

Special Alert: CSBS Sues OCC Over Fintech National Bank Charter

On April 26, 2017, the Conference of State Bank Supervisors (CSBS) [initiated](#) a lawsuit against the Office of the Comptroller of the Currency (OCC) in the U.S. District Court for the District of Columbia challenging the OCC's statutory authority to create a special purpose national bank (SPNB) charter for financial technology (fintech) companies.

Prior to this lawsuit, CSBS had publicly opposed the fintech SPNB charter on numerous occasions, asserting last month that the OCC has acted beyond the legal limits of its authority and that providing SPNB charters to fintech companies "exposes taxpayers to the risk of inevitable FinTech failures."

In the [press release](#) announcing the lawsuit, CSBS President John Ryan referred to the OCC's action as "an unprecedented, unlawful expansion of the chartering authority given to it by Congress for national banks," and stated that "if Congress had intended it to be used for another purpose, it would have explicitly authorized the OCC to do so."

Citing violations of the National Bank Act (NBA), Administrative Procedure Act (APA), and the U.S. Constitution, CSBS seeks declaratory and injunctive relief that would declare the fintech SPNB charter to be unlawful and prohibit the OCC from taking further steps toward creating or issuing an SPNB fintech charter, without express Congressional authority.

CSBS Not Alone in Opposition

While the CSBS is the only party to file suit against the OCC regarding the SPNB charter, it is not alone in opposing the agency's approach. The Independent Community Bankers of America, the Center for Responsible Lending and several other advocacy groups have voiced their concerns through comment letters and media.

Congress has weighed in as well. In January 2017, Senators Jeff Merkley (D-OR) and Sherrod Brown (D-OH), the top Democrat on the Senate Banking Committee, sent a [letter](#) to Comptroller Thomas Curry asserting that "[o]ffering a new charter to nonbank companies seems at odds with the goals of financial stability, financial inclusion, consumer protection, and separation of banking and commerce" and arguing that a company that does not take deposits by offering transaction or savings accounts "should not be able to refer to itself as a bank." The letter requested that the OCC refrain from offering any special purpose charters, stating that "it is up to Congress to take action on these important matters."

Later in March, 34 House Republicans, led by House Financial Services Committee Chair Jeb Hensarling (R-TX), issued a letter to Comptroller Curry cautioning him that "if the OCC proceeds in haste" or "rush[es] to finalize the charter prior to the confirmation of a new Comptroller," Congress may overturn such actions.

The banking regulators of several states have also opposed the OCC's actions. Most notably, the New York State Department of Financial Services ([NYDFS](#)) submitted its own [comment letter](#), setting forth

several arguments similar to CSBS's and also asserting that fintech companies present unique risks that the OCC, unlike state regulators, does not have experience addressing. NYDFS Superintendent Maria Vullo issued a [statement](#) yesterday in support of CSBS's lawsuit, echoing concerns that the OCC's proposal threatens state sovereignty and consumer protection laws. The national charter would afford fintech companies the ability to bypass the state-by-state licensing system and operate without the immediate supervision of state regulators, like the DFS, which Vullo argued, are the most "experienced and best equipped to regulate cash-intensive nonbank financial service companies."

The OCC has thus far been unmoved by such strong opposition. Last month, Comptroller Curry [reiterated](#) the OCC's legal authority to grant special purpose charters to fintech companies, adding that such companies do not need to accept deposits to qualify for a charter. The authority "is not circumscribed just because a company delivers banking services in new ways with innovative technology." Comptroller Curry has been a driving force behind the fintech charter, however, his five-year term as Comptroller expired earlier this month. Treasury Secretary Steven Mnuchin has remarked that the Trump administration is planning to replace him with another Comptroller, who could determine the future of the fintech charter program.

Statutory Authority to Charter Fintech SPNBs

The OCC claims that it has authority under the NBA and its implementing regulation, 12 C.F.R. § 5.20(e)(1), to grant SPNBs to companies that engage in fiduciary activities or "any other activities within the business of banking," which the OCC defines as at least one of the following three core banking functions: receiving deposits, paying checks, or lending money. The OCC's Licensing Supplement clarified that SPNB charters are available to fintech companies engaged in one of the core banking functions of paying checks or lending money, but will not be available to companies engaged in deposit-taking activities.

CSBS contends that the OCC does not have statutory authority under the NBA or any other federal banking law to charter nondepository companies without specific Congressional authorization. The NBA authorizes the OCC to charter companies to carry on the "business of banking" or carry on a special purpose expressly authorized by Congress. In its complaint, CSBS relies on case law, legislative history, and various federal banking statutes, including the Bank Holding Company Act, to support its position that the "business of banking" requires at a minimum, receiving deposits. While the OCC has used its authority to charter SPNBs for other nondepositories such as trust banks, banker's banks, and credit card banks, CSBS argues that OCC was only authorized to do so because it received express Congressional approval.

CSBS further asserts that the OCC exceeded its statutory authority when, in 2003, the agency promulgated 12 C.F.R. § 5.20(e)(1), which defined the "business of banking" to include activities carried out by nondepositories. CSBS requests that the court declare the OCC's regulation unlawful and set it aside.

Violations of the Administrative Procedure Act

Since August 2015, the OCC has taken several steps to position itself as the leading federal regulator for fintech companies. In August 2015, Comptroller Curry [announced](#) the agency's intent to assemble a team of policy experts, examiners, attorneys, and other agency staff to begin researching innovative developments in the financial services industry. In March 2016, the OCC published a [summary](#) of its initial research and plans to guide the development of responsible financial innovation. In September 2016, the OCC issued a [notice](#) of proposed rulemaking clarifying the framework and process for receiverships of national banks without FDIC-insured deposits. That proposal applied to all nondepository national banks, including those with SPNB charters. In October 2016, the OCC detailed its [plans](#) to implement a responsible innovation framework and announced the establishment of the OCC's Office of Innovation, a dedicated, central point of contact for fintech companies as well as for requests and information related to innovation. In December 2016, the OCC published a [white paper](#) announcing its intent to create an SPNB charter for fintech companies, and invited comments on discrete questions for consideration. Finally in March, the OCC [released](#) its Licensing Supplement as well as a *Summary of Comments and Explanatory Statement*, in which the OCC summarized the more than 100 comments it received in response to its December 2016 white paper and explained its decision to issue the Licensing Supplement for public comment. Comments on the Licensing Supplement were due on April 14, 2017.

CSBS argues that these efforts taken by the OCC to charter SPNB fintech companies violate the APA's notice and comment provisions for agency rulemaking. In lieu of formal rulemaking, CSBS argues that the "OCC has opted instead to approve nonbank charters pursuant to the broadly worded policy statements that are subject to change at the whim of the agency and modification based on the type of business seeking a charter." CSBS also expressed concerns over the OCC's plans to make a case-by-case determination on the laws that will apply to successful SPNB fintech applicants, by way of non-public operating agreements.

CSBS describes OCC's efforts to charter fintech SPNBs as "arbitrary, capricious, and an abuse of discretion" in further violation of the APA, which requires agencies to make reasoned decision-making when adopting new rules.

Preemption

Finally, CSBS asserts that absent Congressional authority and intent to preempt state law, the OCC's efforts to charter fintech SPNBs is unconstitutional under the Supremacy Clause and the Tenth Amendment of the U.S. Constitution.

Conclusion

The ultimate outcome of this lawsuit, and its effect on the OCC's recent efforts to charter fintech companies, will be closely monitored by multiple industry participants, state regulators, and consumer advocates. The court may apply Chevron deference and side with the OCC's interpretation of what

constitutes the “business of banking” and the agency’s approach for chartering fintech companies. With Comptroller Curry’s term as Comptroller having recently expired, it remains unclear whether the OCC will continue to prioritize the SPNB charter with the same vigor.

If you have questions about the charter or other related issues, visit our [Financial Institutions Regulation, Supervision & Technology \(FIRST\)](#) and [FinTech](#) practice pages for more information, or contact a Buckley Sandler attorney with whom you have worked in the past.