Florida Law Review

Volume 63 | Issue 6 Article 4

2-8-2013

Some More Watters, Please: The Dodd-Frank Act's New Preemption Standards Lighten Consumers' Wallets

Courtney Gaughan

SOME MORE *WATTERS*, PLEASE: THE DODD-FRANK ACT'S NEW PREEMPTION STANDARDS LIGHTEN CONSUMERS' WALLETS

Courtney Gaughan[*]

Abstract

The Dodd-Frank Wall Street Reform and Consumer Protection Act precipitates innumerable changes that will both directly and indirectly shape the future of the financial industry. This Note addresses two important subsets of the Dodd-Frank Act—Section 1044 and Section 1046—which vitiate the authority of federally chartered banks and thrifts to comply with federal laws over state laws. For decades, courts have preempted scores of state laws, which are often more strict than federal laws, from regulating the operations of national banks and federal thrifts. The Supreme Court's decision in *Watters v. Wachovia Bank, N.A.* extended to operating subsidiaries the same preemption protection afforded to national banks and financial thrifts, allowing parent institutions to operate their subsidiaries uniformly. Now, Sections 1044 and 1046 of the Dodd-Frank Act make it more difficult for banks and thrifts to escape stringent state laws. For choice of law purposes, the new regulations treat subsidiaries the same as individuals and nonbank corporations, thereby burdening financial institutions. Although the goal of the Dodd-Frank Act is to protect consumers from predatory banking practices, the new preemption standards in Sections 1044 and 1046 will ultimately pass increased operating costs on to consumers. To prevent consumers from bearing the burden of these provisions, this Note urges Congress to reinstate the *Watters* preemption standard for subsidiaries of national banks and federal thrifts.

* J.D. Candidate, 2012, University of Florida Levin College of Law; B.S.B.A. in Finance, 2009, Stonehill College. This Note is dedicated to my parents Jim and Kerri, my sister Shannyn, and my brothers Jimmy and Kyle—your love, support, and guidance in every aspect of my life help me achieve my goals every day. Thank you to Matthew Salerno—your continuous love and support mean the world to me. I would also like to thank the editors of the *Florida Law Review* for all of their hard work and assistance.

INTRODUCTION

In 1929, the United States slipped into the worst economic depression ever to face the nation.[1] The people looked to the federal government to stabilize the market and guide America back to prosperity. The Roosevelt Administration responded to the economic crisis in 1933 by passing the New Deal, which augmented the federal government's regulatory powers.[2] Now, with America looking to overcome the recent recession, Congress has passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] a monumental piece of legislation that rivals the scope and breadth of the New Deal.[4] The Dodd-Frank Act purports to resolve and prevent problems posed by inadequate regulatory oversight and to eliminate systemic risk in the financial industry.[5]

Complacent and inadequate oversight of the housing and mortgage loan markets characterized the years preceding the recent state of economic discord.[6] The housing market bubble burst, and the

1. THOMAS E. HALL & J. DAVID FERGUSON, THE GREAT DEPRESSION: AN INTERNATIONAL DISASTER OF PERVERSE ECONOMIC POLICIES 1–2 (1998).

2. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425 (1987).

3. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

4. *See* Damian Paletta, *Fight over Consumer Agency Looms as Overhaul Is Signed*, WALL ST. J., July 22, 2010, http://online.wsj.com/article/SB10001424052748704746804575367502836650966.html.

5. *See* Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J.L. & PUB. POL'Y 671, 673 (2010).

6. *See* CCH, DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: LAW, EXPLANATION AND ANALYSIS ¶ 55 (2010) [hereinafter DODD-FRANK: LAW, EXPLANATION

subsequent subprime mortgage crisis and "freeze-up of the interbank lending market" created a domino effect that rippled through financial institutions with highly concentrated systemic risk.[7] Policymakers' realization that augmented federal controls were needed to reduce systemic risk in the financial industry became the impetus for drafting the Dodd-Frank Act.[8]

Massachusetts Congressman Barney Frank introduced the bill, which is now 2,319 pages, to the House of Representatives on December 2, 2009, with the stated purpose of effecting financial regulatory reform, protecting consumers and investors, and promoting financial stability[9] by reducing systemic risk in the financial industry.[10] President Barack Obama signed the bill into law on July 21, 2010.[11] Whether the Dodd-Frank Act will succeed in stabilizing the financial markets remains uncertain, as many of its implications are not immediately apparent.[12] Although some provisions became effective shortly after the Act was passed, the new preemption standards did not go into effect until 180 days after its passage. Now that the standards are starting to take effect, banks will soon need to make pivotal decisions in response to the changing preemption landscape.[13]

The Dodd-Frank Act generates substantial reform for many aspects of the banking industry.[14] Significantly, the Act alters the application of

---

AND ANALYSIS].

7. *Id.*; *see also Declaration of the Summit on Financial Markets and the World Economy*, THE WHITE HOUSE (Nov. 15, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-1.html; Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., The Recent Financial Turmoil and Its Economic and Policy Consequences (Oct. 15, 2007), http://www.federalreserve.gov/newsevents/speech/bernanke20071015a.htm. Systemic risk is "the risk of a significant reduction in the effectiveness of the financial system caused by a chain reaction of failures of major financial institutions." DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 105.

8. DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 55.

9. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (to be codified in scattered sections of the U.S. Code).

10. MARC LABONTE, CONG. RESEARCH SERV., R41384, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: SYSTEMIC RISK AND THE FEDERAL RESERVE 15 (2010).

11. Amanda Becker, *Financial Overhaul Has Been Signed, but Lawyers' Work on Law Is Far from Over*, WASH. POST, July 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/23/AR2010072304359.html.

12. For a comprehensive overview of the various effective dates of the Dodd-Frank Act, see DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 60,001.

13. Dodd-Frank Act § 1062(c)(1) (to be codified at 12 U.S.C. § 5582).

14. *See, e.g.*, *id.* § 171(b)(1)–(2) (to be codified at 12 U.S.C. § 5371) (requiring federal banking agencies to establish minimum risk-based leverage and capital requirements for financial institutions); *id.* § 619 (to be codified at 12 U.S.C. § 1851) (placing strict regulations on banks' investment activities).

federal preemption for laws regulating national banks, federal thrifts, and their subsidiaries.[15] With entities operating at the state and federal levels, the dual banking system is a defining feature of financial markets in the United States.[16] Although state and national banks coexist harmoniously, conflict often arises as to whether national banks are subject to the same state laws that govern state-chartered banks.[17] Traditionally, federally chartered banks, thrifts, and their subsidiaries had a great deal of leeway to conduct business as they saw fit[18] because they were exempt from many state laws purporting to regulate banking activities.[19] The changes effected by the Dodd-Frank Act aim to tighten the lenient practices that have contributed to a period of financial instability. However, unintended economic consequences precipitated by the new preemption standards set out in sections 1044 and 1046 of the Act—which alter whether state laws apply to federally chartered banks, thrifts, and their subsidiaries—may produce results inconsistent with this goal.

This Note addresses the adjustments that national banks and federal thrifts, especially with regard to their subsidiaries, must consider under the Dodd-Frank Act and the resulting economic consequences of those adjustments. Part I briefly describes federal preemption before the passage of the Act and explains how a lack of both effective federal regulations and state control over national banking practices contributed to the market downturn. Before Dodd-Frank, the states' lack of control over national banking practices raised concerns that consumers were defenseless against predatory practices.[20] Part II examines Congress's attempt to tighten financial regulation through sections 1044 and 1046 of the Act, which alters the landscape of federal preemption as it applies to national banks, federal thrifts, and especially their subsidiaries. Although these provisions have positive effects, they also have the unfortunate consequence of overturning *Watters v. Wachovia Bank*,

15. *Id.* § 1044 (to be codified at 12 U.S.C. § 25b); *id.* § 1046 (to be codified at 12 U.S.C. § 1465).

16. COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS, NATIONAL BANKS AND THE DUAL BANKING SYSTEM 1 (2003), *available at* http://www.nubank.com/bankingtheory/DualBanking.pdf.

17. *See* Emma J. Hodson, *Finding the Middle Ground in the Preemption War Between States and Federal Financial Institutions: The Practical Limitations on* State Farm Bank, F.S.B. v. Reardon, 13 N.C. BANKING INST. 541, 546–47 (2009).

18. *See* discussion *infra* Sections II.A–C.

19. *See, e.g.*, SPGGC, LLC v. Ayotte, 488 F.3d 525, 534–36 (1st Cir. 2007) (holding that a New Hampshire law prohibiting expiration dates and fees attached to gift cards was preempted by both the National Bank Act and the Home Owner's Loan Act).

20. Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, National Banks and Uniform Standards, Remarks Before America's Community Bankers Government Affairs Conference (Mar. 9, 2004), *in* OCC Q.J., June 2004, at 52, *available at* http://www.occ.gov/static/Publications/qj/qj23-2/QJ23-2.pdf.

N.A.,[21] in which the Supreme Court held that federal preemption should apply to a subsidiary as it would to the parent bank. This will ultimately make banking operations a much more expensive endeavor.[22] Part III discusses the economic effect that overturning *Watters* will have on banks and the public. In the wake of the Dodd-Frank Act, federally chartered banks and thrifts will have to decide whether the costs of compliance with the new preemption standards necessitate rolling up their subsidiaries. Internalizing a subsidiary may result in short-term business costs; however, maintaining a subsidiary will likely result in substantial long-term costs that the entity will have to pass on to consumers. Thus, financial institutions face a difficult decision—one that may determine the future stability of their business.

This Note concludes by urging Congress to reinstate *Watters* as the preemption standard for subsidiaries of national banks and federal thrifts. Subsidiaries should be regulated to the same extent as their parent banks. The preemption reforms under Dodd-Frank sufficiently shield banks from many onerous state regulations. However, subsidiaries now are denied protection and are wholly vulnerable to the whims of the states. Sections 1044(a) and 1046 limit the services offered by national banks and increase the cost of financial services. Thus, these provisions may disadvantage consumers who would otherwise be adequately protected under the *Barnett Bank of Marion County, N.A. v. Nelson*[23] standard.

I. FEDERAL PREEMPTION BEFORE DODD-FRANK

A. *Federal Preemption Doctrine: A Brief Overview*

Our government is skillfully crafted around a "system of overlapping legal authority"[24]—both the federal government and the fifty individual state governments are vested with the power to legislate.[25] This strategy creates a dipole that protects both state autonomy and national interest.[26] Under this system, "conflicts inevitably arise" between federal and state laws in a particular field.[27] The Supremacy Clause of the U.S. Constitution stabilizes this internal conflict, stating that federal laws "shall be the supreme Law of the

21. 550 U.S. 1 (2007).

22. *See* discussion *infra* Section II.D.

23. 517 U.S. 25 (1996).

24. Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 182 (2004).

25. U.S. CONST. amend. X.

26. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1638 (2006).

27. Davis, *supra* note 24, at 182.

Land."[28] This principle is the foundation for the federal preemption doctrine, which provides that federal statutes and regulations trump state laws that stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[29] Accordingly, courts have held that state laws that conflict with federal laws are "without effect."[30]

Courts recognize two instances that warrant preemption: express and implied preemption. Express preemption applies when a federal statute explicitly preempts state law; implied preemption exists when congressional intent to preempt state law is implicit within the context of the statute but unexpressed in the statute itself.[31] From implied preemption, courts have carved two narrow subcategories: conflict and field preemption.[32] As a check on federal preemption powers in the absence of clear congressional intent to override a state law, a high threshold must be met for these implied types of preemption to be applicable.[33] Conflict preemption derives its authority from the Supremacy Clause; whenever a state law actually conflicts with a federal law, the state law is preempted and rendered ineffective.[34] The conflict preemption test is met when "it is impossible for a private party

---

28. U.S. CONST. art. VI, cl. 2.

29. John P.C. Duncan, *The Course of Federal Pre-Emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 228 (1999) (emphasis omitted) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977)).

30. Altria Grp. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

31. *Id.* (explaining that Congress's intent to preempt state law may be found in "a statute's express language or through its structure and purpose" (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))); *see also* Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1259 (2010) (distinguishing between "'express' preemption—where Congress includes in a statute an explicit statement of intent to preempt state or local law and sets forth the scope of that preemption—and 'implied' preemption, which covers instances where Congress's preemptive intent is not clearly stated").

32. *See* Duncan, *supra* note 29, at 232 (discussing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963), which established the groundwork for conflict preemption by explaining that a "holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce"); *id.* at 231 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), which held that an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject").

33. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1130 (1999) (discussing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 38 (1824), which explains that a state law must not pose "a mere possibility of *inconvenience* in the exercise of powers, but an *immediate constitutional repugnancy*, that can, by implication, alienate and extinguish a pre-existing right of sovereignty" (quoting THE FEDERALIST NO. 32, at 154 (Alexander Hamilton) (Garry Wills ed., 1982))).

34. *See id.* at 1134.

to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[35] Similarly, field preemption is applicable if the state regulation poses an obstacle "to the accomplishment and execution of the full purposes and objectives of Congress."[36] But field preemption allots even more authority to federal agencies; for any given field, a state law is preempted "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[37]

Congress granted the Office of Thrift Supervision (OTS) maximum regulatory authority by drafting the Home Owners' Loan Act (HOLA) to occupy the field of federal thrifts.[38] On the other hand, the National Bank Act (NBA) neither explicitly preempts state laws nor asserts federal government supremacy over the banking industry.[39] In the seminal banking preemption case of *Barnett Bank of Marion County, N.A. v. Nelson*, the Supreme Court established conflict preemption as the proper grounds for eluding regulation by state banking laws.[40] This standard protected national banks and consumers alike—states could

35. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (citations omitted) (citing *Florida Lime*, 373 U.S. at 142–43 and quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). In deciding whether a state law can survive conflict preemption, the court must determine "whether both regulations can be enforced without impairing the federal superintendence of the field," not whether they are aimed at similar or different objectives. Duncan, *supra* note 29, at 232 (quoting *Florida Lime*, 373 U.S. at 142) (internal quotation marks omitted).

36. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377 (2000) (quoting *Hines*, 312 U.S. at 67) (internal quotation marks omitted).

37. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion of O'Connor, J.) (quoting Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152–53 (1982)) (internal quotation marks omitted); *see also* Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999) (finding congressional intent to occupy a given field where "the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose'" (quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1998))); Davis, *supra* note 24, at 199 ("[S]tate law [that] 'stands as an obstacle to the accomplishment' of federal objectives must yield." (citing Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13 (1985))).

38. *See, e.g.*, L. Richard Fischer, *Financial Services and Federal Preemption*, *in* 14TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE, at 611 (PLI Corp. Law & Practice Course Handbook Ser. No. 18521, 2009) (citing Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001 (9th Cir. 2008) (finding that the OTS's occupation of the field preempted plaintiff's state law claim against a mortgage company)).

39. *See, e.g.*, Mwantembe v. TD Bank, N.A., 669 F. Supp. 2d 545, 550 (E.D. Pa. 2009) (stating that express preemption is not an appropriate basis for determining that a state law regulating bank-issued gift cards is preempted by the NBA because "[w]hen it enacted the NBA, Congress did not expressly preempt state laws in the banking business").

40. Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 30–31 (1996); *see also* *infra* notes 47–54 and accompanying text.

regulate banking activities so long as they did not conflict with federal directives and banks could easily determine which laws applied to them.[41]

B. *National Banks:* Barnett Bank of Marion County, N.A. v. Nelson

Before the Dodd-Frank Act, national banks and federal thrifts had traditionally enjoyed broad preemption of state laws as a result of various factors.[42] For instance, many courts broadly construed statutory provisions to support what came to be a liberal preemption standard.[43] The Office of the Comptroller of the Currency (OCC), the federal administrative body governing national banks,[44] had extensive power to preempt state laws regulating national banks and their operating subsidiaries.[45] Consequently, national banks and subsidiaries were subject to uniform federal regulation rather than a patchwork of diverse state laws.[46]

For more than a decade preceding the 2010 passage of the Dodd-Frank Act, *Barnett Bank of Marion County, N.A. v. Nelson* headlined the preemption trend for national banks. In *Barnett Bank*, the U.S. Supreme Court was confronted with conflicting state and federal laws purporting to regulate the sale of insurance by national banks. Barnett Bank, a federally chartered financial institution, violated Florida law by selling insurance through a branch in Belleview, Florida—a small town with fewer than 5,000 people.[47] The bank justified its actions by citing a federal law that explicitly permitted national banks to act as insurance brokers and to sell insurance in "any place [with a population] . . . [of

41. *See, e.g.*, Kroske v. US Bank Corp., 432 F.3d 976, 989 (9th Cir. 2006) (rejecting State Farm Bank's claim that the NBA preempted a Washington antidiscrimination law because the state law did not fully conflict with the NBA).

42. *See, e.g.*, Bank of Am. v. City & Cnty. of San Francisco, 309 F.3d 551, 566 (9th Cir. 2002) (holding that the NBA and HOLA preempted a California state law regulating ATM fees); Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000, 1022 (E.D. Cal. 2002) (concluding that the NBA and HOLA preempt state law requiring credit card issuers to distribute minimum payment warnings to consumers).

43. *See, e.g.*, National Bank Act of 1864, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.); 12 U.S.C. § 484 (granting the federal government broad visitorial powers); Home Owners' Loan Act, 12 U.S.C. § 1461–70 (2006); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 12 (2007) (citing *Barnett Bank*, 517 U.S. at 32).

44. *See generally About the OCC*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, http://www.occ.gov/about/what-we-do/mission/index-about.html (last visited Oct. 17, 2011).

45. This power is derived from the NBA, which "provides that banks shall have the power '[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.'" *Watters*, 550 U.S. at 7 (alteration in original) (quoting 12 U.S.C. § 24 (2006)).

46. Donald C. Lampe, *Federal Preemption and the Future of Mortgage Loan Regulation*, 59 BUS. LAW. 1207, 1208 (2004).

47. *Barnett Bank*, 517 U.S. at 29.

not more than] five thousand."[48] The Court found that the bank's actions, although in violation of Florida law, were legally permissible.[49] Justice Stephen Breyer, writing for the majority, concluded that a state law can survive federal preemption only where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers."[50] Because the Florida law prevented Barnett Bank from exercising its federal power to sell insurance in a small town, the Court held the state law preempted.[51] Further solidifying preemption rights for federal banks, the Court noted that the history of national bank legislation "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."[52] Thus, the *Barnett Bank* decision subjects national banks to state consumer laws, unless the state law prevents or significantly interferes with the national bank's federally allocated powers.[53]

The OCC's broad interpretation of the *Barnett Bank* standard paved the way for increasingly expansive federal preemption authority over banks and their subsidiaries.[54] In contrast to the exact language used by the Court, which stated that federal laws trump state laws that "prevent or significantly interfere" with execution of national bank powers, the OCC construed the *Barnett Bank* decision to preempt all state laws that "obstruct, impair, or condition" the power of national banks.[55] The OCC's interpretation of *Barnett Bank* therefore lowers the standard for finding that a state law interferes with a national bank's operations.[56]

Following the Supreme Court's holding in *Barnett Bank*, the OCC adopted two sweeping, controversial rules in 2004 preventing specific categories of state laws from regulating national banks.[57] The "Banking Activities and Operations" rule preempted state laws that were thought

---

48. *Id.* at 28 (alterations in original) (quoting Act of Sept. 7, 1916, Pub. L. 270, ch. 461, 39 Stat. 752, 753 (1916) (codified as amended at 12 U.S.C. § 92 (2006))).

49. *Id.*

50. *Id.* at 33.

51. *See id.* at 37.

52. *Id.* at 32.

53. Duncan, *supra* note 29, at 241.

54. *See* Elizabeth R. Schiltz, *Damming* Watters*: Channeling the Power of Federal Preemption of State Consumer Banking Laws*, 35 FLA. ST. U. L. REV. 893, 905–06 (2008).

55. Catherine M. Brennan & Meghan S. Musselman, *Brave New World of Bank Preemption*, BANKING & FIN. SERVICES POL'Y REP., Sept. 2010, at 3 (quoting *Barnett Bank*, 517 U.S. at 33).

56. *Id.* ("[U]se of the terms 'impair' and 'condition' seemed to require a lower threshold of interference with national bank activities in order to preempt state laws.").

57. *See* Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Law*, 29 HARV. J.L. & PUB. POL'Y 981, 985–87 (introducing the Banking Activities Rule, 12 C.F.R. §§ 7.4007–08, 34.4 (2010); Visitorial Powers Rule, 12 C.F.R. § 7.4000 (2010)).

Florida Law Review, Vol. 63, Iss. 6 [2011], Art. 4

to "'obstruct, impair, or condition a national bank's ability to fully exercise' its federally granted powers," including state laws limiting consumer loans, real estate loans, and banks' deposit-taking powers.[58] The "Visitorial Powers"[59] rule defined the scope of activities for which the OCC had exclusive visitorial powers over national banks and their operating subsidiaries.[60] With eight listed exceptions, the rule explained that "the OCC ha[d] exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law."[61]

Although the OCC alleged that the 2004 rules merely codified 130 years of existing case law and regulations,[62] the 2004 rules were met with a "'unanimous and strong outcry' from state organizations and consumer groups" claiming that the rules greatly diminished state regulators' ability to protect consumers from fraud and abuse by shielding national banks from important state regulations.[63] Indeed, the broad preemption categories listed in the rules expanded the OCC's preemption powers to a near de facto preemption of state laws regulating national banks' operational activities and visitorial powers—severely restricting states' authority to control national banks within their boundaries.[64] Although amended slightly to assuage the concerns

58. *Id.* at 985 (quoting Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1911–12 (Jan. 13, 2004) (codified at 12 C.F.R. §§ 7.4007–08 & 34.4)).

59. *Id.* at 985–86 (citing Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4000)). "The term 'visitorial powers' refers to the power of a regulator or superintendent to inspect, examine, supervise, and regulate the affairs of an entity." Press Release, Office of the Comptroller of the Currency, Visitorial Powers Final Rule, Questions and Answers (Jan. 7, 2004), *available at* http://www.occ.gov/static/news-issuances/news-releases/2004/2004-3eVisitorialruleQNAs.pdf.

60. For an in-depth discussion of "visitorial powers," see Matthew J. Nance, Note, *The OCC's Exclusive Visitorial Authority over National Banks After* Clearing House Ass'n v. Cuomo, 87 TEX. L. REV. 811 (2009).

61. Visitorial Powers, 12 C.F.R. § 7.4000(a)(3) (2010).

62. Press Release, Robert M. Garsson, Comptroller of the Currency Adm'r of Nat'l Banks, OCC First Senior Deputy Comptroller Julie L. Williams Tells House Panel New Regulations Grounded in Federal Law, Court Precedent and Constitution (Jan. 28, 2004), *available at* http://www.occ.gov/static/news-issuances/news-releases/2004/nr-occ-2004-8.pdf.

63. Brief of Amicus Curiae North American Securities Administrators Ass'n, Inc., in Support of Appellant Burke and in Support of Reversal at 12–13, Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2006) (No. 04-3770-CV), *available at* http://www.nasaa.org/content/Files/WachoviaBurkeBrief.pdf (citing Review of the National Bank Preemption Rules: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 108th Cong. 2 (2004) (opening statement of Sen. Paul S. Sarbanes)).

64. *See* Brennan & Musselman, *supra* note 55, at 3 ("The OCC's 2004 preemption rule . . . afforded national banks the ability to preempt virtually all state laws affecting lending and banking activities.").

of opponents, the 2004 rules solidified the OCC's extensive authority.[65]

C. *Field Preemption for Federal Thrifts*

Just as the OCC is responsible for overseeing national banks, the Federal Deposit Insurance Corporation created the Office of Thrift Supervision (OTS) to "supervise, charter and regulate" federal savings and loan associations, which are also known as federal thrifts.[66] The scope of a thrift's business is somewhat narrower than that of a bank. Federal thrifts primarily engage in consumer lending and, unlike banks, may not make commercial, corporate, business or agricultural loans that exceed 20% of the thrift's total assets.[67] Congress gave the OTS plenary powers under HOLA[68] to regulate federal thrifts.[69] Before Dodd-Frank, HOLA sections 4(a) and 5(a) furnished the OTS with the ability to "occup[y] the entire field of lending regulation for federal savings associations."[70] Like the 2004 rules, categories of state laws preempted under HOLA or OTS regulations were enumerated in 12 C.F.R. § 560.2(b).[71] However, the mechanical analysis applied under 12 C.F.R. § 560.2[72] allowed the OTS to override state laws for unenumerated

65. *Id.* at 1 (concluding that the 2004 rules "gave national banks virtually unfettered authority to rely on preemption to ignore state laws on a variety of topics").

66. *About the OTS: History*, OFFICE OF THRIFT SUPERVISION, http://www.ots.treas.gov/?p=History (last visited Oct. 17, 2011).

67. *See* Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 167 (2009).

68. 12 U.S.C. §§ 1461, 1463(a), 1464(a) (2006).

69. Fischer, *supra* note 38, at 611 (discussing preemption under Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir. 2008) ("Through HOLA, Congress gave the Office of Thrift Supervision ('OTS') broad authority to issue regulations governing thrifts.")).

70. 12 C.F.R. § 560.2(a) (2010) (citing 12 U.S.C. §§ 1463(a), 1464(a) (2006)); *see also* Lyons Savs. & Loan Ass'n v. Fed. Home Loan Bank Bd., 377 F. Supp. 11, 17 (N.D. Ill. 1974) (finding that regulations passed by the Federal Home Loan Bank Board under authority of HOLA were not limited by state laws addressing thrift branches).

71. *See also* 12 C.F.R. § 560.2(b).

72. Systematic application of the preemption test for federal thrifts is exemplified in *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008). In *Silvas*, the Ninth Circuit considered whether E*Trade Mortgage was bound by a California law requiring subsidiaries of federal thrifts to refund "lock-in" fees to mortgage applicants who had cancelled their mortgage loan transaction within three days. *Id.* at 1003. The initial issue raised by the court was whether the California law "as applied, [was] a type of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2." *Id.* at 1006. The court adhered strictly to the § 560.2 framework, which establishes a presumption in favor of preemption rather than against it. *Id.* at 1005–06. California's law regulating E*Trade's use of "lock-in" fees fell into the category of state laws imposing requirements on loan-related fees under § 560.2(b)(5). *Id.* at 1006–07. The court concluded that because the law fit into paragraph (b), it was unnecessary to analyze whether its impact was more than incidental; once a state law fits into a paragraph (b) category, the law is preempted. *Id.* The *Silvas* decision is indicative of the strong presumption towards field preemption afforded to OTS and HOLA regulations. V. Gerard Comizio & Helen Y. Lee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Impact on Federal Preemption*

categories as well:

> When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.[73]

Courts have interpreted HOLA as occupying the field for matters listed in section (b) pertaining to federal thrifts.[74] HOLA gave the OTS nearly unfettered discretion over realty regulations.[75] HOLA's comprehensive language is evidence that "Congress intended the federal scheme to be exclusive, leaving no room for state regulations, conflicting or complementary."[76]

The OTS' power to occupy the field of the thrift industry was intended to "enhance safety and soundness and enable federal savings associations to conduct their operations in accordance with best practices by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden."[77] This purpose is undermined by the Dodd-Frank Act because thrifts now face hurdles that are more burdensome to compliance than ever.[78] The Act produces major

---

for National Banks and Federal Thrifts, PAUL HASTINGS STAY CURRENT, at 5 (Jan. 2011), *available at* http://www.paulhastings.com/assets/publications/1668.pdf?wt.mc_ID=1668.pdf. (citing *Silvas*, 514 F.3d at 1004–05).

73. *Silvas*, 514 F.3d at 1005 (quoting Lending and Investment, 61 Fed. Reg. 50,951, 50,966–67 (Sept. 30, 1996) (codified at 12 C.F.R. § 560.2)).

74. *See In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 643 (7th Cir. 2007) ("The Office of Thrift Supervision has exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages.").

75. Flagg v. Yonkers Savs. & Loan Ass'n, FA, 396 F.3d 178, 183 (2d Cir. 2005) ("This is an extremely broad grant of power that provides ample authority for the Director's efforts to enforce consistent, nationwide regulations affecting lending practices, by preempting, *inter alia*, 'state laws purporting to impose requirements regarding . . . [e]scrow accounts.'" (quoting 12 C.F.R. § 560.2(b))).

76. Report of Carolyn J. Buck, Cassese v. Wash. Mut., Inc., 2003 WL 25430371, at *2 (E.D.N.Y. Jan. 21, 2003) (No. 2:05CV02724).

77. *Id.*

78. *See infra* Sections II.C–D.

changes in governance of federal thrifts. Effective ninety days after the passage of Dodd-Frank, the OTS was eliminated and all of its responsibilities were transferred to the OCC.[79] Consistent with this shift, section 1046(a) amends HOLA so that thrift preemption determinations will now be "made in accordance with the laws and legal standards applicable to national banks."[80] Thus, Dodd-Frank strips away the field preemption and uniformity that federal thrifts once enjoyed.

The uniformity of federal thrift regulations furthered "both the 'best practices' and safety and soundness objectives of HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden."[81] This is because a lower cost of doing business allowed thrifts to maintain low costs for their services.[82] For example, in *State Farm Bank, F.S.B. v. Burke*,[83] a Connecticut law requiring mortgage brokers to "be licensed by the State, pay annual fees, meet bond, net worth and minimum experience requirements" was blocked by the OTS' regulatory authority.[84] The business costs of complying with the Connecticut law would be high and oppressive, whereas adequate federal oversight could achieve the same level of consumer protection without additional business costs.[85]

D. *Heightened Power:* Watters v. Wachovia Bank, N.A.

The trend toward increasing preemption powers culminated in the Supreme Court's holding in *Watters v. Wachovia Bank, N.A.*[86] The Court held that Wachovia Mortgage, a subsidiary of Wachovia Bank, was not required to comply with Michigan's registration and inspection requirements pertaining to mortgage brokers and lenders because these regulations would be superseded by the National Bank Act when applied to parent banks.[87] Adhering closely to the wording of the NBA[88]

---

79. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 313, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. § 5413).

80. *Id.* § 1046(a) (to be codified at 12 U.S.C. § 1465).

81. Report of Carolyn J. Buck, *supra* note 76, at 3 (quoting Lending and Investment, 61 Fed. Reg. 50,951, 50,965 (Sept. 30, 1996)).

82. *See infra* Part III.

83. 445 F. Supp. 2d 207 (D. Conn. 2006).

84. *Id.* at 212.

85. *See* Howard N. Cayne & Nancy L. Perkins, *National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or the Dual Banking System*, 23 ANN. REV. BANKING & FIN. L. 365, 409 (2004) (explaining that the cost of complying with a myriad of state laws ultimately increases business costs, "thereby making affordable credit unavailable or less available to many, if not most, residents and potential residents in the state").

86. *Financial Regulatory Reform—Conference Report Rolls Back Federal Preemption*, SNR DENTON, 2 (July 12, 2010), http://www.snrdenton.com/pdf.aspx?page=3272&template=article_no_contacts_pdf (citing Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007)).

87. *Watters*, 550 U.S. at 8–9, 13, 15–18.

88. 12 U.S.C. § 24a(g)(3) (defining a financial subsidiary as a company that "engages

and reasoning that it has never been interpreted as applying solely to parent banks, the *Watters* Court concluded that national bank subsidiaries were entitled to the same protection as their parent banks.[89] *Watters* breathed renewed life into 12 C.F.R. § 7.4006—a regulation promulgated by the OCC which states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[90] This holding was a decisive victory for the federal government, as it ensured the OCC's authority to preempt conflicting state laws pertaining to both national banks and operating subsidiaries.[91] *Watters* was the zenith of broadened preemption powers that had been growing since the Court's *Barnett Bank* decision.[92]

Subsidiaries of federal thrifts received the same protection that subsidiaries of national banks received under *Watters*.[93] In *State Farm Bank, FSB v. Reardon*,[94] the court extended preemption protection to subsidiaries of federal thrifts, reasoning that "*Watters* stands for the proposition that when considering whether a state law is preempted by federal banking law, the courts should focus on whether the state law is regulating 'the exercise of a national bank's power' not on whether the entity exercising that power is the bank itself."[95] The *State Farm* decision illustrates the OTS's virtually unrestrained discretion to make preemption determinations.[96]

II. Altering the Preemption Landscape: The Dodd-Frank Act

The landscape of national bank and federal thrift preemption standards is about to undergo a tremendous shift, with implementation of the Dodd-Frank provisions looming large on the horizon. Because the Act's preemption provisions will come into effect "not earlier than 180

---

solely in activities that national banks are permitted to engage in directly and are conducted *subject to the same terms and conditions that govern the conduct of such activities by national banks*" (emphasis added)).

89. *Watters*, 550 U.S. at 18–19.

90. *Id.* at 20 (quoting 12 C.F.R. § 7.4006 (2006)) (internal quotation marks omitted).

91. For a more exhaustive analysis of the *Watters* decision and its consequences, see generally G. Marcus Cole, *Protecting Consumers from Consumer Protection:* Watters v. Wachovia Bank, 2007 CATO SUP. CT. REV. 251.

92. SNR DENTON, *supra* note 86, at 2.

93. Fischer, *supra* note 38, at 39 (discussing State Farm Bank, F.S.B. v. Reardon, 512 F. Supp. 2d 1107, 1121–22 (S.D. Ohio 2007), *rev'd*, 539 F. 3d 336 (6th Cir. 2008).

94. 512 F. Supp. 2d 1107 (S.D. Ohio 2007, *rev'd*, 539 F.3d 336 (6th Cir. 2008).

95. 539 F.3d at 345–46 (quoting *Watters*, 550 U.S. at 18); *see also* WFS Fin., Inc. v. Dean, 79 F. Supp. 2d 1024, 1025 (W.D. Wis. 1999) (holding thrift subsidiaries are governed to the same extent as their parent institutions; subsidiaries are "regulated by the office in the same manner as their parent organizations and equally exempt from state regulation").

96. *State Farm Bank*, 539 F.3d at 349. The OTS exercised field preemption power over both thrift institutions and their subsidiaries.

days, nor later than 12 months, after the date of enactment,"[97] national banks have little time to weigh the pros and cons of the available methods of compliance. The enactment of section 1044, pertaining to national banks,[98] and section 1046, pertaining to federal thrifts,[99] will effect significant change in the preemption arena. These changes carry weighty ramifications that will negatively affect consumers, whom the Dodd-Frank Act was designed to protect.[100] This Part will discuss the changes brought about by the Dodd-Frank Act and will examine the impact these changes will have on financial markets.

A. *Solidifying* Barnett Bank *Through Section 1044*

Section 1044 of the Dodd-Frank Act restricts the OCC's preemption powers by forbidding the agency from relying on a vast body of case law and regulations to preempt categories of state laws.[101] Unable to depend on the preexisting preemption standards, national banks and their subsidiaries now face greater uncertainty as to whether their actions will be subject to state or federal law.[102] Dodd-Frank attempts to clarify by adding Section 5136C to the NBA: "State Law Preemption Standards For National Banks and Subsidiaries Clarified."[103] This new section scales back the authority of the OCC's 2004 rules; sections 5136C(b)(1)(A)–(C) explicitly provide three instances when a federal law will preempt a state law exercising authority over national banks. Under the new provision, a state consumer financial law will be preempted only if:

> (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly

97. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1062(c)(1), 124 Stat. 1376, 2040 (2010) (to be codified at 12 U.S.C. § 5582).

98. *Id.* § 1044(a) (to be codified at 12 U.S.C. § 25b).

99. *Id.* § 1046 (to be codified at 12 U.S.C. § 1465).

100. DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 105.

101. Dodd-Frank Act § 1044 (to be codified at 12 U.S.C. § 25b).

102. *See infra* notes 150–58 and accompanying text (discussing the uncertainty caused by differing state laws and how that will affect banks' decisions to maintain their subsidiaries).

103. Dodd-Frank Act sec. 1044(a), § 5136C (to be codified at 12 U.S.C. § 25b).

> interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than this title.[104]

Although this provision was intended to "clarify" current law, section 1044 actually raises a host of new questions as to when preemption is appropriate. In particular, the addition of section 5136C(b)(1)(B) to the NBA likely will raise many issues as banks seek to preserve their current banking practices. Consequently, the very language of section 1044 imposes a great burden on the OCC's preemption of state laws; a state law will prevail unless the OCC is able to prove at least one of the narrow prongs listed in section 5136C.[105]

Section 5136C(b)(1)(B) restores the *Barnett Bank* standard as the primary standard for federal preemption: a state law that "prevents or significantly interferes" with a national bank's exercise of its power will be preempted.[106] Connecticut Senator Christopher Dodd explained that section 5136C(b)(1)(B) was intended to solidify the *Barnett Bank* standard. In a colloquy between Senator Dodd and Delaware Senator Thomas Carper, Senator Dodd stated: "There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [*Barnett Bank*]."[107] Reverting to the *Barnett Bank* paradigm requires that the OCC first make a determination as to whether the state consumer financial law "significantly interfere[s]" with the OCC rules.[108] Read in juxtaposition with the introductory clause, section 5136C(b) affirms that, on a case-by-case basis, a state law will be preempted *only if* it is determined that the state law prevents or significantly interferes with the exercise of a national bank's

104. *Id*. sec. 1044(a), § 5136C(b)(1)(A)–(C).

105. *Id*. ("State consumer financial laws are preempted, *only if* . . . ." (emphasis added)).

106. *Id*.; *see also* Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 33 (1996).

107. 156 CONG. REC. S5870, S5902 (daily ed. July 15, 2010) (statement of Sen. Christopher Dodd).

108. *Barnett Bank*, 517 U.S. at 33; *see also* N.Y. Bankers Ass'n, Inc. v. Levin, 999 F. Supp. 716, 719 (W.D.N.Y. 1998) ("The only potential issue of fact is whether or not the imposition of New York Insurance Law § 2501 on the plaintiffs 'significantly interferes' with the exercise of their powers under federal law. If so, then federal law will pre-empt the state regulation, and the state provision may not be imposed upon the federal bank.") (citing *Barnett Bank*, 517 U.S. at 33)); Fischer, *supra* note 38, at 36 (referencing SPGGC, LLC v. Ayotte, 488 F.3d 525, 533 (1st Cir. 2007) (holding that "[b]ecause the New Hampshire CPA 'significantly interferes' with USB's statutory power, it is preempted by the National Bank Act")).

powers.[109]

Despite allegedly codifying existing case law, the prevailing preemption test significantly hampers the OCC's preemption discretion. The OCC will no longer be able to establish a categorical basis for preemption as it did previously with the 2004 "Banking Activities and Operations" and "Visitorial Powers" rules.[110] Rather, preemption determinations will be subjected to scrutiny of the effects of a "*particular* state consumer financial law on *any* national bank that is subject to that law, or the law of any other State with *substantively equivalent* terms."[111] Consequently, a challenged state law will be evaluated only with respect to its effect in that particular state.[112] In-depth, fact-based analysis will likely perpetuate differing holdings across state lines, causing much confusion for large banks.[113] Accordingly, the OCC's broadly constructed 2004 rules no longer preempt entire categories of state consumer financial laws; rather, preemption is determined in a narrow vacuum to analyze the impact an individual state law has on a national bank's exercise of power.[114]

B. *New Hurdles to Preemption Under Section 1044*

The Dodd-Frank Act further restricts the OCC's regulatory authority by mandating a higher standard of scrutiny for preemption determinations. Section 5136C(b)(3)(B), under which the OCC must consult with the Bureau of Consumer Financial Protection before

109. "Case-by-case basis" analysis is defined by Dodd-Frank § 1044 as a determination "made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms." Dodd-Frank Act sec. 1044, § 5136C(b)(3)(A) (to be codified at 12 U.S.C. § 25b).

110. *See supra* notes 54–59 and accompanying text (discussing the OCC's 2004 rules); Brennan & Musselman, *supra* note 55, at 3–4.

111. Dodd-Frank Act sec. 1044, § 5136C(b)(3)(A) (to be codified at 12 U.S.C. § 25b) (emphasis added).

112. Comizio & Lee, *supra* note 72, at 8; Nancy L. Perkins & Beth S. DeSimone, *Has Financial Regulatory Reform Materially Altered the Preemption Landscape for Federally Chartered Institutions?*, 127 BANKING L.J. 759, 762 (2010).

113. There are many intricacies in state laws that would need to be addressed for each state in which the bank does business. For example, Connecticut's Fair Acts and Practices law prohibits banks from advertising that "refinancing preexisting debt with a high cost home loan will reduce a borrower's aggregate monthly debt payment without also disclosing that the high cost home loan may increase" the total amount owed and the number of monthly installments. CONN. GEN. STAT. ANN. § 36a-746e (West 2001). On the other hand, Oklahoma law states more broadly that banks, "with respect to any home equity account," may not "refer to such credit as 'free-money'" or any other term determined to be misleading. OKLA. STAT. ANN. tit. 14A § 3-312(9) (1996).

114. Brennan & Musselman, *supra* note 55, at 4 ("It seems clear that the OCC preemption rules will fall away. . . . The Preemption Standard, with its requirement for case-by-case determination disfavors, if not outright prohibits, broad regulations of general applicability.").

overriding state law, places significant burdens on the OCC's regulatory scheme.[115] Section 5136C(c) prohibits preemption "unless substantial evidence" is produced to support "the specific findings regarding the preemption of such provision in accordance" with *Barnett Bank*.[116] This heightened requirement deters superfluous OCC preemption determinations and prevents the OCC from maintaining a liberal interpretation of *Barnett Bank* that essentially implements field preemption of categories of state laws.[117] Section 1044(a) requires that the OCC conduct a review within five years after a preemption determination has been made and "at least once during each 5-year period thereafter."[118] Upon conducting a review, the OCC must publish a notice with the Federal Register announcing its decision to either continue or rescind preemption.[119] Such obstacles were created to subject the OCC to additional scrutiny, thereby preventing abuse of federal preemption powers.[120] Consumers will benefit from these added safeguards because the OCC will be deterred from preempting state laws that do not "prevent or significantly interfere"[121] with the powers of national banks; states, which have "a legitimate interest in protecting the rights of their consumers, businesses and communities" will be able to enact laws for the benefit of their citizens.[122] With the inclusion of

115. Dodd-Frank Act sec. 1044(a), § 5136C(b)(3)(B).

116. *Id*. sec. 1044(a), § 5136C(c).

117. Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 250 (2004). Indeed,

> The OCC's "obstruct, impair, or condition" standard for preemption appears nowhere in *Barnett*. Unless it is overturned by Congress or the courts, the OCC's self-created preemption standard will obviously have a far greater impact in preempting state laws than the "prevent or significantly interfere" rule that the Supreme Court actually adopted in *Barnett.* Under the OCC's newly-invented standard, state laws would be preempted if they have any impact on national banks other than merely an "incidental" effect that "makes it practicable" for national banks to conduct their business. In contrast, under the *Barnett* standard state laws apply to national banks unless they either prevent or significantly interfere with the exercise of a congressionally-authorized power.

Id. at 248 (footnote omitted) (quoting Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910, 1912 (Jan. 13, 2004) (to be codified at 12 C.F.R. pt. 34)).

118. Dodd-Frank Act sec. 1044(a), § 5136C(d)(1) (to be codified at 12 U.S.C. § 25b).

119. *Id.*

120. DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 4640, at 508–09.

121. Wilmarth, *supra* note 117, at 230 (emphasis removed) (quoting Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 33 (1996)).

122. *Id.* (quoting H.R. REP. NO. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074) (internal quotation marks omitted); Linda Singer, Zachary Best & Nina Simon, *Breaking Down Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 14 J. CONSUMER

these provisions, section 1044 promotes the overarching goal of the Dodd-Frank Act: "to protect consumers from abusive financial services practices."[123] However, Congress went a step too far in furtherance of this goal. These provisions adequately serve the interests of consumers—it was unnecessary for the Act to leave subsidiaries vulnerable to a landslide of state regulations.[124]

C. *Elimination of the Office of Thrift Supervision and Substantial Changes to Section 1046 for Federal Thrifts*

The impact that the Dodd-Frank Act has on federal thrifts is far greater than its impact on national banks. Notably, section 313 abolishes the OTS[125] and section 312 transfers all of the OTS's responsibilities and authority to the OCC.[126] As a result, federal thrifts will be subject to stricter preemption standards.[127] Federal thrifts no longer have the benefit of comprehensive protection from state laws.[128] Section 1046(a) of the Act dictates the new preemption standard for federal thrifts and their operating subsidiaries. This provision amends HOLA by adding a new Section 6: "State law preemption standards for Federal savings association clarified."[129] The newly added section severely restricts the OTS's power to preempt state consumer financial laws that purport to regulate federal thrifts. Significantly, section 6(a) states that all preemption determinations for federal thrifts and their subsidiaries "shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law."[130] Accordingly, federal thrifts, which once relied on the OTS's field preemption authority,[131] are now subject to the OCC's *Barnett Bank* test for preemption.[132] Consistent with 5136C(b)(1)(B) of the amended National Bank Act,[133] HOLA § 6(b) requires preemption determinations to be made on a case-by-case basis, rather than broad field preemption

---

& COM. L. 2, 10 (2010) ("State officials are consumers' first responders; they are closer to consumers and often the first to become aware of new and devastating consumer scams.").

123. Dodd-Frank Act § 1376 pmbl.

124. *See infra* Part III.

125. Dodd-Frank Act § 313 (to be codified at 12 U.S.C. § 5413).

126. *Id*. § 312(b)(2)(B)(i)(II) (to be codified at 12 U.S.C. § 5412).

127. DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 4650, at 510.

128. *See supra* notes 64–65 and accompanying text.

129. Dodd-Frank Act sec. 1046(a), § 6 (to be codified at 12 U.S.C. § 1465).

130. *Id.* sec. 1046(a), § 6(a) (to be codified at 12 U.S.C. § 1465).

131. *See* Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir. 2008).

132. DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 4650, at 510.

133. Dodd-Frank Act sec. 1044(a), § 5136C(b)(1)(B) (to be codified at 12 U.S.C. § 25b) ("[A]ny preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law.").

of whole categories of state laws: "Notwithstanding the authorities granted under sections 4 and 5, this Act does not occupy the field in any area of State law."[134] As a result of the HOLA amendments, laws regulating federal thrifts and subsidiaries will now be analyzed under the more state-friendly preemption standards set forth in Dodd-Frank.

D. *Overturning* Watters*: Exposing Subsidiaries to a Patchwork of Legislation*

Perhaps the greatest consequence of the Dodd-Frank Act is its new preemption standard for national bank and thrift subsidiaries. Under the *Watters* decision, national banks' operating subsidiaries enjoyed the same expansive preemption rights as parent banks: "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[135] However, the Dodd-Frank Act does away with this holding and gives ample discretion to state policymakers. For instance, section 1044(e) states:

> [A] State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.[136]

This provision effectively overturns *Watters*[137] and treats bank subsidiaries as people and nonbank businesses, rather than as federally chartered banks. Effectively separating subsidiaries from parent banks exposes the subsidiaries to a patchwork of state laws and denies them the protections they were once afforded under *Watters*.[138]

Thrift subsidiaries face the greatest compliance challenges. Once answering to a single regulatory body with field preemption powers, thrift subsidiaries may now theoretically answer to fifty different legislatures. Thrift subsidiaries, like bank subsidiaries, can no longer rely on precedent set by court decisions. Most courts preempting state laws in favor of federal subsidiary regulations based their holding on

---

134. *Id.* sec. 1046(a), § 6(b) (to be codified at 12 U.S.C. § 1465); DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, ¶ 4650, at 511.

135. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 20 (2007) (quoting Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,786 (July 2, 2001) (to be codified at 12 C.F.R. pt. 7)) (internal quotation marks omitted).

136. Dodd-Frank Act sec. 1044, § 5136C(e) (to be codified at 12 U.S.C. § 25b).

137. B. Rush Smith III, Thad H. Westbrook & Sarah B. Nielson, *Litigation Implications of the Dodd-Frank Financial Reform Act*, BUS. L. TODAY, at 1, 4 (Sept. 2010), *available at* http://www.nelsonmullins.com/DocumentDepot/smith_westbrook_BLT.pdf.

138. *Id.*

whether the state law would be preempted for the parent bank. Accordingly, these courts applied the *Watters* holding.

III. ECONOMIC CONSEQUENCES OF MORE STRINGENT PREEMPTION STANDARDS

National banks and federal thrifts will undoubtedly feel the consequences of the Dodd-Frank Act for years to come.[139] Without the blanket protection of uniform federal regulations, national banks and thrifts are vulnerable to a myriad of state laws, which may vary greatly across state lines.[140] Dodd-Frank's codification of the *Barnett Bank* standard and its requirement that preemption analysis be made on a case-by-case basis[141] will likely result in confusion over whether federal or state law applies.

The Dodd-Frank Act, by retracting some of the preemption powers claimed by federal agencies, allows states to exercise more control over banks and thrifts within their borders.[142] This is especially true of subsidiaries, which will be subject to state laws to the same extent that the laws govern people and businesses, rather than national banks.[143] Consequently, state laws regulating subsidiaries will be given the same presumption against preemption that is given to matters in which the government has not historically had a "significant federal presence."[144] The resulting decentralization of preemption powers eliminates much of the systemic risk that plagued the industry in the years leading up to the recent economic crisis.[145] Proponents of the Dodd-Frank amendments to the NBA and HOLA argue that state policymakers are in the best position to observe and react to banking activities within their states and that Dodd-Frank allows states to enact regulations that benefit state consumers and state banks.[146]

Although the Act may protect consumers and state banks from abuse of federal government power, consumers will be negatively affected by the increased uncertainty that the financial industry now faces.[147] Opposite a multitude of state laws, national banks and thrifts are exposed to demanding regulations affecting their day-to-day

139. Brennan & Musselman, *supra* note 55, at 1.

140. *See supra* notes 108–11 and accompanying text.

141. Dodd-Frank Act sec. 1044(a), § 5136C(b)(1)(B); *id.* sec. 1046(a), § 6(a).

142. Brennan & Musselman, *supra* note 55, at 2–3.

143. Dodd-Frank Act sec. 1044(a), § 5136C(e); *id.* sec. 1046(a), § 6.

144. Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1004 (9th Cir. 2008) (quoting United States v. Locke, 529 U.S. 89, 108 (2000)) (internal quotation marks omitted).

145. *See* Clyde Mitchell, *Domestic Banking: The Federal Reserve as Systemic Regulator*, N.Y. L.J. Apr. 8, 2009, at 3.

146. *See* Singer, Best & Simon, *supra* note 122, at 10–11.

147. SNR DENTON, *supra* note 86, at 1.

business.[148] Congress's solution ignores the fact that many financial consumers will find it difficult to afford pricey mortgages and high interest rates resulting from the banks' attempts to remain profitable. Compliance with new state laws will be costly, especially for mid-sized financial institutions.[149]

Among the most significant decisions that national banks and thrifts need to make is whether to incorporate their subsidiaries.[150] Mid-sized banks doing business in numerous states might not have the capital to cover the increased costs of compliance with multiple state laws—"to the extent that banks are subject to additional state regulation with costs that they can't or won't pass along to the consumer, then [banks] will put out of those states."[151] Financial institutions can opt to "roll up" their operating subsidiaries and make them bank divisions—this would ensure that the same preemption standards that apply to the parent bank also apply to the former subsidiary.[152] However, the price of "rolling-up" a subsidiary can be high. Banks will lose the flexibility to liquidate the subsidiary in the future because "it is much easier to sell a subsidiary than a division of a bank."[153]

Moreover, incorporating a subsidiary would require restructuring if the "subsidiary [had] a different salary and benefits structure than the bank."[154] Merging subsidiaries into parent banks may also cause collateral damage to the communities in which the wholly owned subsidiaries operate.[155] Numerous national bank subsidiaries have implemented Community Development Corporations (CDCs), which, according to the OCC, greatly benefit "declining neighborhoods" that require "long-term commitment of resources to facilitate revitalization."[156] Banks and thrifts that are unwilling to incorporate their subsidiaries but wish to avoid confusion may request an advisory opinion from the OCC as to whether the state regulation in question will

---

148. *See* Karl D. Belgum & Krista Bell, *Dodd-Frank Act Alters Preemption Rules for National Banks and Federal Thrifts*, NIXON PEABODY LLP (July 28, 2010) http://www.nixonpeabody.com/services_pubdetail.asp?ID=3425&SID=102.

149. *Id.*

150. *New Financial Regulatory Reform Act: Has It Materially Altered the Preemption Landscape for Federally Chartered Institutions?*, ARNOLD & PORTER LLP, 3–4 (July 2010), http://www.arnoldporter.com/resources/documents/AdvisoryFinal%20Financial%20Reform%20Legislation-Has%20it%20Materially%20Altered%20the%20Preemption_71610.pdf.

151. Interview with Michael Rave, Partner, Day Pitney LLP (Jan. 25, 2011).

152. ARNOLD & PORTER LLP, *supra* note 150, at 3–4.

153. Interview with Robert Taylor III, Partner, Day Pitney LLP (Jan. 21, 2011).

154. *Id.*

155. *Formation of a National Bank Subsidiary Community Development Corporation*, U.S. DEP'T OF THE TREASURY, http://www.occ.treas.gov/topics/community-affairs/resource-directories/public-welfare-investments/formation-of-subsidiary-cdc.html (last visited Oct. 17, 2011).

156. *Id.*

likely be preempted;[157] however, these advisory opinions are not binding and may not accurately reflect the outcome of subsequent litigation.[158] The mounting pressures on banks either to incorporate or to retain their subsidiaries will cause an increase in the cost of services offered to the public.

The solution to this predicament is to reinstate *Watters* as the standard for subsidiary preemption. Reaffirming the *Watters* decision would afford protection to bank and thrift subsidiaries, while simultaneously shielding the public from predatory practices.[159] Bank and thrift operating subsidiaries are an important aspect of our banking system. They allow banks to reach a wide market, provide flexibility of business and management structure, and reduce risks of business failure.[160] Notwithstanding subsidiaries' many benefits, the Dodd-Frank Act makes operating a subsidiary a nearly insurmountable task.[161] Opening the floodgates to differing laws from the fifty states undoubtedly will cause confusion for parent banks operating in a different state than their subsidiaries.[162] The ensuing business and litigation expenses associated with compliance with state laws will cause many banks to determine that the cost of operating a subsidiary necessitates increased fees or reduced services.[163]

---

157. Emma J. Hodson, *Finding Middle Ground in the Preemption War Between States and Federal Financial Institutions: The Practical Limitations on* State Farm Bank, F.S.B. v. Reardon, 13 N.C. BANKING INST. 541, 547 (2009).

158. Office of Employee Benefits Security, Employee Benefit Plans, Advisory Opinion Procedure, 41 Fed. Reg. 36,821, 36,823 (Aug. 27, 1976), *available at* http://www.fdic.gov/regulations/examinations/trustmanual/appendix_e/e_procedure.html.

159. Under *Watters*, bank and thrift subsidiaries would be subject to the *Barnett Bank* preemption rules in Dodd-Frank § 1044(a), which, in conjunction with the imposition of various obstacles to preemption, adequately safeguard against abusive federal practices. *Supra* Sections I.D, II.A.

160. Interview with Robert Taylor III, s*upra* note 153.

161. States' aggressive regulation of subsidiary activities that were once exempt from regulation will cause banks to incur substantial compliance costs. Williams, *supra* note 20, at 2–4.

162. *Supra* note 113 and accompanying text.

163. Defending broad federal preemption powers, First Senior Deputy Comptroller and Chief Counsel Julie L. Williams asserted:

> Adding layers of regulation brings added costs, which may lead to higher prices for customers. It may also have other undesirable collateral consequences, such as diminished product availability. For example, state and local laws that increase a bank's costs and its potential liabilities in connection with subprime loans, which are already high risk, inevitably will cause some legitimate lenders to conclude that the cost and risks are not worth it. The result is diminished credit availability, and legitimate credit options that may otherwise be available to a segment of potentially credit-worthy subprime borrowers will be reduced.

Dodd-Frank's tightened rules for preemption under section 1044(a) and its elimination of the OTS[164] are sufficient measures to safeguard consumers from the plight of systemic risk and financial crisis. Moving forward, federal thrifts will no longer be able to claim field preemption over broad categories of state law.[165] Conversely, courts making preemption determinations are now compelled to use the *Barnett Bank* standard on a case-by-case basis. [166] Therefore, courts have ample opportunity to assess the impact that bank practices have on society, rather than merely relying on only tenuously similar case law. The threshold question for thrift preemption is no longer whether the contested law "incidentally affect[s] the lending operations of Federal savings associations or [is] otherwise consistent with the purposes" of section 560.2(b) of the Code of Federal Regulations.[167] Therefore, with many protective measures in place, it is unnecessary to subject subsidiaries to the whims of the states.[168] Dodd-Frank's headlong thrust of subsidiaries into the realm of state regulations is problematic for both banks' business operations and consumers, to whom the costs of these problems are passed down.[169]

Large, national financial institutions like Wells Fargo, which operates in thirty-nine states[170] with subsidiaries throughout the country,[171] will find the costs of doing business to be much greater after Dodd-Frank. Consider the holding in *State Farm Bank, F.S.B. v. District of Columbia*, in which the court held a federal law preempted the District of Columbia Mortgage Lender and Broker Act (D.C. Act), which required "that individuals engaged in mortgage lending activities, including marketing and advertising, be licensed and trained, pay annual fees, and submit to general oversight by the Commissioner of Insurance, Securities, and Banking."[172] Here, the court relied on *Watters* to preempt the D.C. Act as it applied to State Farm Bank, a subsidiary of

---

Williams, *supra* note 21, at 4.

164. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1044(a), 124 Stat. 1376, 1376 (2010) (to be codified in scattered sections of the U.S. Code).

165. *Id.* ("This title does not occupy the field in any area of State law.").

166. *See supra* note 109 and accompanying text.

167. Applicability of Law, 12 C.F.R. § 560.2(c) (2011); *see also In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 643 (2007) (upholding a state law forbidding deceptive acts and practices as within the ambit of state regulatory authority).

168. *See supra* notes 116–20.

169. Williams, s*upra* note 20, at 4.

170. WELLS FARGO BANK, N.A., WELLS FARGO TODAY 3 (2011) https://www.wellsfargo.com/downloads/pdf/about/wellsfargotoday.pdf.

171. *National Bank Operating Subsidiary List (N-W)*, U.S. DEPT. OF THE TREASURY, http://www.helpwithmybank.gov/national-banks/operating-subsidiaries/national-banks-subsidiaries-n-w.html (last visited Oct. 17, 2011).

172. State Farm Bank, F.S.B. v. D.C., 640 F. Supp. 2d 17, 19 (D.D.C. 2009).

State Farm Mutual Insurance Corporation.[173] Now that subsidiaries are regulated to the same extent as individuals and nonbank corporations, State Farm Bank would be compelled to comply with the D.C. Act. However, the complications do not end here. Similar to Washington, D.C., many states have laws governing mortgage-lending practices.[174] Subsidiaries, like State Farm Bank, would be required to comply with the intricacies of differing mortgage laws across state lines. This inevitably leads to extreme unpredictability for banks doing business on a national scale.

To truly protect consumers from economic risks, Congress should return to the *Watters* paradigm. Subsidiaries, like parent banks, would then be subject to the *Barnett Bank* test.[175] Even with *Barnett Bank* in place, state legislatures are able to circumvent federal preemption to promulgate laws in the best interest of their residents.[176] In *Kroske v. U.S. Bank Corp.*, the plaintiff's age discrimination claim under the Washington Law Against Discrimination (WLAD) prevailed over the NBA's "dismiss at pleasure" provision.[177] The *Kroske* court determined that the "provision of the WLAD prohibiting age discrimination [did] not conflict with the at-pleasure provision of the National Bank Act."[178] As a result, the Washington legislature succeeded in safeguarding the interests of individuals within their state without drastically altering the business model of national banks. The states' ability to further best banking practices is augmented by the burdens heaped on OCC preemption determinations by the Dodd-Frank Act.[179] Moving forward, less deference will be given to the OCC, which, pursuant to the new reporting and five-year review requirements, will need to provide a valid reason for preemption determinations and will be under heightened scrutiny.[180] With the already burdensome safeguards now established, there is little reason to overturn the *Watters* decision. Reestablishing the *Watters* test would submit subsidiaries to the same heightened scrutiny as parent banks and thrifts without shaking a bank's entire business model to its core. This would provide more protection for consumers than existed before Dodd-Frank and would

173. *Id.* at 23–24.

174. *See, e.g.*, ALASKA STAT. § 06.60.010 (2010); ARIZ. REV. STAT. ANN. § 6-903 (2011); IDAHO CODE ANN. § 26-31-211 (West 2011); KAN. STAT. ANN. § 9-2208 (West 2010); MICH. COMP. LAWS § 445.1672a (2011).

175. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 17–18 (2007).

176. *See* Kroske v. U.S. Bank Corp., 432 F.3d 976, 989 (9th Cir. 2005).

177. *Id.*

178. *Id.* at 987.

179. *See supra* notes 116–20.

180. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1044(a), 124 Stat. 1376, 1376 (2010) (to be codified in scattered sections of the U.S. Code).

simultaneously shield consumers from the enormous internalized costs that will inevitably pass down through the system and emerge as increased administrative fees, raised interest rates, tightened due dates, and the elimination of free checking.[181] Eliminating the *Watters* standard for subsidiary preemption is counterproductive to the goal of the Dodd-Frank Act: to protect consumers from uncertainty and turmoil in the financial industry.[182]

CONCLUSION

The Dodd-Frank Act is a highly debated piece of legislation that will undoubtedly lead to many lawsuits and tough decisions. As one of the most comprehensive legislative instruments of our time, it will also produce many positive outcomes, such as compelling banks to comply with state antipredatory lending laws,[183] to which they were once immune.[184] In drafting the Dodd-Frank Act, Congress had the opportunity to establish safeguards against financial instability in the banking industry, while maintaining reasonable costs for consumers.[185] However, legislators chose a more radical approach[186] by overturning the *Watters* holding.[187] Although the Dodd-Frank Act does much to further consumer protection, Congress should retract section 5136C(e) from the National Bank Act and reinstate the *Watters* standard for regulation of operating subsidiaries.

One of the more immediate and significant effects of the Dodd-Frank Act is the elimination of the OTS and the abrupt shift of its responsibilities to the OCC.[188] The resulting uncertainty about which laws are applicable to federal thrifts will force parent financial

---

181. Williams, *supra* note 20, at 4.

182. DODD-FRANK: LAW, EXPLANATION AND ANALYSIS, *supra* note 6, at 44–47.

183. Dodd-Frank Act § 1400 (to be codified in scattered sections of 12 U.S.C.).

184. *See, e.g.*, Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 772 (2007) (citing Mayor of N.Y. v. Council of N.Y., 780 N.Y.S.2d 266, 271–72 (2004) (concluding that both the NBA and HOLA preempted a New York antipredatory lending law)).

185. *See supra* notes 116–20 and accompanying text. State residents would be adequately protected under the *Barnett Bank* standard, which prevents operation of state law only to the extent that it irreconcilably conflicts with a federal regulation. Dodd-Frank's new safeguards—requiring the OCC to consult with the Bureau of Consumer Financial Protection and to revisit its preemption determinations every five years—are enough to ensure that bank subsidiaries are not unnecessarily excused from state consumer protection laws.

186. Brennan & Musselman, *supra* note 55, at 1 (commenting on the Dodd-Frank's altered preemption scheme that "[t]he result promises to be years of litigation to unravel precisely what state laws the National Bank Act preempts and—more importantly—what a national bank must do to comply with state laws").

187. Dodd-Frank Act § 1044(a) (to be codified in scattered sections of 12 U.S.C.) (adding section 5136C(e) to the NBA).

188. *See supra* notes 125–29 and accompanying text.

institutions to decide whether to subsume their subsidiaries or leave them subject to state regulations.[189] In spite of the many conveniences that subsidiary status affords,[190] national banks and thrifts may consider merging subsidiaries into their respective parent banks in order to assure long-term stability.[191] Alternatively, banks that choose to retain their subsidiaries will compensate for the increased litigation and compliance costs by imposing greater fees for their services.[192] Both options will cause consumers to be worse off than they otherwise would be under the *Watters* ruling. According to First Senior Deputy Comptroller and Chief Counsel Julie Williams in reference to increased preemption, the OCC's "approach to combating abusive lending practices does not diminish credit *access* but does effectively target credit *abuses*."[193] Congress's decision to effectively overturn *Watters* ignores the long-term complications and economic impacts that accompany such a drastic measure. Considering the substantial increase in operating costs and the incentive for financial institutions to "roll-up" subsidiaries, Congress deviated from the overall goal of consumer protection in overturning *Watters*. Accordingly, Congress should reinstate *Watters* and retract section 5136C(e) from the National Bank Act.

189. Michael Hamburger, *The Dodd-Frank Act and Federal Preemption of State Consumer Protection Laws*, 128 BANKING L.J. 9, 18 (2011).

190. *See supra* notes 150–58 and accompanying text.

191. *See supra* text accompanying note 152.

192. "Banks will still need to be profitable. To the extent that regulation adds costs, they will be passed on to customers." Interview with Robert Taylor III, *supra* note 153.

193. Williams, *supra* note 20, at 4.