

## [Banking and Finance Law Daily Wrap Up, TOP STORY—D.D.C.: CSBS challenge to OCC's nonbank charter decision dismissed, \(May 2, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

Because any potential harm to state banking regulators was speculative and tenuous, an organization representing the regulators had no standing to challenge the Office of the Comptroller of the Currency's purported decision to issue charters to fintechs, held the United States District Court for the District of Columbia, in dismissing the action. The Conference of State Bank Supervisors (CSBS) had argued that the Nonbank Charter Decision would preempt state banking regulations and cause injury the state regulators. But the court found that because the OCC had not even finalized procedures for accepting charter applications from fintechs, much less accepted an application or granted a charter, any injury was not "certainly impending." In addition, the controversy lacked ripeness because there was no particular fintech charter grant to review. The president and CEO of CSBS, John Ryan, [commented](#) on the decision, stating that although no decision had been issued on the merits, state regulators are moving forward with plans to modernize financial regulation, with a multi-state system that will include supervision of fintechs ([Conference of State Bank Supervisors v. Office of the Comptroller of the Currency](#), April 30, 2018, Friedrich, D.).

**Background.** The CSBS challenged the OCC's Nonbank Charter Decision, in which the OCC planned to move forward with a process for considering national bank charter applications from companies that provide bank-like services, but do not accept deposits (for example, fintechs). The origins of the decision were from a 2003 OCC rule in which OCC interpreted its chartering authority to include the power to charter special purpose banks that do not receive deposits, so long as the bank pays checks or lends money. That portion of the rule lay dormant until 2016, at which point the OCC announced that it would move forward with fintech charters. OCC published a white paper on supervisory requirements for charter holders, received feedback, and published a response. The OCC also published a draft supplement to the Comptroller's Licensing Manual indicating that fintechs could receive charters. Public feedback was received, but the status of the supplement remained as a draft. In April 2017, CSBS filed a challenge to the OCC's purported decision to move forward with chartering national bank banks that do not accept deposits, arguing that the OCC lacks statutory authority for the Nonbank Charter Decision and corresponding regulation; the agency failed to follow appropriate rulemaking procedures; the Nonbank Charter Decision was arbitrary and capricious; and the Nonbank Charter Decision violated the Tenth Amendment ([Banking and Finance Law Daily](#), April 26, 2017).

Since the CSBS lawsuit was filed, the OCC has undergone leadership changes and it is unclear whether the agency would accept an application from a nondepository fintech company. In addition, a similar lawsuit was filed against the OCC in the Southern District of New York. That case was dismissed in late December 2017, for lack of standing and ripeness (see [Banking and Finance Law Daily](#), Dec. 13, 2017).

**Article III standing.** The court noted that an organization such as CSBS could have standing on its own or associational standing on behalf of its members. The court then concluded that associational standing did not exist, because none of CSBS's members would have had standing in their own right. CSBS failed to plead a "certainly impending" injury or one that exposed its members to a "substantial risk." Even assuming that the Nonbank Charter Decision would interfere with a state's regulatory management of financial institutions, no harm would ever occur if the OCC never charters a fintech. Before any fintech would be chartered, the OCC would have to finalize the relevant procedures and a fintech would have to apply and be granted a charter. In the 15 years since the 2003 rule was put in place, no fintech has attempted to apply for a charter. Given the events that would need to occur, any potential injury to a CSBS member is too speculative to be "certainly impending."

The court also rejected CSBS's argument that it could challenge the preemptive effects of the decision, because the OCC's decision preempted no state law and would not increase regulatory costs to the states. Any preemption of state laws would occur only after a fintech received a charter. The court also found that no particular member of CSBS had been shown to have suffered any harm. Therefore, CSBS lacked standing, as it failed to plead an injury in fact and did not identify an injured member.

**Ripeness.** The court also found that the controversy lacked ripeness. Considering whether the OCC may issue fintech charters would require the court to consider the legality with respect to the wide range of possible fintechs; it would be much more appropriate to consider the legality of awarding a charter to a particular fintech. As the agency has not even finalized procedures for fintech charters (and may never do so), any agency action is not sufficiently settled for review. The court also found that CSBS had failed to state why any delay in judicial review of the agency's actions would cause it hardship.

The case is [No. 17-0763 \(DLF\)](#).

Attorneys: Graham Robert Cronogue (Baker & McKenzie, LLP) for Conference of State Bank Supervisors.  
Douglas Bradford Jordan for the OCC.

Companies: Conference of State Bank Supervisors

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