

October 23, 2019

# OCC to Appeal Decision Holding That It Lacks Authority to Issue Special Purpose National Bank Charters to Non-Depository Fintechs

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## A Successful Appeal by the OCC Could Greatly Expand and Simplify the Ability of Certain FinTech Companies to Make Loans

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This memo follows our [May 3, 2019 memo to clients](#) summarizing a decision by the U.S. District Court for the Southern District of New York (S.D.N.Y.) that the Office of the Comptroller of the Currency (“OCC”) lacks authority to issue special purpose national bank (“SPNB”) charters for non-depository financial technology (“fintech”) companies. The OCC had indicated that it sought to establish an application process for these fintech companies because it believed that these entities would help facilitate innovation in financial services. The N.Y. Department of Financial Services (“DFS”) sued the OCC, claiming that issuing SPNB charters to non-depository institutions exceeded the OCC’s authority under the National Bank Act (“NBA”) and improperly usurped the DFS’s regulatory authority over such institutions.<sup>1</sup> The DFS also argued that the OCC’s decision violated the Tenth Amendment. The OCC moved to dismiss the DFS’s complaint, arguing that the DFS lacked standing, the dispute was unripe and time-barred, and, in any event, the DFS failed to state a claim because the OCC’s interpretation of the NBA to allow it to issue SPNB charters to non-depository institutions was entitled to deference under the Supreme Court’s *Chevron* doctrine. On May 2, 2019, the S.D.N.Y. denied the OCC’s motion to dismiss the DFS’s complaint, holding that the DFS had standing, the claims were timely, and *Chevron* deference did not apply because, *inter alia*, the meaning of “business of banking” in the NBA “unambiguously requires receiving deposits as an aspect of the business”.<sup>2</sup> Based on the court’s decision, it seemed clear the court would ultimately rule in the DFS’s favor.

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On October 21, 2019, at the request of the parties, the court entered a final judgment in favor of the DFS.<sup>3</sup> In doing so, the court sided with the DFS in holding that the appropriate remedy was to vacate the OCC's regulation allowing for the possibility of SPNB charters. The entry of final judgment will allow the OCC to appeal that decision to the U.S. court of Appeals for the Second Circuit without further litigation before the trial court. On October 22, the OCC announced its intention to appeal the judgment.<sup>4</sup>

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### ENDNOTES

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- <sup>1</sup> The NBA provision that was being challenged states that the OCC may charter entities that are "lawfully entitled to commence the business of banking." 12 U.S.C. § 27(a).
- <sup>2</sup> *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 292 (S.D.N.Y. 2019).
- <sup>3</sup> *Vullo v. Office of Comptroller of Currency*, No. 18 Civ. 8377 (VM) (S.D.N.Y. Oct. 21, 2019).
- <sup>4</sup> B. Pedersen, *Banking charter remains a long way off for fintechs after court ruling*, AM. BANKER, Oct. 23, 2019, at 2, 2019 WLNR 31914654.

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