

## Comments

### **THE APPLICATION OF DODD-FRANK'S DUAL PREEMPTION STANDARD TO STATE UDAP LAWS**

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In July 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”),<sup>1</sup> a landmark law designed to address the regulatory weaknesses that facilitated the financial crisis. Dodd-Frank made several significant regulatory changes, including an amendment to the National Bank Act (“NBA”).

This comment discusses the dual-preemption analysis created by Dodd-Frank’s amendment to the NBA. Under the new dual-preemption analysis, state laws that qualify as “state consumer financial laws” are subject to a different preemption procedure than state laws that do not qualify as state consumer financial laws. The comment focuses on several issues that arise when determining whether the amended NBA preempts state unfair or deceptive acts or practices (“UDAP”) laws. The main conclusion reached through this analysis is that applying the new preemption regime adds little clarity to the preemption debate, especially with regard to state UDAP laws. In fact, it is the position of the Office of the Comptroller of the Currency (“OCC”) that, since 1996, the OCC has adhered to the same standard as articulated in Dodd-Frank and, therefore, only minor changes must be made to the OCC’s preemption regulations to bring them into compliance with Dodd-Frank.<sup>2</sup> If the OCC succeeds in defending its position, the type and breadth of laws that can be preempted will be unlikely to change. If so, the only alteration Dodd-Frank will make

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

2. See, e.g., Letter from John Walsh, Acting Comptroller of the Currency, to Sen. Thomas R. Carper, SEC Interpretive Letter, 2011 WL 2110224 (May 12, 2011) (stating the OCC’s intent to propose amendment of 12 C.F.R. § 7.4000 and regulations applicable to federal savings associations and their subsidiaries, and rescission of 12 C.F.R. § 7.4006).

to the preemption debate will be the addition of more stringent procedures to preempt state consumer financial laws.

Part I of this comment briefly reviews NBA preemption and the OCC's pre-Dodd-Frank rules for preemption. This section focuses on how *Barnett Bank* and the OCC's 2004 preemption rule became the basis for assessing national bank preemption. Part II discusses Dodd-Frank's amendments to the NBA. Part III addresses unresolved issues with the legislation, such as the definition of "state consumer financial law." Part IV analyzes national bank preemption of state UDAP laws. Part V concludes by looking at the practical effect of Dodd-Frank on national bank preemption.

## I. A BRIEF HISTORY OF NATIONAL BANK ACT PREEMPTION

For nearly 200 years, the United States has adhered to a dual banking system composed of federally-chartered national banks and state-chartered state banks.<sup>3</sup> The supremacy of federal law over state law with respect to national banking was clearly articulated in the landmark case of *McCulloch v. Maryland*, where the Supreme Court held that "the government of the Union, though limited in its powers, is supreme within its sphere of action."<sup>4</sup> Then, in 1864, Congress enacted the NBA, which granted national banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking . . ."<sup>5</sup> Since that time, federal courts have defended the primacy of federal law, "repeatedly ma[king] clear that federal control shields national banking from unduly burdensome and duplicative state regulation."<sup>6</sup> The Supreme Court in *Davis v. Elmira Savings Bank* clarified that, despite the primacy of federal banking laws, national banks are still subject to state laws of general application to the extent that such laws do not conflict with the letter or general purposes of the NBA.<sup>7</sup> In recent years, this has resulted in numerous states attempting to apply their own laws to national banks, with the intention of providing greater consumer protection for their citizens.<sup>8</sup>

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3. Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 677 (1988).

4. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

5. National Bank Act of 1864, 12 U.S.C. § 24 (2008).

6. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

7. *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896) (stressing that the court's holding does not neutralize state laws that regulate national banks' contracts, as long as those statutes do not collide with federal legislation).

8. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-387, OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION LAWS TO NATIONAL BANKS 12 (2006) (examining the impact of consumer protection and dual dual banking system rules) [hereinafter GAO-06-387].

“It is upon the foundation of the dual banking system and the struggle between states and the Federal government to regulate national banks that U.S. preemption rules have developed.” This section discusses the OCC’s pre-Dodd-Frank rules regarding preemption of state laws. Part A addresses the OCC’s general preemption authority, focusing on *Barnett Bank* and the OCC’s 2004 preemption rule. Part B discusses the OCC preemption with regard to state UDAP laws.

A. *The OCC’s Application of National Bank Act Preemption*

Over the years, the OCC has asserted its preemption authority with increased vigor. As the regulatory agency charged with administering the NBA, the OCC’s official interpretations of the Act receive *Chevron* deference.<sup>9</sup> Two significant recent events that have shaped OCC preemption are the ruling in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and the OCC’s 2004 preemption rule.

*Barnett Bank* established the standards for assessing preemption of state laws. An oft-cited standard from *Barnett Bank* requires that a state law cannot “prevent or significantly interfere with the national bank’s exercise of its powers.”<sup>10</sup> The Court reasoned that “Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.”<sup>11</sup> The holding in *Barnett Bank* “reflect[ed] the Court’s view that the national banking laws do not create field preemption.”<sup>12</sup> Thus, the decision reserved for the States the power to adopt laws that do not “significantly interfere” with national bank powers.<sup>13</sup>

In 2004, the OCC used the *Barnett Bank* language as the foundation to create its 2004 preemption rule (“2004 Rule”).<sup>14</sup> The 2004 rule sought to enable national banks to “operate to the full extent of their powers under federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system . . . .”<sup>15</sup> Under

9. *Cuomo v. Clearing House Ass’n, L.L.C.*, 129 S. Ct. 2710, 2730 (2009) (noting that *Chevron*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), gives an agency the discretion to interpret an ambiguously-worded statute differently than a court would, “within the limits of reason”).

10. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

11. *Id.*

12. Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 HARV. J.L. & PUB. POL’Y 981, 1001 (2006).

13. Joseph R. Mason, Robert Kulick & Hal J. Singer, *The Economic Impact of Eliminating Preemption of State Consumer Protection Laws*, 12 U. PA. J. BUS. L. 781, 786 (2010).

14. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4000).

15. *Id.* at 1908.

the 2004 Rule, the OCC would preempt state laws that “obstruct, impair, or condition a national bank’s ability to fully exercise” its federally granted powers.<sup>16</sup> The OCC standard became a concern for consumer groups, state attorneys general, some members of Congress, and others opposed to national bank preemption because, whereas *Barnett Bank* called for the preemption of state laws that “impair significantly” a federal grant of power,<sup>17</sup> the OCC’s standard removed the word “significantly” and replaced it with *de facto* field preemption.<sup>18</sup> This appears to permit preemption of a state law that impairs federally granted powers to *any degree*.<sup>19</sup> Reflecting this concern, in 2004, the House Financial Services Committee passed a budget resolution stating that the OCC’s 2004 Rule “may represent an unprecedented expansion of Federal preemption authority.”<sup>20</sup>

In addition to codifying *Barnett Bank*, the OCC sought to codify other recent judicial decisions and OCC opinions regarding the preemption of specific categories of state law.<sup>21</sup> For example, state laws relating to lending disclosure, checking accounts, mortgage origination, and mortgage-related activities are preempted under the 2004 Rule.<sup>22</sup> However, despite its attempt to clarify the OCC’s position on preemption, the 2004 Rule left many uncertainties about the applicability of state laws to national banks.<sup>23</sup>

Nonetheless, recent cases have relied on the 2004 Rule when making preemption determinations. For example, in *Rose v. Chase Bank USA, N.A.*, the Ninth Circuit relied on the OCC’s 2004 Rule in finding that plaintiffs’ class action against Chase Bank was preempted by the NBA.<sup>24</sup> The complaint alleged that Chase violated California Civil Code section

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16. *Id.* at 1904, 1911–13.

17. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

18. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (describing assorted strains of federal preemption that invalidate states’ exercise of their regulatory authority).

19. Richard H. Neiman, *Managing Preemption and Oversight in a Modernized Dual Banking System*, 94 *Banking Rep. (BNA)* 3 (May 18, 2010); Fisher, *supra* note 12.

20. STAFF OF H.R. COMM. ON FIN. SERVS., 108TH CONG., VIEWS AND ESTIMATES OF THE COMMITTEE ON FINANCIAL SERVICES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005 15–16 (Comm. Print 2004).

21. Jeremy T. Rosenblum, *Dodd-Frank Reform Act: A Sea Change Regarding Federal Preemption of State Law*, 14 *CONSUMER FIN. SERV. L. REP.* 9 (2010); GAO-06-387, *supra* note 8.

22. *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 *Fed. Reg.* at 1904.

23. GAO-06-387, *supra* note 8, at 11.

24. *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008) (relying on the holdings of *Barnett Bank* and *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), to conclude that the NBA preempts Cal. Civ. Code § 1748.9, and affirming the district court’s dismissal of plaintiffs’ claims under Cal. Bus. & Prof. Code §§ 17200–17209).

1748.9 by not including the disclosures required under the Code when mailing convenience checks to its credit card holders.<sup>25</sup> In addition to alleging a violation of section 1748.9, plaintiffs also brought two causes of action for violation of California's UDAP law.<sup>26</sup> Relying in part on the 2004 Rule, the Ninth Circuit held that all three claims were preempted by the NBA.<sup>27</sup>

However, despite the fears and occasional court decisions, such preemption determinations did not widely proliferate after the OCC issued its 2004 Rule. This is in part because the OCC is subject to certain procedural requirements under the NBA when issuing preemption determinations, in addition to the ones that apply to all federal agencies under the Administrative Procedure Act.<sup>28</sup> Under 12 U.S.C. § 43, the OCC must provide a notice and comment period before issuing any opinion letter or interpretive rule that concludes that a federal law preempts the application of a state law to a national bank.<sup>29</sup>

#### B. UDAP PREEMPTION

Preemption of state UDAP laws has been a difficult issue, with the OCC supporting preemption at times and the courts denying preemption at other times.<sup>30</sup> In 2002, the OCC issued an advisory letter that seemed to support the applicability of state UDAP laws to national banks. The letter, entitled "Guidance on Unfair or Deceptive Acts or Practices," advised that "[t]he consequences of engaging in practices that may be unfair or deceptive under federal or state law can include litigation, enforcement actions, monetary judgments, and harm to the institution's reputation."<sup>31</sup> The letter went on to say that "[a] number of state laws prohibit unfair or deceptive acts or practices, and such laws may be applicable to insured depository institutions."<sup>32</sup> Two years later, the OCC sought to clarify the

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25. *Id.* at 1035.

26. CAL. BUS. & PROF. CODE § 17200 (2010).

27. *Rose*, 513 F.3d at 1038.

28. 5 U.S.C. §§ 500–504, 551–559, 561–570a, 571–584, 591–596 (2000).

29. 12 U.S.C. § 43(a) (1994).

30. *See, e.g.*, *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010) (holding that the NBA did not preempt claims against Wachovia Bank for allegedly manipulating the posting of transactions to impose overdraft fees); *Mann v. TD Bank, N.A.*, No. 09-1062, 2009 WL 3818128 (D.N.J. Nov. 12, 2009) (holding that the New Jersey Consumer Fraud Act applied to TD Bank); *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008) (holding that the Georgia Fair Business Practices Act for unfair or deceptive business practices by manipulating the posting of transactions to impose overdraft fees was not preempted).

31. OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC ADVISORY LETTER 2002-3, GUIDANCE ON UNFAIR OR DECEPTIVE ACTS OR PRACTICES (2002).

32. *Id.* at n.2.

applicability of state laws in its 2004 rule.<sup>33</sup> Despite the OCC's best efforts, preemption of state UDAP laws remained unclear. A 2006 investigation by the U.S. Government Accountability Office found:

differing views among state officials with respect to the applicability of state consumer protection laws, particularly their UDAP laws, to national banks. . . . In one state, a banking department official said that the state's UDAP statute would likely be preempted. In another state, an official said that the state's UDAP statute would not be preempted. Two other state banking department officials were unclear about the status of their states' UDAP laws.<sup>34</sup>

Ambiguity regarding the applicability of a state law can pose a significant problem for all parties. National banks must know which laws they are subject to so they can design appropriate compliance programs. Additionally, state legislators and attorneys general must know the limits of their authority so they do not expend precious government resources enacting laws or pursuing cases that will ultimately be preempted.

In the absence of sufficient agency guidance, scholars and courts have developed their own analytical framework for determining whether state UDAP laws should be preempted.<sup>35</sup> One interpretation of the rules uses a two-step approach to analyze whether a state law is susceptible to preemption by the National Bank Act.<sup>36</sup>

First, the court decides whether the state statute qualifies as a "lending regulation."<sup>37</sup> This inquiry looks to whether: (i) the type of law is listed among the types of preempted state laws under the OCC lending preemption rule; (ii) the state law pertains to a subject matter that the governing agency regulates, such as permissible terms, lending practices and disclosures; or (iii) the object of the state law is to regulate the relationship between the institution and the borrower.<sup>38</sup>

Second, the state law qualifies as a lending regulation, it is can be preempted unless it is listed among certain non-preempted state laws (e.g., contract, tort, criminal) and has only an incidental effect on the operations of national banks.<sup>39</sup> If the state law does not qualify as a lending regulation, then the court will look at whether the state law is of general application and non-discriminatory towards a national bank.<sup>40</sup> If the state

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33. GAO-06-387, *supra* note 8, at 11.

34. *Id.* at 16.

35. Jeffrey I. Langer, *UDAP Preemption for National Banks: The Skies are Cloudy*, 12 CONSUMER FIN. SERV. L. REP. 17 (2009).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

law meets these criteria, then it will not be preempted unless it has more than an incidental effect on the operations of national banks.<sup>41</sup>

Despite these attempts, no universally accepted method for determining preemption under the National Bank Act has emerged. Given the breadth of state UDAP laws and the case-by-case analysis that must be undertaken, it is clear why the Government Accountability Office recommended that the OCC try yet again to “clarify the characteristics of state consumer protection laws that would make them subject to federal preemption” and to find a way to “improve communication and coordination between OCC and state officials with respect to the impact of preemption rules . . . .”<sup>42</sup>

## II. DODD-FRANK PREEMPTION

### A. *The Text*

The following section takes an in-depth look at section 1044 of Dodd-Frank. A careful examination of the text and the drafters' intention provides a better understanding of the Act's dual preemption framework.

In the wake of the financial crisis, Congress sought to address the regulatory lapses that enabled the subprime and predatory lending practices that contributed to the financial crisis. Federal preemption of state laws as they apply to national banks was among the issues Congress thought needed clarification in order to ensure the financial stability of the U.S. economy. To clarify preemption, Congress enacted Section 1044 of Dodd-Frank to amend the NBA. Section 1044 sets forth a framework for analyzing NBA preemption as well as procedural requirements for the OCC to follow when issuing preemption determinations.

Although Dodd-Frank claims to return preemption to *Barnett Bank*,<sup>43</sup> it must be noted that the new, *Barnett Bank*-based preemption standard only applies to laws that qualify as “state consumer financial laws.” As U.S. Representative Melissa Bean explained:

I removed a sentence, previously suggested by the Committee that said national banks are to generally comply with State law . . . because I wanted to make clear that the changes in the Act do not alter the preemption standards and precedents that apply to

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41. *Id.*

42. GAO-06-387, *supra* note 8, at 44–45.

43. *See, e.g.*, 156 CONG. REC. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Johnson) (“it is clear that this legislation is codifying the preemption standard expressed by the U.S. Supreme Court in *Barnett Bank of Marion Cnty., N.A. v. Nelson Florida Insurance Commissioner*, 517 U.S. 25 (1996) case”).

those State laws which are not State consumer financial laws.<sup>44</sup>

Thus, the first step in any preemption analysis is determining whether the state law qualifies as a “state consumer financial law.” A state law will qualify as a state consumer financial law if it: (1) “does not directly or indirectly discriminate against national banks” and (2) “directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.”<sup>45</sup>

If the state law qualifies as a state consumer financial law, then it may be preempted if it: (1) has a discriminatory effect on national banks; (2) is preempted by a Federal law other than the National Bank Act; or (3) prevents or significantly interferes with the exercise of a national bank’s powers.<sup>46</sup>

Preemption determinations made by the OCC regarding state consumer financial laws must be made on a “case by case” basis and be supported by “substantial evidence.”<sup>47</sup> Preemption determinations may relate to the laws of another state with substantively equivalent terms. All preemption determinations must be made by the Comptroller of the Currency and require consultation with the new Consumer Financial Protection Bureau.<sup>48</sup> Additionally, the OCC must review its preemption determinations every five years.<sup>49</sup>

### B. *The OCC’s Final Regulations*

On July 20, 2011, the OCC issued its final rule implementing the Dodd-Frank Act.<sup>50</sup> With regard to the preemption standard, the OCC revised its regulations to institute the procedural requirements cited above. Also, in order to clarify that the OCC considers preemption under the *Barnett Bank* decision, the final rule eliminates the “obstruct, impair, or condition” language, leaving only a direct reference to “the decision of the Supreme Court in [*Barnett Bank*].”<sup>51</sup> It is important to note that the OCC did not remove the section of the 2004 rule which lists categories of state

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44. 155 CONG. REC. E3029-2 (daily ed. Dec 17, 2009) (statement of Rep. Bean).

45. Dodd-Frank Act § 1044, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. News Release, Department of the Treasury, Office of the Comptroller of the Currency, Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, Docket ID OCC-2011-0018 (July 20, 2011), <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-95a.pdf>.

51. *See, e.g.*, 12 C.F.R. §§ 7.4007(c), 7.4008(e), 34.3(b) (2011) (eliminating “obstruct, impair, or condition” language).



laws that do not apply to national bank's lending and deposit-taking activities.<sup>52</sup>

### III. ISSUES COURTS & THE OCC WILL FACE

Dodd-Frank was drafted relatively quickly and was intended to cover a broad array of areas. As frequently occurs with complex legislation, Dodd-Frank contains many ambiguous provisions. In the months following the passage of Dodd-Frank, the OCC, Congressmen, and other organizations and advocates sought to clarify key areas before the law took effect in July, 2011. Although the OCC has released its final rule, the debate will almost certainly spill over into the courtroom in the coming years. This section will identify several key areas and explore strategies for resolving the preemption ambiguities contained in the legislation.

#### A. Defining "State Consumer Financial Law"

The dual-preemption regime created by Dodd-Frank hinges entirely on whether a state law meets the criteria for a state consumer financial law. If a state law qualifies as a state consumer financial law, then the OCC must go through the analysis set forth in section 1044. However, if a state law does not qualify as a state consumer financial law, then the OCC can rely on its traditional analysis and prior determinations. Section 1044 broadly defines state consumer financial law as:

[A] State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto with respect to a consumer.<sup>53</sup>

The main challenge for this analysis is the lack of legislative or judicial history defining the term "state consumer financial law." Earlier versions of Dodd-Frank, Section 143 of the House Bill and Section 1043 of the Senate Bill, both used the more common term, "state consumer law." However, by the final version, "state consumer law" was removed and replaced with the new term "state consumer financial law."<sup>54</sup> As a result, interpreters must rely solely on the language provided in Dodd-Frank to create a workable definition of this term.

Two possible ways to unearth a working definition for the term state consumer financial law are to: (1) compare the term to Dodd-Frank's

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52. 12 C.F.R. §§ 7.4007(b), 7.4008(d) (2011).

53. Dodd-Frank Act § 1044.

54. H.R. 3126, 111th Cong. (2009).

definition of “federal consumer financial law”; and (2) break the term into its component parts.

### 1. State Consumer Financial Laws & Federal Consumer Financial Laws

One way to understand the term “state consumer financial law,” is to look at it in context of the phrase “federal consumer financial law,” which also appears in Title X of Dodd-Frank.<sup>55</sup> Under principles of statutory construction, it can be argued that a state law modeled after a federal law defined under Title X as a “federal consumer financial law” would logically qualify as a “state consumer financial law.”<sup>56</sup> Section 1002(14) defines “federal consumer financial law” as:

the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act.<sup>57</sup>

The definition of “enumerated consumer laws” contained in section 1002(12) lists a number of federal laws, including the Consumer Leasing Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act, the Real Estate Settlement Procedures Act, and the Federal Debt Collection Practices Act, which would all qualify as federal consumer financial laws.<sup>58</sup> One could argue that, since the federal laws listed in section 1002(12) are defined in section 1002(14) as “federal consumer financial laws,” state laws based on the laws in section 1002(12) should be defined as “state consumer financial laws.” After all, the term “federal” does not modify or alter the phrase “consumer financial law.”

### 2. State . . . Consumer . . . Financial . . . Law

In trying to understand the whole, it may be best to define the parts. Title X of Dodd-Frank defines “state” as “any State, territory, or possession of the United States . . . .”<sup>59</sup> Although the broad definition of a state is clear, Dodd-Frank leaves uncertain whether the smaller subdivisions of the

55. Dodd-Frank Act § 1002(14).

56. Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co., 522 U.S. 479, 501 (1998) (“similar language within the same statutory section must be accorded a consistent meaning”).

57. Dodd-Frank Act § 1002(14).

58. *Id.* § 1002(12).

59. *Id.* § 1002(27).

state are included for the purposes of defining the term “state consumer financial law.” Black’s Law Dictionary, in referring to appealing criminal cases, notes that the “term ‘state’ . . . is all inclusive and intended to include not only the state but its political subdivisions, counties, and cities.”<sup>60</sup> This definition would allow county and city laws to qualify as state consumer financial laws, requiring the OCC to undergo the more rigorous preemption procedures articulated in Title X. This issue arose during the comments process, where commentators “voiced concern that the imposition of an overlay of 50 state and an indeterminate number of local government rules . . . would have a costly consequence . . . .”<sup>61</sup> However, those concerned could argue that since numerous other sections in Dodd-Frank include the language “of any State or of any political subdivision of a State,” the omission of such language here is intentional.<sup>62</sup>

The Supreme Court addressed a similar issue in *City of Columbus v. Ours Garage and Wrecker*.<sup>63</sup> In the case, the Court discussed whether municipalities could exercise the authority to issue safety regulations for local towing truck operations when the law granted such authority to the “authority of a State,” and omitted the language “or a political subdivision of a State.”<sup>64</sup> The Supreme Court found that the law did not bar states from delegating to municipalities and other local units the state’s authority to establish safety regulations.<sup>65</sup> The court explained that “[a]bsent a clear statement to the contrary, Congress’s reference to the ‘regulatory authority of a State’ should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.”<sup>66</sup> It would therefore appear that municipality and county laws may be defined as “state laws.” If such laws were included in the definition, then the OCC could be forced to make case-by-case determinations of consumer financial laws not only from State legislatures, but from all subdivisions within every state, territory, or possession of the United States.

Title X of Dodd-Frank defines “consumer” as “an individual or an agent, trustee, or representative acting on behalf of an individual.”<sup>67</sup> This definition implies that laws pertaining solely to transactions between banks and other business entities cannot qualify as “state consumer financial laws.”

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60. BLACK’S LAW DICTIONARY 1262 (5th ed. 1979).

61. OFFICE OF THRIFT SUPERVISION INTEGRATION, *supra* note 50.

62. *See, e.g.*, Dodd-Frank Act §§ 619, 724, 731, 764 (using the language “of any State or of any political subdivision of a State.”)

63. *City of Columbus v. Ours Garage and Wrecker*, 536 U.S. 424 (2002).

64. *Id.* at 428.

65. *Id.*

66. *Id.* at 429.

67. Dodd-Frank Act § 1002(4).

The last two terms “financial” and “law” are best understood under the definition of “state consumer financial law.” Section 1044 explains that the words, taken together, are intended to cover laws that directly and specifically regulate financial transactions and any account related thereto.<sup>68</sup> The only definition of “financial transaction” contained in Dodd-Frank is found in Title VIII.<sup>69</sup> Title VIII defines financial transactions as:

(1) funds transfers; (2) securities contracts; (3) contracts of sale of a commodity for future delivery; (4) forward contracts; (5) repurchase agreements; (6) swaps; (7) security-based swaps; (8) swap agreements; (9) security-based swap agreements; (10) foreign exchange contracts; (11) financial derivatives contracts; and (12) any similar transaction that the Council determines to be a financial transaction for purposes of this title.<sup>70</sup>

The other phrase that requires careful analysis is the phrase “directly and specifically.”<sup>71</sup> Black’s Law defines “direct” as “[i]mmediate. . . . [w]ithout any intervening medium, agency, or influence” and defines “specifically” as “explicitly, particularly, [or] definitely.”<sup>72</sup> The use of both terms emphasizes Congress’s intent that only state laws that are explicitly intended to regulate financial transactions will qualify as state consumer financial laws. If Congress had intended a broader application, it would have used the phrase “directly or indirectly,” as Congress chose to use in describing discrimination against national banks.<sup>73</sup>

Putting these definitions together, it becomes clear that state consumer financial laws must relate to individual consumers, not business entities, and explicitly intend to regulate financial transactions or related accounts. The terms, however, will be subjected to much closer scrutiny as courts are forced to assess whether state laws qualify as state consumer financial laws.

#### B. *Dodd-Frank’s Interpretation of Barnett Bank*

The next issue that arises when analyzing preemption under Dodd-Frank is understanding exactly what the drafters intended when they included the language “prevent or significantly interfere” in section 1044. The Court in *Barnett Bank* used several phrases in explaining the types of State laws that would be preempted by the National Bank Act.<sup>74</sup> The Court

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68. *Id.* § 1044(a).

69. *Id.* § 801.

70. *Id.* § 803(7)(B).

71. *Id.* § 1044(a).

72. BLACK’S LAW DICTIONARY 459, 1398 (6th ed. 1990).

73. Dodd-Frank Act § 1044(a).

74. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

mentions preemption terms such as “irreconcilable conflict,”<sup>75</sup> “stand as an obstacle to,”<sup>76</sup> “forbid, or to impair significantly,”<sup>77</sup> and “prevent or significantly interfere.”<sup>78</sup> Although the court refers three times to the “stan[d] as an obstacle to the accomplishment” language from *Hines v. Davidowitz*,<sup>79</sup> scholars and legislatures seem to have taken the phrase “prevent or significantly interfere”<sup>80</sup> as the standard for preemption, even though the Court only refers to that phrase once in the entire opinion. In 1999, Congress used *Barnett Bank*'s “prevent or significantly interfere” language when drafting the Gramm-Leach-Bliley (GLB) Act of 1999.<sup>81</sup> As with Dodd-Frank, the GLB Act specifically refers to *Barnett Bank* as the primary case the Act sought to codify.

However, there is an obvious concern with taking a few words from a decision and using it as the definitive legal standard. In a news release, the American Bankers Insurance Association explained that *Barnett Bank*'s “prevent or significantly interfere” language must be read in conjunction with the entire decision, including the references to prior Supreme Court decisions that use the “impair,” “hamper,” and “encroach” language.<sup>82</sup> The fact that Dodd-Frank only quotes a specific standard from *Barnett Bank* rather than the entire opinion leaves open the an argument that by solely using the term “prevent or significantly interfere,” the drafters did not intend to codify *Barnett Bank* but rather sought to create a new standard that merely borrows language from *Barnett Bank*. This has been the position taken by the State of New York Banking Department<sup>83</sup> and the Department of the Treasury.<sup>84</sup>

This argument is given further credence by the language in section 1044, which states that state consumer financial laws are preempted “in accordance with the legal *standard* for preemption in the decision of [*Barnett Bank*]. . . .”<sup>85</sup> The reference to the “legal standard” set forth in

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75. *Id.* at 31.

76. *Id.*

77. *Id.* at 33.

78. *Id.*

79. *Hines v. Davidowitz*, 312 U.S. 52, 56 (1941).

80. *Barnett Bank*, 517 U.S. at 33.

81. Gramm-Leach-Bliley Act of 1999, § 104(d)(2)(A), 15 U.S.C. § 6701(d)(2)(A).

82. News Release, American Bankers Insurance Association, Gramm-Leach-Bliley Act Preemption of State Insurance Sales Laws Applicable to Banks (June 4, 2002) (on file with author).

83. Letter from Benjamin Lawsky, Superintendent of Financial Services and Acting Superintendent of Banks, to John Walsh, Acting Comptroller (June 27, 2011) (<http://graphics8.nytimes.com/packages/pdf/business/20110629bank/newyork.pdf>).

84. Letter from George Madison, General Council at the Department of the Treasury, to John Walsh, Acting Comptroller (June 27, 2011) ([http://cdn.americanbanker.com/media/pdfs/TreasuryOCC\\_062811.pdf](http://cdn.americanbanker.com/media/pdfs/TreasuryOCC_062811.pdf)).

85. Dodd-Frank Act § 1044(a), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (emphasis

*Barnett Bank*, versus the plural form “legal standards,” could show legislative intent to draw out only the “prevent or significantly interfere” language from the opinion. The argument becomes even stronger if the Dodd-Frank language was based on section 104(d)(2)(A) of the GLBA Act, which clearly states that the provision is to be interpreted “in accordance with the legal *standards* for preemption set forth in [*Barnett Bank*].”<sup>86</sup> The alteration seems to imply that the language in Dodd-Frank was drafted with specific intent to carve out the “prevent or significantly interfere” standard from the rest of *Barnett Bank*.

The question of whether Dodd-Frank was intended to codify *Barnett Bank* becomes clearer when looking to the debates and materials produced during and after the drafting of the Act. A Senate Report released in April 10, 2010 clarified that under section 1044, “the 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 v. Nelson*, 517 U.S. 25 (1996 *Barnett*), undoing broader standards adopted by rules, orders and interpretations issued by the OCC in 2004.”<sup>87</sup> Although this was an attempt to clarify Title X’s adherence to the entirety of the *Barnett Bank* decision, it suggests a grammatical error by first referring to a single *Barnett Bank* “standard” and later using the pronoun “those,” implying multiple standards.<sup>88</sup>

When discussing the Bill in the Senate floor debate on the House-Senate Conference Committee Report, Senator Dodd, the Chairman of the Senate Banking, Housing and Urban Affairs Committee, stated that “[t]here should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [*Barnett Bank*].”<sup>89</sup> Although this statement, again, has the ambiguity of stating “standard” versus “standards,” Senators Carper and Warner further clarified in a letter to Secretary of the Treasury Timothy Geithner that both the legislation and the colloquy on the Senate floor were intended to ensure the entirety of *Barnett Bank* would be used when making preemption determinations.<sup>90</sup>

Given the conflicting positions taken on the issue, it is appropriate to review case law for guidance. In *Association of Banks in Insurance, Inc. v. Duryee*, the Sixth Circuit applied the “prevent or significantly interfere”

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added).

86. Gramm-Leach-Bliley Act of 1999, § 104(d)(2)(A), 15 U.S.C. § 6701(d)(2)(A) (emphasis added).

87. S. REP. NO. 111-176, at 175 (2010).

88. *Id.*

89. 156 CONG. REC. S5870-02, (daily ed. July 15, 2010) (colloquy between Sen. Thomas Carper and Chairman Christopher Dodd).

90. Letter from Senators Thomas Carper and Mark Warner to Timothy Geithner, Secretary of the Treasury (July 8, 2011), [http://www.politico.com/static/PPM170\\_110707\\_treasurypreemption.html](http://www.politico.com/static/PPM170_110707_treasurypreemption.html).

language contained in the Gramm-Leach-Bliley Act.<sup>91</sup> Although the court recognized that *Barnett Bank* set forth “legal standards for preemption,”<sup>92</sup> the court focused on the two prong “prevent or significantly interfere” standard.<sup>93</sup> Nonetheless, in interpreting the language, the court considered *Barnett Bank*'s reference to the decisions in *McClellan v. Chipman*,<sup>94</sup> and *First National Bank v. Kentucky*,<sup>95</sup> which use the “impair the efficiency of,” “destroy,” and “hamper,” language. The court used this understanding to reject plaintiff's argument that “prevent or significantly interfere” means “effectively thwart.”<sup>96</sup> Eight years after *Duryee*, the Sixth Circuit used the same analysis in *Monroe Retail, Inc. v. RBS Citizens, N.A.*, holding that “the level of ‘interference’ that gives rise to preemption under the NBA is not very high.”<sup>97</sup>

The Eleventh Circuit has recently weighed in on the subject. In *Baptista v. JP Morgan Chase Bank, N.A.*, the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's state law claims as preempted by the NBA.<sup>98</sup> Plaintiff argued that defendant violated a Florida statute that specifically prohibited a bank from “settling any check drawn on it otherwise than at par” when defendant charged plaintiff a \$6.00 fee for cashing a check.<sup>99</sup> The court looked to the *Barnett Bank* decision as setting the standard of conflict preemption.<sup>100</sup> The court went on to state that “it is clear that under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes . . . .”<sup>101</sup> By adhering to the conflict preemption standard, the Eleventh Circuit refused to entertain the idea that Dodd-Frank did anything but codify *Barnett Bank*.

Although the plain text of section 1044 does leave ambiguity as to whether the section intended only to codify the “prevents or significantly interferes with” language from *Barnett Bank*, the legislative history and judicial background support the OCC's conclusion that section 1044 intended to codify the entirety of the *Barnett Bank* decision. Further, the case law supports the use of the phrase “prevent or significantly interfere” and asserts that the language does not pose a very high hurdle for preemption determinations.

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91. *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 409 (6th Cir. 2001).

92. *Id.* at 405 n.4 (emphasis added).

93. *Id.* at 409–10.

94. *McClellan v. Chipman Traders' Nat'l Bank*, 164 U.S. 347, 358 (1896).

95. *First Nat'l Bank v. Kentucky*, 76 U.S. 353, 362 (1869).

96. *Duryee*, 270 F.3d at 409.

97. *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009).

98. *Baptista v. JP Morgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011).

99. *Id.* at 1196.

100. *Id.* at 1197.

101. *Id.*

C. *Applicability of the OCC's Prior Determinations*

As discussed, the OCC has issued numerous preemption determinations over the years, as well as official interpretations, including the OCC's 2004 Rule. The April 30, 2010 Senate Report stated that the new preemption regime under Dodd-Frank was "undoing broader standards adopted by rules, orders and interpretations issued by the OCC in 2004."<sup>102</sup> This raises the issue of what exactly becomes of the legislative and agency history surrounding National Bank Act preemption.

Several areas of the law will not be altered by Title X and therefore, prior OCC interpretations and court decisions will still apply. Since the preemption standard created in Title X only applies to "state consumer financial laws," those laws that do not qualify as state consumer financial laws will be subject to the preemption standards currently in place. As mentioned in the prior section, since "consumer" is defined as an individual, decisions regarding transactions between banks and other business entities will not be affected.

According to the April 30, 2010 Senate Report, those laws that do qualify as state consumer financial laws will be subject to a stricter standard than has traditionally been applied. Despite the report's language, it is not readily apparent that a stricter standard has indeed been created. Recall that Title X preempts any state law that: (1) has a discriminatory effect on national banks; (2) is preempted by a federal law other than the National Bank Act; or (3) prevents or significantly interferes with the exercise of a national bank's powers.<sup>103</sup> The first prong will be analyzed in the next subsection. The second prong has always been a clear case of preemption. The third prong is, as discussed above, arguably a codification of *Barnett Bank*, and would appear to be the basis for the Senate Report's conclusion that a stricter standard has been created.

However, the third prong does not seem to alter the OCC's analysis in the slightest. In the Federal Register notice for its 2004 Rule on preemption authority, the OCC stated that it adopted the language "obstruct, impair, or condition . . . as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in *Hines* and *Barnett Bank*, and not as a replacement construct that is in any way inconsistent with those standards."<sup>104</sup> In a 2003 letter from John Hawke, the then Comptroller of the Currency, to Senator Sarbanes, Hawke states that "[t]he OCC scrupulously follows [*Barnett Bank*] and other applicable precedents when we evaluate a national bank preemption

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102. S. REP. NO. 111-176, at 175 (2010).

103. Dodd-Frank Act § 1044(a), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

104. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904-01, 1910 (Jan. 13, 2004).



issue.”<sup>105</sup> And then again in May of 2011, Acting Comptroller Walsh wrote that “the conflict preemption principles of the Supreme Court’s *Barnett [Bank]* decision are the governing standard for national bank preemption.”<sup>106</sup>

In its final rule the OCC admitted that “the obstruct, impair, or condition” language in the 2004 rule “created confusion and misunderstanding,” and agreed to remove the language.<sup>107</sup> Despite the change, the OCC reaffirmed its position that, “the specific types of laws cited in the [2004 rule] are consistent with the standard for conflict preemption in the Supreme Court’s *Barnett* decision,” adding that further requests to review the 2004 rule are inappropriate, because Dodd-Frank only applies to determinations made after the Act’s effective date of July 21, 2011.<sup>108</sup>

In the OCC’s opinion, it has scrupulously adhered to *Barnett Bank*. If this is truly the case, then all prior OCC determinations will survive judicial review under the “new” three-prong standard and remain in place even if a law qualifies as a state consumer financial law.<sup>109</sup> In fact, the addition of “discriminatory effect” as possible grounds for preemption would seem to provide the OCC a broader standard than it has traditionally been working under.

#### D. What is “Discriminatory Effect”?

The decision in Title X to demarcate “discriminatory effect” as grounds for preemption is significant. The language appears to be borrowed from the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which gave the Comptroller of the Currency the

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105. Letter from John Hawke, Jr., Comptroller of the Currency, to Sen. Paul Sarbanes (December 9, 2003), <http://www.occ.gov/static/enforcement-actions/SarbanesPreemptionletter.pdf>.

106. Letter from John Walsh, Acting Comptroller of the Currency, to Sen. Thomas R. Carper, (May 12, 2011) (internal quotations omitted), <http://www.occ.gov/static/interpretations-and-precedents/may11/int1132.pdf>.

107. OFFICE OF THRIFT SUPERVISION INTEGRATION, *supra* note 50, at 26. In a footnote, the OCC commented that the change should not affect prior preemption determinations since no prior OCC-issued preemption precedent rested solely on the “obstruct, impair, or condition” formulation. *Id.* at 43556 n.43. By including this explanation, the OCC seems to implicitly acknowledge that there exists a difference between *Barnett Bank* and the OCC’s formulation. If such a difference exists, then the OCC needs to look beyond preemption determinations that rely solely on the “obstruct, impair, or condition” formulation, and assess instances where the OCC’s formulation may have significantly influenced the preemption determination.

108. *Id.* at 43558.

109. If and when the OCC’s determinations with regard to state consumer financial laws are challenged and reviewed by a court, they will no longer be afforded *Chevron* deference.

authority to preempt state laws that have a discriminatory effect on national bank branches.<sup>110</sup> The use of this language in Title X now appears to broaden that authority beyond just national bank branches.

The language not only appears to expand the OCC's preemption authority, but the addition may also create a redundancy in Dodd-Frank's preemption analysis. First, a law cannot qualify as a state consumer financial law if it "directly or indirectly discriminate[s] against national banks."<sup>111</sup> Then, if a state law qualifies as a state consumer financial law, it will be preempted if it "has a discriminatory effect on national banks in comparison with the effect of the law on a bank chartered by that State."<sup>112</sup> One would think that a state law that has a discriminatory effect on national banks would never reach the Dodd-Frank preemption standards for state consumer financial laws, because by discriminating against a national bank the state law would not qualify as a state consumer financial law. This would be a strong argument for the redundancy of the two standards.

However, it is well-established canon of statutory construction that a statute should not be read in a way that makes any part of the statute redundant.<sup>113</sup> Differences in the language must be read to indicate differences between the two standards. The key difference between the two is that the first standard refers to "direct or indirect" discrimination, whereas the second standard focuses on the "discriminatory effect" of the state law. However, this does not help the analysis. The first standard seems to cast a wider net than the second. Whereas the second standard only looks to discriminatory effects against national banks, the first standard seems to allow the OCC to look at direct and indirect discrimination, including discriminatory effects as they relate to state banks and any other competing financial institutions.

One way to reconcile this issue is to analogize the two standards to the employment discrimination provisions of Title VII of the Civil Rights Act of 1964.<sup>114</sup> Under Title VII, a plaintiff can make a *prima facie* case that employment discrimination has occurred by showing either disparate treatment or disparate impact.<sup>115</sup> Disparate treatment occurs when there is deliberate discrimination (i.e. discriminatory intent).<sup>116</sup> Disparate impact

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110. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 36(f)(1)(A)(ii).

111. Dodd-Frank Act § 1044(a), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

112. *Id.*

113. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (reaffirming the "cardinal principle" that statutes should be read to be construed "so no clause, sentence, or word shall be superfluous, void, or insignificant").

114. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

115. 42 U.S.C. § 2000e-2(k) (2000).

116. *See Lewis v. City of Chi.*, 130 S. Ct. 2191, 2194 (2010) ("For disparate-treatment claims . . . plaintiff must demonstrate deliberate discrimination within the limitations

covers “practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities.”<sup>117</sup> The Supreme Court in *Lewis v. City of Chicago* explained that, although the terms seem similar, “[t]he effect of applying Title VII’s text is that some claims that would be doomed under one theory will survive under the other. . . .”<sup>118</sup>

Applying this framework to Dodd-Frank, one can analogize the “directly or indirectly discriminates” language in Dodd-Frank to Title VII’s disparate treatment. Under this logic, a law that deliberately discriminates against national banks would not qualify as a state consumer financial law. This would leave the second Dodd-Frank standard regarding the “discriminatory effect” of a state law to be applied in a similar way as Title VII’s disparate impact. Thus, a law that may have no discriminatory intent may still be preempted because the law has a disproportionately adverse effect on national banks in comparison to state banks.

Interpreting Dodd-Frank in this manner eliminates the seeming redundancy in the law.<sup>119</sup> The first standard would be used specifically to analyze whether a law qualifies as a state consumer financial law will have a specific application and prevent laws that have discriminatory intent from qualifying as state consumer financial laws. Then, should a law qualify as a state consumer financial law, the OCC and the courts will judge it under the broader second standard of “discriminatory effect” by looking beyond the intent of the law and assessing its impact on national banks.

#### IV. PREEMPTION ANALYSIS FOR STATE UDAP LAWS

As previously discussed, state UDAP laws have had a long, confused history of preemption. This Section of the comment will build off of the understanding of “state consumer financial” law created in Section III, the other interpretations proposed in Section III, and the language of section 1044 to assess what preemption framework state UDAP laws may be analyzed under, and whether, under that framework, state UDAP laws will be preempted.

##### A. *Congressional Intent*

A unique issue arises with the applicability of state UDAP laws. In early versions of the Dodd-Frank Act (which in the House was called the

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period.”).

117. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009).

118. *Lewis*, 130 S. Ct. at 2199.

119. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.” (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))).

Consumer Financial Protection Commission Act, H.R. 3126), section 143 of the House Bill amended the National Bank Act to read:

Notwithstanding any other provision of Federal law and except as provided in subsection (d), any consumer protection provision in State consumer laws of general application, *including any law relating to unfair or deceptive acts or practices*, any consumer fraud law and repossession, foreclosure, and collection law, shall apply to any national bank.<sup>120</sup>

However, after December 9, 2009, the term “state consumer law” was scrapped for the term “state consumer financial law,” and the language relating to state UDAP laws was removed. The implications of the removal of the reference is open to interpretation. One interpretation may be that the consideration and removal of the UDAP language shows intent by Congress to preempt state UDAP laws. According to the Congressional Research Service, courts may attribute significance to the fact that Congress considered and rejected bill language that would have adopted the very position at issue.<sup>121</sup>

Under this interpretation, the fact that Congress initially included state UDAP laws and then removed the language could show Congressional intent to preempt such laws. However, previous cases that advanced such an argument were bolstered by further evidence from Congress regarding why the language was removed. For example, in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission* the Supreme Court faced the issue of whether the Atomic Energy Act of 1954 preempted a state statute conditioning the construction of nuclear power plants on a finding of adequate means of disposal of nuclear waste.<sup>122</sup> In deciding the issue, the Court looked to the federal legislation, particularly the decision of the House not to adopt an amendment requiring nuclear power plants to have facilities for disposal of spent fuel and high-level nuclear waste.<sup>123</sup> After rejecting the amendment, Rep. Ottinger stated that the language was deleted “to insure that there be no preemption.”<sup>124</sup> Considering this information, the court found that “[w]hile we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected.”<sup>125</sup>

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120. H.R. 3126, 111th Cong. § 143 (2009) (emphasis added).

121. YULE KIM ET AL., CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 42 (2008).

122. *Pacific Gas and Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190, 194-95 (1983).

123. *Id.* at 220.

124. *Id.*

125. *Id.*

Unfortunately, in the case of state UDAP preemption, the legislative history is insufficient to determine why Congress removed the reference to state UDAP laws. One alternative interpretation may simply be that Congress thought the term state consumer financial law clearly encompassed state UDAP laws and therefore the addition of the language would be redundant. Without further insight into Congress's intent, the argument that Congress showed its desire to preempt state UDAP laws by changing the language of the statute would probably be rejected by a reviewing court.

*B. Preemption Analysis for State UDAP*

Without statutory language indicating Congressional intent, state UDAP laws are probably subject to the dual preemption framework reserved for all other state laws. As discussed, the two main steps in the dual preemption analysis are: (1) discovering whether the state UDAP law qualifies as a "state consumer financial law" and then, based on the outcome, (2) applying the appropriate preemption standards.

1. Does It Qualify As a "State Consumer Financial Law"?

The first step in the preemption analysis is to determine whether the state UDAP law qualifies as a state consumer financial law. The previous section discussed two methods for assessing whether a state law may qualify as a state consumer financial law: (1) use of the term "federal consumer financial law" as an indicator for what types of state laws are "consumer financial laws"; and (2) use of the definition of state consumer financial law provided in section 1044(a) as well as the definition of each word.

Looking first at the definition of "federal consumer financial law," arguments can be made on both sides as to whether a state UDAP law would qualify as a state consumer financial law. The first possible clue comes in the section 1002(14) definition, which specifically says that the Federal Trade Commission Act is not a federal consumer financial law.<sup>126</sup> State UDAP laws are often based on Section 5(a) of FTC Act,<sup>127</sup> and are sometimes referred to as "mini-FTCs."<sup>128</sup> Thus, an argument can be made that since the FTC does not qualify as a consumer financial law, mini-FTCs should not qualify either.

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126. Dodd-Frank Act § 1002(14), Pub. L. 111-203, 124 Stat. 1376 (2010).

127. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a) (2006).

128. See, e.g., Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 674 (2007-2008).

However, §1002(14) is not the only part of the legislation that speaks to the FTC Act. However, state mini-FTCs are based on section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices. Section 1031 of Dodd-Frank specifically addresses federal UDAP law (i.e., §5(a) of the FTC Act), charging the new Bureau of Consumer Financial Protection with the power to “prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”<sup>129</sup> Since §1011 and §1012 state that the Bureau’s responsibility is to regulate federal consumer financial law, a strong argument can be made that section 1031 (and therefore §5(a) of the FTC Act) qualifies as a federal consumer financial law.<sup>130</sup> Therefore, state UDAP laws, which are based on §5(a) of the FTC Act, should qualify as state consumer financial laws.

With the comparative analysis providing an unsatisfactory result, the next method would be to breakdown section 1044’s definition of state consumer financial law and look for clues. Section 1044(a) requires that a state consumer financial law: (1) not directly or indirectly discriminate against national banks and (2) specifically regulate the manner, content, or terms and conditions of any financial transaction.<sup>131</sup>

Applying the understanding of “directly or indirectly discriminate” developed in section III.D, a state UDAP law does not qualify as a state consumer financial law if the intent of the law is to discriminate against national banks.<sup>132</sup> Given the broad applicability of state UDAP laws, it would be surprising and unlikely to see a state UDAP law intentionally discriminate against national banks. Thus, the first part of the state consumer financial law definition need not be discussed further.

The second requirement is that the state UDAP law “directly and specifically” regulate financial transactions. There is one additional element to this definition implied by the statute. As discussed in the prior section, the word “consumer” in the term “state consumer financial law” implies that the law must regulate the transaction of individual consumers, rather than corporate transactions. A large majority of state UDAP law provisions cover individual transactions. Thus, the analysis hinges on whether the law “directly and specifically regulate[s] the manner, content or terms and conditions of any financial transaction. . . .”<sup>133</sup> One must therefore show that state UDAP laws directly and specifically regulate

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129. Dodd-Frank Act § 1031.

130. *Id.* §§ 1011–12.

131. *Id.* § 1044(a).

132. *Id.*

133. *Id.*

financial transactions in order for them to qualify as state consumer financial laws.

By prohibiting the terms of financial transactions from being unfair or deceptive, state UDAP laws arguably regulate the manner, content, and terms of financial transactions. A state UDAP law's ability to directly and specifically regulate a transaction is not altered merely because it covers a broad category of transactions.

However, commentators have called into question the extent to which state UDAP laws of general application can directly and specifically regulate financial transactions or accounts.<sup>134</sup> As discussed in Section III, the combination of the terms "directly" and "specifically" connotes a clear desire that a state law must expressly intend to cover consumer financial transactions in order to qualify as a state consumer financial law. *Barnett Bank* provides insight into analyzing the term "specifically." In deciding whether a federal statute specifically related to the business of insurance, the Supreme Court explained that although "the general words 'business activity,' for example, will sometimes include, and thereby implicitly refer, to insurance; the particular words 'finance, banking, and insurance' make the reference explicitly *and specifically*."<sup>135</sup> The Court further clarified that "[m]any federal statutes with potentially pre-emptive effect . . . use general language that does not appear to 'specifically relate' to insurance . . ."<sup>136</sup> Applying *Barnett Bank*'s understanding of "specifically relates," generally applicable state laws could not satisfy the less stringent "specifically relates" standard, let alone the arguably more stringent "directly and specifically regulates" standard contained in Title X.

State UDAP laws of general applicability would probably not have clear enough intent to regulate consumer financial transactions and would therefore be subject to the current preemption regime.

## 2. If the Law Qualifies as a State Consumer Financial Law, Is It Preempted Under the Three Prong Dodd-Frank Test?

Assuming, for the sake of argument, that state UDAP laws do indeed qualify as state consumer financial laws, then preemption is determined by the three-prong test set forth in section 1044 of Dodd-Frank. Under the Dodd-Frank test, a state consumer financial law may be preempted if it: (1) has a discriminatory effect on national banks; (2) is preempted by a federal law other than certain portions of the NBA; or (3) prevents or significantly interferes with the exercise of a national bank's powers.<sup>137</sup>

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134. Rosenblum, *supra* note 21, at 3–4.

135. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996).

136. *Id.* at 42.

137. Dodd-Frank Act §§ 1044(b)(1)(A)–(C).

Under the first prong of the Dodd-Frank test, the state consumer financial law cannot have a discriminatory effect on national banks.<sup>138</sup> Following the proposed analysis discussed in Section III, to have a discriminatory effect (i.e., disparate impact), a state UDAP law need only disproportionately impact national banks as compared to state banks. State UDAP laws broadly apply to a number of transactions, including those conducted by state banks.<sup>139</sup> Therefore, most state UDAP laws could not be said to have a discriminatory effect on national banks.

Under the second prong, the state law must not be preempted by a federal law other than Title 62 of the Revised Statutes, commonly known as the NBA.<sup>140</sup> Although section 5 of the FTC Act covers unfair or deceptive acts or practices, nothing in the law specifically preempts state UDAP laws. However, several laws outside of section 5 may preempt a state UDAP law. For example, the Fair Credit Reporting Act,<sup>141</sup> the Gramm-Leach-Bliley Act,<sup>142</sup> and even parts of the NBA outside of Title 62<sup>143</sup> contain regulations that could preempt an overreaching state UDAP law. Therefore, a broad review of relevant federal laws is required to satisfy the third prong.

Under the third prong, the state law must comply with the legal standard set forth in *Barnett Bank*, in that the state law cannot prevent or significantly interfere with the exercise of a national bank's powers.<sup>144</sup> As discussed, state legislatures typically model UDAP laws after Section 5 of the FTC Act, although they may contain additions, such as a private right of action. State UDAP laws generally do not forbid activities authorized by federal statute, because federal statutes, namely §5 of the FTC Act, forbid much of the same conduct.<sup>145</sup> The OCC's 2002 advisory letter bolsters this argument with its statement that national banks may be subject to state UDAP laws.<sup>146</sup> If the OCC has indeed been working under the framework of *Barnett Bank* and applicable case law, then most state UDAP laws would not be preempted by prong three. However, since *Barnett Bank* remains the standard under Dodd-Frank, the debate surrounding the

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138. *Id.*

139. See, e.g. CAROLYN CARTER, NATIONAL CONSUMER LAW CENTER INC., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 6 (2009) (discussing how consumer issues surrounding mortgages and lending can be brought under state UDAP statutes).

140. Dodd-Frank Act §§ 1044(b)(1)(A)–(C).

141. 15 U.S.C. §§ 1681–1681x (2006).

142. 15 U.S.C. §§ 6701–6781 (2000).

143. 12 U.S.C. §§ 38, 92a, 371 (2006).

144. Dodd-Frank Act § 1044.

145. *Barnett Bank of Marion Cnty., N.A., v. Nelson*, 517 U.S. 25, 31 (1996) (discussing explicit and conflict preemption).

146. OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC ADVISORY LETTER 2002-3, *Guidance on Unfair or Deceptive Acts or Practices*, at 1 (2002).



preemption of state UDAP laws remains as uncertain as it did pre-Dodd-Frank.

It is worth noting that since the first prong (i.e., discriminatory effect) is rarely at issue, it is of little importance whether state UDAP laws qualify as state consumer financial laws. Whether or not the law qualifies as a state consumer financial rule, the law would still be subject to preemption by other federal laws (prong two) as well as preemption under the standard set forth in *Barnett Bank* (prong three). Unless the OCC or the courts determine that the first prong has a more inclusive interpretation, it is largely irrelevant whether a state law qualifies as a state consumer financial law.

### CONCLUSION

The amendments to the NBA codified in section 1044 of Dodd-Frank have added a new set of procedures for OCC preemption determinations. This comment sought to shed light on those procedures and any substantive changes the amendments might have made to the preemption analysis.

Section I summarized the pre-Dodd-Frank standards for OCC preemption. In the coming years, the OCC will surely face scrutiny regarding its adherence to *Barnett Bank* and other standards. In the pre-Dodd-Frank era, state UDAP laws' applicability to national banks was unclear.

Section II addressed the text of Dodd-Frank and the new procedures required for laws that qualify as state consumer financial laws. Section III then identified several parts of the law that will likely come under close scrutiny in the future. The issues surrounding (1) the definition of the new term "state consumer financial law," (2) Dodd-Frank's interpretation of *Barnett Bank*, (3) the applicability of the OCC's prior regulations, and (4) the application of the "discriminatory effect" language, are significant and can substantively alter the preemption analysis.

Based on this comment's assessment of these issues, Dodd-Frank does little to change preemption in a substantive manner.<sup>147</sup> Whether or not a law qualifies as a state consumer financial law, the standard for preemption remains the standard that was used in *Barnett Bank*. Additionally, whether or not the rule qualifies as a state consumer financial law, it is still subject to preemption by other federal laws outside of Title 62 of the Revised Statutes. The wild card in the preemption debate is the manner in which

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147. Section 1044 does provide a number of new procedural requirements when preempting a law that qualifies as a state consumer financial law. The OCC must make preemption determinations on a case-by-case basis, consult with the Bureau of Consumer Financial Protection before preempting state consumer financial laws, and review all preemption determinations every five years. Dodd Frank Act §§ 1044(b)-(d).

the OCC and the courts will interpret the “indirect or direct discrimination” and “discriminatory effect” language to avoid redundancy in the law.

Section IV used the insight from the prior sections to understand how state UDAP laws may be processed under Dodd-Frank. From the analysis, many state UDAP laws are too broad to “directly and specifically regulate” consumer financial transactions and would therefore not qualify as state consumer financial laws. This would place state UDAP laws outside the new preemption procedures in Dodd-Frank, leaving state UDAP laws subject to the same uncertain preemption regime in which they have operated for years.

The new dual preemption standard is still in its infancy and the OCC has just recently published its proposed final rule interpreting section 1044’s amendments to the NBA.<sup>148</sup> Given the desires of the OCC to maintain its preemption authority and state governments to enact their own standards for institutions operating within their borders, it is certain that the language contained in Section 1044 will soon be the subject of multiple legal disputes. The intention of this article has been to provide a starting point for the discussion of the changing landscape of national bank preemption of state UDAP laws.

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148. Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 140 (proposed May 26, 2011) (codified as amended at 12 C.F.R. §§ 7.4000(a)–(b)).



