



National Bank Preemption Post Dodd-Frank Act*

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Recently, we completed a thorough analysis of the impact of the Dodd-Frank Act on national bank preemption, and this study has been accepted for publication later this year by the Virginia Law and Business Review..

The article explains that preemption was put in the spotlight during the legislative debates leading to the Dodd-Frank Act, when some argued that the preemption policies and regulations issued by the OCC contributed significantly to the risky mortgage lending practices that led to the financial crisis we faced beginning in 2008. In particular, it was argued that the OCC preempted state “anti-predatory” lending laws without providing an effective national standard to prevent abusive mortgage lending practices.

We conclude that the underlying argument against national bank preemption is not correct. National banks were effectively prevented from engaging in predatory lending practices, and all of the available data supports this conclusion. Further, the argument against preemption conflates predatory lending with subprime lending. The state anti-predatory lending laws were not aimed at subprime lending, but against abusive lending practices, characteristic of only a fraction of the total subprime loans made. In fact, “responsible” subprime lending was encouraged by both the states and the Federal Government as a means of increasing home ownership among lower income consumers. Unfortunately, once housing prices began to collapse, these “responsible subprime loans” began to massively default, initiating the financial crisis.

With respect to subprime lending, the evidence is clear that the overwhelming majority of the loans were originated by state regulated and state chartered entities. These entities were not subject to preemption. In fact, many conglomerates that had national bank subsidiaries chose state-regulated affiliates to originate subprime loans, to avoid the more stringent underwriting standards imposed by the OCC.

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The Dodd-Frank Act included new procedures for the issuance of OCC preemption determinations and provided that NBA preemption does not apply to subsidiaries, affiliates or agents of a national bank. Based on a review of the statutory language, its legislative history, canons of statutory construction, and relevant case law, the article concludes that the Dodd-Frank Act does not make any material change in the preemption standards applicable to national banks under the NBA. The other changes made by the Dodd-Frank Act with respect to national bank preemption are relatively minor.

The OCC's recent changes to its preemption regulation will require national banks to be careful about relying on past OCC precedents, but in light of the fact that the categories of preempted state law remain in the regulation, the regulatory change will have a limited impact on national bank activities.

Although the article will not appear in print until the fall of this year, a copy of it can be found at the SSRN Website.

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