

## [Banking and Finance Law Daily Wrap Up, TOP STORY—D.D.C.: CSBS requests, OCC opposes, jurisdictional discovery in fintech charter case, \(Feb. 21, 2019\)](#)

Banking and Finance Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

The Conference of State Bank Supervisors has requested leave to conduct jurisdictional discovery to determine the imminence of the Office of the Comptroller of the Currency's issuance of a fintech charter. The OCC opposes the request.

The Conference of State Bank Supervisors has requested leave to conduct jurisdictional discovery in its case against the Office of the Comptroller of the Currency, regarding the OCC's plans to issue Special Purpose National Bank (SPNB) Charters to fintechs. The OCC motioned to dismiss the case, arguing that the court previously decided that CSBS will not have standing to challenge the SPNB chartering authority until the OCC actually charters a fintech, which to date, it has not. CSBS argued that issuance is imminent and that it should be allowed to conduct jurisdictional discovery into the meetings OCC has conducted with potential applicants and the status of any draft applications. The OCC opposed the motion, arguing that there is no information available through any discovery that would change the fact that no fintech has filed an application and no charter has been granted. The OCC also asserted that the discovery request is overbroad and that granting CSBS access to privileged information would have a negative impact upon the ability of the OCC to conduct discussions with parties that are interested in an SPNB Charter (*In Re: Generic Pharmaceuticals Pricing Antitrust Litigation*, Feb. 15, 2019, Case No. 1:18-cv-02449-DLF).

**Background.** As previously reported, the Conference of State Bank Supervisors sued the Office of the Comptroller of the Currency in an effort to block the agency from creating a new special-purpose fintech charter, under its Special Purpose National Bank (SPNB) charter authority. CSBS is seeking court action based on the OCC's announcement this past July that it is accepting applications for the new bank charter for fintechs as well as the OCC's publication of a Licensing Manual Supplement. CSBS previously filed suit against the OCC in 2017. After that suit was filed, the OCC announced that it had not yet determined whether it would move forward with the new charter, and the court decided that the issue was not ready for consideration. The latest complaint from the CSBS argues that "[t]hings have changed substantially since the Court's decision," and that "issuance of a Nonbank Charter is now clearly imminent" (*Banking and Finance Law Daily*, Oct. 25, 2018).

The OCC motioned to dismiss the latest lawsuit, arguing that CSBS cannot establish injury and ripeness because the OCC has not yet issued a nonbank charter and such issuance is not imminent. CSBS opposed the motion, asserting that the OCC has had hundreds of meetings with interested companies, a number of which are finalizing applications. In addition, the OCC has made numerous public statements stressing its rapid progress with the program. CSBS requested jurisdictional discovery to be able to obtain additional information about the applications and the imminence of the OCC's charter approvals.

**CSBS argues for leave to conduct jurisdictional discovery.** CSBS argued that although the OCC submitted a declaration that no application for an SPNB charter has been filed, the declaration is silent as to draft applications or ongoing vetting of forthcoming applications. Given the speed with which the OCC usually approves charters and the high rate of applications granted, final approval of an application is imminent. CSBS [argued](#) that the standard for jurisdictional discovery is liberal. It specifically seeks discovery to determine the name and number of the companies with whom the OCC has met concerning the Nonbank Charter, the status of any draft applications, the status and anticipated submission dates of any expected formal applications,

whether articles of association and/or an organizational certificate has been drafted or adopted for any applicant or potential applicant, and whether a home state for the nonbank's main office has been chosen.

**OCC opposes the motion.** The OCC [asserted](#) that the court previously decided that CSBS will not have standing to challenge the SPNB chartering authority until the OCC actually charters a fintech. Therefore, discovery as requested by CSBS is not necessary, because the public record shows that the OCC has not granted an SPNB Charter and that no fintech has filed an application for an SPNB Charter. Both of these events would be part of the public record, posted to the OCC's website, and there is no information available through any discovery that would change the fact that neither of those events has occurred. The OCC also argued that the discovery request from CSBS is overbroad. CSBS seeks interrogatories, document requests, and depositions related to which companies have prepared or submitted draft applications, the content of the draft applications, and the nature and number of companies with which the OCC has met. This information is irrelevant as to CSBS' standing and would allow CSBS to access privileged, non-public OCC information. Draft application information is not probative because draft applications are not acted on by the OCC. The OCC's purpose in reviewing a draft application during the pre-filing phase is not to assess whether a potential application will satisfy the requirements for approval, but is intended to identify policy, legal, and supervisory issues that may bear on the appropriateness of a potential application. Filing a draft application does not guarantee that the OCC will approve a formal application and a party may ultimately decide to not apply for a Charter after submitting a draft application.

Therefore, the nature and scope of discovery sought by CSBS is not directly relevant to the jurisdictional dispute over standing because it is not aimed at discovering any facts relevant to standing and ripeness. In addition, granting discovery concerning confidential OCC information would have a negative impact upon the ability of the OCC to conduct discussions with parties that are interested in an SPNB Charter. Proprietary or confidential business information provided to an agency such as the OCC during the course of discussions is normally exempted from disclosure because the disclosure could cause substantial competitive harm to the submitter.

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Companies: Conference of State Bank Supervisors

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