

LEGAL UPDATES

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A Primer on OCC Preemption Determinations

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In December 2025, the Office of the Comptroller of the Currency (OCC) issued a proposed preemption determination that federal bank law preempts New York's and other states' interest-on-escrow laws. On April 24, 2026, the OCC issued an interim final order finding that federal bank law preempts the Illinois Interchange Fee Prohibition Act including the Act's prohibition on charging interchange fees on certain parts of the payment card transactions and its restrictions on the use of payment card transaction data.

As the federal regulator of national banks and federal savings banks (FSBs), the OCC has long issued guidance on National Bank Act (NBA) preemption of state laws through interpretative letters, rulings, and opinions. So why are these recent preemption determinations notable? Since the passage of the Dodd-Frank Act, the OCC has not issued formal preemption determinations. Indeed, we found no final OCC preemption determinations published in the Federal Register since 2010. The recent preemption determinations signal a potential resurrection of the OCC's use of preemption determinations to provide key guidance on controversial preemption issues.

It is important for national banks and FSBs to have background on OCC preemption determinations so that banks can respond appropriately to new preemption determinations. The following provides a primer on OCC preemption determinations.

Preemption determinations defined

The term "preemption determination" is not defined in the NBA. In a 2022 challenge to the OCC's "valid when made" rule, a federal court rejected states' argument that the "valid when made" rule was a preemption determination issued by the OCC in violation of the Dodd-Frank Act, 12 U.S.C. § 25b. In *State of California, et al. v. the OCC*, the court described a preemption

determination as an affirmative act by the Comptroller of the Currency that considers and resolves whether a particular state consumer financial law is preempted. According to the court, a regulation that has a preemptive effect is not a preemption determination.

Scope of OCC preemption determinations

The Dodd-Frank Act placed limitations on the scope of preemption determinations with respect to “state consumer financial laws” (broadly defined) in 12 U.S.C. § 25b. The Comptroller has the non-delegable authority to make preemption determinations and must do so on a case-by-case basis. This means determinations can address only whether a particular state law and other state laws with substantively equivalent terms are preempted. The Comptroller cannot, for example, declare that all state debt collection laws are preempted through a preemption determination. The OCC may use preemption determinations to address preemption questions for national banks and FSBs not only under the NBA but also under other federal laws.

When the state law at issue is not a “state consumer financial law,” these restrictions on the scope of OCC preemption determinations do not apply.

Other requirements on OCC preemption determinations

The Dodd-Frank Act also places standards and procedures around issuing and maintaining preemption determinations. If the OCC makes a preemption determination on a state consumer financial law based on the NBA preemption standard in *Barnett Bank v. Nelson*, the OCC must support the specific preemption finding with substantial evidence made on the record. In other words, the OCC must back up its position that a state law prevents or significantly interferes with the exercise of a bank’s powers.

Except in certain situations, the NBA may require the OCC to provide prior notice and receive comments on preemption determinations involving a state law related to community reinvestment, consumer protection, fair lending, or certain branch issues.

In addition, the Dodd-Frank Act requires the OCC to follow certain procedures in connection with preemption determinations. The OCC must consult the CFPB before making a preemption determination that includes other state laws with substantively equivalent terms as the specific state law being analyzed. The OCC must periodically review, through notice and public comment, each existing preemption determination made under Section 25b and affirmatively state whether the determination is continued, rescinded, or amended. It must also submit reports to Congress on such periodic reviews and issue quarterly reports with a list of preemption determinations then in effect. The periodic review requirement highlights the fact that the OCC could change preemption determinations over time.

While these procedures increase the OCC's workload, the procedures may not create materially more work with each subsequent OCC preemption determination to create a roadblock to the OCC's future use of this regulatory tool, as demonstrated by the OCC issuing its second preemption determination on the Illinois Interchange Fee Prohibition Act within four months of its mortgage interest-on-escrow preemption determination.

Courts and OCC preemption determinations

Courts do not have to follow OCC preemption determinations. Even before *Chevron* deference was struck down in *Loper Bright*, Section 25b (added by the Dodd-Frank Act) provided that OCC preemption determinations of state consumer financial laws based on the NBA and 12 U.S.C. § 371 (real estate lending bank powers) are not entitled to *Chevron* deference. Rather, courts reviewing such preemption determinations should consider the validity of the preemption determinations, the thoroughness of the consideration of the agency, the validity of the reasoning, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision. Post *Loper Bright*, the higher bar for court deference to an OCC preemption determination now applies to all OCC preemption guidance, not just preemption determinations of state consumer financial laws subject to Section 25b.

Closing thoughts

The two preemption determinations may signal the OCC's willingness to issue more preemption guidance in the future, particularly in situations where the OCC views unresolved preemption issues as creating significant risk to banks' safety and soundness.

In response to current regulatory developments involving NBA preemption, national banks and FSBs may be evaluating their preemption positions on state laws. Understanding OCC preemption determinations as a regulatory tool should put national banks and FSBs in a better position to analyze and weigh how preemption determinations may change their preemption positions.

Contact us

We routinely advise clients on NBA preemption and interest rate preemption, including whether federal banking laws preempt particular state law requirements. Contact Susan Seaman or your Husch Blackwell attorney if you have federal bank preemption questions.