In 2004, the OCC promulgated a regulation broadly preempting state laws in the area of deposit-taking.\textsuperscript{154} In 2011, in response to the Dodd-Frank Act, the OCC made minor changes to that regulation.\textsuperscript{155} The regulation still purports to broadly preempt most state laws governing deposit-taking. The regulation may be subject to challenge as inconsistent with the Dodd-Frank Act’s procedural and substantive requirements, but it may also be possible to interpret it narrowly to conform to the Dodd-Frank Act.\textsuperscript{156}

The OCC’s deposit-taking preemption regulation\textsuperscript{157} states that a “national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable federal law.”\textsuperscript{158} It goes on to provide that a national bank “may exercise its deposit-taking powers without regard to state law limitations” concerning:

- Abandoned and dormant accounts;\textsuperscript{159}
- Checking accounts;
- Disclosure requirements;\textsuperscript{160}
- Funds availability;
- Savings account orders of withdrawal;
- State licensing or registration requirements (except for purposes of service of process); and
- Special purpose savings services.

The regulation includes a savings clause preserving several categories of general state laws. It provides that state laws on a list of subjects “are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in \textit{Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.}, 517 U.S. 25 (1996).”\textsuperscript{161} The subjects listed are:

- Contracts;\textsuperscript{162}
- Torts;\textsuperscript{163}
- Criminal law;
- Right to collect debts;\textsuperscript{164}
- Acquisition and transfer of property;
- Taxation;
- Zoning; and
- Any other law that the OCC determines to meet the same criteria or that is made applicable by federal law.\textsuperscript{165}

The UCC is not among the itemized categories, but the OCC has stated in an interpretive letter that the UCC is not preempted because, like the categories above, it establishes the legal infrastructure that makes practicable the conduct of the banking business.\textsuperscript{166} The letter does not take a position on non-uniform aspects of state UCC laws, which some courts have found to be preempted in particular circumstances.\textsuperscript{167}

The OCC’s preemption regulations are silent as to whether they preempt state laws governing unfair or deceptive acts or practices (UDAP). In general, courts have held that state UDAP statutes are laws of general applicability and are not preempted unless used as a vehicle to enforce a state statute that is preempted or to impose new substantive terms on a banking transaction.\textsuperscript{168} Preemption of UDAP laws is discussed in more detail in another treatise in this series.\textsuperscript{169}

Footnotes


159 [150] The regulation includes a footnote saying that the preemption of state laws governing abandoned and dormant accounts “does not apply to state laws of the type upheld by the United States Supreme Court in Anderson Nat’l Bank v. Luckett, 321 U.S. 233 (1944), which obligate a national bank to ‘pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business.’ Id. at 248–249.”

160 [151] See Robinson v. Bank of Am., 525 Fed. Appx. 580 (9th Cir. 2013) (claim that national bank should have disclosed means of avoiding monthly bank account fee is preempted).


162 See Clark v. Bank of Am., 2013 WL 12286057 (E.D. Ark. Sept. 10, 2013) (claim that bank’s assessment of attorney fee—in addition to $100 fee for garnishment—breached deposit agreement is a contract claim, so it is not preempted).

163 [153] But see 1409 W. Diversey Corp v. JPMorgan Chase Bank, 2016 WL 4124293 (N.D. Ill. Aug. 3, 2016) (holding that unidentified negligence claim arising from bank’s cashing of payroll check that payee then cashed again at a second bank was preempted).

164 [154] The OCC has opined that banks’ practice of imposing overdraft fees and debiting those fees from depositors’ accounts is not an exercise of the “right to collect debts” under the OCC regulation that preserves state laws governing debt collection. OCC Interpretive Letter No. 1082, 2007 WL 5393636 (May 17, 2007).


167 [157] See, e.g., Gutierrez v. Wells Fargo Bank, 704 F.3d 712 (9th Cir. 2012) (preempting California U.C.C. commentary, which states that banks may not maximize the number of returned checks for the sole purpose of increasing fees); Wells Fargo Bank of Texas v. James, 321 F.3d 488 (5th Cir. 2003) (finding that OCC regulation permitting banks to charge fees to “customers,” 12 C.F.R. § 7.4002(a), which an OCC interpretive letter defined to include any person who presents a check for payment, preempted Texas law that required banks to negotiate checks drawn on that bank at par (without a fee)). But see Aguayo v. U.S. Bank, 653 F.3d 912, 922 (9th Cir. 2011) (NBA does not preempt state repossession law, even if not a uniform part of UCC).


169 [159] National Consumer Law Center, Unfair and Deceptive Acts and Practices § 2.5.3 [9] (9th ed. 2016), updated at...
1.5.5 OCC Preemption of State Laws Affecting Deposit-Taking

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