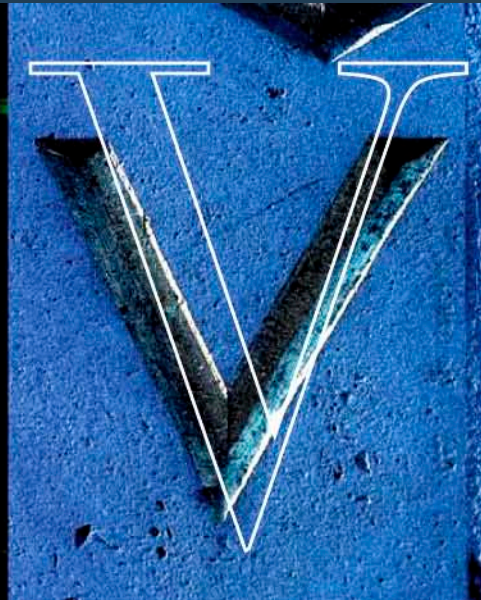


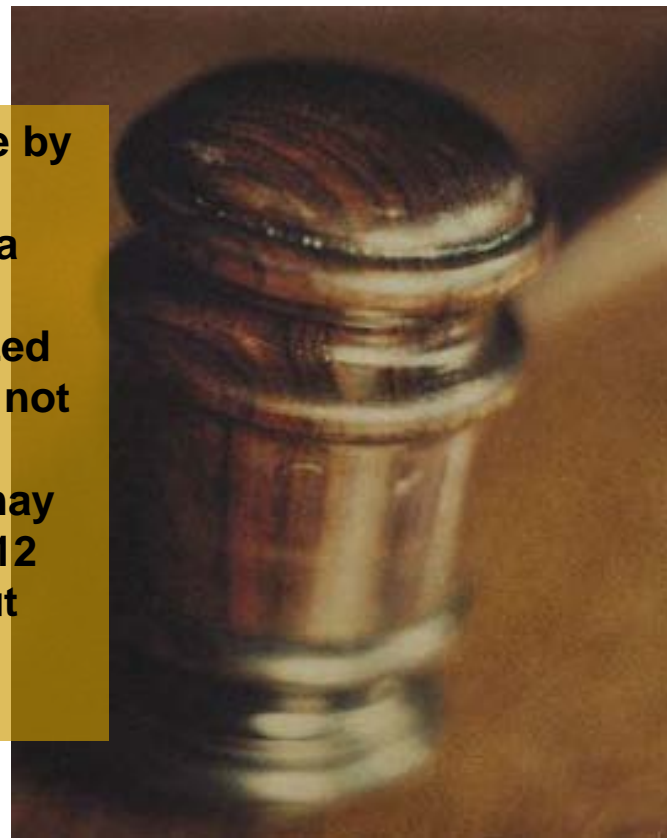
## federal preemption after financial regulatory reform

MAY 4, 2010

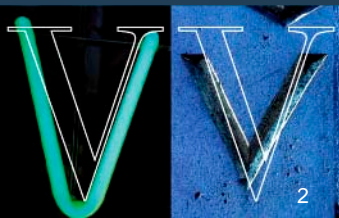


## OCC Current Preemption - 12 CFR Part 34.4

**Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. § 371 and §34.3, without regard to state law limitations concerning:**

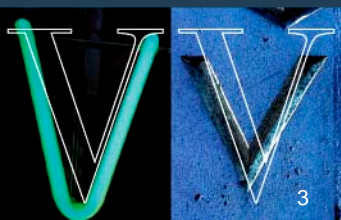


**LIMITATIONS**



# OCC Current Preemption - 12 CFR Part 34.4

1. Licensing, registration (except for purposes of service of process), filings, or reports by creditors;
2. The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;
3. Loan-to-value ratios;
4. The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
5. The aggregate amount of funds that may be loaned upon the security of real estate;
6. Escrow accounts, impound accounts, and similar accounts;
7. Security property, including leaseholds;
8. Access to, and use of, credit reports;
9. Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;
10. Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;
11. Disbursements and repayments;
12. Rates of interest on loans;
13. Due-on-sale clauses except to the extent provided in 12 U.S.C. §1701j-3 and 12 CFR part 591; and
14. Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.



# OCC Current Preemption - 12 CFR Part 34.4

**State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:**

- Contracts
- Torts
- Criminal law
- Homestead laws specified in 12 U.S.C. §1462 a (f)
- Rights to collect debts
- Acquisition and transfer of real property
- Taxation
- Zoning
- Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in §34.3(a).



# The Consumer Financial Protection Bureau (CFPB) and Preemption

Title X of S. 3217—The Consumer Financial Protection Act (CFP Act) significantly modifies:

- Charter preemption
- Transactional preemption; and
- Provides the CFPB authority to override both charter preemption and transactional preemption through the grant of broad UDAP authority



# Charter Preemption

**Section 1044 of the CFP Act creates a dual test for National Bank Act preemption:**

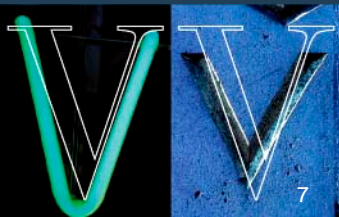
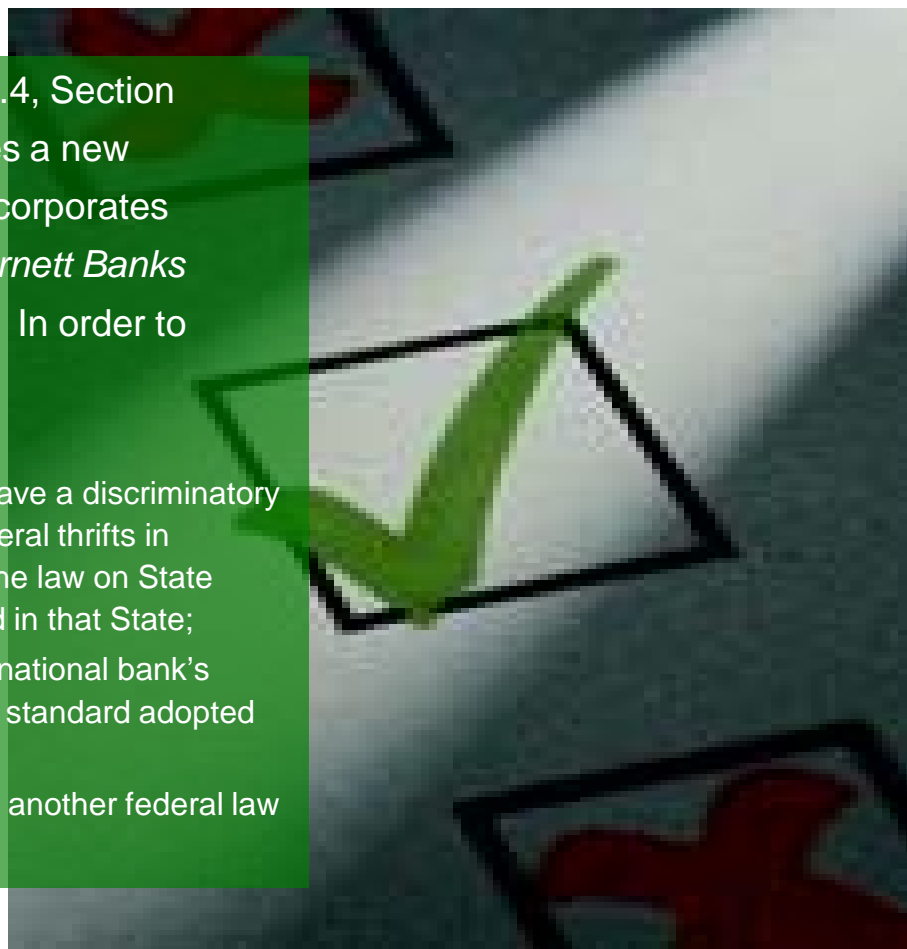
- No change when preempting for State laws of general applicability
- Creates new rules for “consumer financial laws” that “directly regulate the manner, content or terms and conditions of financial contracts with respect to consumers”



# State Consumer Law Preemption Test

In the place of 12 CFR Part 34.4, Section 1044 of the CFP Act substitutes a new three-part test that *arguably* incorporates the preemption standard of *Barnett Banks v. Nelson*, 510 U.S. 25 (1996). In order to preempt:

- The State law would have to have a discriminatory effect on national banks or federal thrifts in comparison with the effect of the law on State banks or State thrifts chartered in that State;
- If a State law interferes with a national bank's powers in accordance with the standard adopted by the *Barnett* decision; or
- The State law is preempted by another federal law



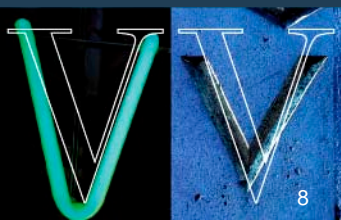
# OCC Consumer State Law Preemption Process

## "Noisy" Regulatory Procedure

Require consultation with the CFPB;

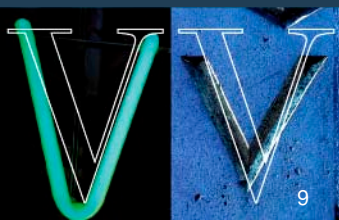
A preemption determination must be supported by “substantial evidence”; and

A written finding must be made that a federal law exists that provides a significant degree of protection to the state’s consumers if the state law is to be preempted



# Court Review of OCC Consumer Preemption Determinations

- A court may also make preemption determinations as part of litigation
- When reviewing an OCC preemption determination, a court need not afford the OCC's preemption findings *Chevron* deference, but may consider the following factors:
  - The thoroughness of the OCC's analysis;
  - The validity of the reasoning;
  - Consistency with other determinations of the OCC; and
  - Other factors a court deems pertinent



# Other Preemption Changes

## Elimination of Preemption for Subsidiaries

### Section 1045

- Subsidiaries of national banks and federal thrifts no longer authorized to make use of any charter preemption
- Operating subsidiary advantage likely eliminated

## Elimination of HOLA Preemption

### Section 1046

- Preemption for grandfathered thrifts must follow same rules as applicable to national banks
- Eviscerates Section 5 of HOLA at least as to state consumer laws



# Other Preemption Determinations

**Section 1046 - Adopts as federal law the holding in *Cuomo v. Clearing House Association*, 129 S. Ct. 2710 (2009)—**  
**State Attorney Generals are authorized to bring judicial action against national banks or federal thrifts to enforce a federal law or a non-preempted State law**

## Adoption of Cuomo Decision

**Section 1076 - Prohibits all prepayment penalties for residential mortgages that are not “qualified mortgages” and limits the amount of a prepayment charge that may be imposed for a qualified mortgage**

## Eliminates Prepayment Preemption

**Section 1083 - Modifies AMPTA to reduce the definition of “alternative mortgage” to allow states to regulate certain loan terms previously preempted**

## Partial Elimination of AMPTA Preemption

# The CFPB Preemption Authority—A Floor, Not a Ceiling

- Section 1041— the CFPB cannot preempt State laws if the State law provides greater protection to consumers
- States will be able to petition the CFPB to issue a new or modified consumer protection regulation
- The CFPB will be required to consult with the federal banking agencies to ensure that the proposed regulation or rule does not present a safety or soundness risk
- The CFPB's determination must be published in the Federal register
- Any CFPB preemption decision cannot impact any prior preemption determination of the OTC or the OCC for loans or activities entered into prior to the decision of the CFPB



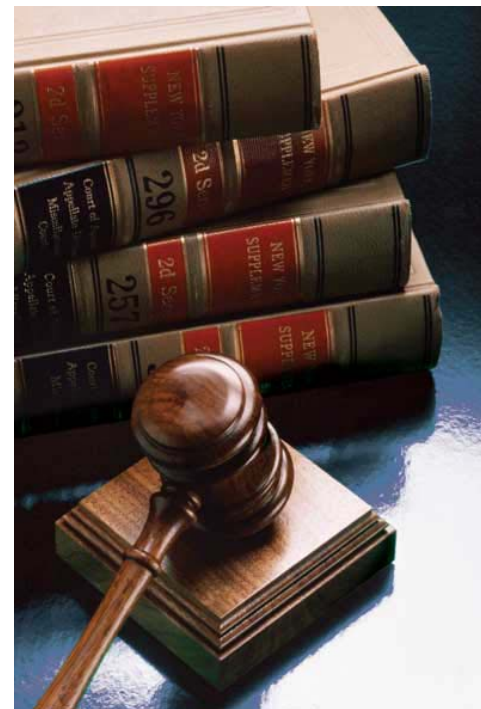
**Loan servicing activities may not be protected!**



# CFPB UDAP Authority

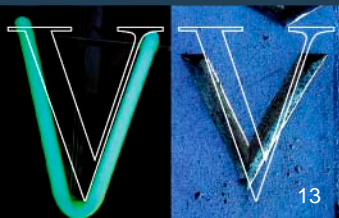
**Section 1021 of the CFP Act provides the CFPB with authority to declare an act or practice by a provider of a consumer financial product or service to be an unfair, deceptive or abusive act or practice**

**As a federal statute, this authority may be used to negate lending activity otherwise authorized by federal law**



**“Unfair and deceptive” analysis probably subject to law developed pursuant to Section 5, FTC Act**

**“Abusive” standard is another matter**



## Definition of Abusive

**In order to find an act or practice to be “abusive, the CFPA must find that the act or practice:**

**(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or**

**(2) takes unreasonable advantage of:**

- (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
- (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.



# Possible Future Mortgage Lending Analysis

- Do old/new preemption rules apply to a loan or practice?
  - Servicers beware!
- Does State law discriminate against National Banks vis-à-vis State banks?
- Is the loan compliant with applicable state and federal laws and regulations?
- Is the loan or practice “fair” as structured and as implemented?



**Questions?**



## contact information

### YOUR VENABLE TEAM



**Joseph T. Lynyak, Partner**

JTLynyak@Venable.com

t 310.229.9660

f 310.229.9901

[www.Venable.com](http://www.Venable.com)

