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The Fintech Charter Goes into Hibernation

By Randall D. Guynn & Margaret E. Tahyar on May 3, 2019

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A federal judge has put the fintech charter into the deep hibernation of a long litigation battle. It is back to the drawing board for those who might desire a fintech charter. Time to take another look at bank partnerships or industrial loan companies. Moreover, in light of the Federal Reserve's proposed new rule on control, minority investments in general purpose national banks may be more feasible without causing the minority shareholders to become subject to the restrictions and requirements of the Bank Holding Company Act because they will not be deemed to have control over the national bank unless they are closer to having actual control.[1]

In *Vullo v. Otting*, an SDNY judge rejected the OCC's motion to dismiss and concluded, after a song of praise to the dual banking system, that the "business of banking" in the National Bank Act (the **NBA**) requires, at its core, that a chartered bank take deposits.[2] The judge determined that the term "'business of banking,' as used in the NBA, unambiguously requires receiving deposits as an aspect of the business."[3]

The ruling permits the New York Department of Financial Services (the **DFS**) to proceed with its claims that the fintech charter exceeds the OCC's authority under the NBA.[4]

The decision is a blow to supporters of the fintech charter. Even assuming that the OCC appeals this ruling, it will encourage suits by other state banking regulators. There is also a pending lawsuit brought by the Conference of State Banking Supervisors (the **CSBS**), which makes claims similar to the DFS suit and which has faced similar procedural and substantive defenses by the OCC.[5] Moreover, the Federal Reserve has not yet reached a position on whether it would grant membership to a fintech charter; there is a serious question whether it would do so while the litigation is pending.

Law Clerk Jeremy M. Sklaroff contributed to this post.

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[1] For a link to our recent memorandum regarding the Federal Reserve's control proposal, please see *Federal Reserve's Proposed Rule on Controlling Influence: A Step in the Right Direction*.

[2] The judge also ruled against the OCC on its procedural claims that the court lacked subject-matter jurisdiction, rejecting arguments that the DFS has not suffered an injury-in-fact; that the DFS's claims are not ripe because the OCC has not accepted, reviewed or approved any FinTech charters; and that the DFS's challenge is time-barred. *Vullo v. Otting*, No. 1:18-cv-08377-VM (S.D.N.Y. May 2, 2019) (order rejecting motion to dismiss), at 9.

[3] *Id.* at 38. The court reached this conclusion under the first step of *Chevron* deference and, as a result, the OCC did not benefit from the deference it would have received for a "reasonable interpretation" under *Chevron*'s second step. *Id.* at 52-3.

[4] *Id.* at 53. The court, however, rejected the DFS's Tenth Amendment claim. *Id.* at 55-56.

[5] *See CSBS v. Otting*, No. 1:18-cv-02449-DLF (D.D.C filed Oct. 25, 2018); *see also CSBS v. Otting*, No. 1:18-cv-02449-DLF (D.D.C filed Jan. 7, 2019) (defendant's motion to dismiss).