

OCC Interim Final Rule and Order on National Bank Fees and Preemption

Federal regulator goes all-in on protecting the swipe fee racket and paves the way for more

On April 24, the Office of the Comptroller of the Currency (OCC) announced an [interim final rule](#) that would fundamentally transform a longstanding federal regulation, 12 C.F.R. § 7.4002, that governs fees that national banks – those with federal charters – can charge.

The OCC's revised rule would authorize national banks to collectively set fees through third parties and the agency clearly has its eye on Visa and Mastercard and swipe fees. The five banks responsible for [70% of credit card transactions](#) (JPMorgan Chase, Bank of America, Citigroup, Capital One, and American Express) are all national banks. So, it's not surprising that the OCC also issued an [interim final order](#) asserting that federal law preempts Illinois legislation that bans swipe fees on taxes and tips from applying to national banks, even though a federal court has already ruled against preemption.

What is surprising is ***the massive scope of the OCC's preemption regulation***. Not only is the OCC saying that interchange price-fixing by third parties on behalf of big, national banks is okay. It is also opening the door to collusion facilitated by third parties to fix *other* fees the banks charge, potentially drawing a target on consumers nationwide.

The OCC said that its interim final rule and order would take effect on June 30 and said it will accept comments submitted by May 29. A rundown on what the agency is doing:

Current Federal Law Requires Fees Set in a Competitive Manner

- Currently, 12 C.F.R. § 7.4002 [provides](#) that national banks are authorized by the National Bank Act to charge customers fees, but those fees must be set in a competitive market environment with fees “arrived at by each bank on a *competitive basis* and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.” (Emphasis added.)
- The regulation also currently provides that banks’ methods of calculating fees “are business decisions to be *made by each bank*, in its discretion, according to sound banking judgment and safe and sound banking principles.” (Emphasis added.)

Current Federal Law Does Not Preempt States from Regulating Anticompetitive Fees

- In February, a federal district court in Illinois [rejected](#) a lawsuit brought by the bank lobby and concluded that the National Bank Act does *not* preempt provisions of an Illinois state law, the Interchange Fee Prohibition Act (IFPA), that bans interchange fees on tax and tip portions of credit card transactions.
- The court explicitly noted that interchange fee rates are *not* set by each bank in a competitive market environment: “even the Office of the Comptroller does not meaningfully contest that the third parties set the fees.”

- In fact, the fees are not set by banks at all and are centrally fixed by card network companies like Visa and Mastercard and used uniformly by all banks that issue Visa- or Mastercard-branded cards. This fee-fixing structure prevents competition, even if the banks wanted it.

The OCC Is Now Trying to Outflank Federal Appellate Court Before Any Decision

- The OCC filed a brief in the case. Its argument for preemption was rejected by the district court. The case is currently on appeal before the 7th Circuit Court of Appeals, with oral arguments scheduled on May 13. The OCC has filed a brief on the appeal.
- Consumer advocates, antimonopoly groups, and small businesses have filed an amicus brief in support of the Illinois law.
- Rather than letting the court decide, the OCC is now trying to overrule the appellate court and exempt national banks from the law before the court has a chance to finish the case.

The OCC Regulation is Bad Policy that Endorses Price-Fixing – Even on Consumer Fees

- The OCC's interim final rule approves of collective price-fixing of bank fees: It says national banks can receive fees "set by or in consultation with third parties." As the OCC explained in its accompanying [order](#), this revised rule "unambiguously reaffirms a national bank's power to charge interchange and other fees 'set' by third parties."
- The OCC has effectively rubber-stamped big banks arranging for a third party to set fees on all their behalf, so that they don't have to compete with each other over the fee rates they receive.
- Alarming, this rule wouldn't just apply to interchange fees charged to businesses. It applies to fees charged to consumers as well – such as late fees, over limit fees, annual fees, ATM fees, and more. The OCC rule defines "charge" very broadly: "directly or indirectly, through intermediaries, partners, payment networks, interchanges, or other third parties, assess, collect, impose, levy, receive, reserve, take, or otherwise obtain, including through a fee sharing or similar economic relationship."
- The OCC has long required competition in setting all bank fees but is wholly abandoning that position in order to bless big bank price-fixing on swipe fees, a system that net megabanks and Visa/Mastercard \$198.2 billion last year.

OCC's Regulation Does Not Preempt Payment Card Networks

- Notably, the OCC's interim final order only preempts national banks from the Illinois law and does not preempt other key players within the payments system like payment card networks from the law. Card networks simply are not banks, and therefore the agency does not have the authority to preempt non-bank entities from state law.
- Notably, active interchange fee reform legislation moving in other states like SB26-134 in Colorado and HB 315 in Delaware solely and explicitly focus their requirements for and enforcement against payment card networks, so these bills are outside the scope of OCC's regulation and remain on solid legal grounds to become law.