



July 19, 2024

Acting Comptroller Michael J. Hsu
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

Re: *Cantero* decision and OCC preemption rules and determinations

Dear Acting Comptroller Hsu,

The Americans for Financial Reform Education Fund, the Center for Responsible Lending, Consumer Federation of America, Consumer Reports, National Association of Consumer Advocates, the National Consumer Law Center (on behalf of its low-income clients) and Public Citizen write to urge you to immediately rescind the preemption rules, interpretations, bulletins and opinions that the Office of the Comptroller of the Currency (OCC) has issued impacting state consumer financial laws, as they are not in compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). That is especially clear in light of the Supreme Court’s recent decision in *Cantero v. Bank of America*.¹

We appreciate your recent statement that you are reviewing the OCC's 2020 interpretation of preemption under the Dodd-Frank Act to determine whether updates are needed in light of the *Cantero* decision. If the OCC chooses not to immediately rescind the preemption regulations, the OCC must undertake the five-year review mandated by the Dodd Frank Act. The OCC has long failed to comply with the Dodd-Frank amendments to the National Bank Act. In light of *Cantero*, the OCC can no longer ignore the requirements of the Dodd-Frank Act and must take immediate action to comply with Congress’s mandate.

The OCC’s preemption activity leading up to the Dodd-Frank Act

Over more than 20 years, the OCC has taken a number of actions to preempt state laws, including state consumer financial laws, as applied to national banks and federal savings associations. These actions include individual opinions preempting particular laws,² and broad regulations preempting entire classes of laws, including those impacting real estate loans, deposit taking, and non-real estate lending.³

Preemption of state mortgage laws by the OCC and other federal bank regulators was a significant contributing factor to the 2007 mortgage crisis.⁴ Preemption of state consumer protection laws has also

¹ 144 S.Ct. 1290 (2024).

² See National Consumer Law Center, Mortgage Lending, Appx. E.4 & E.5 (summarizing OCC interpretive and advisory letters and other preemption determinations).

³ 12 C.F.R. §§ 7.4007, 7.4008, 34.4, as adopted by 69 Fed. Reg. 1904, 1907, 1908, 1910, 1911 (Jan. 13, 2004).

⁴ National Consumer Law Center, [Restore the States’ Traditional Role as “First Responder”](#) at 1 (Sept. 2009) (“In 2006, the peak year of irresponsible lending, national banks, federal thrifts, and their subsidiaries made 32% of subprime loans, 40% of Alt A loans, and 51% of interest-only and option ARM loans. A total of over \$700 billion in risky loans were made by entities that states could not touch. States

led to a number of other consumer harms, including the spread of abusive credit card practices (forcing Congress to pass the Credit CARD Act of 2009), and destructive overdraft fee practices,⁵ which still plague consumers.⁶

In response, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended the National Bank Act (NBA) to limit the preemption of state laws by the NBA and the OCC. Those amendments make clear that the NBA preempts state consumer financial laws **only if** the laws discriminate against national banks or if they prevent or significantly interfere with the exercise of bank powers following the standard of *Barnett Bank v. Nelson*.⁷ The Dodd-Frank amendments also imposed procedural requirements on the OCC's ability to preempt state consumer financial laws, including requirements for case-by-case review and for input from the Consumer Financial Protection Bureau (CFPB) when a preemption determination impacts more than a single state's law.⁸

The OCC's post Dodd-Frank preemption actions

The OCC made minor changes to some of its preemption regulations in 2011 in response to the Dodd-Frank Act.⁹ However, it failed to make sufficient revisions to conform those regulations to the Dodd-Frank preemption standard, or to follow the Dodd-Frank procedures in renewing the preemption of state consumer financial laws.¹⁰ The broad preemption regulations continue to preempt broad fields of state consumer financial laws in violation of the ban on field preemption and without regard to whether the *Barnett Bank* "prevent or significantly interfere" standard is met.

In 2020, under prior leadership, the OCC issued a guidance stating that many measures by states to address COVID-19 hardships are preempted, asserting that banks "are governed primarily by uniform federal standards and generally are not subject to state law limitations."¹¹ That statement is flatly wrong; it contradicts the mandate of the Supreme Court and the NBA that state consumer financial laws that do not discriminate against national banks are preempted by the NBA "only if" they prevent or significantly interfere with a bank's powers. While the COVID-19 guidance cited *Barnett Bank*, it failed to cite the "prevent or significantly interfere" standard and asserted that broad categories of laws are preempted, making no reference to the degree of interference.¹²

were also preempted from regulating any mortgage lender on the very terms that made many mortgages dangerous: balloon payments, negative amortization, variable rates, and other nontraditional terms."); see also Danyeale L. Hensley, Section 1044 of Dodd-Frank: When Will State Laws Be Preempted Under the OCC's Revised Regulations?, 16 N.C. Banking Inst. 161, 162 (Mar. 2012); Arthur E. Wilmarth, Jr., The Dodd Frank Act's Expansion of State Authority to Protect Consumers of Financial Services, 36 J. Corp. L. 893 (2011); Kurt Eggert, Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Rule in Mortgage Servicing Regulation, 15 Chap. L. Rev. 171 (2011).

⁵ National Consumer Law Center et al., [Comments to the Comptroller of the Currency, Office of the Comptroller of the Currency on "Exploring Special Purpose National Bank Charters for Fintech Companies"](#) at 16-19 (Jan. 17, 2017).

⁶ See National Consumer Law Center, [Overdraft Lending at Very Large Financial Institutions, Comments to the Consumer Financial Protection Bureau](#) (April 1, 2024).

⁷ 12 U.S.C. § 25b(1)(B); *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

⁸ 12 U.S.C. §§ 25b((1)(B), 25b(b)(3), 25b(c).

⁹ 76 Fed. Reg. 43,549 (July 21, 2011) (amending 12 C.F.R. §§ 7.4007 (deposit-taking), 7.4008 (lending), 12 C.F.R § 34.4 (real estate loans).

¹⁰ See National Consumer Law Center, [OCC Ignores Dodd-Frank Act's Repeal of 2004 Preemption Regulations](#) (May 2011).

¹¹ OCC Bulletin 2020-62, [COVID-19 Relief Programs: Preemption](#) (June 17, 2020).

¹² For example, the guidance stated that "State action that limits banks' ability to foreclose on a defaulted loan and take possession of collateral, beyond what is provided for in the CARES Act, would interfere with banks' powers to make secured mortgage loans." *Id.* But under *Barnett Bank* and the NBA, such

In 2020, the OCC also issued Interpretive Letter 1173 setting forth the chief counsel's interpretation of the requirements of the Dodd-Frank amendments.¹³ While the letter is unclear, it appears that the chief counsel effectively took the position that the preemption requirements only apply when the OCC decides to comply with them. The letter states that the Dodd-Frank requirements only apply when a "regulation or order issued by the OCC concludes that a state consumer financial law is preempted pursuant to the Barnett standard," and not when an OCC action "has only indirect or incidental effects on a state consumer financial law." This could be read to make the preposterous claim that the OCC can continue to preempt broad categories of state consumer financial laws, without complying with the Dodd-Frank Act preemption standard or procedures, as long as it does not issue a regulation or order applying the *Barnett* standard to a particular law. Yet the OCC's broad preemption regulations do not have an "indirect or incidental" effect on state consumer financial laws; they directly preempt them.

The continuing harm caused by the OCC's preemption actions

We are gratified that you intend to revisit the OCC's preemption stance and urge you to do so expeditiously. The OCC's preemption activities have continued to harm consumers. They had a chilling effect on state actions to address the impact of the COVID-19 crisis and cast doubt on current and future efforts by states to address consumer hardships in other contexts.

OCC rules have been cited by courts in finding that these, among other, state laws are preempted:

- The duty to act in good faith, and not for the sole purpose of increasing fees, when processing overdraft items,¹⁴
- Right to cure laws and foreclosure prevention laws for personal loans and mortgages,¹⁵
- Debt collection laws that prohibit a \$15 pay-by-phone fee to pay a mortgage, when that fee is not authorized by the deed of trust,¹⁶
- Laws against deceptive concealment.¹⁷

As noted above, abusive bank overdraft fee practices also persist, potentially immune from state efforts to address them.

The Cantero decision

The Supreme Court's recent decision in *Cantero* makes clear what has long been apparent: the OCC is not complying with the Dodd-Frank Act. The Court emphasized that "Dodd-Frank ruled out field preemption" and that "the National Bank Act preempts a state law 'only if' the law discriminates against national banks or 'prevents or significantly interferes' with the exercise of national bank powers."¹⁸ The

laws are preempted only if they prevent or significantly interfere with those powers, not if they merely impose limits that do not rise to that level.

¹³ OCC, Interpretive Letter 1173, OCC Chief Counsel's Interpretation: 12 U.S.C. § 25b (Dec. 18, 2020).

¹⁴ Gutierrez v. Wells Fargo Bank, 704 F.3d 712 (9th Cir. 2012).

¹⁵ Lako v. Portfolio Recovery Assocs., 2021 WL 3403632 (W.D. Wash. Aug. 4, 2021) (state law requiring notice of right to cure and prohibition on acceleration of debt if notice is not given); Narvasa v. U.S. Bancorp., 2016 WL 4041317 (E.D. Cal. July 28, 2016) (state statute requiring bank to provide a statement describing the calculations on which it based its denial of a loan modification is preempted, as are similar UDAP, negligence, and good faith claims); George v. Stonebridge Mortg. Co., 988 F. Supp. 2d 142 (D. Mass. 2013) (state pre-foreclosure right to cure law); Sloane v. JPMorgan Chase Bank, 2012 WL 7806163 (D. Mass. Mar. 27, 2012) (state law requiring pre-foreclosure opportunity to cure default).

¹⁶ Mariscol v. Flagstar Bank, 2021 WL 4260879 (CD. Cal. Sept. 9, 2021).

¹⁷ Downey v. Wells Fargo Bank, 2014 WL 3510510 (D. Mass. July 11, 2014); Barton v. Capital One Bank, 2013 WL 12173918 (N.D. Cal. Apr. 16, 2013); Robinson v. Bank of Am., 2011 WL 5870541 (C.D. Cal. Oct. 19, 2011), adopted by 2011 WL 5870086 (C.D. Cal. Nov. 22, 2011), aff'd, 525 Fed. Appx. 580 (9th Cir. 2013).

¹⁸ *Cantero*, 144 S.Ct. at 1297.

Court ruled that the *Barnett Bank* preemption standard incorporated into the NBA requires “a practical assessment of the nature and degree of interference caused by a state law,”¹⁹ using a “nuanced comparative analysis.”²⁰ The Court was clear: “*Barnett Bank* did not draw a bright line”; it is a test under which some state laws are preempted but others are not.²¹

In particular, the Court rejected the Second Circuit’s view that the NBA preempts any state law that exercises control over a federally granted banking power “regardless of ‘the magnitude of its effects.’”²² The Second Circuit’s approach did not comply with the NBA because, instead of conducting a “nuanced comparative analysis,” the Second Circuit “relied on a line of cases going back to *McCulloch v. Maryland* to distill a categorical test that would preempt virtually all state laws that regulate national banks, at least other than generally applicable state laws such as contract or property laws.”²³

That is also precisely what the OCC’s preemption regulations and the 2020 interpretations impermissibly do: designate broad categories of laws that are preempted, regardless of the magnitude of interference, without any practical assessment of the degree of interference of particular laws. The only laws that the preemption regulations describe as *not* preempted are generally applicable state laws such as contract or property laws. And, tellingly, the only mention of the *Barnett Bank* standard in the regulations is as a qualification to the statement that generally applicable laws are not preempted,²⁴ rather than as a limitation on the preemption of the other listed categories of laws, which are described as flatly preempted.

While *Cantero* did not directly address the validity of the OCC preemption regulations, the decision elucidates the *Barnett Bank* standard that governs both the NBA’s general preemptive effect and the OCC’s authority under the NBA to preempt state laws. The preemption regulations violate the ban on field preemption and are not based on a practical assessment of the degree of interference required by *Barnett Bank*.

In fact, the OCC has a special duty to conduct “a practical assessment of the nature and degree of interference caused by a state law”²⁵ – rather than preempting entire classes of laws – because Congress specifically stated that the OCC may preempt state consumer financial laws only by undertaking a case-by-case analysis of the impact of a particular law on a national bank.²⁶ Moreover, the OCC may go beyond an individual state consumer financial law to preempt other state laws with substantively equivalent terms only if the OCC first consults with the CFPB.²⁷ Instead, after the passage of Dodd-Frank, the OCC ignored the statute and reaffirmed broad regulations preempting state consumer financial laws without following the mandated Dodd-Frank preemption standard or procedures.

The Dodd-Frank Act also mandated that the OCC review its preemption determinations regarding state consumer financial laws every five years.²⁸ Yet 14 years since the passage of Dodd-Frank, it has yet to do so, leaving numerous OCC interpretive and advisory letters and other preemption determinations outstanding.²⁹

¹⁹ *Id.* at 1300.

²⁰ *Id.* at 1301.

²¹ *Id.*

²² *Id.* at 1296 (quoting 49 F.4th 121, 131 (2022)).

²³ *Id.* at 1301.

²⁴ See 12 C.F.R. §§ 7.4007(c), 7.4008(e), 34.4(b).

²⁵ 144 S.Ct. at 1300.

²⁶ 12 U.S.C. §§ 25b(b)(1)(B), 25b(b)(3)(A).

²⁷ 12 U.S.C. § 25b(b)(3)(B).

²⁸ 12 U.S.C. § 25b(d)(1).

²⁹ See National Consumer Law Center, Mortgage Lending, Appx. E.4 & E.5.

In a 2011 letter to Congress, the OCC implied that it did not need to review the 2004 preemption regulations because they were consistent with the principles of *Barnett*.³⁰ But that is plainly not the case. *Cantero* makes clear that the OCC can no longer preempt state consumer financial laws without conducting a case-by-case practical assessment of the law's degree of interference with national bank powers.

Actions mandated by Cantero

We agree with the statement of Conference of State Bank Supervisors President and CEO Brandon Milhorn:

“In light of *Cantero*, the OCC must immediately revisit its preemption rules and processes and comply with the case-by-case justification requirements in the Dodd-Frank Act. These mandates have been ignored for over a decade, and current OCC rules fail to meet the high preemption bar reaffirmed today.”³¹

The OCC must immediately rescind its preemption regulations, opinions, interpretations and bulletins that purport to preempt state consumer financial laws unless and until, following the Dodd-Frank Act procedures, the OCC conducts a nuanced assessment of those laws and finds that any of them prevent or significantly interfere with the powers of national banks or federal savings associations. The preemption regulations are not necessary; with or without them, state laws will be preempted if, and only if, they are preempted following the requirements of *Barnett Bank*, *Cantero* and the *Dodd-Frank Act*.

The OCC must also conduct the five-year review of any regulations and other determinations that remain on the books. The current preemption regulations impermissibly draw categorical lines. The OCC might prefer “a clearer preemption line... But Congress expressly incorporated *Barnett Bank* into the U.S. Code[, and] ... *Barnett Bank* did not draw a bright line.”³² Instead, the OCC must “carefully account for and navigate [the Supreme] Court’s prior bank preemption cases” and “may find a state law preempted ‘only if,’ ‘in accordance with the legal standard’ from *Barnett Bank*, the law ‘prevents or significantly interferes with the exercise by the national bank of its powers.’”³³

Thank you for addressing this important matter. We would be happy to discuss this matter with you. If you have questions, please contact Lauren Saunders, Associate Director, National Consumer Law Center at lsaunders@nclc.org.

Yours very truly,

Americans for Financial Reform
Center for Responsible Lending
Consumer Federation of America
Consumer Reports
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
Public Citizen

³⁰ OCC, Interpretive Letter #1132 at 3-4 (May 12, 2011).

³¹ Conference of State Bank Supervisors, Press Release, [CSBS President and CEO Brandon Milhorn Statement on U.S. Supreme Court Decision, *Cantero v. Bank of America*](#) (May 30, 2024).

³² *Cantero*, 144 S.Ct. at 1301.

³³ *Id.*