



**Interpretive Letter 1173
December 2020**

OCC Chief Counsel's Interpretation: 12 U.S.C. § 25b
December 18, 2020

I. Introduction

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress codified preemption standards and established procedural requirements in 12 U.S.C. § 25b applicable to certain preemption actions by the Office of the Comptroller of the Currency (OCC). This document sets out how the OCC interprets these standards and requirements and summarizes the agency's framework for compliance.

II. Background

Federal preemption derives from the Supremacy Clause of the U.S. Constitution and has been recognized as fundamental to the design of the federal banking system since the earliest years of our nation's history. In the landmark case of *McCulloch v. Maryland*, the U.S. Supreme Court held that under the Supremacy Clause, states "have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations" of an entity created under federal law.¹ Federal preemption permits federally chartered financial institutions, many of which operate across state lines, to achieve efficiencies associated with operating under a uniform set of rules. As the Supreme Court noted at the beginning of the 20th century, federal legislation and regulation "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the [s]tates."²

Since the enactment of Dodd-Frank, the OCC has received questions and comments regarding the preemption standards and procedural requirements in section 25b. Therefore, the agency believes it would be beneficial to provide a comprehensive interpretation of these provisions and to set out a consistent framework for compliance.

¹ 17 U.S. (4 Wheat.) 316, 436 (1819).

² *Easton v. Iowa*, 188 U.S. 220, 229 (1903); see also *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. (Barnett)*, 517 U.S. 25 (1996).

III. Discussion

As noted above, in section 25b, Congress codified preemption standards and established procedural requirements that apply when the OCC concludes that certain state laws are preempted. Each of these provisions is addressed in turn below.³

A. Standards for preemption of state consumer financial laws

Section 25b codifies three standards pursuant to which federal law may preempt a “[s]tate consumer financial law.”⁴ First, a state consumer financial law is preempted if it has a “discriminatory effect” on national banks when compared to the law’s effect on banks chartered by that state (“discriminatory effect standard”).⁵ Second, a state consumer financial law is preempted if “in accordance with the legal standard for preemption in . . . [Barnett], [it] prevents or significantly interferes with” a national bank’s exercise of its powers (“Barnett standard”).⁶ Finally, a state consumer financial law may be preempted by a provision of federal law other than title 62 of the Revised Statutes (“other federal law standard”).⁷ Because section 25b(b)(1)

³ In addition to the provisions described below, section 25b addresses the applicability of state law to national banks’ subsidiaries, affiliates, and agents, as well as visitorial powers. 12 U.S.C. § 25b(b)(2), (e), (h), and (i). Because the OCC’s post-Dodd-Frank regulatory amendments addressed these provisions, they are not discussed in this document. *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549 (July 21, 2011).

Dodd-Frank also placed federal savings associations on equal footing with national banks with respect to preemption by providing that any determination regarding the preemption of state law by the Home Owners’ Loan Act must “be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of [s]tate law.” See 12 U.S.C. § 1465; see also 12 C.F.R. §§ 7.4010(a) and 34.6.

⁴ A state consumer financial law is defined as any “[s]tate 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.” 12 U.S.C. § 25b(a)(2). A “consumer” is “an individual or an agent, trustee, or representative acting on behalf of an individual.” 12 U.S.C. § 5481(4) (defining “consumer” for purposes of title X of Dodd-Frank, which includes section 25b).

⁵ 12 U.S.C. § 25b(b)(1)(A).

⁶ 12 U.S.C. § 25b(b)(1)(B). As the OCC explained when amending its preemption regulations in 2011, “[Dodd-Frank] does not create a new, stand-alone ‘prevents or significantly interferes’ preemption standard, but rather, incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court’s *Barnett* decision.” *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,555 (July 21, 2011). The OCC based this conclusion on (1) the statutory language of this and other closely related provisions; (2) contemporaneous statements from the congressional sponsors; and (3) case law interpreting similar statutory language in the Gramm-Leach-Bliley Act of 1999. *Id.*; see also *Baptista v. J.P. Morgan Chase Bank N.A.*, 640 F.3d 1194 (11th Cir. 2011).

⁷ 12 U.S.C. § 25b(b)(1)(C). This includes, for example, federal consumer financial laws, which generally have their own specific preemption standards, and 12 U.S.C. § 371, which authorizes national banks to engage in real estate lending and is not part of title 62 of the Revised Statutes.

uses the word “or” rather than “and” to join these statutory standards, each provides an independent basis on which federal law preempts any given state consumer financial law.

B. State law preemption not requiring a statutory “preemption determination”

Section 25b(b)(1)(B) allows the OCC to make “preemption determinations” pursuant to the *Barnett* standard, subject to specific procedural requirements described in more detail below.⁸ The term “preemption determination” is specific to the *Barnett* standard in 25b(b)(1)(B); it is not used in connection with the discriminatory effect or other federal law standards. Furthermore, the word *determination* contemplates an affirmative conclusion by the OCC that federal law preempts a state consumer financial law.

Accordingly, it is the OCC’s view that a preemption determination, as that term is used in section 25b, is limited to a regulation or order issued by the OCC that concludes that a state consumer financial law is preempted pursuant to the *Barnett* standard. An OCC action that has only indirect or incidental effects on a state consumer financial law is not a preemption determination. In addition, the OCC does not make a preemption determination, and thus is not subject to the procedural requirements of section 25b, when it concludes that (1) a state consumer financial law is preempted pursuant to the discriminatory effect or other federal law standards or (2) a state law other than a state consumer financial law is preempted.

C. Preemption determinations under the Barnett standard

1. Case-by-case basis; consultation with the Consumer Financial Protection Bureau (CFPB)

The provision codifying the *Barnett* standard provides that the OCC may make a preemption determination by regulation or order on a “case-by-case basis,” in accordance with applicable law.⁹ The requirement to act on a case-by-case basis only applies to OCC preemption determinations pursuant to section 25b(b)(1)(B). Section 25b defines “case-by-case basis” to mean “a determination . . . concerning the impact of a particular [s]tate consumer financial law on any national bank that is subject to that law.”¹⁰ A determination made on a case-by-case basis may also address “the law of any other [s]tate with substantively equivalent terms,” if the OCC first consults with the CFPB regarding whether the other state’s law has substantially equivalent terms as the state law the OCC is preempting and takes these views into account.¹¹ CFPB consultation is not required for other types of preemption.

⁸ 12 U.S.C. § 25b(b)(1)(B).

⁹ *Id.*

¹⁰ 12 U.S.C. § 25b(b)(3)(A).

¹¹ 12 U.S.C. § 25b(b)(3)(A)-(B).

2. Substantial evidence

Section 25b states that “[n]o regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the [s]tate consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard” in *Barnett*.¹² This requirement is expressly limited to OCC preemption determinations pursuant to section 25b(b)(1)(B).

The OCC interprets the substantial evidence standard in section 25b *in pari materia* with the substantial evidence standard in the Administrative Procedure Act (APA) and refers to APA case law when determining whether it has satisfied this standard.¹³

3. Periodic review of preemption determinations

Section 25b requires that the OCC periodically review “each determination that a provision of [f]ederal law preempts a [s]tate consumer financial law.”¹⁴ This review must occur every five years and include notice and an opportunity for comment. When issuing a periodic review, the OCC must also submit a report to Congress.¹⁵ Because this provision references “each determination,” rather than each “preemption determination,” the OCC interprets this language to require a periodic review of any conclusion by the OCC that a state consumer financial law is preempted (*i.e.*, it is not limited to OCC preemption determinations pursuant to the *Barnett* standard under section 25b(b)(1)(B)).

4. Transparency of OCC preemption determinations

Section 25b requires the OCC to “publish and update no less frequently than quarterly, a list of preemption determinations . . . then in effect.”¹⁶ This provision refers specifically to “preemption determinations,” which, as explained above, is a term only used in connection with

¹² 12 U.S.C. § 25b(c).

¹³ The APA standard is codified at 5 U.S.C. § 706(2)(E). The OCC’s interpretation is consistent with case law holding that the “substantial evidence” standard in other agencies’ organic statutes and the APA’s substantial evidence standard should be interpreted in the same manner. *See, e.g., Ass’n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984) (“We hold, therefore, that the [12 U.S.C.] § 1848 ‘substantial evidence’ requirement applicable to our review here demands a quantum of factual support no different from that demanded by the substantial evidence provision of the APA . . .”).

¹⁴ 12 U.S.C. § 25b(d)(1).

¹⁵ 12 U.S.C. § 25b(d)(2).

¹⁶ 12 U.S.C. § 25b(g).

section 25b(b)(1)(B). Therefore, the OCC concludes that this requirement only applies to OCC preemption determinations pursuant to section 25b(b)(1)(B).

D. Preservation of powers related to charging interest

Section 25b expressly preserves national banks' authority to charge interest pursuant to 12 U.S.C. § 85, stating that “[n]o provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85 . . . including with respect to the meaning of ‘interest.’”¹⁷ Section 25b is part of title 62 of the Revised Statutes. Consequently, consistent with this provision, OCC interpretations of section 85 are not affected by, and therefore not subject to, the provisions of section 25b.¹⁸

E. Deference

Section 25b addresses the level of deference a reviewing court must provide to the OCC. Specifically, when reviewing an OCC conclusion that “title 62 of the Revised Statutes or section 371” preempts state law, a court must afford the conclusion *Skidmore* deference.¹⁹ Section 25b expressly excludes other OCC interpretations of federal law from this *Skidmore* deference provision.²⁰ Therefore, the deference afforded to other OCC interpretations of federal law, generally *Chevron* deference, is unchanged.²¹

Unlike many procedural provisions of section 25b, this *Skidmore* deference provision is not limited to either: (1) OCC preemption determinations pursuant to section 25b(b)(1)(B); or (2) the preemption of state consumer financial laws. Rather, it applies to OCC conclusions that any type of state law is preempted by either title 62 of the Revised Statutes or section 371 (rather than only title 62).

Taken together, the deference provisions in section 25b clarify that the OCC generally receives *Chevron* deference for any interpretation of federal law concluding that a particular national

¹⁷ 12 U.S.C. § 25b(f); see 12 C.F.R. § 7.4001(a) (defining “interest” for purposes of section 85).

¹⁸ In addition, interpretations of section 85 are interpretations of a federal authority granted to national banks, even though they may ultimately have some effect on the applicability of a particular state law (e.g., if an interpretation informs the determination of which state law governs under section 85).

¹⁹ 12 U.S.C. § 25b(b)(5)(A). Under this standard, the court must “assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.” *Id.*

²⁰ 12 U.S.C. § 25b(b)(5)(B).

²¹ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*).

bank power is authorized by title 62 of the Revised Statutes or section 371²² and *Skidmore* deference for any conclusion that these federal laws preempt state law.

IV. OCC Framework for Compliance

Before assessing whether a state law is preempted, the OCC evaluates whether the state law is a state consumer financial law as defined in section 25b(a)(2). If the state law is a state consumer financial law, the OCC assesses whether it would be preempted in accordance with one or more of the standards in section 25b(b)(1).

If the OCC concludes that a state consumer financial law is preempted pursuant to the section 25b(b)(1)(B) *Barnett* standard, the OCC may issue a regulation or order on a case-by-case basis, as required by section 25b(b)(1)(B). The OCC will also consult with the CFPB when determining whether other state laws have substantially similar terms, consistent with section 25b(b)(3)(B). As part of the issuance, the OCC will assess whether there is substantial evidence supporting a conclusion of preemption and ensure that this substantial evidence is part of the record, as provided for in section 25b(c).

After making a section 25b(b)(1)(B) preemption determination, the OCC will ensure that the determination is reflected in a quarterly publication, as provided for in section 25b(g). It will also conduct periodic reviews of the preemption determination and submit a report to Congress when issuing its review, as provided for in section 25b(d).

If the OCC concludes that a state consumer financial law is preempted by the discriminatory effect or other federal law standards, only section 25b(d) applies.

V. Conclusion

This document sets out how the OCC interprets the preemption standards and procedural requirements codified in section 25b. It also summarizes the agency's framework for compliance with these standards and requirements. Stakeholders may contact the OCC with any questions regarding this document.

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²² See, e.g., *Nationsbank of N.C., N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995) (citing *Chevron* in conferring deference on the OCC's interpretation of 12 U.S.C. § 24(Seventh) of the National Bank Act). Based on the language in section 25b(b)(5)(B), the OCC is also entitled to *Chevron* deference for its interpretations of the provisions of section 25b.