scrutiny) when the OCC determines that the NBA preempts state laws. For all other OCC interpretations of federal law, a court should apply *Chevron* deference. According to the OCC, interpretations of federal law subject to *Chevron* deference include the OCC’s interpretation of Section 25b (*i.e.*, the December 18 interpretative letter) and the OCC’s interpretation of whether a particular national bank power is authorized by the NBA.

The OCC’s interpretative letter was met with criticism from consumer advocates and state regulators, who viewed the letter as an overreach by the OCC. This letter follows the OCC’s recent promulgation of the valid-when-made rule and “true lender” rule, both of which are being challenged in court, and the OCC’s push for a special purpose national bank charter. As a result, consumer advocates and state regulators may have elevated sensitivity to any action by the OCC that appears to minimize the applicability of state law to federally chartered depository institutions.

We routinely advise clients on federal bank preemption for federally chartered and state chartered depository institutions. If you are considering buying a bank, changing your charter, partnering with a bank or reviewing your bank preemption determinations, we can help. □

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