The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[115] (hereinafter the Dodd-Frank Act) made significant amendments to the NBA and HOLA that limit the circumstances under which those Acts preempt state consumer protection laws. Prior to the Dodd-Frank Act, the Office of the Comptroller of the Currency (OCC), which regulates national banks, had promulgated a series of broad preemption regulations under the NBA, including one governing deposit-taking activities.[116] Courts often relied on these and other regulations, and on OCC interpretive letters, to find a conflict with, and preemption of, state laws that restrict authorized activities.[117]

The Dodd-Frank Act imposed both procedural and substantive restrictions on OCC’s ability to preempt state consumer financial laws.[118] In particular, the NBA now preempts state consumer financial laws “only if” the law discriminates against national banks, conflicts with a federal law other than the NBA, or, “in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.”[119] The effect of this language is to restore and codify the prevent-or-significantly-interfere preemption standard adopted by the Supreme Court in Barnett Bank of Marion County v. Nelson.[120]

Another significant feature of the Dodd-Frank Act is that it further reins in the OCC’s ability to preempt state laws by subjecting any preemption determinations to a more rigorous standard of judicial review than agency regulations normally receive. A court reviewing any OCC preemption determination cannot use the deferential Chevron[121] standard, which had led some courts to rubber stamp OCC regulations. Instead, the court must use the more rigorous Skidmore[122] standard, and evaluate the agency’s determination “depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant.”[123] Applying Skidmore deference, the Ninth Circuit has held that the OCC’s pre-Dodd-Frank preemption regulation and its post-Dodd-Frank version are entitled to “little, if any, deference.”[124]

The Dodd-Frank Act provides that neither the NBA[125] nor HOLA[126] “occup[y] the field in any area of State law.”[127] Prior to the Dodd-Frank Act, the Office of Thrift Supervision (OTS)—which regulated federal savings associations—had promulgated a regulation under HOLA that purported to preempt the entire field of state laws as applied to the activities of federal savings associations.[128] The Dodd-Frank Act abolished the OTS and made the HOLA preemption standard conform to the NBA standard.[129] Because of these changes, the sweeping OTS preemption regulation is no longer in effect. The Dodd-Frank Act also limits preemption to national banks and federal savings associations themselves, not their affiliates, subsidiaries or agents.[130]

The Dodd-Frank Act contains a grandfather clause providing that the new preemption standards apply only to contracts entered into after July 21, 2010.[131] However, courts have often used the Act to interpret the preemption standard prior to that date.[132]

Although the Dodd-Frank Act changed the preemption standard in 2010, many court cases continue to involve either pre-Dodd-Frank Act facts or cases that are governed by the pre-2010 preemption standards under the Dodd-Frank Act grandfather clause.[133] Even cases that cite the Dodd-Frank Act amendments may involve pre-Dodd-Frank Act facts.[134] Some decisions cite the Supreme Court’s Barnett Bank standard, codified in the Dodd-Frank Act,[135] yet give short shrift to the question of whether a state law truly prevents or significantly interferes with the bank’s deposit-taking powers and to the historical preemption standards that the Supreme Court was summarizing in that case.[136] Following the Ninth Circuit’s decision in Lusnak v. Bank of America,[137] courts have only recently begun to question whether the OCC preemption regulations are valid in light of the Dodd-Frank Act restrictions on the OCC’s preemption authority—and the level of deference to give them.[138]

Footnotes


A detailed list of authorized national bank activities, with citations and a list of preemption determinations, is found in Office of the Comptroller of the Currency, Activities Permissible for a National Bank, Cumulative, 2011 Annual Edition (Apr. 2012) (available online as companion material to this treatise). See also National Consumer Law Center, Mortgage Lending §§ 5.2.4.1 [8], 5.2.4.2 [9] (3d ed. 2019), updated at www.nclc.org/library (powers of national banks).

118 [117] The Dodd-Frank Act did not amend the Federal Credit Union Act, which also preempts some state laws. See § 1.5.4 [10], infra.


133 [124] See § 1.5.2 [18], supra.

134 [125] See, e.g., Baptista v. JPMorgan Chase Bank, 640 F.3d 1194 (11th Cir. 2011).

135 [126] See § 1.5.2 [18], supra.


137 Lusnak v. Bank of Am., 883 F.3d 1185 (9th Cir. 2018).


Source URL: https://library.nclc.org/cbp/010502-1

Links
[1] https://library.nclc.org/nclc/link/ML.05.06.02.01
[2] https://library.nclc.org/nclc/link/ML.05.06.02.02
[3] https://library.nclc.org/nclc/link/ML.05.08.03
[4] https://library.nclc.org/nclc/link/ML.05.08.04
[5] https://library.nclc.org/nclc/link/CBP.01.05.06
[6] https://library.nclc.org/nclc/link/CBP.01.05.07
[8] https://library.nclc.org/nclc/link/ML.05.02.04.01
[9] https://library.nclc.org/nclc/link/ML.05.02.04.02
[10] https://library.nclc.org/nclc/link/CBP.01.05.04
[11] https://library.nclc.org/nclc/link/ML.05.02
[12] https://library.nclc.org/nclc/link/ML.05.03.08