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OCC Issues Preemption Rule and Order to Block Illinois Swipe Fee Law

Key Takeaways

- The OCC issued two interim final rules on April 24 aiming to preempt Illinois' swipe fee law before its July 1, 2026 effective date. The rules respond directly to ongoing federal litigation and seek to preserve banks' ability to collect interchange fees.
- This raises significant questions about federal preemption and agency authority under the National Bank Act. Courts are likely to closely scrutinize whether the IFPA significantly interferes with bank powers without deferring to the OCC's position.
- Banks and payment system participants should reassess their reliance on preemption arguments as the litigation proceeds and evaluate compliance strategies ahead of the law's July 1, 2026 effective date.

In a late-stage move that could reshape ongoing litigation over swipe fees, the Office of the Comptroller of the Currency (OCC) issued a pair of interim final rules on April 24 aimed at preempting the Illinois Fee Interchange Prohibition Act (IFPA). Passed in 2025, the IFPA requires credit card networks and banks to waive their interchange fees — the portion of each swipe fee that goes to the banks that issue the cards — on state and local tax and tip portions of every transaction. Set to take effect July 1, 2026, the law has already sparked a high-stakes legal challenge in federal court, with significant implications for payment systems, bank powers and the scope of federal preemption under the National Bank Act.

In this alert, we examine the OCC's rules, the status of the IFPA litigation and the key questions they raise about National Bank Act preemption and agency authority.

Illinois Court Finds No NBA Preemption of Swipe Fee Law; OCC Responds

Earlier this year, the U.S. District Court for the Northern District of Illinois held that because payment card networks, rather than issuers themselves, set interchange fee rates that merchant acquirers pay, the IFPA does not "directly" regulate national banks, and thus NBA preemption did not apply.[1] The banking industry has appealed to the U.S. Court of Appeals for the Seventh Circuit.

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The OCC's two interim final rules are designed to preempt the adverse effects of the IFPA on banks. According to the OCC, applying the IFPA to national banks "would create a complex, potentially unworkable, and destabilizing standard for national banks, Federal savings associations, and the nation's payment card systems. Further, such effects could be exacerbated to the extent other states impose similarly unworkable or conflicting standards." One of the rules would amend the OCC's regulations on federal bank powers to expressly authorize banks to collect swipe fees regardless of whether they are set by "third parties." The second rule would conclude that the IFPA's swipe-fee limits sufficiently interfere with the newly OCC's promulgated authority to trigger preemption under the National Bank Act.

Two Issues to Watch in the OCC's Swipe Fee Preemption Push

The OCC's actions raises several interesting issues.

1. Can the OCC issue a preemption regulation while litigation is pending?

For one, is it proper for a federal regulatory agency to use its rulemaking authority to potentially resolve a question that is currently pending in the courts. The U.S. Supreme Court answered that question in the affirmative in a unanimous decision in *Smiley v. Citibank (South Dakota)*. In that case the courts were reviewing whether certain fees might constitute "interest" for purposes of national banks' interest rate exportation authority. While the litigation was working its way through the courts, the OCC promulgated a regulation to resolve the issue. The challengers argued that the court should not look to the OCC's regulation for guidance, in part because "the regulation was prompted by litigation, including this very suit."

Justice Scalia, writing for the Court, rejected that argument, explaining that while courts do not defer to ad hoc agency positions advanced only in litigation, a formally issued regulation — adopted through notice-and-comment procedures and reflecting considered agency judgment — may be valid, regardless of whether it was prompted by ongoing litigation. Applying this reasoning, the fact that the OCC promulgated the new rules in direct and immediate response to a problem raised by pending litigation is not fatal to the preemption analysis.

2. Does the IFPA Trigger NBA Preemption?

The second and more substantive question raised by the OCC's action, is whether the OCC is in fact correct in its determination that national banks have the power to collect swipe fees, and whether the OCC was correct in determining that the IFPA "prevents or significantly interferes with a national bank's exercise of its powers."[2]

The lessons learned from the Court's rejection of *Chevron* deference in *Loper Bright Enterprises v. Raimondo* and its National Bank Act preemption decision in *Cantero*, are that the courts will no longer give the OCC carte blanche in determining whether a given state law is preempted, and that the courts will closely scrutinize whether the OCC's preemption actions, whether by regulation or order, are supported by the Court's precedent. In *Cantero*, the Court emphasized that *Barnett Bank* provides a calibrated standard for preemption, under which only some non-discriminatory state laws are displaced. Consistent with Dodd-Frank, a court may find preemption only where, applying that standard, the state law prevents or significantly interferes with a national bank's exercise of its powers.

What This Means for NBA Preemption Going Forward

This will be a closely watched decision that may also eventually find its way to the

Supreme Court. It also serves as another example of the need for close and scrutinizing analysis of National Bank Act precedent before a national bank attempts to invoke preemption.

As the IFPA litigation continues to unfold, banks and payment system participants should expect closer judicial scrutiny of preemption arguments, even where the OCC has taken a clear position. Courts will independently assess both the scope of the asserted bank power and whether the state law meets the *Barnett Bank* "significant interference" standard, rather than deferring to the agency's view.

At the same time, the OCC's decision to act while litigation is pending may shape the analysis but does not resolve it. The ultimate outcome will turn on how courts apply existing precedent to the IFPA, including on appeal.

For more information on the OCC's preemption rules, the IFPA litigation or National Bank Act preemption, please contact Tra or your regular Polsinelli attorney.

[1] Ill. Bankers Ass'n v. Raoul, 2026 WL 371196, at *9-10, *13 (N.D. Ill. Feb. 10, 2026).

[2] Cantero v. Bank of America, N.A., 602 U.S. 205, 220 (2024), citing Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 33 (1996).