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Section 1044 of Dodd-Frank: When Will State Laws be Preempted Under the OCC’s Revised Regulations?

I. INTRODUCTION

As of January 31, 2012, there are 1,378 national banks registered with the Office of the Comptroller of Currency (OCC), each with the ability to preempt state consumer financial laws under the National Bank Act of 1864 (NBA). The NBA gave national banks “all such incidental powers as shall be necessary to carry on the business of banking.” In 1996, the Supreme Court set forth the preemption standard for national banks in Barnett Bank of Marion County, N.A. v. Nelson. States have the power to regulate national banks to the extent state laws do not “prevent or significantly interfere with the national bank’s exercise of its powers.” In 2004, the OCC, for the first time adopted rules setting forth a standard for preemption; state laws that “obstruct, impair or condition” a national bank’s exercise of powers under the NBA will be preempted. It has been suggested that this new standard had implicitly instituted field preemption of state laws that affected the operations of national banks. States attempted to protect consumers with the enactment of anti-predatory lending laws, but the NBA preempted these laws.

5. Id.
This broad preemption standard may have created a “race to the bottom” between state and nationally chartered banks, which contributed to the financial crisis; and may have been lessened had Congress replaced the state preempted laws with federal laws that were tough on lending practices or if federal financial regulators promulgated regulations to curb abusive lending. Numerous individuals testified before the Senate Committee on Banking Housing and Urban Affairs in 2009 about the harmful effects of preemption on consumers and the economy. Congress responded to the financial crisis by enacting the wide-ranging Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which identified a provision affirming the standard for preemption.

In section 1044, Dodd-Frank set forth the preemption standard for the NBA to preempt state consumer financial laws. Pursuant to Dodd-Frank, the OCC recently finalized the standard for preemption, effective July 21, 2011. The OCC determined the preemption stand-


This Note examines the standard for preemption set forth in Dodd-Frank for consumer financial laws and the amended regulations set forth by the OCC pursuant to Dodd-Frank. This Note starts out with an overview of preemption and an analysis of *Barnett Bank*, the leading case on state law preemption. Part II continues with a short overview of the 2004 regulations set forth by the OCC. Part III addresses the enactment of Dodd-Frank as it applies to consumer financial laws. Additionally, Part III supports the conclusion that Congress intended to adopt the whole analysis of *Barnett Bank*, through a discussion of the statutory construction of section 1044, the legislative history, textual support in the Gramm-Leach-Bliley Act (GLBA), a subsection of 1044, and case law that applied *Barnett Bank* to preemption determinations. Part IV looks at the OCC’s interpretation of section 1044 and provides an overview of industry perspectives presented through comment letters sent to the OCC during the notice and comment period. Further, Part IV discusses in detail the changes made to the 2004 regulations by the OCC and how three recent court decisions have interpreted section 1044 and the amended 2004 regulations. Lastly, Part IV looks at the current status of precedent that relied on the “obstruct, impair or condition” language.

II. OVERVIEW OF PREEMPTION

In 1819, the Supreme Court determined that a state law, which taxed a branch of the Second Bank of the United States, was preempted because the state law would impede the ability of Congress to act pur-

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13. *Id.* at 43,555.
14. *See infra* Part II.
15. *See infra* Part II.
16. *See infra* Part III.
18. *See infra* Part III.
20. *Id.*
21. *Id.*
suant to the powers vested to it; this decision was the start of federal supremacy for national banks.\textsuperscript{22} With the passage of the NBA, Congress gave banks “all such incidental powers as shall be necessary to carry on the business of banking.”\textsuperscript{23} Whether the NBA preempts state law was extensively discussed in the \textit{Barnett Bank} case.\textsuperscript{24}

\textbf{A. Barnett Bank of Marion County, N.A. v. Nelson}

The issue presented in \textit{Barnett Bank} was whether a federal statute that permitted national banks to sell insurance in small towns preempted a state statute that specifically prohibited them from doing so.\textsuperscript{25} State laws can be preempted based on three theories of preemption.\textsuperscript{26} A state law can be explicitly preempted in the language of the federal statute, under field preemption the court could find that a federal statute is part of federal regulation “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or there is an “irreconcilable conflict” where, for example, both statutes together may be a “physical impossibility.”\textsuperscript{27} The \textit{Barnett Bank} Court analyzed the preemption issue with an inquiry into whether there was an “irreconcilable conflict.”\textsuperscript{28} While the state and federal statutes are not in direct opposition to one another, the state law prohibition was an “obstacle” to one of the federal statute’s purposes and was therefore preempted by the federal statute.\textsuperscript{29} The federal statute gave broad authority to national banks to engage as insurance agents.\textsuperscript{30} The Florida

\textsuperscript{22} M’Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 436 (1819). “The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any State to the contrary notwithstanding.’” \textit{Id.} at 406.
\textsuperscript{25} \textit{Id.} at 27. “In addition to the powers now vested by law in national [banks] . . . any such [bank] located and doing business in any place the population of which does not exceed five thousand . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any . . . insurance company authorized by the authorities of the State . . . to do business [there] . . . .” 12 U.S.C. § 92 (2006).
\textsuperscript{26} See \textit{Barnett Bank}, 517 U.S. at 31.
\textsuperscript{27} \textit{Id.} (citation and internal quotations omitted).
\textsuperscript{28} \textit{Id.} (citing Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982)).
\textsuperscript{29} \textit{Id.} (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
\textsuperscript{30} \textit{Id.} at 32.
statute limited insurance agent activities permissible if the insurance agency was affiliated with a bank holding company.\textsuperscript{31} In defining the scope of preemption, the Court stated, “normally Congress would not want States to forbid, or to impair significantly, the exercise of a power” granted to national banks through statutes and regulations.\textsuperscript{32} However, this is not to deny states the power to regulate, if the state law “does not prevent or significantly interfere with the national bank’s exercise of its powers.”\textsuperscript{33} In reaching this conclusion, the Court referenced precedent which determined that state laws would not be preempted if the law did not “unlawful[ly] encroach[ ] on the rights and privileges of national banks,” “would not ‘destro[y] or hampe[r]’ national banks’ functions” and “does not ‘interfere with, or impair [national banks’] efficiency in performing the functions by which they are designed to serve.”\textsuperscript{34} Since the Barnett Bank decision, rulemaking has expanded the scope of preemption.

B. 2004 OCC Rulemaking

In 2004, the OCC issued regulations that contained preemption provisions set forth in 12 C.F.R. part 34, governing real estate lending and in three sections of part 7, governing deposit-taking activities, non-real estate lending activities, and other authorized activities of national banks.\textsuperscript{35} The regulations added these provisions to clarify the application of state law to national banks.\textsuperscript{36} Each regulation contained a provision that preempted state laws that “obstruct, impair or condition” a national bank’s authority to exercise its powers.\textsuperscript{37} Sections 34.4, 7.4007 and 7.4008 included non-exclusive lists of state laws that are preempted.

\textsuperscript{31} Barnett Bank, 517 U.S. at 29. As an “affiliated” national bank that owned a Florida licensed insurance agency, Barnett Bank was ordered by Florida to stop selling the prohibited insurance. Id.

\textsuperscript{32} Id. at 33.

\textsuperscript{33} Id. (emphasis added).

\textsuperscript{34} Id. (citing Anderson Nat’l Bank v. Luckett, 321 U.S. 233, 247-52 (1944); McClellan v. Chipman, 164 U.S. 347, 358 (1896); Nat’l Bank v. Commonwealth, 75 U.S. 353 (1870)) (alteration in original).

\textsuperscript{35} See 12 C.F.R. §§ 34.4, 7.4007, 7.4008, 7.4009 (2011).


\textsuperscript{37} See 12 C.F.R. §§ 34.4(a), 7.4007(b), 7.4008(d), 7.4009(b)(2) (2011).
III. DODD-FRANK: THE ADOPTION OF THE CONSUMER FINANCIAL PROTECTION ACT OF 2010

Dodd-Frank was enacted in the aftermath of the financial crisis "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."41 Section 1044, which is set forth in the Consumer Financial Protection Act of Dodd-Frank, addresses state law preemption standards for consumer financial laws.42 A state consumer financial law "directly or indirectly discriminate[s] against national banks and [ ] directly and specifically regulates the manner, content, or terms and conditions of any financial transactions (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer."43 Under Dodd-Frank, "[s]tate consumer financial laws are to be preempted, only if -- [ ] in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in

38. See §§ 34.4(a), 7.4007(b), 7.4008(d).
39. See §§ 34.4(b)(9), 7.4007(c); 7.4008(e)(8), 7.4009(c)(2)(vii).
42. See 12 U.S.C. § 25b (Supp. IV 2010). Dodd-Frank eliminated preemption of state law by national bank subsidiaries, agents and affiliates. See id. Dodd-Frank changed the preemption standards applicable to federal savings associations to conform to those laws applicable to national banks. See § 1465. Dodd-Frank transferred to the OCC from the Office of Thrift Supervision all functions relating to federal savings associations. See § 5411-12.

"without regard to state law limitations concerning" the enumerated law.38 State laws that had only an incidental effect on the national bank were not preempted.39 Until Dodd-Frank, no significant attempts were made to scale back these regulations.40
Barnett Bank . . . the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers. . . . A preemption determination is to be made by a court, or by the OCC through an order or regulation, based on a case-by-case determination. Dodd-Frank defined case-by-case as a determination by the OCC "concerning the impact of a particular state law."

A. Statutory Construction

"[T]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." If the Barnett Bank standard were determined to be a stand-alone standard of "prevent or significantly interfere," long standing precedent consistent with the principles of Barnett Bank would be reversed. Section 1044 does not explicitly state that Congress intended to reverse these decisions; a limitation read into the Barnett Bank preemption standard would be in opposition to statutory construction principles. The courts will also pay close attention to the legislative history. As illustrated in Part II.B., Congress did not intend to limit Barnett Bank to "prevent or significantly interfere." The use of "prevent or significantly interfere" is a tool of statutory construction to incorporate the case law related to state law preemption; the phrase was used as shorthand. Congress also required a preemption

45. § 25b.
46. § 25b(b)(3)(A). The OCC is required to consult with the Consumer Financial Protection Bureau in making preemption determinations. § 25b(b)(3)(B).
49. Senators Carper and Warner Comment Letter, supra note 47, at 3 (citing Henning v. Union Pacific Railroad Co., 530 F.3d 1206, 1216 (10th Cir. 2008)).
50. See discussion infra Part III.B.
51. Clearing House Comment Letter, supra note 9, at 5-6; see also Letter from Minh-Duc T. Le., Assoc. Gen. Counsel, Capital One Fin. Corp., to Office of the Comptroller of the Currency 2 (June 30, 2011) [hereinafter Capital One Comment Letter] (stating "[t]he Barnett 'standard' . . . is broader and more complex than the 'significantly interferes' shorthand used in section 1044."
determination to be made "in accordance with"... Barnett Bank," if Congress did not want the OCC to consider the analysis of Barnett Bank as a whole, the statute would have simply "direct[ed] the OCC to 'apply the legal standard for preemption.'"\textsuperscript{52}

While one critic has argued that the reference to Barnett Bank was simply to clarify that Barnett Bank is the source of law for the "prevent of significantly interfere" language, this interpretation does not withstand a statutory construction analysis.\textsuperscript{53} "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."\textsuperscript{54} It would not have been necessary for Congress to include the reference to Barnett Bank if it was solely to provide the source of law. "Prevent or significantly interfere" as a stand-alone provision would be interpreted as a two-prong analysis inquiring whether the state law would either (1) prevent and/or (2) significantly interfere with a national bank, regardless if Barnett Bank was referenced; therefore, "in accordance with Barnett Bank" would be superfluous. This argument has been made about the OCC's treatment of "prevent or significantly interfere" as a touchstone.\textsuperscript{55} However, the reference to "prevent or significantly interfere" read in conjunction with "in accordance with Barnett Bank" was intended to include the other formulations of conflict preemption used in Barnett Bank in order to provide an illustrative and explanatory reference of the degree to which interference with national bank powers would give rise to preemption.\textsuperscript{56} Neither Barnett Bank nor "prevent or significantly interfere"

\textsuperscript{52} Letter from Carl Levin, S. Comm. on Homeland Sec. and Gov't Affairs, to Timothy Geithner, Sec'y of the Treasury and John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 7 (July 13, 2011) [hereinafter Comm. on Homeland Sec. and Gov't Affairs Comment Letter].

\textsuperscript{53} See Letter from Suzanne Martindale, Staff Attorney, Consumers Union, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 3 [hereinafter Consumers Union Comment Letter]; Letter from Benjamin M. Lawsky, Superintendent of Fin. Servs. and Acting Superintendent of Banks, State of N.Y. Banking Dep't., to John Walsh, Acting Comptroller of Currency, Office of the Comptroller of the Currency 3 (June 27, 2011) [hereinafter N.Y. Banking Dep't Comment Letter] (arguing that the reference to Barnett Bank is irrelevant to interpret the preemption standard).

\textsuperscript{54} Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

\textsuperscript{55} See Consumers Union Comment Letter, supra note 53, at 3.

interfere” is superfluous. Congress did not state the preemption standard to be Barnett Bank in and of itself because Congress intended to scale back the OCC’s interpretation, which broadened the scope of “prevent or significantly interfere” in the 2004 regulations. The exemplary language was necessary to ensure the OCC understood it had gone too far in the 2004 regulations. As noted in its final rule, the OCC perceived this language as a message that Congress rejected the “obstruct, impair or condition” language.

B. Legislative History Section 1044

On December 2, 2009, Representative Frank introduced a House bill to provide regulatory reform, which included reformation of the preemption standard for state consumer financial laws. While the bill proposed a preemption standard that called upon the Comptroller of the Currency to determine whether a state law would “prevent or significantly interfere” with a national bank’s ability to engage in the “business of banking,” the bill did not refer to the Barnett Bank decision. The bill did not pass in the House. The standard was amended to: “prevents, significantly interferes with, or materially impairs” and passed the House on December 11, 2009.

After the Act was referred to the Senate, the Senate consented to strike the entirety of the Act following the enactment clause and sub-

4, 5, 7, 8, 28, and 34). The reference to Barnett Bank was intended to address a problem Senator Carper saw in the version of Dodd-Frank that passed the House without Barnett Bank incorporated into the standard. A reference was necessary to “ensure the preemption principles in the Barnett case were preserved.” Interpretative Letter, supra note 48, at 2.

57. See Comm. on Homeland Sec. and Gov’t Affairs Comment Letter, supra note 52, at 7.
60. Id. at 832.
stituted a new bill. The amended bill changed the preemption standard to include the *Barnett Bank* standard without reference to "prevent or significantly interfere." In spite of additional amendments made to the bill, the preemption standard was not changed significantly. The Senate agreed to the language of the amendment and agreed to insert the amendment in lieu of the preemption standard that had previously passed in the House.

At the House-Senate Conference, both the House and Senate adopted the preemption standard that was ultimately set forth in section 1044 of Dodd-Frank. During the congressional proceedings and debates, Senator Dodd was questioned by Senator Carper whether the Conference Committee, which restated the preemption standard in a slightly different version than the Senate proposed amendment, maintained the standard for preemption in *Barnett Bank*; Senator Dodd answered in the affirmative. Senator Carper responded and stated that he believed this change would provide certainty to consumers and national banks. In the accompanying House Report submitted by Senator Dodd, he stated: "[t]he standard for preempting State consumer financial law would return to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank*... undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in

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64. See 156 CONG. REC. S4077 (daily ed. May 20, 2010) (agreeing to strike the text after the enacting clause and substitute the language of S. 3217, as amended (by unanimous consent)).


66. See 156 CONG. REC. S3873 (daily ed. May 18, 2010) (agreeing to Amdt. 4071 to S. 3217 ("Carper Amendment")) ("[T]he State consumer financial law is preempted in accordance with the legal standard of 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), and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law.").

67. 156 CONG. REC. S4043 (daily ed. May 20, 2010) (agreeing to cloture motion on Admt. 3739 to S 3217 ("Dodd/Lincoln Amendment")).


69. 156 CONG. REC. S5902 (daily ed. July 15, 2010) (colloquy between Senator Carper and Senator Dodd) ("There should be no doubt that the legislation codified the preemption standard by the U.S. Supreme Court in that case.").

70. Id. (statement of Senator Carper).
2004. Senator Johnson also commented that the legislation clearly codified *Barnett Bank* into Dodd-Frank.

During the comment process on the proposed rule, Senator Carper and Senator Warner submitted a comment letter to the OCC on behalf of the United States Senate. Both Senators were involved in the negotiations of the preemption standard during the Conference Committee. The Senators maintained that the standard for preemption requires the OCC to adopt a standard "in accordance with *Barnett Bank,*" and not "in accordance with 'part of' the legal standard." The letter rejected the supposition that Dodd-Frank chose to single out "prevent or significantly interfere" as a stand-alone standard; the reference to "prevent or significantly interfere" was just "a touchstone of the *Barnett Bank* Case [and] it is not a limiting phrase and cannot reasonably be read to be one."

While the legislative history clearly demonstrates Congress intended the preemption standard to be in accordance with the *Barnett Bank* decision, nothing more and nothing less; critics still claim to find support in the legislative history that Dodd-Frank created a new stand-alone standard. The Department of the Treasury, the Department that houses the OCC, wrote a comment letter that opposed the proposed rule. Treasury argued in its letter that the OCC broadened the standard beyond Dodd-Frank. In support, Treasury pointed to a statement in the Conference Committee Report that referred to the language of the

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73. See Senators Carper and Warner Comment Letter, supra note 47.
74. Id. at 1-2.
75. Id.
76. Id. (rejecting the premise of the comment letter written by George W. Madison on behalf of Treasury, which suggested that "prevent or significantly interfere" is a new standard taken from the *Barnett Bank* case).
77. See, e.g., N.Y. Banking Dep’t Comment Letter, supra note 53, at 4-5 (arguing that the colloquies between Senator Carper and Johnson support the conclusion that "prevent or significantly interfere" is the standard Congress intended to adopt).
79. Id. at 1.
statute as a revision. However, Senator Carper and Senator Warner refuted this statement as support for a new standard; they argued Treasury took the statement out of context. The Senators criticized Treasury for ignoring the very next sentence of the Conference Committee Report, which stated that the Barnett Bank decision is codified as the standard. The senators further explained that the committee believed the OCC had taken preemption too far beyond Barnett Bank in their 2004 regulation, and in order to return to the Barnett Bank standard, a revision was required.

The preemption standard is conflict preemption, in accordance with the Barnett Bank analysis as a whole. This is the standard Congress intended when it adopted section 1044 of Dodd-Frank. While Treasury attempted to interpret Congressional intent for a stand-alone standard of “prevent or significantly interfere,” a thorough reading of the legislative history and a comment letter from two senators who negotiated the standard, demonstrate otherwise. Support can also be found in a subsection of section 1044 and the GLBA.

C. Further Textual Support in Section 1044 and the GLBA

The OCC found support in the text of section 1044(c) of Dodd-Frank, which requires a regulation or order by the OCC to be supported by “substantial evidence” that a preemption decision was made “in accordance with the legal standard of the decision of Barnett Bank.” This provision does not reference the “prevent or substantially interfere”

80. Id. at 3 (referencing H. REP. NO. 111-517, at 744 (July 29, 2010) (Conf. Rep.)).
82. Id.
83. Id.
84. See discussion infra Part III.C.
language. The OCC and Senators Carper and Warner took the position that if the *Barnett Bank* analysis were reduced to a stand-alone test of "prevent or significantly interfere," as opposed to the whole of the decision, the courts and the OCC would be applying different preemption standards.\(^8\) The courts would be required to comply with the *Barnett Bank* standard as a whole, while the OCC would be subjected to a more restricted standard.\(^8\) This would be an inconsistent application of the preemption standard.\(^8\) Senator Carper and Senator Warner found any interpretation of the statute that could come to this conclusion to be absurd.\(^8\)

Congress passed the GLBA in 1999, which stated a similar preemption standard for state laws regulating insurance sales by depository institutions or their affiliates.\(^9\) The GLBA adopted the "legal standards" set forth in *Barnett Bank* for preemption, under which no state through its laws may "prevent or significantly interfere" with a deposit institution’s ability to perform insurance activities.\(^9\) The language relied upon in the GLBA is almost indistinguishable from the language of section 1044.\(^9\) Case law interpreting this provision confirms that


\(^8\) See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,555.

\(^9\) Senators Carper and Warner Comment Letter, *supra* note 47, at 2; see also Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,555 ("It would not make sense for this 'substantial evidence' requirement to require compliance with a different preemption standard than the standard intended by the *Barnett* standard preemption provision.").


\(^9\) Id.

\(^9\) ABA Comment Letter, *supra* note 85, at 3. Dodd-Frank used the singular of standard, in contrast to the GLBA, which used standards; this difference could be interpreted as a limitation, however, it does not appear that this was Congress' intent. When Congress considered the GLBA, Senator Bryan, the sponsor of the amendment setting forth the preemption standard, stated that the "'prevent or significantly interfere' language was taken directly from the Supreme Court's *Barnett* decision and is intended to codify that decision." 145 CONG. REC. 6046 (daily ed. May 24, 1999) (statement of Senator Bryan); see also H. REP. NO. 106-434, at 156-57, 106th Cong. (daily ed. Nov. 2, 1999) (Conf. Rpt.) ("States may not prevent or significantly interfere with the activities of depository institutions or their affiliates, as set forth in *Barnett Bank*."). Senator Dodd similarly stated that "there should be no
“prevent or significantly interfere” codified the Barnett Bank standard as a whole.93 For example, in Massachusetts Bankers Association v. Bowler,94 the court determined if it were required to find a state law prohibited an activity of a national bank before it could be preempted, as the defendant contended, the court would be required to ignore the plain language of the GLBA and the decision of Barnett Bank.95 The court did not limit its interpretation of Barnett Bank to the “prevent or significantly interfere” language.96 Based on the similarity in the language, it is reasonable that Congress intended the standard to achieve the same result.97

D. Precedent Supports Barnett Bank as Applied Beyond “Prevent or Significantly Interfere”

The standard in Barnett Bank has been applied with reference to not only the “prevent or significantly interfere” language of the opinion, but also to the other amalgamations of language from precedent cited by the Barnett Bank Court. In 2001, the Sixth Circuit decided Association of Banks in Insurance Inc. v. Duryee,98 dealing with the right of a national bank to act as an insurance agent under the GLBA.99 The defendant contended that under Barnett Bank the state law at issue should not be considered to “prevent or significantly interfere” unless it “essentially thwarted” the national bank’s ability to exercise its powers and because the state law here did not “totally prohibit” the powers of the na
ional bank, the state law cannot be preempted. The court refused to equate “prevent or significantly interfere” with “effectively thwart.” The court referenced two cases cited by the Barnett Bank Court to determine the scope of “prevent or significantly interfere;” specifically, the court relied on the following language: “‘impair the efficiency of national banks’ or would ‘destroy’ or ‘hamper national bank’s functions’” and “interfere with or impair efficiency.” In 2003, the Fifth Circuit, in Wells Fargo Bank of Texas, N.A. v. James determined the state law was preempted because the state statute “interfere[d] with a power which national banks are authorized to exercise, the state statute irreconcilably conflict[ed] with the Federal statute and is preempted by operation of the Supremacy Clause . . . [and] Barnett Bank.” In Wachovia Bank, N.A. v. Burke, the Second Circuit stated that “‘conflict preemption’[ ] can arise where ‘state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” In 2008, a district court concluded that the NBA preempted a state law because it would “frustrate[ ] or limit[ ] the ability of a national bank.” In 2009, the Third Circuit denied the national bank’s motion to dismiss since the state law did not “interfere with the purposes of national banks . . . tend to impair or destroy the efficiency of national banks as federal agencies, or . . . conflict with any other provision of federal law.” These cases applied the foundational principles of Barnett Bank and demonstrate that the decision is not limited to “prevent or significantly interfere” as the standard for preemption.

Preemption analysis, as correctly adopted, is a conflict preemption legal standard in accordance with the full analysis of preemption set

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100. Id. at 409 (citing Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 28-29 (1996)).
101. Id.
102. Id. (quoting McCellan v. Chipman, 164 U.S. 347, 358 (1896); First Nat’l Bank v. Ky., 76 U.S. 353, 362 (1869)).
103. 321 F.3d 488 (5th Cir. 2003).
104. Id. at 492 (quoting U.S. Const. art. VI, cl. 2; Barnett Bank, 517 U.S. at 31).
105. 414 F.3d 305 (2d Cir. 2005).
106. Id. at 313-14 (quoting Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982)).
out in *Barnett Bank*. "Prevent or significantly interfere" is only one hallmark of the conflict preemption standard and analysis.109 The *Barnett Bank* Court in its analysis did not limit itself to the "prevent or significantly interfere" language; courts post-*Barnett Bank* have logically inferred that their analysis of state law preemption is not to be based solely on "prevent or significantly interfere." If Dodd-Frank were intended to create a new standard of preemption, precedent making up an extensive body of national bank law would be questioned or rejected.110 Congress would have discussed the challenges national banks and government agencies would encounter. Moreover, Congress would have adopted the original bill of Dodd-Frank, which did not make any reference to *Barnett Bank*, but simply stated "prevent or significantly interfere" as the preemption standard.111 It is simply a matter of practicality; to include all the analysis the court considered in the *Barnett Bank* case would have been unreasonable.112

IV. WHAT DOES THIS MEAN GOING FORWARD?

A. **OCC Rulemaking after Dodd-Frank**

On May 26, 2011, the OCC published in the Federal Register a notice of proposed rulemaking to implement, among other provisions of Dodd-Frank, section 1044.113 On July 21, 2011, the OCC released its final rule, in the interim the OCC received over forty comment letters,


111. See H.R. 4173, 111th Cong. (1st Sess. 2009).


the majority of which were from banking and financial institutions, trade associations, and advocacy groups.\textsuperscript{114} The OCC concluded that Dodd-Frank incorporated the conflict preemption standard and reasoning set forth in \textit{Barnett Bank}, rejecting a stand-alone “prevent or significantly interfere” standard as proposed in some comment letters.\textsuperscript{115} The OCC explained that their determination was based on the language of the statute, the language of other related provisions in Dodd-Frank that addressed preemption, the interpretation of “virtually identical preemption language” in the GLBA and subsequent explanation of the intent of the GLBA sponsors, and explanation of the standard provided by the sponsors at the time Dodd-Frank was enacted.\textsuperscript{116} The OCC determined the use of “prevent or significantly interfere” in the statute was only a “touchstone” and the language in the statute preceding the phrase, which requires the standard be in accordance with \textit{Barnett Bank} cannot be separated from the interpretation.\textsuperscript{117}

The OCC eliminated the “obstruct, impair or condition” language from 12 C.F.R. sections 7.4007(b), 7.4008(d), and 34.4(a), and deleted section 7.4009 in its entirety.\textsuperscript{118} Although the OCC proposed to delete this language in the proposed rule, it stated a caveat that defined its intention and effect of the deletion; the language was deleted solely to remove any ambiguity placed on the principles of \textit{Barnett Bank}.\textsuperscript{119} The OCC cautioned that “obstructs, impairs or conditions” was language construed from precedent relied upon by the Supreme Court in \textit{Barnett Bank}, and as a result, any existing precedent that relied upon this language remains valid.\textsuperscript{120} In the final rule, the OCC reversed its position. “[I]nclusion of the ‘prevent or significantly interferes’ conflict preemption formulation in the \textit{Barnett Bank} standard preemption provi-

\begin{footnotesize}
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  \item \textsuperscript{114} See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549 (July 21, 2011) (to be codified in scattered parts of 12 C.F.R. pts. 4, 5, 7, 8, 28, and 34).
  \item \textsuperscript{115} See id. at 43,554.
  \item \textsuperscript{116} See id.
  \item \textsuperscript{117} Id. at 43,555.
  \item \textsuperscript{118} Id. at 43,555-56.
  \item \textsuperscript{119} Office of Thrift Supervision Integration; Dodd-Frank Implementation, 76 Fed. Reg. 30,557, 30,563 (proposed May 26, 2011) (to be codified in scattered parts of 12 C.F.R. pts. 4, 5, 7, 8, 28, and 34).
  \item \textsuperscript{120} Id.
\end{itemize}
\end{footnotesize}
sion may have been intended to change the OCC’s approach by shifting the basis of preemption back to the decision itself, rather than placing reliance on the OCC’s effort to distill the Barnett Bank principles in this matter.”

Deletion of the language was also intended to clear up any ambiguities regarding whether Barnett Bank is the governing standard for preemption determinations. Case law that relied exclusively on the “obstruct, impair or condition” standard, if any, will have to be tested against the Barnett Bank conflict preemption standard. The OCC stated that it has not identified any precedent that relied solely on the “obstruct, impair or condition” standard. The OCC also determined that the case-by-case procedural requirements only apply to determinations made after July 21, 2011, the effective date of Dodd-Frank. Regulations effective on this date are valid subject to the Barnett Bank standard. In addition, the OCC stated that it would determine whether state laws of general applicability apply to national banks under the Barnett Bank preemption standard.

The comment letters primarily addressed whether the OCC’s proposed rule for the preemption standard is in accordance with Dodd-Frank, whether the 2004 regulations that contain “obstruct, impair or condition” are still valid post-Dodd-Frank, and whether case-by-case determination requires the OCC to revisit the 2004 rules. The American Bankers Association (ABA), a trade association representing both nationally and state chartered banks, submitted a comment letter to the


122. Id.

123. Id. Under § 1043 of Dodd-Frank, it may be possible for a case that relied exclusively on the “obstructs, impairs or conditions” language to still be considered good law under Dodd-Frank. Id. at 43,556 n.43 (referencing 12 U.S.C. § 5553 (Supp. IV 2010)).

124. Id. at 43,556 n.43.

125. Id. at 43,557.


127. Id. at 43,557-58 & n.50. For example, the governance of contracts and the acquisition and transfer of property are considered laws of general applicability. See Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007) (citing Nat’l Bank v. Commonwealth, 76 U.S. 353 (1870)).
OCC.128 The ABA comment letter is representative of the position taken by nationally chartered banks,129 federal savings banks,130 payment service providers,131 a bank holding corporation, a law firm that submitted comments on behalf of a state chartered bank,132 the Consumer Bankers Association,133 and Financial Services Roundtable.134 For this reason, the Note will focus on the ABA’s position taken on the issues discussed in the comment process.

The ABA’s position is that Dodd-Frank codified the Barnett Bank analysis.135 The ABA relied on the statutory language, the legislative history of section 1044, other provisions of Dodd-Frank, principles of statutory construction, and judicial interpretations of Dodd-Frank.136 The ABA noted the practical consequences banks would face if the federal preemption standard changed,137 suggesting that banks would need

128. ABA Comment Letter, supra note 85.
133. See Letter from Steven I. Zeisel, Vice President and Gen. Counsel, Consumer Bankers Ass'n, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency (June 27, 2011) [hereinafter Consumer Bankers Ass'n Comment Letter].
135. ABA Comment Letter, supra note 85, at 1. But see Consumer Mortgage Coal. Comment Letter, supra note 43, at 3 (arguing that Congress intended “prevent or significantly interfere” to be an alternative, thereby permitting a national bank to preempt a state law if it only partially interferes with the national bank).
136. ABA Comment Letter, supra note 85, at 2.
137. Id. at 4.
to determine whether state laws are applicable to them, which would entail substantial costs, revisions to processes, changes to long-standing business models, customer inconvenience, and changes to customer relationships. For example, the ABA stated that customer relationships would need to be changed to comply with requirements relating to account disclosures, non-interest fee restrictions, and use of third-party agents and customer agreements. Conversely, regulators of state chartered banks and advocacy groups opposed the proposed rule and argued that the preemption standard is limited by Dodd-Frank to "prevent or significantly impair." The position taken by the State of New York Banking Department (NY Banking Department) is representative: the plain meaning of the statutory language is limited to "prevent or significantly interfere," and the fact that the section calls for the standard to be "in accordance with the legal standard for preemption" in Barnett Bank is not relevant. The NY Banking Department further maintained if Congress wanted to take the standard and use it only as a starting point, it would have said this; the NY Banking Department asserts support in the legislative history.

The ABA argued that the 2004 regulations were a codification of the Barnett Bank analysis and are therefore still valid under Dodd-Frank. Specifically, the ABA supported its position by suggesting

138. Id.
139. Id.
140. N.Y. Banking Dep’t Comment Letter, supra note 53, at 3-4; see also Letter from Joseph A. Smith Jr., Comm’r of Banks, State of North Carolina, Office of the Comm’r of Banks, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 2 (June 27, 2011) [hereinafter N.C. Office of Comm’r of Banks Comment Letter] ("The standard for preemption is not conflict preemption as the OCC has continuously interpreted and construed it and as the proposed rulemaking again proposes.").
141. See, e.g., Letter from Neil Milner, President and CEO, Conference of State Bank Supervisors, to John Walsh, Acting Comptroller of Currency, Office of the Comptroller of the Currency 2 (June 27, 2011) ("The plain language and legislative intent of the law clearly establish that the OCC may preempt a State consumer protection law only where the State law ‘prevents or significantly interferes with the exercise by [a] national bank of its powers.’") (alteration in the original); Consumers Union Comment Letter, supra note 53, at 2 (finding “[s]ubparagraph (B) does more than simply make reference to the Barnett Bank decision as a whole; rather, it states in plain language that a State law is preempted if it ‘prevents or significantly interferes with’ a national bank’s exercise of its powers.").
142. N.Y. Banking Dep’t Comment Letter, supra note 53, at 3.
143. Id. at 4-5.
144. ABA Comment Letter, supra note 85, at 4.
that the preamble for the 2004 regulations set forth the “obstruct, impair or condition” standard as a codification of applicable case law and was not a new standard. The ABA also maintained there is support in the Comptroller’s 2004 testimony before the Senate Banking Committee stating the regulations “did nothing more than ‘distill the various phrases’” used by the Supreme Court to make preemption determinations. Also, the ABA urged the OCC not to delete section 7.4009, rather the ABA recommended substituting a reference to the Barnett Bank standard to replace “obstruct, impair or condition.” The Clearing House argued that many aspects of bank operations that are incidental to the “business of banking” are not addressed by other rules or precedent, thus it is necessary to maintain section 7.4009 for clarity and consistency purposes. Consumer Bank Association is concerned that leaving in sections 7.4007 and 7.4008, but removing section 7.4009 will be used to argue that laws effecting national bank operations should be treated differently than laws on lending or deposit taking powers. Presumably, Consumer Bank Association is concerned that laws regulating bank operations will be more difficult for national banks to preempt.

Commentators who are opposed to the OCC’s interpretation of “obstruct, impair or condition” have suggested the OCC either revise the rules or repeal the regulations in their entirety. The North Carolina Commissioner of Banks argued that “prevent or significantly interfere” is not the same standard as “obstruct, impair or condition,” therefore the OCC must review and revise the standard and review all decisions that rest on this standard. The NY Banking Department suggested section

147. Id. at 6.
149. Consumer Bankers Ass’n Comment Letter, supra note 133, at 5.
150. See N.C. Office of Comm’r of Banks Comment Letter, supra note 140, at 3; Letter from Lisa Madigan et al, state attorney generals, Nat’l Ass’n of Attorneys Gen., to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 3-4 (June 27, 2011) [hereinafter Nat’l Ass’n of Attorneys Gen. Comment Letter] (“[T]he OCC must review its existing preemption precedents . . . [b]y stating that precedents based on the “obstruct, interfere or condition” language remain valid, the OCC is subverting the intention of Congress by essentially continuing to use the standard that was rejected by Dodd-Frank
1043 of Dodd-Frank supports the conclusion that the codification of "prevent or significantly interfere" rejected "obstruct, impair or condition" by implication. Under section 1043, a contract entered into before Dodd-Frank is not affected by any changes in the preemption standard. The NY Banking Department reasoned; if prior precedent remained valid after the new standard, it would not have been necessary to include this section. Consumers Union suggested the OCC’s analysis ignored the fact that Dodd-Frank limited Barnett Bank to “prevent or significantly interfere” and because the OCC’s proposed change to the 2004 regulations requires state laws be in accordance with Barnett Bank as a whole, the proposed rules cannot be valid under Dodd-Frank. This argument is dependent upon the determination that a Barnett Bank analysis is limited to “prevent or significantly interfere.” Advocacy groups, including the National Association of Consumer Advocates, suggested that Congress intended to undo the broader standards for preemption adopted by the OCC in 2004, and therefore, the OCC is required to repeal the 2004 regulations and issue new regulations consistent with Dodd-Frank. Advocacy groups assert support in the Senate Report accompanying the proposed amendment, where section 1044

151. N.Y. Banking Dep’t Comment Letter, supra note 53, at 5-6; see also Letter from David Certner, Legislative Counsel and Legislative Policy Dir. of Gov’t Affair, AARP, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 8 (June 27, 2011) (suggesting a list of proposed changes and arguing unless the OCC clearly incorporates Congress’ intent, consumers will continue to face the issue of having to overcome preemption defenses raised by national banks in lawsuits, and as a result, consumers may face difficulties in finding an attorney to represent them in these types of cases).


153. N.Y. Banking Dep’t Comment Letter, supra note 53, at 6.


155. See generally Letter from Ellen Taverna, Legislative Assoc., Nat’l Ass’n of Consumer Advocates, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 2 (June 27, 2011) [hereinafter NACA Comment Letter] (arguing that the OCC is required under Dodd-Frank to rescind the 2004 regulations); the Nat’l Ass’n of Attorneys Gen. Comment Letter, supra note 150, at 3.
is described as "undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004."\textsuperscript{156}

The ABA argued that case-by-case determinations fall under a new section of the NBA, which is only applicable after the effective date; thus, rules adopted before the effective date are not affected.\textsuperscript{157} The ABA further emphasized, if case-by-case determination were applied retroactively, as a practical matter, national banks would be exposed to extensive and costly litigation.\textsuperscript{158} On the other hand, advocacy groups argued the requirement for case-by-case determinations was intended to give state banking laws a more thorough review by forcing national banks to pursue challenges to individual state statutes rather than preempting classes of laws.\textsuperscript{159} Further, Consumers Union argued that section 1043, addressing contracts entered into before the effective date and section 1044, addressing state usury laws, are the only two situations where case-by-case determination does not apply.\textsuperscript{160} Treasury contended the proposed rule was not clear as to how the OCC intended to apply case-by-case determinations, but if the OCC sought to preempt categories of laws going forward without a case-by-case analysis they would not be in conformity with Dodd-Frank.\textsuperscript{161}

B. The 2004 Regulations as Amended

After Dodd-Frank, the OCC removed the "obstruct, impair or condition" language from the 2004 regulations.\textsuperscript{162} Section 34.4, as originally enacted made three preemption determinations as follows: (1) explicitly preempted state laws, (2) state laws of general applicability that did not “incidentally affect” a national bank, and (3) a catchall that per-

\textsuperscript{156} E.g., NACA Comment Letter, \textit{supra} note 155, at 2 (citing S. Rep. No. 111-176, at
175 (Apr. 30, 2010)). \textit{See} Letter from Jonathan Mintz, Comm’r, N.Y.C. Dep’t of Consumer
Affairs, to Office of the Comptroller of the Currency 1 (June 27, 2011).

\textsuperscript{157} ABA Comment Letter, \textit{supra} note 85, at 6-7.

\textsuperscript{158} \textit{Id.} at 7.

\textsuperscript{159} \textit{See}, e.g., NACA Comment Letter, \textit{supra} note 155, at 2.

\textsuperscript{160} Consumers Union Comment Letter, \textit{supra} note 53, at 3-4 (citing 12 U.S.C. §§ 25b, 5553 (Supp. IV 2010)).

\textsuperscript{161} \textit{See} Treasury Comment Letter, \textit{supra} note 78, at 3.

\textsuperscript{162} Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) (to be codified in scattered parts of 12 C.F.R. pts. 4, 5, 7, 8, 28, and 34).
mitted the OCC to add to the list of state laws applicable to national banks if the OCC determined the law had an "incidental" effect on a national bank's powers and purposes.  

Under section 34.4, "state laws that 'obstruct, impair, or condition' a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans . . . without regard to state law limitations concerning" an enumerated list of laws. After removal of the "obstruct, impair, or condition" language, the regulations simply state: "[a] national bank may make real estate loans . . . without regard to state law limitations concerning" the enumerated list of laws. The Barnett Bank standard was not substituted in its place. The OCC did not make any changes to the enumerated list of laws. As originally enacted, subsection (b) stated that certain state laws of general applicability were not preempted "to the extent that they only incidentally affect the exercise of national banks' real estate lending powers." In conformity with Dodd-Frank, the OCC replaced this weaker standard; state laws, "to the extent consistent with the decision . . . in Barnett Bank are not preempted."

Lastly, in section (b)(9) the OCC was permitted to make a determination whether any other state law has only an "incidental" effect and is therefore applicable to the national bank. The Barnett Bank standard was substituted for the "incidental" standard.

Section 7.4007 as originally enacted set forth a similar division of preemption determinations. Under subsection (b)(1), state laws "that obstruct, impair, or condition a national bank's . . . deposit taking powers" will be preempted and "without regard to state law limitations"

164. Id.
165. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,569 (to be codified at 12 C.F.R. § 34.4). The Center for Responsible Lending suggested that removal of "obstruct, impair or condition" is only in form, not in substance. See Ctr. for Responsible Lending Comment Letter, supra note 10, at 11, 13.
166. 12 C.F.R. § 34.4(b) (2011).
167. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,569 (to be codified at 12 C.F.R. § 34.4(b)).
168. 12 C.F.R. § 34.4(b)(9).
169. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,569 (to be codified at 12 C.F.R. § 34.4(b)(9)).
seven classes of laws are preempted. Post-Dodd-Frank, the “obstruct, condition, or impair” language has been repealed, but the offending language was not replaced with Barnett Bank. The regulation maintains that a national bank may preempt a state law regardless of any limitation on the same seven classes of laws set forth in the 2004 regulations. Subsection (c), as originally enacted, established that state laws of general applicability that “only incidentally affect the exercise of a national bank’s deposit-taking powers” are not preempted. In the amended regulation, state laws are “not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent consistent” with Barnett Bank if they fall into seven classes of laws. Pre-Dodd-Frank, one class of laws was a catchall provision that permitted the OCC to determine whether any other state laws, if applied to national banks would have an “incidental effect.” This standard was amended to be consistent with Barnett Bank. In the 2004 regulations, section 7.4008 set forth the same framework for lending activities. The post-Dodd-Frank amendments to section 7.4008 are consistent with the amendments to section 7.4007.

The “obstruct, impair or condition” language has been repealed from each of the 2004 regulations. Since the OCC has not replaced this language with the Barnett Bank standard, there is no longer a broad preemption standard set forth in the regulations. Under the current regulations, state laws are preempted regardless of their limitation if they fall into one of the enumerated classes of laws, state laws are not preempted if they fall into a category of general applicability and are in accordance with Barnett Bank or the OCC determines that the state law

170. 12 C.F.R. § 7.4007(b).
171. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,565 (to be codified at 12 C.F.R. § 7.4007(b)).
172. 12 C.F.R. § 7.4007(c).
173. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,565 (to be codified at 12 C.F.R. § 7.4007(c)).
174. 12 C.F.R. § 7.4007(c)(8).
175. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,565 (to be codified at 12 C.F.R. § 7.4007(c)(8)).
176. 12 C.F.R. § 7.4008.
178. Id. at 43,565-66, 43,569 (to be codified at 12 C.F.R. §§ 34.4, 7.4008, 7.4008).
is applicable to national banks because the law is in accordance with *Barnett Bank*.\(^{179}\) If a state law does not fall into one of these categories, the preemption determination will need to be made under section 25b of the NBA. Also, cases contesting national bank operations that would have been preempted under repealed section 7.4009 will now have to be argued under section 25b. Based on the fact that section 1044 is set forth in section 25b verbatim, a preemption determination of a state law will be made in accordance with *Barnett Bank*.\(^{180}\)

Although the inclusion of *Barnett Bank* in the regulations as amended does not include a reference to the "prevent or significantly interfere" language as referenced in Dodd-Frank, this is consistent with the OCC's interpretation of section 1044. Since Dodd-Frank incorporated the whole analysis of *Barnett Bank*, it would not be necessary to include this language in the regulations. However, because preemption of state consumer financial laws is a contentious issue, the OCC is likely to face litigation for not acting in accordance with law.\(^{181}\) Although, the OCC's interpretation is likely to withstand a challenge; in the interim, there is likely to be uncertainty about the preemption standard.

If a cause of action is initiated alleging the OCC's interpretation of Dodd-Frank is not in accordance with law, the court will review the OCC's interpretation under the analysis for deference set forth in *Chevron v. Natural Resources Defense Council*.\(^{182}\) First, the court will inquire whether Congress directly addressed the precise legal issue.\(^{183}\)

\(^{179}\) Id.


\(^{181}\) Section 1044(c) of Dodd-Frank requires regulations and orders by the OCC to be supported by "substantial evidence, made on record of the proceeding, support[ing] the specific finding regarding the preemption of such provision in accordance with the legal standard" set forth in *Barnett Bank*. 12 U.S.C. § 25b(c) (Supp. IV 2010). This provision does not apply to provisions that were effective before July 21, 2011. See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,557. In its comment letter to the OCC, Consumers Union stated that the new standard set forth for case-by-case determinations is akin to the analysis for deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rather than the standard set forth in *Chevron v. Natural Resources Defense Fund*, 467 U.S. 837 (1984), which is more deferential to the agency. Consumers Union Comment Letter, supra note 53, at 4-5.


\(^{183}\) Id. at 842.
The precise issue in this case is whether the standard Congress set forth in Dodd-Frank limited the OCC from adopting a preemption standard that codified the whole analysis set forth by the Barnett Bank Court. In analyzing whether Congress directly addressed the issue, the court will look at Congress’s expressed intent, which includes the legislative history; if what Congress intended is clear, then the court and the OCC are required to defer to Congress. As previously discussed, the statutory construction and the legislative history clearly demonstrate that Congress intended to adopt the analysis in Barnett Bank as a whole. Since Congress clearly spoke on the issue and the OCC’s regulations adopted a standard for preemption in accordance with Dodd-Frank, the regulations will withstand a challenge under Chevron. It is not necessary to analyze the OCC’s amended regulations further under the second step in Chevron; however, an analysis under the second step would only strengthen the ability of the OCC to withstand a challenge. Under the second step, the court will look to the OCC’s amended regulation and determine whether the regulation as enacted constituted a permissible interpretation of section 1044. Since the OCC’s interpretation of section 1044 would be a reasonable interpretation, the court will not disturb the OCC’s decision.

C. How Have Courts Handled this New Legislation?

The United States Court of Appeals for the Eleventh Circuit recently had an opportunity to hear a case under the post-Dodd-Frank NBA provision in Baptista v. JP Morgan Chase Bank, N.A. At issue was a Florida statute, which prohibited a bank from cashing a check for other than par value. Under the NBA, the bank alleged a fee to cash a check was an incidental power necessary to the business of banking. To determine the proper preemption type, the court reviewed Dodd-

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184. Id.
185. See discussion supra Parts III.A-B.
186. Chevron, 467 U.S. at 842.
187. Id. at 843.
188. See id. at 844-45.
189. 640 F.3d 1194 (11th Cir. 2011).
190. Id. at 1196-97.
191. Id. at 1197.
Frank’s preemption provision and the *Barnett Bank* Court’s analysis and determined that the threshold question is “whether the state statute ‘forbid[s], or . . . impair[s]’ significantly, the exercise of a power that Congress explicitly granted.”\(^{192}\) The *Baptista* court concluded, “it is clear that under Dodd-Frank, the proper preemption test asks whether there is a significant conflict between the state and federal statutes – that is, the test for conflict preemption.”\(^{193}\) The Florida statute was in “irreconcilable conflict” with the NBA.\(^{194}\) The OCC noted this decision in its final rule to support their conclusion that “prevent or significantly interferes” is only a touchstone.\(^{195}\)

In *U.S. Bank N.A. v. Schipper*,\(^{196}\) a district court in Iowa granted the U.S. Bank’s summary judgment motion in part, on the basis of preemption.\(^{197}\) U.S. Bank, a nationally chartered bank, sought to provide services to state chartered banks, however, an Iowa state law prohibited U.S. Bank from providing these services without the proper approval from a state administrator.\(^{198}\) U.S. Bank filed an action seeking a declaration that the NBA preempted the Iowa state law.\(^{199}\) Although the state suggested that Dodd-Frank heightened the standard for NBA preemption, the court maintained that Dodd-Frank did not significantly alter the standard for preemption.\(^{200}\) The court analogized the preemption provision in Dodd-Frank to *Watters v. Wachovia Bank, N.A.*, which analyzed under *Barnett Bank* whether the state law would “prevent of significantly interfere” with the national bank’s activities.\(^{201}\)

\(^{192}\) Id.

\(^{193}\) Id.

\(^{194}\) Id.

\(^{195}\) *See* Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,555 n.35 (July 21, 2011) (to be codified in scattered parts of 12 C.F.R. pts. 4, 5, 7, 8, 28, and 34).

\(^{196}\) No. 4:10-cv-00064, 2011 U.S. Dist. LEXIS 105390 (S.D. Iowa Aug. 29, 2011).

\(^{197}\) Id. at *26-27, *30.

\(^{198}\) Id. at *2-6.

\(^{199}\) Id. at *7.

\(^{200}\) Id. at *11-12 n.1.

\(^{201}\) 550 U.S. 1 (2007).

\(^{202}\) *See* Schipper, 2011 U.S. Dist. LEXIS 105390, at *11-12 n.1 (referencing *Watters*, 550 U.S. at 12) (“States are permitted to regulate the activities of national banks where doing so does not prevent of significantly interfere with the national bank’s or national bank regulator’s exercise of its powers.”).
A district court in West Virginia was the first court to apply section 7.4008 as amended, in *Cline v. Bank of America, N.A.* The plaintiff alleged that Bank of America violated the state’s consumer credit and protection act. Bank of America claimed the NBA preempted the state law. The court concluded that the amendments to the 2004 regulations did not change the substance of the regulations; they are clarifications of the law and therefore do not present an issue of retroactivity. Post-Dodd-Frank, preemption determinations are no longer made under the “obstruct, impair or condition” standard or whether there is more than an “incidental[] affect” on the national bank, but rather, preemption determinations will be made based on the principles of *Barnett Bank.* "[T]he inquiry under *Barnett Bank* distills to whether the state measure either (1) imposes an obligation on a national bank that is in direct conflict with federal law, or (2) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

These decisions are being viewed as a determination that national banks have won the preemption battle because post-Dodd-Frank there have not been significant changes in how the courts analyze preemption issues. Industry participants have suggested that these decisions support the notion that Dodd-Frank did not change the preemption standard and other courts will be influenced in their decisions by these cases. It has also been suggested that these recent decisions provide a better understanding of how the *Barnett Bank* standard

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204. *Id.* at *2.
205. *Id.* at *3-4.
206. *Id.* at *22.
207. *Id.* at *18-19.
208. *Id.* at *25. The court concluded that the state statute does not concern “state consumer financial laws,” and therefore the 2004 regulation cannot be used to preempt the state law.
210. See *id.*
will be applied by the courts. However, it is too soon to determine if anybody has won the preemption battle.

D. What is the Status of Case Law Based on “Obstructs, Impairs or Conditions”?

1. Section 7.4009: Applicability of State Law to National Bank Operations

While courts have made determinations under section 7.4009, they are far and few between. A thorough analysis of the case law referencing section 7.4009(b) leads to the conclusion that these cases will not be affected by Dodd-Frank. Less than twenty cases reference section 7.4009. Of these cases, not a single case made a decision to preempt state law solely on the basis that the law would “obstruct, impair or condition” federal law. In cases where the court found preemption, the decision was not based exclusively on this language. The majority of cases denied preemption based on one of the following reasons: both federal and state law could be applied without frustration of the NBA, the state law was of general applicability, or the state law had only an incidental effect. Since the cases decided under section

211. Id. National banks, in anticipation of challenges from the states may need to go directly to the OCC to get an opinion first whereby the decision will be given deference, subject to the new scrutiny standards, or the national bank could go directly to a court, where the court can rely on case precedent. See id.

212. Id.


214. See, e.g., SPGGC, LLC v. Blumenthal, 408 F. Supp. 2d 87, 94 (D. Conn 2006) (“[C]ompliance with [state law] as applied in this case is not an obstacle to the purposes and objectives of Congress in enacting the NBA.”).

215. See, e.g., Mwantembe v. TD Bank, N.A., 669 F. Supp. 2d 545, 553-54 (E.D. Pa. 2007) (finding the state law prohibits deceptive and misleading conduct by all businesses; this is a state law of general applicability and does not impair a bank’s ability to exercise its gift-card issuing powers, assuming arguendo that the law did impair, the effect is only incidental).

216. See Jefferson v. Chase Bank Home Fin., C 06-6510 TEH, 2008 U.S. Dist. LEXIS 101031, at *28-29 (N.D. Cal. Apr. 29, 2008) (denying Chase’s claim that the state law was preempted because it only “incidentally affect[ed]” the bank’s ability to exercise its powers); Hood v. Santa Barbara Bank & Trust, 143 Cal. App. 4th 526, 546 (Cal. App. 2d Dist. 2006) (denying the preemption claim because the state law did not “impose any substantial
7.4009 did not rely exclusively on "obstruct, impair or condition," the cases are still good authority post-Dodd-Frank.

2. Regulations with Illustrative Classes of Laws that are Expressly Preempted

Unlike section 7.4009, case law has been established under section 34.4 where state laws have been preempted based solely on the state law falling into one of the fourteen enumerated classes of laws.\textsuperscript{217} It is not necessary to go through all cases where section 34.4 has been applied to preempt a state law, however, it is helpful to look at the analysis undertaken by some courts. In a West Virginia decision an issue arose with processing and servicing of mortgages, an enumerated class of laws under section 34.4.\textsuperscript{218} The court first looked at whether the type of law at issue was listed in the regulation; once that is determined, the analysis ends.\textsuperscript{219} The state law is summarily preempted without a discussion of the effect the state law would have.\textsuperscript{220} This same summary preemption has been applied under section 7.4007\textsuperscript{221} and section 7.4008.\textsuperscript{222}
The OCC maintains that regulations in effect before Dodd-Frank’s effective date are not subject to the new procedural requirements, but continued validity is subject to the preemption standard set forth in Dodd-Frank. On this basis the OCC is required to analyze each class of laws set forth in the 2004 regulations. The OCC asserted in its final rule that it “re-reviewed” whether the preempted classes of laws enumerated in the 2004 regulations are consistent with the Barnett Bank standard and determined, based on the OCC’s experience with the various laws and the potential impact on a national bank, that the laws are consistent with Dodd-Frank. One example is set forth in the final rule; the OCC analyzed the lending area and the types of laws that could be imposed that would “meaningfully interfere” with a national bank’s powers. No analysis is provided to determine why, for example, a state law would affect risk mitigation, only that a state law would interfere. Although the classes of law were set forth under the 2004 rules, it is not necessarily determinative that these regulations would fail under Barnett Bank. The OCC needs to disclose a thoroughly analyzed review of each class of laws that sets forth whether they are complicit with the Barnett Bank conflict preemption standard.

Another issue arises where the courts relied on language in a regulation which exempted certain areas of state law from preemption, on the condition they “only incidentally affect[ed]” the national bank’s exercise of its powers. After Dodd-Frank and the OCC’s final rule, these regulations were amended to include the conflict preemption standard of Barnett Bank. In a 2008 case in Washington, the court

224. Id. at 43,556.
225. Id.
226. See Ctr. for Responsible Lending Comment Letter, supra note 10, at 13 (arguing that post-Dodd-Frank the OCC does not have the authority to make any categorical determinations that state laws are preempted without justifying how the determination is consistent with the principles of Barnett Bank).
228. 12 C.F.R. § 34.4(b) (2011).
229. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,565-66, 43,569 (to be codified at 12 C.F.R. §§ 7.4009(c); 7.4008(c); 34.4(b)).
found the state common law and statute imposed "more than an incidental effect" on the national bank to exercise its lending operation powers.\textsuperscript{230} Since the regulation only permitted state laws that were consistent with federal law and had only an incidental effect on national banks, anything inconsistent or having more than an incidental effect would be preempted.\textsuperscript{231} This court only analyzed whether the state laws were being used as a means to impose a limitation on the national banks.\textsuperscript{232} From the brevity of this analysis it is impossible to conclude whether this decision would have come out differently under a \textit{Barnett Bank} analysis. This leads to the question of whether this case is still good law and what should be done with similar cases?

\textbf{V. CONCLUSION}

Studies have suggested that preemption contributed to the "deterioration in lending standards and a rollback in consumer protection during the subprime crisis."	extsuperscript{233} Congress addressed these concerns with the adoption of section 1044 of Dodd-Frank. Dodd-Frank has shed light on the OCC's abusive preemption standards and has scaled back the scope of the OCC's authority to preempt state laws. Throughout the legislative process and subsequent colloquies with the senators who negotiated section 1044, it is unambiguous that Congress intended to adopt a preemption standard in accordance with the whole analysis set forth in the \textit{Barnett Bank} decision. Although the statute makes specific reference to "prevent or significantly interfere," it is apparent that Congress intended this reference to be an indication to the OCC that it had gone too far in what it perceived was the scope of preemption. Subsequent case law confirms that Dodd-Frank codified the \textit{Barnett Bank} case in whole.

In order for the OCC to comply with \textit{Barnett Bank}, the repeal of "obstruct, impair or condition" was required. With the deletion of sec-

\begin{thebibliography}{9}
\bibitem{231} \textit{See id.}
\bibitem{232} \textit{See id.} at *4.
\end{thebibliography}
tion 7.4009, the OCC has made a significant effort to comply with Dodd-Frank; however, it is not clear whether the enumerated classes of laws set forth in sections 34.4, 7.4007 and 7.4008 are complicit with *Barnett Bank*. While the OCC has stated in the final rule that the 2004 regulations have been "re-reviewed;" disclosure of one "re-reviewed" class of laws with a conclusory analysis is not sufficient to determine whether these laws are in compliance with Dodd-Frank. It is necessary for the OCC to make a fully analyzed disclosure if it is to avoid a challenge to the amended regulations.234 Until that time comes, consumers, courts and banks are left to question the state of the law for preemption of consumer financial laws.

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234. Comm. on Homeland Sec. and Gov't Affairs Comment Letter, supra note 52, at 1.