

# OCC Moves To Dismiss State Regulators' Second Lawsuit Opposing Fintech Charter

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The OCC has filed a [motion to dismiss](#) the lawsuit filed in D.C. federal district court in October 2018 by the Conference of State Bank Supervisors (CSBS) to stop the OCC from issuing special purpose national bank (SPNB) charters to fintech companies.

The CSBS had previously filed a lawsuit challenging the OCC's authority to grant SPNB charters to fintech companies at a time when the OCC had not yet decided whether it would move forward on its charter proposal. That lawsuit [was dismissed](#) for failing to establish an injury in fact necessary for Article III standing and for lacking ripeness for judicial review. The [new lawsuit](#) was filed in response to the OCC's [July 2018 announcement](#) that it would begin accepting applications for SPNB charters from fintech companies.

In its brief, the OCC makes the following principal arguments in favor of dismissal:

- CSBS cannot have standing to sue until the OCC approves an application for an SPNB charter because only then could a CSBS member suffer an injury in fact.
- Because the OCC “remains several stages away from actually granting an SPNB Charter” and “has not finalized its decision to issue an SPNB Charter to a particular applicant,” the matter remains both constitutionally and prudentially unripe for judicial review.
- Because the OCC's July 2018 announcement was not a final agency action within the meaning of the Administrative Procedure Act, it is not subject to judicial review under the APA's arbitrary and capricious standard.
- The OCC's July 2018 announcement does not represent a preemption determination to which notice and comment procedures apply “because the question of whether granting a proposed national bank will result in the preemption of any particular state consumer financial law is not relevant to the chartering process.” (According to the OCC, in deciding whether to grant a charter, its focus is on “the proposed institution's prospects and whether it will operate in a safe and sound manner.”)
- The OCC's rule (12 C.F.R. Section 5.20(e)(1)) interpreting the term “business of banking” in

the National Bank Act by reference to three core banking functions—receiving deposits, paying checks, or lending money—represents a reasonable interpretation of such term and supports treating any one of such functions as the required core activity for purposes of the OCC’s chartering authority. Nothing in the NBA identifies deposit-taking as an indispensable function for a national bank to be engaged in the “business of banking.”

In September 2018, the New York Department of Financial Services (DFS) filed a second in a New York federal district court to block the OCC’s issuance of SPNB charters. Like the first CSBS lawsuit, the first DFS lawsuit challenging the OCC’s authority to grant SPNB charters [was dismissed](#) for failing to establish an injury in fact necessary for Article III standing and for lacking ripeness for judicial review.

]Last month, the OCC [submitted a letter to the court](#) indicating that it intends to file a motion to dismiss the DFS lawsuit. The grounds for the motion set forth in the OCC’s letter substantially mirror its arguments for dismissal above in the CSBS lawsuit. The DFS also submitted a letter to the court in which, in addition to outlining the arguments it would make in opposing an OCC motion to dismiss, it indicated that it intends to file a motion for a preliminary injunction to prevent the OCC from issuing any SPNB charters while the lawsuit is pending.

The next step in the case is likely to be the entry of an order by the court setting a motion schedule. However, based on a docket entry indicating that a standing order was entered on December 27 requiring the U.S. Attorney’s Office to notify the court immediately upon the restoration of DOJ funding, it appears any further developments will not occur until the partial government shutdown ends.

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National Law Review, Volumess IX, Number 9

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