

NYSDFS Sues to Block the OCC's Special Purpose National Bank Charters for Fintech Companies

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On September 14, 2018, Superintendent of the New York State Department of Financial Services (“NYSDFS”) Maria T. Vullo filed a complaint in federal court against the U.S. Office of the Comptroller of the Currency (“OCC”) to block the OCC from issuing any special purpose national bank (“SPNB”) charters. The OCC [announced](#) last month, after much industry anticipation, that a nondepository financial technology (“fintech”) company that engages in a core banking activity, such as paying checks or lending money, can now apply for a SPNB charter (the “Fintech Charter Decision”).

In its [complaint](#), the NYSDFS argues that the Fintech Charter Decision exceeds the OCC’s authority under the National Bank Act (“NBA”), which limits national bank charters to institutions engaged in the “business of banking.” Through a regulation, the OCC has interpreted this phrase to include receiving deposits, paying checks, or lending money, whereas the NYSDFS’s suit takes the position that the “business of banking . . . at a minimum requires taking deposits.”

In addition, the complaint argues that the NBA does not expressly authorize the preemption of state law under a SPNB charter as would be required by the Tenth Amendment to the U.S. Constitution for the charter to have preemptive effect.

The NYSDFS complaint includes a scathing preliminary statement decrying the Fintech Charter Decision as “lawless, ill-conceived, and destabilizing of financial markets” and as “reckless folly.” The statement asserts that the preemption of state laws by SPNB charters would leave consumers less protected, enable “too big to fail” levels of consolidation, and create risks “similar to what was seen in the 2008 financial crisis.”

The NYSDFS’s suit asks the U.S. District Court for the Southern District of New York (“SDNY”) to strike down the Fintech Charter Decision and permanently enjoin the OCC from issuing “any other special purpose charter” to a nondepository institution under the OCC’s interpretive regulation.

In December 2017, the SDNY [dismissed](#) (paywall) a similar case brought by the NYSDFS on standing and ripeness grounds, noting that the OCC at the time was merely considering offering a SPNB charter and that the agency had not yet reached a “final” decision. In April 2018, the U.S. District Court for the District of Columbia [dismissed](#) (paywall) a similar case brought by the

Conference of State Bank Supervisors on similar justiciability grounds. Notably, though, the court suggested in that dismissal that a renewed case might remain premature until the OCC actually issues a SPNB charter.

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