Preemption under the Consumer Financial Protection Act of 2010

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I. Introduction

Recent years have witnessed a plethora of new substantive statutes and regulations at the federal level affecting consumer financial services. The latest in this parade of federal laws is the Consumer Financial Protection Act of 2010 (CFPA), which is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010.[1] The CFPA added new substantive prohibitions and requirements for consumer financial services. Equally as important, the CFPA redefines in major ways the relationship between the federal body of law and the bodies of law promulgated at the state and local level that affect consumer financial services. This article examines this relationship, and specifically the impact that the new preemption regime likely will have.

II. Basic Principles

The supremacy clause of the United States Constitution establishes that as a matter of constitutional principle federal laws "shall be the supreme law of the land" and that in certain instances state laws shall yield to the federal law.[2]

The jurisprudence with regard to preemption doctrines has created defined categories. From the broadest preemption category to the narrowest category, these are generally defined as: (1) field preemption; (2) express or implied preemption; and (3) conflict preemption. The latter in its narrowest formulation would preempt a state law only if compliance

1. Pub. L. No. 111-203, 124 Stat. 1376 (codified, in relevant part, at 12 U.S.C.S. §§ 25b, 1465, 5551-5553 (LexisNexis 2010)). Hereinafter, footnote references to the CFPA cite the U.S.C.S. codification.

2. U.S. Const. art. 6, cl. 2.

with that state law would necessarily result in non-compliance with the federal law. Simplistically, field preemption, as its name implies, negates state law with respect to an entire sector of human conduct. The doctrines of expressed or implied preemption fall in between and impose preemption under more limited circumstances than field preemption but without a conflict requirement.

Congress has made it clear in the CFPA that in the future neither the National Bank Act (NBA) nor the Home Owners Loan Act (HOLA) "[occupies] the field in any area of state law."[3] So much for field preemption. However, much of the remainder of Congress' articulation of new preemption standards is not so clear. Rather, Congress has likely created a multi-year period of great uncertainty as the agencies and the courts interpret the statutory language of the new preemption regime.

In broad outline, the new preemption standards:

- retain the standards set out in existing federal "enumerated consumer laws";[4]
- adopt a general standard for new laws promulgated under the CFPA;[5]
- eliminate the applicability of charter-based preemption standards to federally-chartered financial institution operating subsidiaries;[6]
- define statutorily a preemption standard to be applied by the Comptroller of the Currency and the courts with respect to a particular, defined category of state laws, namely those that fall within the definition of "State consumer financial laws";[7]
- establish that the preemption standards for federal savings associations will be the same as those for national banks;[8]
- grandfather existing contracts that were entered into prior to the enactment date regarding preemption issues;[9] and
- create additional opportunities for state actions against federally-chartered institutions;[10] and reduce the exclusive nature of the visitorial powers of their regulators.[11]

III. Preemption Principles Applicable to Enumerated Consumer Laws

As a general proposition, the CFPA locks in the preemption principles contained in existing federal consumer financial services protection statutes. The applicable section does so by providing that the CFPA shall not be construed "as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law."[12] Congress defined "enumerated consumer laws" by listing eighteen statutes or parts of statutes as to which it intended to preserve the existing preemption doctrines.[13]

The Director of the new Consumer Financial Protection Bureau (the Bureau) will assume the power to make preemption determinations that Congress originally delegated to the agencies charged with regulatory responsibilities under the enumerated consumer laws. Absent a change in jurisprudential direction by the Bureau from the direction travelled for decades by the agencies presently vested with those powers, there should be stability with regard to the preemption doctrines associated with the enumerated consumer laws. Additionally, the Bureau is given explicit general power to make such preemption determinations as to whether a state law is inconsistent with the provisions of the CFPA.[14] Since this article is primarily devoted to the changes created by the CFPA, it does not dwell at any length on the characteristics of the existing preemption doctrines contained in the enumerated consumer laws.

It deserves to be noted, however, that there are a number of different preemption doctrines contained in the enumerated consumer laws. They include, for example, three different preemption standards contained in the Truth in Lending Act alone,[15] direct preemption of certain state laws under the Equal Credit Opportunity Act,[16] and a large number of provisions of the Fair Credit Reporting Act that establish national uniform provisions and preempt defined provisions of state law.[17]

IV. Preemption Principles for Other Laws

For CFPA issues, other than enumerated consumer laws that contain their own preemption determination doctrine, the CFPA adopts a similar standard to the standard most frequently articulated in the enumerated consumer laws: namely that state laws are preempted only to the extent that any such a law is inconsistent with the provisions of the CFPA, and then only to the extent of the inconsistency.[18] The CFPA goes on to state, as do many of the enumerated consumer laws, that

3. 12 U.S.C.S. §§ 25b(b)(4), 1465(b).
4. 12 U.S.C.S. § 5551(b).
5. *Id.* § 5551(a).
6. 12 U.S.C.S. § 25b.
7. *Id.*
8. 12 U.S.C.S. § 1465.
9. 12 U.S.C.S. § 5553.
10. 12 U.S.C.S. § 5552.
11. 12 U.S.C.S. § 25b(i).
12. 12 U.S.C.S. § 5551(b).
13. 12 U.S.C.S. § 5481(12).
14. 12 U.S.C.S. § 5551.
15. *See, e.g.*, 15 U.S.C. § 1610(a)(1).
16. 15 U.S.C. § 1691d (c), (d).
17. *See* 15 U.S.C. § 1681t (b)-(d).
18. 12 U.S.C.S. § 5551(a)(1).

a state law is not inconsistent with the provisions of the CFPA if the state law affords greater protection to consumers than the protection under the CFPA.[19]

The "greater protection" principle raises many obvious, and some not so obvious, difficulties in application. In certain circumstances, the Bureau, which is charged with making such preemption determinations,[20] will have to determine whether "more" is "greater." For example, if a state law requires additional disclosures, does that law provide greater protection for consumers, even if not inconsistent in a conflict sense? The growing wisdom of decades, born of multiple empirical studies, is that information-overload can be detrimental to consumers and that additional disclosure may provide lesser rather than greater consumer protection.

The statute provides that the Bureau may make such preemption determinations on its own motion or in response to a nonfrivolous petition initiated by an interested person. The statute does not explain, however, who is regarded as an interested person. Other federal banking agency regulations use similar terms, and the Bureau may take guidance from such regulations. For example, the Federal Reserve Board (FRB) permits such petitions under the Truth in Lending Act from "any creditor, State or other interested person."[21] Accordingly, it is likely that "interested persons" will include banks and other institutions that may be covered by the state laws, as well as the states themselves.

The Bureau will be applying the general standards set forth in CFPA section 1041(a) to the substantive provisions of the CFPA and to its own regulations.[22] It is probable, however, that Congress will continue, as it has for decades, to set out appropriate preemption standards that are tailored to new statutory provisions if it chooses to enact additional substantive consumer protections.

What is missing from this statutory construct is a safe harbor provision that would protect covered persons who do not comply with state laws based on a preemption determination of the Bureau in those instances where that determination is rescinded or invalidated by a court at a later date. Such a safe harbor for preemption determinations (as well as, for that matter, a safe harbor for those who rely on substantive interpretations by the FRB) is a regular feature of the multiple existing statutes characterized as enumerated consumer laws.[23] In contrast, absent corrective action by Congress or adoption by the courts of a safe harbor principle, covered persons may be assuming risks for a failure to comply with a state law even subsequent to a favorable preemption determination by the Bureau.

V. Charter Based Preemption—Substantive Provisions

Federally-chartered institutions, including national banks and federal savings associations, rely consistently on federal regulators' preemption determinations to conduct the banking activities authorized by their charterers consistently across state lines. Congress destabilizes that environment in two key provisions of the CFPA.

First, Congress determined that subsequent to the "designated transfer date," federal savings associations will be subject to the same laws and legal standards that are applicable to national banks regarding preemption of state law. Furthermore, Congress expressly stated that the HOLA "does not occupy the field in any area of state law."[24] Without more, these new statutory principles would have had a major impact on the preemption doctrine associated with a federal savings association charter. But there is more, much more, with regard to the impact of the CFPA on federally-chartered institution preemption doctrine.

As an initial matter, the CFPA creates a special category of state laws denominated as "State consumer financial laws" as to which a special preemption regime applies, with both substantive and procedural components. Hence, knowing which state laws fit into the category of "State consumer financial law" is an all-important threshold question in a preemption analysis for federally-chartered institutions.

A State consumer financial law is defined 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…or any account related thereto, *with respect to a consumer*."[25] The scope of this concept will no doubt be wrestled with by federally-chartered institutions, the Office of the Comptroller of the Currency (OCC), and the courts for years to come. The specific manner in which Congress defined the concept of a "State consumer financial law" raises immediately questions of whether state statutes that require, for instance, licensing, bonding or qualifications of employees, or adherence to generally stated principles such as prohibitions against unfair or deceptive practices, are excluded from the statutory definition of a State consumer financial law.

If the state law in question falls within the scope of a State consumer financial law, it is preempted only if it meets one of three tests: (1) the state law has a discriminatory effect on national banks in comparison with banks chartered by that state; (2) it is preempted in accordance with the legal standard for preemption set forth in the unanimous decision of the U.S. Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*;[26] or (3) the state law is preempted by a provision of federal law other than the CFPA. The

19. 12 U.S.C.S. § 5551(a)(2).

20. *Id.*

21. 15 U.S.C.S. § 1610(a).

22. 12 U.S.C.S. § 5551(a).

23. *See e.g.*, Electronic Funds Transfer Act, at 15 U.S.C. §§ 1693q, 1693m(d).

24. 12 U.S.C.S. § 1465(b).

25. 12 U.S.C.S. § 25b(a)(2)) (emphasis added).

26. 517 U.S. 25 (1996).

second of these three tests has far and away generated the most discussion.

With respect to the *Barnett Bank* standard, Congress not only specifically referred to that case but added language that could, in itself, define a standard, to wit: a state law is preempted only if a State consumer financial law "prevents or significantly interferes with the exercise by the national bank of its powers…."[27] The quote is a close paraphrase of language contained in *Barnett Bank*. Congress explicitly used the *Barnett Bank* preemption standard for national banks at least once before, in the Gramm-Leach-Bliley Act in 1999, with respect to insurance sales, solicitations and cross marketing by national banks.[28] Nevertheless, the addition of this language, when reference to the *Barnett Bank* decision alone was thought by many to be legally sufficient, created significant debates in the weeks leading up to the passage of the CFPA concerning whether Congress was attempting to achieve some result different from the statutory incorporation of the *Barnett Bank* case law.

One could argue that Congress need not have specifically mentioned the *Barnett Bank* case if what Congress intended was to legislate federal preemption where a state law "prevents or significantly interferes with the exercise by the national bank of its powers." That statutory language alone would have sufficed to define a standard. Because Congress specifically referred to the U.S. Supreme Court's unanimous decision in *Barnett Bank*, one might conclude that Congress meant to emphasize that it was adopting the law of *Barnett Bank*; that is, not only the language of *Barnett Bank* itself, but those judicial decisions that in the period after 1996 applied the *Barnett Bank* standard in differing situations and further illuminated the *Barnett Bank* standard.

To deal with such concerns, both in the conference report that accompanied the bill[29] and in a colloquy between Senators Carper (R. Tenn.) and Dodd (D. Mass) (author of the bill and chair of the Senate Banking Committee) on July 15, 2010, the same assurance was made: that the intent of Congress was the straight-forward codification of the judicial standard contained in the *Barnett Bank* decision, not the creation of a new legislative standard severed from its judicial roots and precedent.[30]

The major practical question with regard to the application of the *Barnett Bank* standard to "State consumer financial laws" is whether this congressionally-borrowed judicial standard significantly changes the judicially developed preemption standard under the National Bank Act with respect to such defined state laws. If the adoption of the *Barnett Bank* standard was intended to include the judicial gloss that surrounds the *Barnett Bank* decision, there is an argument that there has not been a major change in the judicially-created doctrines that were based on *Barnett Bank*. Or, to put it another way, courts that purported to be following *Barnett Bank* in 1997 might be expected to rule on an identical case in 2011 the same way that they did in 1997.

Others may argue, however, that some NBA preemption judicial decisions were based on the OCC's 2004 articulation of its preemption standards[31] and the deference that the courts accorded the OCC's regulation. They might argue that, to the extent it can be demonstrated that the OCC's regulation exceeded the proper application of *Barnett Bank*, in the future the judiciary should not rely on those particular precedents.

Whatever the conclusion with regard to the substantive question of what is the preemption standard, the CFPA will dramatically change the procedures the OCC must follow when making State consumer financial law preemption determinations. As a result, the time and expense associated with achieving certainty with respect to scores of State consumer financial laws may be enormous, whether the quest for certainty is directed initially at the Comptroller or the judiciary.

First, with respect to State consumer financial laws, the Comptroller is obliged to make future preemption determinations not by the category of the law, but only on a case-by-case basis. Under that restriction, the Comptroller must make a determination concerning the impact of a particular State consumer financial law on any national bank that might be subject to that law. The Comptroller is allowed, however, to include in such a determination the law of any other state with "substantively equivalent terms." When expanding a preemption determination to include the law of "another State" the Comptroller is obliged to consult with the Bureau and take the views of Bureau into account.[32]

Further, no preemption determination made by the Comptroller shall preempt a state law "unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption…."[33]

What effect does the CFPA have on state laws that do not fall within the definition of "State consumer financial law"? It would appear that the OCC is free of any substantive narrowing that may (or may not) be associated with the statutory adoption of the *Barnett Bank* legal standard for preemption, and may have greater flexibility with regard to preemption determinations. It seems clear that the OCC would be free of the case-by-case process limitations. Furthermore, the CFPA suggests no such case-by-case statutory

27. 12 U.S.C.S. § 25b(b)(1)(B).

28. *See* 15 U.S.C. § 6701(d)(2)(A).

29. Staff of H. and S. Committee of Conference on The Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Cong., Joint Explanatory Statement on H.R. 4173, at 875 (2010). The Joint Explanatory Statement of the Committee of the Conference also stated: "The conference report also revises the standard the OCC will use to preempt state consumer protection laws." *Id.*

30. 156 Cong. Rec. S 5902 (daily ed. July 15, 2010).

31. *See* 69 Fed. Reg. 1,904, 1,910 (January 13, 2004) (amending 12 CFR §§ 7, 34, which provide in relevant parts, and using substantially similar language, that "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized power are not applicable to national bnaks." (*e.g.*, 12 CFR § 7.4007(b))).

32. 12 U.S.C.S. § 25b(b)(3).

33. *See id.* § 25b(b)(c).

limitation on the judiciary, even when a State consumer financial law is at issue.

However, whether or not a preemption determination made by the OCC involves a State consumer financial law, new specific statutory standards for judicial review of any OCC determination regarding preemption would appear to apply.[34] For any OCC preemption determination under the NBA or certain provisions of the Federal Reserve Act, courts are instructed to "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."[35] This language invokes a *Skidmore*-level of deference,[36] which has been described as "respect," but only to the extent that it has the power to persuade.[37]

While the Congress clearly intended to impact the OCC's functioning with regard to preemption determinations, Congress explicitly indicated that with respect to non-preemption determinations and interpretations it did not intend to affect the deference that a court might afford to the OCC.[38]

Congress did not stop with its efforts to straight-jacket the Comptroller by articulating new legal standards for preemption, providing a new process for making such determinations, and imposing on the courts specific requirements for review. Congress also added requirements that:

- the preemption determination authority of the Comptroller cannot be delegated;[39]

- the Comptroller will be required to conduct a periodic review of each determination it makes that a State consumer financial law was preempted. Those reviews must be conducted no less frequently than once every five years. That review process is required to be accomplished through notice and public comment and the result of the review must be published in the *Federal Register*;[40] and

- on the completion of such reviews, the OCC is required to submit a report of the review to the relevant Congressional committees.[41]

A related issue of significant import is the treatment of subsidiaries and affiliates of federally-chartered institutions with regard to preemption doctrines. In *Watters v. Wachovia Bank*,[42] the banking industry successfully had argued that whether an activity of a bank was conducted within the bank itself or in a organization owned by the bank was a question of corporate structure formality and that the formal legal structure should not impinge on the ability of a national bank's subsidiary to be protected from state laws that prevented or interfered with the exercise of bank powers. For the industry, there was much to cheer about in 2007 as a result of the *Watters* decision, which permitted such subsidiaries to enjoy the charter-based preemption protections of their parents. That cheering has been silenced. Preemption protection for non-depository subsidiaries of federally-chartered institutions will be eliminated as of the effective date of the CFPA (*i.e*., the "designated transfer date"). At that time such subsidiaries and affiliates will enjoy no special preemption status as a result of their relationship to a national bank or federal savings association.[43] Federally-chartered institutions functioning today through subsidiaries or affiliates face hard choices with respect to reorganizing or subjecting such subsidiaries and affiliates to state law.

VI. Safe Harbor for Existing Contractual Provisions

As noted above, Congress created unnecessary uncertainty in the CFPA by failing to continue generally a prior pattern of providing statutory safe harbors for federal preemption determinations. Statutory safe harbors will, however, remain available for preemption determinations made by the Bureau under the enumerated consumer laws.

Congress did, however, ameliorate one aspect of the uncertainty associated with the new preemption doctrines: it grandfathered contracts that pre-date the enactment of the CFPA by creating a limited statutory safe harbor. Congress provided that the CFPA, as well as any subsequent Bureau action, does not affect any preemption determination by the OCC or the Director of the Office of Thrift Supervision (OTS) regarding the applicability of state law under banking laws or regulations to contracts entered into before July 22, 2010 by a national bank, federal savings association, or a subsidiary or affiliate thereof.[44] National banks and federal savings associations may, of course, also avail themselves of far broader safe harbors in the enumerated consumer laws.[45]

Major differences may exist between the ability of a national bank or federal savings association to rely on preemption determinations made pursuant to authority under the enumerated consumer laws and the reliance available under CFPA section 1043.[46]

34. *Id*. § 25b(b)(5)(A).

35. *Id*.

36. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

37. *See, e.g*., Christensen v. Harris County, 529 U.S. 576, 587 (2000).

38. 12 U.S.C.S. § 25b(b)(5)(B).

39. *Id*. § 25b(b)(6).

40. *Id*. § 25b(d)(1).

41. *Id*. § 25b(d)(2).

42. 550 U.S. 1 (2007).

43. *See* 12 U.S.C.S. §§ 25b(b)(2), (e), (h), and 1465(a).

44. 12 U.S.C.S. § 5553.

45. *See, e.g*., Electronic Funds Transfer Act, 15 U.S.C. § 1693q (providing that "If the [FRB] determines that a State requirement is inconsistent, financial institutions shall incur no liability under the law of that State for a good faith failure to comply with that law, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.").

46. 12 U.S.C.S. § 5553.

For contracts entered into before July 22, 2010, CFPA section 1043 raises interesting issues with regard to any amendments to such a protected contract. In particular, it raises issues with respect to all contracts that are relational in nature between covered persons and their customers. Such contracts include typical deposit account relationships, any open-end credit contracts, including tens of millions of credit card accounts, and debit card contracts. Those customer relationships clearly envision that the underlying contract will not be frozen for all time in its initial iteration, but that the relationship will be amended from time to time by the bank as circumstances change. Many times, such changes are mandated by law. If the new term is unacceptable, customers will assumedly take their future business to a competitor with more favorable terms.

Obvious questions thus arise: Will the amended term enjoy the safe harbor protection of section 1043? Or, will the new term not be protected by the section 1043 safe harbor but the remainder of the contractual terms will be protected? Or, will any contract in its entirety lose the safe harbor protection when it is amended?

A second gap, highlighted by a comparison with the safe harbor provisions under the enumerated consumer laws, is in the scope of the safe harbor. Under the enumerated consumer laws, the preemption safe harbor extends to all activity that might otherwise be a violation of a preempted state law. Under the specific language of section 1043, it is clear that the terms of any contract entered into before July 22, 2010 will be protected. It ought to be almost as clear that any conduct engaged in by a financial institution that carries out the terms contained in such a contract should also be protected.

VII. Rate Limits

Despite vigorous assaults, Congress retained national policies as to one key aspect of credit products: interest provisions. As to all lenders, Congress forcefully stated that no provision of the CFPA "shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit…by a covered person to a consumer…."[47]

As to national banks, Congress confirmed the body of statutory, regulatory and case law that exists associated with the charging of interest by such banks.[48] It did so by providing that no provision of the NBA, as amended by the CFPA, shall be construed as: (1) altering the authority conferred by 12 U.S.C. section 85 (Section 85) to national banks to charge interest as allowed by the laws where the bank is located; or (2) altering the meaning of "interest."

While explicitly protecting this feature of national bank law, Congress did not explicitly protect the federal savings association analogue to Section 85.[49] That latter provision, further elucidated by OTS regulations,[50] has provisions similar to Section 85. While Congress did not explicitly protect the federal savings association provisions, it also did nothing to alter those interest provisions.

This protective provision of the CFPA,[51] should be read as confirming not just the statutory language of Section 85, but the rich body of case law and regulatory interpretation that provides a full articulation of what the statutory language means. That body of law certainly includes the key Supreme Court decision that determined that interest could be exported.[52] Further, Congress, by expressly eschewing any CFPA impact on the "meaning of interest" under Section 85, protected a second rich body of case law and regulatory interpretation, which has expanded considerably, for purposes of Section 85 only, the traditional concept of interest. Congress has preserved, therefore, determinations of the OCC, for example, that late charges, for Section 85 purposes, are included within the meaning of interest. That particular determination was also confirmed by a unanimous U.S. Supreme Court in *Smiley v. Citibank*.[53]

The impact of these important provisions does not only affect federally-chartered banks. In the formative period, three decades ago, when these "interest" principles were being clarified by the courts, state legislatures, and the OCC, Congress did not intercede with a contrary view. Rather, Congress interceded with a supportive doctrine by, in 1980, amending the Federal Deposit Insurance Act.[54] The amendment, not tied directly to Section 85, provided to state-chartered banks and other insured depository institutions similar interest rate protection and exportation rights as those possessed by national banks.

With regard to any judicial review of the OCC's Section 85 interest interpretations, it is important to note Congress' decision not to affect "the deference that a court may afford to the [OCC]" for non-preemption determinations.[55] OCC interpretations of the Section 85 meaning of interest clarify federal statutory language, but are not themselves state law preemption determinations. Thus, such OCC interpretations of the concept of interest in Section 85 should be classified as "determinations regarding the meaning of" the NBA.[56] And, existing deference standards, not the higher bars established for preemption determinations of the OCC,[57] should continue to apply.

VIII. Other Aspects of the Federal-State Relationship

A. Introduction

Congress enhanced the ability of the states to actively participate in the regulation of consumer financial services in additional ways. Congress clarified

47. 12 U.S.C.S. § 5517(o).

48. 12 U.S.C.S. § 25b(f).

49. 12 U.S.C. § 1463(g).

50. 12 CFR § 560.110 (2010).

51. 12 U.S.C.S. § 25b(f).

52. Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978).

53. 517 U.S. 735 (1996).

54. 12 U.S.C. § 1831d.

55. 12 U.S.C.S. § 25b(b)(5)(B).

56. *Id.*

57. *Id.* § 25b(b)(5)(A).

and enhanced the enforcement powers of states in sections 1042 and 1047 of the CFPA.[58] It further created a new, unusual statutory mechanism through which the states can attempt to prod the Bureau into rulemaking action.[59]

B. Enforcement Powers

Section 1042 creates a new framework for determining the states' enforcement powers as against financial services providers.[60] It addresses five different categories of actions: (1) actions by state attorneys general against all persons (other than national banks and federal savings associations) to enforce the CFPA and its regulations; (2) actions by state regulators against state-licensed or state-chartered entities to enforce the CFPA and its regulations; (3) actions by state attorneys general against national banks or federal savings associations to enforce regulations prescribed under the CFPA; (4) actions by state attorneys general or other state regulators against all persons to enforce the enumerated consumer laws; and (5) actions by state attorneys general or other state regulators to enforce state laws.

Section 1042(a)(1) of the CFPA provides that state attorneys general "may bring a civil action…to enforce provisions of [the CFPA] or the regulations issued under [the CFPA]," against any defendant that is subject to state jurisdiction, and may "secure remedies under provisions of [the CFPA] or remedies otherwise provided under other law."[61] Thus, state attorneys general have broad authority to bring actions under the CFPA against defendants subject to state jurisdiction. National banks and federal savings associations are specifically exempt from this broad authority, and instead are subject to the more limited authority described below.

Along the same lines, CFPA section 1042(a)(1) provides that "a State regulator may bring a civil action or other appropriate proceeding to enforce provisions of [the CFPA] or the regulations issued under [the CFPA] with respect to any entity that is State-chartered…."[62] The state regulator is authorized "to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity." Here again, a state regulator may not use this authority to bring actions against a national bank or federal savings association.

Section 1042(a)(2)(A) of the CFPA states the general rule for state attorneys general authority with respect to national banks and federal savings associations: Except as otherwise provided in CFPA section 1042 (a)(2)(B), state attorneys general "may not bring a civil action…against a national bank or federal savings association to enforce a provision of the [CFPA]."[63] The exception to that general rule, in CFPA section 1042(a)(2)(B), provides that state attorneys general may bring a civil action in federal or state court against a national bank or a federal savings association "to enforce a regulation prescribed under a provision of [the CFPA] and to secure remedies under [the CFPA] or remedies otherwise provided under other law."[64] The contrasting language between CFPA section 1042(a)(2)(A) and section 1042(a)(2)(B), and the heading of section 1042(a)(2)(B)—"Enforcement of Rules Permitted," suggests that the state attorneys general may only bring actions under regulations of the Bureau implementing the CFPA, but not under the provisions of the CFPA themselves.[65]

The fourth category of state enforcement powers is that of the powers granted by the enumerated consumer laws. Once again, the CFPA defers to the enumerated consumer laws where those laws themselves determine when the state attorneys general or state regulators may take enforcement action under those laws. The CFPA provides that "[n]o provision of [the CFPA] shall be construed as modifying…the authority of a State attorney general or State regulator to enforce [the enumerated consumer laws]."[66] Thus, within the construct set out in section 1042, state attorneys general are specifically permitted to bring civil actions against federally-charted financial institutions when the action arises under: (1) regulations promulgated under the CFPA; or (2) the enumerated consumer laws.

The last category preserves state authority to take enforcement action under state law with respect to three types of regulators.[67] It preserves the authority of: (1) state attorneys general and other state regulatory or enforcement agencies to bring actions or regulatory proceedings that arise solely under state law; (2) state securities regulators to "adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by [the state securities regulator];" and (3) state insurance regulators to "adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by [the state insurance regulator]."

The CFPA also imposes new procedural requirements for state authorities that bring actions under the CFPA.[68] A state attorney general or state regulator must notify the Bureau and the covered person's prudential regulator, if any, before initiating any court or administrative action against any covered person to enforce any provision of the CFPA or its regulations. The state attorney general or state regulator also must provide a copy of the complaint to be filed. There is an exception to the notice requirement where prior notice is "not

58. 12 U.S.C.S. §§ 5552, 25b.

59. 12 U.S.C.S. § 5551(c).

60. 12 U.S.C.S. § 5552.

61. *Id.* § 5552(a)(1).

62. *Id.*

63. *Id.* § 5552 (a)(2)(A).

64. *Id.* § 5552(a)(2)(B).

65. *Id.* § 5552(a)(2).

66. 12 U.S.C.S. § 25b(a)(3).

67. *Id.* § 25b(d).

68. *Id.* § 25b(b).

practicable."[69] In that instance, the state attorney general or state regulator must provide the notice to the Bureau and any prudential regulator immediately upon instituting the action or proceeding.

If a state authority brings an action to enforce any provision of the CFPA or its regulations, the Bureau is authorized to intervene in the action. Although the notice described above must be provided by a state authority to both the Bureau and any prudential regulator, only the Bureau is given the right to intervene.[70] If the Bureau elects to intervene in the action, the Bureau also has the right to: (1) remove the action to federal district court; (2) be heard on all matters; and (3) appeal any order or judgment to the same extent as any other party in the proceeding.[71]

C. Visitorial Powers

The CFPA amends the NBA and the HOLA to distinguish between state enforcement powers and the exclusive visitorial powers of the OCC and the OTS for national banks and federal savings associations, respectively. It also confirms the rights of private parties to pursue enforcement rights granted by federal and state law. The CFPA does so first by adopting the Supreme Court's holding in *Cuomo v. Clearing House Association, L.L.C.*,[72] which provides that state attorneys general are not limited in bringing judicial enforcement actions against national banks by virtue of the visitorial powers provisions of the NBA.[73] The CFPA also establishes a new section 6(c) of the HOLA, which incorporates and applies the provisions on visitorial powers relating to national banks to the visitorial powers relating to federal savings associations and their subsidiaries.[74]

Section 1047 of the CFPA preserves private parties' ability to enforce rights granted under federal and state law in the courts.[75] Both subparagraphs of section 1047 provide, in identical language, that "the ability of the [OCC] to bring an enforcement action under [the NBA or the HOLA, as applicable, or section 5 of the Federal Trade Commission Act] does not preclude any private party from enforcing rights granted under Federal or State law in the courts."[76] Note that section 1047 does not, in itself, grant any new rights to private parties to bring enforcement actions.[77]

D. The Power to Goad

Finally, the CFPA creates for the states an unusual procedure by which they can ask the Bureau to issue new consumer protection regulations or to amend an existing consumer protection regulation. The CFPA requires the Bureau to "issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau."[78]

While this provision would appear to give the states a role in the rulemaking process of a federal agency, the actual impact that the states will have on the Bureau's regulations is problematic. First, this process will be initiated only if the Bureau is requested to act by a majority of the states, and there may be few instances in which a majority of the states will organize to formally request an action by the Bureau. The political hurdles in each state and timing considerations may make informal pressure on the Bureau a more feasible alternative. Second, while the Bureau may feel pressured to take action in response to the states' request, it is not obligated to do so, except that the Bureau is required to issue a notice of proposed rulemaking. And finally, if the Bureau does change its regulations, it is not obligated to take the specific action requested by the states.

In response to any formal request from a majority of the states, the Bureau must follow the specific procedural requirements prescribed by the CFPA. If the Bureau plans to issue a regulation in response to the states' request, the Bureau must publish a *Federal Register* notice that discusses the following factors: (1) whether the proposed regulation would afford greater protection to consumers than any existing regulation; (2) whether the intended benefits of the proposed regulation would outweigh any increased costs or inconveniences for consumers, and would not discriminate unfairly against any category or class of consumers; and (3) whether a federal banking agency has advised that the proposal is likely to present an unacceptable safety and soundness risk to insured depository institutions.[79] The Bureau will need to do this whether the final regulation is the same as, or differs from, the requested action of the states. If the Bureau does not issue a final regulation, it must publish an "explanation of such determination" in the *Federal Register*.[80] It must provide a copy of the explanation to each state that requested the action, as well as to the Senate Banking Committee and House Financial Services Committee.

IX. Conclusion

The Subtitle that contains the new preemption doctrines of the CFPA is called Preservation of State Law. Most frequently, similar provisions of existing statutes, under the enumerated consumer laws, for instance, are labeled more neutrally, "relation to state law" or "effect on other laws." The CFPA choice of language for the heading may reflect the attitude of some members of Congress. Those members may have been convinced in 2009–2010, probably incorrectly, that

69. *Id.* § 25b(b)(1)(B).

70. *Id.* § 25b(b)(2).

71. *Id.*

72. 129 S. Ct. 2710 (2009).

73. 12 U.S.C.S. § 25b(i)(1).

74. 12 U.S.C.S. § 1465(c).

75. 12 U.S.C.S. §§ 25b, 1465.

76. *Id.*

77. *See* 12 U.S.C.S. §§ 25b(j), 1465(d).

78. 12 U.S.C.S. § 5551(c)(1).

79. *Id.* § 5551(c)(2).

80. *Id.* § 5551(c)(3)(B).

the states had been hobbled by federal preemption doctrines and that the states otherwise could have, and would have, prevented aspects of our nation's 2008–2011 (and continuing) economic crisis.

Congress dramatically altered the law of preemption for subsidiaries and affiliates of federally-chartered financial institutions. It eliminated the near-field preemption previously accorded to federal savings associations. It placed procedural constraints on some preemption determinations of the OCC, those that will be directed at a limited and defined class of state laws.

Whether Congress otherwise intended to, or has, altered the basic substantive preemption doctrines associated with national banks is unclear.

Because of the powers vested in the OCC and the unusual new powers that will be possessed by the new Bureau, some of the answers to the direction of preemption law will be shaped by the persons appointed to lead these agencies.

One other aspect of the new preemption doctrines is clear. The costs to covered persons of, first, uncertainty and, then, litigation and compliance will be high. Those costs will be born ultimately by society. The total costs are unknowable today, but can be determined in the years ahead. Policy makers should evaluate the consequences of Congress' new preemption regime to determine whether there are, in fact, clear societal benefits that justify the costs imposed on the public as a result of that new regime.

Clarifications to Interim Rule…

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amortization loans. The Commentary notes that the payments in this row must be calculated based on an assumption that the consumer makes the minimum required payment for as long as possible under the terms of the legal obligation;

- the minimum periodic payment that would be due at the first payment increase and the second, if any, which must also correspond to the interest rates disclosed as noted above at Part III.D.; and
- a statement that the minimum payment pays only some interest, does not repay any principal, and will cause the loan amount to increase;
- the fully amortizing periodic payment amount at the earliest time when such a payment must be made, which must correspond to the interest rate disclosed as noted above at Part III.D.; and
- if applicable, in addition to the payments set forth above, for each interest rate disclosed under the negative amortization interest rate disclosure provisions, the amount of the fully amortizing periodic payment, labeled as the "full payment option," and a statement that these payments pay all principal and all accrued interest.

The September Interim Rule also provides that, for a negative amortization loan, the creditor must disclose the following information, in close proximity to the required table with headings, content, and format substantially similar to Model Clause H–4(G) in Appendix H to Regulation Z:[20]

- the maximum interest rate, the shortest period of time in which such interest rate could be reached, the amount of estimated taxes and insurance included in each payment disclosed, and a statement that the loan offers payment options, two of which are shown; and
- the dollar amount of the increase in the loan's principal balance if the consumer makes only the minimum required payments for the maximum possible time and the earliest date on which the consumer must begin making fully amortizing payments, assuming that the maximum interest rate is reached at the earliest possible time.

D. Disclosures for Balloon Mortgages

With respect to mortgages that require a balloon payment,[21] the September Interim Rule provides that a balloon payment must be disclosed separately from any other periodic payments disclosed in a table, and must be outside the table and disclosed in a manner substantially similar to Model Clause H–4(J) in Appendix H to Regulation Z. Model Clause H–4(J) reads as follows:

> **[Final Balloon Payment due (date): $___]**

Notwithstanding the foregoing, if the balloon payment is scheduled to occur at the same time as another payment required to be disclosed in a table, then the balloon payment must be disclosed in the table.

V. "No-Guarantee-to-Refinance" Statement Disclosure

The September Interim Rule also requires creditors to disclose a statement that there is no guarantee the consumer can refinance the transaction to lower the interest rate or periodic payments. This statement must be in a form substantially similar to Model Clause H–4(K) in Appendix H to Regulation Z, which reads as follows:

> **There is no guarantee that you will be able to refinance to lower your rate and payments.**

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20. *See* the Appendices to this article and the preceding article in this issue for the Model Clauses.

21. The September Interim Rule defines a balloon payment as a payment that is more than two times a regular periodic payment.