

CSBS and OCC battle over discovery in lawsuit challenging fintech charter

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Earlier this month, the Conference of State Bank Supervisors (CSBS) [filed a brief](#) opposing the OCC's motion to dismiss the second lawsuit filed by CSBS to stop the OCC from issuing special purpose national bank (SPNB) charters to fintech companies. That brief was accompanied by an "[Alternative Motion for Leave to Conduct Discovery](#)" filed by CSBS.

The OCC [argued in its motion to dismiss](#) that 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. According to the OCC, since it is still several stages away from actually granting an SPNB charter, the matter continues to be both constitutionally and prudentially unripe for judicial review.

In opposing the motion to dismiss, CSBS argues that even if it has not yet established actual injury because no charter has been granted, it has standing because the current facts show that injury is "certainly impending." Such facts are the "OCC's unequivocal decision to issue charters, its public statements stressing the imminence of an actual charter, and the extensive steps it has taken toward vetting and chartering applicants."

Similarly, [in support of its alternative motion](#), CSBS states that while the OCC "depicts the eventual granting of a nonbank charter as far off, speculative, and contingent...the facts belie OCC's assertions." It contends that since announcing its decision to grant SPNB charters, the OCC "has stated that it has held 'hundreds of meetings' with interested companies, a number of which are finalizing applications,

and further, that the OCC expects to approve a charter by mid-2019.” CSBS asks the court to allow it “to conduct jurisdictional discovery because it will allow CSBS to supplement its jurisdictional allegations to establish standing and ripeness—specifically, to resolve factual disputes concerning the status of OCC’s implementation of the [SBNB charter] Program (to the extent the Court finds the current allegations insufficient.)” Among other things, CSBS asks for discovery to determine the nature and number of companies the OCC has met with concerning the SBNB charter and the status of any draft applications, including which companies are preparing or have submitted draft applications and the content of such applications.

[In opposing CSBS’s alternative motion](#), the OCC asserts that because CSBS cannot establish that any of its members have suffered an injury until an SPNB charter is finally approved and whether a charter application has been filed or a charter has been granted is a matter of public record (e.g. disclosed on the OCC website), the discovery sought by CSBS is “entirely unnecessary.” In addition, the OCC agrees that it “voluntarily will undertake to immediately inform the Court and CSBS when an SBNB Charter applicant makes public notice required by [OCC regulations.]”

The OCC also asserts that “granting CSBS (and presumably its members) access to OCC’s licensing materials on the terms proposed by CSBS...would have a chilling effect on the interest of fintech companies in pursuing an SPNB Charter. Knowing that discussion materials-however informal-reflecting an entity’s potential business plans may be made available to the state regulators that make up CSBS and who view the SPNB Charter as a threat to their own jurisdiction and initiatives in the fintech area would intimidate anyone seeking to open a discussion with the OCC. And this may be the primary purpose behind CSBS’s request....”

The other pending lawsuit seeking to block the OCC’s issuance of SPNB charters to fintech companies is the second lawsuit filed in September 2018 by the New York Department of Financial Services (DFS). Like the first CSBS lawsuit, the first DFS lawsuit was dismissed for failing to establish an injury in fact necessary for Article III standing and for lacking ripeness for judicial review.

In December 2018, the OCC [submitted a letter to the court](#) indicating that it intends to file a motion to dismiss the DFS lawsuit based on grounds that substantially mirror the OCC’s arguments for dismissal 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. On February 12, the court directed the parties to submit a proposed briefing schedule by letter.

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