



## GEORGETOWN LAW

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Chief Counsel's Office  
Attention: Comment Processing, Office of the Comptroller of the Currency  
400 7th Street SW, Suite 3E-218  
Washington, DC 20219

Re: Docket Numbers OCC-2026-0430 and OCC-2026-0431

To Whom It May Concern:

I write to express my objection to both the proposed regulation of the Office of Comptroller of the Currency ("OCC") regarding National Bank Non-Interest Charges and Fees (Docket Number OCC-2026-0430) and the OCC's Order Preempting the Illinois Interchange Fee Act (Docket Number OCC-2026-0431). As the proposed rulemaking and order as so closely connected, I write about them together, although particular sections of my comments are addressed solely to one or the other as indicated.

The proposed regulation is procedurally invalid, outside the OCC's authority, constitutionally infirm, and ultimately misleading of consumers.

### **I. Qualifications**

By way of background, I am the Carmack Waterhouse Professor of Law and Finance at Georgetown University Law Center, where I teach courses in Financial Regulation and Payment Systems, among other topics. I have also previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School and as faculty for the Federal Trade Commission's Division of Financial Practices training program. I have written extensively on payment card interchange fees and on National Bank Act preemption (including the OCC's past abuse of its preemption authority).

### **II. The Proposed Rule Is Procedurally Invalid Because of an Inadequate Notice and Comment Period**

As an initial matter, the proposed regulation (Docket Number OCC-2026-0430)—and therefore the preemption order that springs off of it (Docket Number OCC-2026-0431)—is procedurally invalid because the rulemaking has not gone through the normal Administrative

Procedure Act notice and comment process. Executive Order 12866, which applies to the OCC, provides that “each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” 58 Fed. Reg. 51735 (October 4, 1993).

Here, the OCC has not provided a 60 day comment period. Instead, the OCC is rushing through a proposed rule with a comment period of 30 days and an effective date 30 days after that. The only reason for this rush is for the rule to go into effect before July 1, 2026, when the Illinois Interchange Fee Prohibition Act goes into effect.

The OCC, however, has known about the IFPA since it was passed in May 2024. The OCC, however, failed to do anything in response the nearly two years since. The OCC acted only after an adverse federal court decision regarding the act in February 2026 and now claims that there is such urgency that advance notice and comment is impracticable. That is false. The purported urgency exists only because the OCC dawdled and decided to see how the court decision would play out before acting. In other words, the OCC wanted two bites at the apple—once in court (via the private litigants) and another through a rule and order. That sort of tactical judgment is not sufficient cause for forgoing a normal notice and comment period to allow sufficient time public participation regarding the proposed rule. There was no reason for the OCC to leave the rule vulnerable to being overturned on procedural grounds other than that it wanted to jam up opponents with too short of a window to respond.

### **III. The Proposed Rule and Preemption Order Are Both *Ultra Vires* Because Interchange Regulation Is a “Major Question,” and There Is No Clear Delegation of Authority to the OCC to Regulate Interchange Fees, Including Through a Preemption Order**

The proposed rule and preemption order both exceed the OCC’s authority. Under the “major questions doctrine” established by *West Virginia v. EPA*, 597 U.S. 697 (2022), a federal regulatory agency lacks rulemaking authority when (1) the underlying claim of authority concerns an issue of “vast economic and political significance,” and (2) there is no clear delegation of authority over the issue.

On the first prong, there is no question that regulation of interchange fee involves the exercise of authority of “vast economic and political significance.” Total annual US interchange fees (credit and debit) are over \$66 billion per year.<sup>1</sup> Interchange fees are key to the balancing of the entire payment card ecosystem and have been a hotly debated political issue for over a quarter century, with Congress regulating debit card interchange fees in 2010 (at the same time it curtailed the OCC’s preemption powers in light of past OCC abuses of preemption) and with bills to regulate credit card interchange pending in Congress, including a bill for which the Vice-President was previously an original co-sponsor.

On the second prong, section 93a of the National Bank Act delegates to the OCC authority “to prescribe rules and regulations to carry out the responsibilities of the office,” 12

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<sup>1</sup> <https://www.stlouisfed.org/on-the-economy/2026/apr/banking-analytics-credit-debit-card-fees-collected-banks-rose-2025>.

U.S.C. § 93a. But that delegation does not go so far as to allow the OCC to preempt state laws dealing with the regulation of payment card interchange fees. The delegated rule does not fall into any specific statutory charge for the OCC. Much like the All Writs statute for federal courts, it is merely an enabling clause that requires a separate, standalone authority. If there is any authority for the delegation, it must be found in the general charge made to the OCC for “assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.” 12 U.S.C. § 1(a).

Regulation of interchange fees does not squarely fall within any part of the OCC’s general charge. A national bank does not need to receive interchange fees to be safe and sound. While liability under the Illinois statute would affect a national bank’s safety and soundness, so too would all sorts of other state law liabilities.

#### *A. Safety-and-Soundness*

More importantly, preemption of the Illinois statute is not necessary for ensuring banks’ safety-and-soundness because it is not the only way for a national bank to avoid potential liability thereunder. The OCC itself noted some alternative ways, but gave no consideration in the rulemaking to the comparative benefits of the approaches.

The easiest way to avoid liability under the IFPA is to comply with the IFPA and not accept prohibited interchange fees. Thus, the OCC itself notes that banks could advise “merchants in Illinois not to accept payment cards for tax and gratuity, attempting to decline certain classes of transactions (e.g., purchases of gasoline, where excise tax is imbedded in the product’s price), or denying payment card transactions originating in Illinois or elsewhere.” 91 Fed. Reg. 22993 (Apr. 29, 2026). Although the OCC noted some potential technical issues with this approach in a footnote, it provided no evidence to support those claims.

Another solution would be for the card networks to require acquirer banks to require merchants to indemnify issuers for any IFPA liability. That alone would substantially eliminate any argument that there is a safety-and-soundness threat to national banks from the IFPA.

Alternatively, technological solutions are readily within the abilities of the payment card networks. The OCC adduces no evidence whatsoever that the payment card networks cannot find a technological solution, including one as simple as vibe coding authorization codes to indicate if a transaction is for a tax or gratuity and then not charging an interchange fee for it (or denying the transaction). My point is not that it is costless, but that it is feasible.

There would, of course, be some compliance costs for any of these approaches, but avoidance of compliance costs, no matter how high, is not itself a safety-and-soundness concern. If it were, then the OCC would have grounds for preempting all state laws whatsoever and indeed for not complying with law in general. It simply proves too much. Compliance cost are part of the cost of doing business in a state, and if a national bank cannot comply, then it should not do business in that state.

Nor is the urgency of the IFPA’s effective date a reasonable basis for a safety-and-soundness intervention. National banks have had two years to prepare for compliance. If

they have not prepared, that is not just on them, but it is also on the OCC for failing to ensure that its regulatory charges are prepared to comply with the law. A last minute claim of preemption does not excuse the OCC from its own regulatory failure.

#### *B. Fair Access to Financial Services and Fair Treatment of Customers by National Banks*

The OCC's other two regulatory charges do not present a credible hook for sidestepping the major questions doctrine via the section 93a delegation of authority. The regulation of interchange fees is not related to "fair access to financial services" (nor does anything in the proposed rule so claim, and any consideration of "fairness" would have to include the interest of merchants who pay interchange fees as part of accessing payment card services, not just consumers and banks). And regulation of interchange fees is not necessary to ensure the "fair treatment of customers" by national banks. Indeed, the interchange fee is not charged to banks' customers, as the rulemaking recognizes by eliminating the "customer" nexus from 12 U.S.C. § 7.4002.

#### *C. Competitive Equality*

Additionally, the proposed rule would also undermine the principle of competitive equality for state-chartered banks because the preemption rule would apply solely to national banks. The principle of competitive equality in the dual chartering system is so fundamental to the American banking system that this too would likely be an independent ground for concluding that the proposed rule runs afoul of the major questions doctrine.

Either way, regulation of interchange fees is a "major question," for which Congress has not clearly delegated authority to the OCC, so the proposed rule is outside the scope of the OCC's authority and void as *ultra vires*.

### **IV. The Proposed Rule Is Unconstitutional Because It Creates Inconsistency in the Unitary Executive**

The proposed rulemaking is also unconstitutional because it violates the principle of the "unitary executive." The Constitution states that "The executive Power shall be vested in a President of the United States of America." U.S. Const. art II, § 1. There is only one President and the entire executive branch serves as an extension of him. As a result, the right hand of the President cannot act contrary to the left. The Department of Justice has sued the Visa, alleging that it is engaged in monopolization of the debit card market. Complaint, U.S. v. Visa, Inc., No. 1:24-cv-7214 (S.D.N.Y. Sept. 24, 2024). The proposed rule is inconsistent with that suit. The proposed rule states, "Business decisions regarding non-interest charges and fees permitted under this section should be arrived at by each national bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers."

Nowhere, however, does the rule acknowledge that the position of the executive branch of the United States is that interchange fees are *not* currently set, at least in the debit card market, on a competitive basis. The rule does not state that it preempts the IFPA only in regard to *competitively set* interchange fees.

Instead, it purports to preempt state regulation even of interchange fees that are set illegally, in violation of the antitrust laws. Such a broad preemption is inconsistent with the constitutional unitary executive principle. The rulemaking could be brought into compliance, however, with a clear statement that preemption applies solely to fees that otherwise comply with federal law.

## **V. The Scope of the Proposed Rule Is Unclear Because the “Considerations” Section Has No Obvious Operational Effect**

The proposed rule includes a lengthy section on “considerations,” that states that non-interest fees and charges are to be set competitively and in a manner consistent with safety-and-soundness. The rule never explains, however, whether a non-interest fee or charge that does not meet these “considerations,” is covered by the scope of section 7.4002. Indeed, the entire “considerations” section floats, unattached operationally to the rest of section 7.4002. Are non-interest fees and charges that do not comply with 7.4002(c) covered by section 7.4002? Is section 7.4002(c) definitional? The rule does not specify, but it is hard to see what operational work 7.4002(c) has if it is not definitional, and therefore what possible authority exists for section 7.4002(c). Every section of a rule must be independently authorized by a Congressional delegation. As it stands, section 7.4002(c) is a hobo freighthopping on the rest of the rule (which is itself of dubious authorization, as noted above). The OCC should either clarify the connection of section 7.4002(c) to the rest of the rule or cut it.

In any event, it is notable that interchange fees do not comply with *either* subsection 7.4002(c). As noted above, interchange fees are not competitively set. And the process of setting the fees does not comply with section 7.4002(c)(2), which states that:

A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if it employs a decision-making process through which it considers the following factors, among others:

- (i) The cost incurred by the national bank in providing the service;
- (ii) The deterrence of misuse by customers of banking services;
- (iii) The enhancement of the competitive position of the national bank in accordance with its business plan and marketing strategy;
- (iv) The use of third parties to provide or facilitate the provision of a product or service; and
- (v) The maintenance of the safety and soundness of the national bank.

As the OCC surely knows, no national bank considers any of these section 7.4002(c)(2) factors regarding interchange fees for a simple reason: national banks do not set the interchange fees. National banks that participate in payment card schemes simply accept the fee schedule proposed by the payment card network. The fees are not bespoke to the bank.

What then is the impact of section 7.4002(c) given that there is no national bank that qualifies for it? Is it merely a safe harbor, such that a national bank can still be safe-and-sound

if it is paid interchange fees that do not comply with section 7.4002(c)? Does section 7.4002(c) operate to exclude interchange fees that do not comply from the scope of 7.4002 preemption? Does it bind the OCC to ensure that banks actually do comply with section 7.4002(c) with regard to interchange fees? If the OCC cannot explain what section 7.4002(c) actually does operationally, it is hard to consider it as anything other than hortatory window dressing.

## **VI. The Order Exacerbates the “Patchwork Effect” the OCC Criticizes**

The OCC criticizes the IFPA for creating “a complex and potentially unworkable standard.” Yet the proposed rule exacerbates that very problem. The IFPA creates a distinction between transactions for which interchange fees are permitted and those for which it is forbidden. The proposed rule would *add* to the complexity by providing that interchange fees are forbidden, but only for a subset of financial institutions, namely national banks. They would still be forbidden for Federal savings associations,<sup>2</sup> Federal credit unions, state-chartered banks and savings associations, and state-chartered credit unions.

It is hard to see this as a sensible policy outcome. The OCC bemoans the “patchwork effect” of the IFPA, but it is the OCC itself that is adding to the patchwork. If the IFPA is bad policy, it should be addressed across the board—by Congress—rather than preempted only for a subset of financial institutions.

## **Conclusion**

The OCC’s last-minute proposed rule and order are the result of an emergency of its own creation. The IFPA was passed in May 2024. National banks have had nearly two years to come into compliance with it. If they have not, that is on them and on the OCC for failing to ensure that its regulatory charges comply with state law. The OCC might not like the policy embodied in the IFPA (and I make no argument for it here). But dislike of the IFPA’s policy does not give the OCC unfettered preemption authority over a major economic and political

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<sup>2</sup> The OCC asserts in a footnote to the rulemaking that “12 CFR 145.17 authorizes Federal savings associations “to transfer, with or without fee, its customers’ funds.” This interim final rule does not address savings associations because we interpret Federal law, including § 145.17, to clearly provide Federal savings associations with comparable authority.” 91 Fed. Reg. 22990, n. 4 (Apr. 28, 2026). This claim is risible.

First, the OCC omits a key part of section 145.17, namely that such transfer must “conform with applicable laws,” which would include state law, such as the IFPA, and federal antitrust law.

Second, the authority to “transfer, with or without fee, its customers’ funds,” likely refers to whether a Federal savings association is authorized to transfer customer funds without *customer* fees; nothing in the original rulemaking, 48 Fed. Reg. 23032 (May 23, 1983), suggests that the term refers to third-party fees. But even if it were interpreted to cover any fee, all it does is authorize transfers without fees, which is exactly what the IFPA requires in certain cases. Nothing in 12 C.F.R. § 145.17 vests a Federal savings association with comparable powers to a national bank. Independent authority must be found for the IFPA to be preempted as to Federal savings associations.

question, much less the right to pursue a policy inconsistent with preexisting and continuing executive branch action. If the IFPA is a problem, it is one for Congress, not the OCC to fix.

Sincerely,

/s/Adam J. Levitin