

The lawsuit filed in September 2018 by the DFS in the U.S. District Court for the Southern District of New York seeking a declaratory judgment that the OCC's decision to accept applications for SPNB charters from non-depository companies exceeds the OCC's powers under the National Bank Act (NBA) represents the second time that DFS has sued the OCC regarding the SPNB charter.

The original lawsuit filed by DFS [was dismissed](#) in December 2017 due to lack of ripeness and the absence of a case or controversy. In reaching its decision, the court pointed to statements made by former Acting Comptroller Keith Noreika indicating that while the OCC was continuing to consider its SPNB charter proposal, it had not yet determined its ultimate position. It also noted that Joseph Otting, the new Comptroller, had not yet taken a public position on the charter proposal.

The court concluded that the injuries that DFS alleged would result from the issuance of SPNB charters “would only become sufficiently imminent to confer standing once the OCC makes a final determination that it will issue SPNB charters to fintech companies.” Such alleged injuries included the potential for New York-licensed money transmitters to escape New York's regulatory requirements and for their consumers to lose the protections of such requirements as well as DFS's loss of the funding it receives through assessments levied on the New York-licensed financial institutions that would instead obtain SPNB charters.

With regard to ripeness, the court concluded that DFS's claims were neither constitutionally nor prudentially ripe. According to the court, the claims were not constitutionally ripe for the same reason that Article III standing was lacking—namely, the claims were not “actual or imminent” but instead were “conjectural or hypothetical.”

The new complaint filed by DFS is almost a carbon copy of its 2017 complaint with minor changes to discuss the OCC's decision to accept applications for SPNB charters and to argue that the decision removes questions of ripeness or standing. The OCC makes the following principal arguments in the new complaint:

- The NBA does not allow the OCC to charter non-depository financial services companies
- The OCC's decision to issue SPNB charters to fintech companies, by enabling non-depository charter holders to disregard state law, violates the Tenth Amendment of the U.S. Constitution under which states retain the powers not delegated to the federal government, including the police power to regulate financial services and products delivered within a state

In defending its authority to charter SPNBs that do not take FDIC-insured deposits, the OCC has relied on 12 C.F.R. Section 5.20(e)(1) which allows the OCC to charter a bank that performs a single core banking function—receiving deposits, paying checks, or lending money. The DFS lawsuit includes a declaration that the OCC lacks authority under the NBA to issue SPNB charters to fintech companies that do not take deposits, a declaration that 12 C.F.R. Section 5.20(e)(1) is null and void because it exceeds the OCC's authority under the NBA, and an injunction prohibiting the OCC from issuing SPNB charters as planned.

We expect that the OCC's power to issue an SPNB charter will ultimately be upheld. In 12 U.S.C. §21, the NBA permits the formation of an association to carry on the business of banking. In 12 U.S.C. §24, subd. 7, a national banking association is empowered "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes." The NBA does not state that a national bank must take deposits and the OCC has chartered trust companies that are not deposit-taking institutions.