

Why OCC Preemption Bulletins Do Not Impact State Covid-19 Relief Measures

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Recently, the Office of the Comptroller of the Currency (OCC), the federal agency that regulates national banks, has issued several bulletins asserting that the National Bank Act would preempt certain types of state and local COVID-19 relief measures. For instance, the bulletins assert that foreclosure moratoria and other foreclosure mitigation measures would interfere with national bank powers and therefore be preempted. Likewise, they say that imposing reporting requirements on national banks would intrude upon the OCC's exclusive visitorial authority with respect to national banks and therefore be preempted. For this reason, the OCC's bulletins encourage state and local officials to expressly exempt national banks and other federally chartered institutions from these state COVID-19 relief measures.

However, as explained below, these bulletins and the anticipatory and categorical assertions of preemption therein do not have the force and effect of law, because the Comptroller has not followed the process required by the National Bank Act (NBA) to determine that these state COVID-19 relief measures are preempted, let alone established that the substantive preemption standard set out in the NBA has been met in the case of these state laws. The bulletins lack any actual preemptive effect; therefore, there should be no feeling of compulsion to accede to the OCC's request for exemptions.

Do the OCC bulletins preempt state COVID-19 relief measures?

It is the constitutional role of state authorities to protect the health, safety and welfare of citizens of their state, including through the regulation of financial services. Historically, in times of national economic crisis, state authorities have seized upon this authority through the enactment of measures intended to provide relief to struggling borrowers. For instance, during the Great Depression, over half the states enacted foreclosure moratoria and other foreclosure mitigation measures designed to mitigate the effects of the economic crisis that was sweeping the country.¹

More recently, prior to the Great Recession, states again acted expeditiously in responding to the needs of their citizens by enacting laws to crack down on anti-predatory lending practices. Unlike during the Great Depression, however, the OCC issued broad, anticipatory statements that these state laws were preempted by the NBA because national banks were subject to "uniform federal standards." It even subsequently adopted regulations that set out broad categories of state law that were preempted.

In response to the OCC's categorical assertions of preemption, with the enactment of the Dodd-Frank Act, Congress amended the NBA to overturn the OCC's preemption regulations and establish substantive and procedural requirements for the OCC to determine that the NBA preempts state law.²

Substantively, Congress made clear that the NBA “does not occupy the field in any area of State law,”³ but rather, preempts a state consumer financial law (such as the COVID-19 relief measures referred to in the OCC bulletin) only if a court or the OCC determines that it “prevents or significantly interferes with the exercise by the national bank of its powers.”⁴ ?

Procedurally, a determination by the OCC that a law prevents or significantly interferes with national bank powers must be made on a “case-by-case basis,” meaning that it must assess the impact of a particular state’s law on national bank operations.⁵ This determination must be made by the Comptroller himself in the form of a regulation or order subject to notice and comment and supported by “substantial evidence” on the record.⁶ Additionally, Congress clarified that the OCC’s preemption determinations are entitled only to *Skidmore* deference—meaning they must be persuasive, consistent and thorough—which involves a much more exacting review than involved in a *Chevron* deference analysis.⁷

Clearly, the bulletins issued by the OCC do not satisfy these procedural requirements as they are not made in the form of a regulation or order, they are not being made on a case-by-case basis, and no evidence is provided to substantiate the significance of the purported interference with bank powers. For that reason alone, the assertions in the bulletin that certain state laws would be preempted lack any actual preemptive effect. Accordingly, unless the OCC intends to follow the process established by Congress, assertions such as “[s]tate action that limits banks’ ability to foreclose on a defaulted loan and take possession of collateral, . . . would interfere with banks’ powers to make secured mortgage loans” should be viewed as merely predictive of what a court might hold. However, there are reasons to doubt that a court would find such state foreclosure laws to be preempted by the NBA.

Do the OCC regulations cited in the bulletin preempt state COVID-19 relief measures?

As an initial matter, it is worth noting that the Great Depression state foreclosure moratoria applied to national banks to the same extent that they applied to every other mortgage lender. The OCC never determined, and the courts never held, that these moratoria were preempted by the NBA. Further, even when the OCC was making sweeping preemption assertions before the Great Recession, the OCC repeatedly conceded that state foreclosure laws “do not attempt to regulate the manner or content of national banks’ real estate lending” and therefore are “not within the scope of the NBA preemption.”⁸ So, even if the OCC were to follow preemption determination process to give actual legal effect to the assertions set out in the bulletin, there are reasons to doubt whether such a regulation or order could survive review under a *Skidmore* deference standard given the lack of consistency in the OCC’s interpretation of the NBA.

More generally, there are reasons to doubt whether the OCC preemption regulations pertaining to national bank lending and deposit-related activity cited in the bulletin can serve as a guide regarding the scope of NBA preemption. In a post-Dodd Frank Act world, the OCC’s authority to assert that broad categories of state law are preempted or not preempted is, at best, unclear in light of the preemption standard and case-by-case requirement discussed above.⁹ Even putting aside this question, the continued validity of the preemption regulations is open to question on procedural grounds alone. The Dodd-Frank Act amended the NBA to require the OCC to review and decide, through notice and comment, whether to “continue or rescind” each preemption determination every five years.¹⁰ Since it has been well over five years¹¹ since these rules were adopted¹¹ and no such

review has ever been conducted, it is unclear whether the cited rules continue to have any legal effect regardless of whether they are substantively valid.

Finally, while the bulletins are correct in pointing out that the OCC has exclusive visitorial authority with respect to national banks and therefore state regulators are not permitted to examine national banks, it is perhaps overly broad to say that all state law reporting requirements are therefore also preempted. Whether all reporting requirements amount to state visitation is far from settled. What is settled is that the OCC's exclusive visitorial authority does not preclude state law enforcement officers from conducting investigations of and initiating enforcement actions against national banks for violations of non-preempted state laws.¹² It is equally settled that NBA preemption more broadly does not insulate the subsidiaries, affiliates or agents of national banks from state supervision or state law.¹³

One of the hallmarks of our federalist system is that it enables states "to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times, without having to rely solely upon the political processes that control a remote central power."¹⁴ States adopting or considering adopting COVID-19 relief are merely fulfilling this role by enabling citizens to exercise control over their economic destiny.

Therefore, in making decisions regarding the scope and extent of their COVID-19 relief efforts, it is perhaps best to keep in mind, as the Supreme Court held long ago, that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law."¹⁵

1. See Geoff Walsh, *Analysis Of Constitutional Issues Related To Foreclosure Crisis-Driven State Relief Laws*, National Consumer Law Center (February 2009), available here:

https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/model-foreclosure-crisis-driven.pdf.

2. See 12 USC 25b. See also Arthur E. Wilmarth Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893 (2011).

3. See 12 USC 25b(b)(4).

4. See 12 USC 25b(b)(1)(B).

5. See 12 USC 25b(b)(3)(A), (c). Assessments of multiple substantively equivalent state laws at one time is permitted but the OCC must consult with the CFPB regarding the issue of substantive equivalence. See 12 USC 25b(b)(3)(B).

6. See 12 USC 25b(b)(1)(B), (b)(6).

7. See 12 USC 25b(b)(5)(A).

8. See *Tamburri v. Suntrust Mortg., Inc.*, 875 F. Supp. 2d 1009, 1019 (N.D. Cal. 2012) (citing Bank

Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, at 1912 & n.59 (Jan. 23, 2004)). See also Statement of John C. Dugan, Comptroller of the Currency, before the Financial Crisis Inquiry Commission (April 8, 2010) (“state laws governing the foreclosure process are not preempted”).

9. See *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194 (9th Cir. 2018) (concluding that OCC preemption regulations were entitled to “little if any” deference under a *Skidmore* standard); see also Arthur E. Wilmarth Jr., *OCC Gets It Wrong on Preemption, Again*, *American Banker* (July 28, 2011).

10. See 12 USC 25b(d)(1).

11. See 76 Fed. Reg. 42549 (July 21, 2011).

12. See 12 USC 25b(i)(1). Private rights of action are likewise not preempted by the OCC’s exclusive visitorial authority. See 12 USC 25b(j).

13. See 12 USC 25b(h).

14. See *Bond v. United States*, 564 U.S. 211, 221 (2011).

15. See *Nat’l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)