OCC 5-Year Review of Preemption

COMMENT LETTER

OCC 5-Year Review of Preemption

July 28, 2024
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Acting Comptroller of the Currency Michael J. Hsu
O?ce of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219

Dear Acting Comptroller Hsu,

We read with interest your comments before the Exchequer Club on July 17, particularly your decision to revisit prior preemption determinations of the Office of the Comptroller of the Currency (OCC).[1] The Conference of State Bank Supervisors (CSBS), along with numerous consumer groups,[2] believes this review is long overdue, and we stand ready to assist as you undertake the processes mandated by the Dodd-Frank Act.[3]

Thirteen years ago, nearly to the day, the OCC reissued its 2004 preemption regulations.[4] In the intervening years, the OCC has failed to conduct the 5-year reviews required by the Dodd-Frank Act.[5]

The Supreme Court recently reaffirmed that OCC preemption determinations require a nuanced review of the "nature and degree" that a state law "prevents or significantly interferes" with the exercise of national bank powers.[6] With respect to the 5-year review, the OCC must also comply with the notice-and-comment requirements set forth in Section 1044 of the Dodd-Frank Act.[7]

Given the breadth of prior OCC preemption decisions, the OCC must also specifically revisit prior regulations, determinations, and orders that fail to meet the review requirements mandated by the Dodd-Frank Act. For example, the OCC has previously i) issued interpretive letters to national banks or States informing the relevant parties that certain State laws and regulations were deemed preempted by federal law,[8] ii) issued Preemption Determination and Order Notices in the Federal Register,[9] and iii) issued sweeping preemption regulations affecting more than thirty broad categories of state consumer ?nancial laws across the nation.[10] If the interpretive letters, Preemption Determination and Order Notices, and regulations do not have a nuanced decision on the record regarding a particular state law, and the Consumer Financial Protection Bureau was not consulted when the OCC moved to preempt substantively equivalent state laws,[11] the determination is flawed.

We respect your decision to revisit prior OCC determinations that have clearly overreached and needlessly thwarted state laws that protect their consumers.

We look forward to working with you as you pursue this important review. Please do not hesitate to contact us if CSBS or the states may be of assistance to your efforts.

Sincerely,

Brandon Milhorn President & CEO

cc: Director Rohit Chopra
Consumer Financial Protection Bureau

Endnotes

1 Acting Comptroller of the Currency Michael Hsu, Remarks Before the Exchequer Club, Size, Complexity, and Polarization in Banking (July 17, 2024).

2 *See* Letter from Americans for Financial Reform, Center for Responsible Lending, Consumer Federation of America, Consumer Reports, National Association of Consumer Advocates, and National Consumer Law Center to Acting Comptroller Hsu, O?ce of the Comptroller of the Currency (July 19, 2024) ("If the OCC chooses not to immediately rescind the preemption regulations, the OCC must undertake the ?ve-year review mandated by the Dodd Frank Act.").

3 See 12 U.S.C. 25b(b), (c), and (d).

4 *See* 12 C.F.R. §§ 7.4007(b), 7.4008(d) and 34.4(a); 69 Fed. Reg. 1904 (Jan. 13, 2004); 76 Fed. Reg. 43549 (July 21,

2011).

5 12 U.S.C. § 25b(d)(1) ("The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer ?nancial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter.").

6 *Cantero v. Bank of Am., N.A.*, 144 S. Ct. 1290, 1300 (2024) ("A court applying that *Barnett Bank* standard must make a practical assessment of the nature and degree of the interference caused by a state law.").

7 12 U.S.C. § 25b(d)(1) ("After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination.").

8 *See, e.g. Interpretive Letter #971* (September 2003) (letter from Julie Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, to Reginald S. Evans, Chief Counsel, Pennsylvania Department of Banking, regarding the activities of operating subsidiaries of national banks).

9 *See Preemption Determination and Order*, 68 Fed. Reg. 46264 (August 5, 2003) (preempting "the provisions of the [Georgia Fair Lending Act] a?ecting national banks' real estate lending" in response to a request from National City).

10 *See* 12 C.F.R. §§ 7.4007(b), 7.4008(d), and 34.4(a); 69 Fed. Reg. 1904 (Jan. 13, 2004); 76 Fed. Reg. 43549 (July 21,

2011). The OCC issued the 2004/2011 regulations after publishing notices of proposed rulemaking in the Federal Register, which included only general descriptions of the State laws the OCC intended to preempt and did not provide detailed ?ndings of fact to support the OCC's proposals, while in its ?nal regulations the OCC did not present any meaningful additional ?ndings of fact to support its far-reaching assertions of preemption.

11 12 U.S.C. 25b(b)(1) and (3).

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