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State Banking Regulators Oppose Office of Comptroller of Currency Fintech Charter

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With this week's close of the comment period on the December 2016 whitepaper by the ***Office of the Comptroller of the Currency ("OCC")*** regarding special purpose charters for fintech companies, which we discussed previously, several key stakeholders have weighed in on the OCC's plans. Notably, on January 13, 2017, the Conference of State Bank Supervisors ("CSBS"), the nationwide organization representing banking regulators from all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, submitted a comment letter opposing the OCC's creation of the charter. On January 17, 2017, the Superintendent of the ***New York State Department of Financial Services ("NYSDFS")***, Maria T. Vullo, submitted a standalone comment letter also opposing the charter.

CSBS's and NYSDFS's letters make a number of arguments against the charter:

- ***Legal basis for the charter.*** According to CSBS and NYSDFS, the OCC lacks the statutory authority under the National Bank Act to charter a national bank that does not issue deposits, unless the charter is for a type of special purpose bank expressly authorized by statute, namely, trust banks, bankers' banks, and credit card banks. The OCC has taken the position that it has the statutory authority to charter national banks that engage in fiduciary activities, receive deposits, pay checks, or lend money, including the "modern equivalent" of those activities.

- ***Preemption of state laws.*** CSBS and NYSDFS argue that federally-chartered fintech banks would be exempt from state consumer protection laws by virtue of preemption afforded to national banks under the National Bank Act, but the only identified examples of state laws that would be preempted for federally-chartered fintech banks are licensing and usury laws of the customer's state of residence.

- ***Uneven application of federal laws.*** CSBS argues that a special purpose fintech charter would result in an ad-hoc, uneven application of federal laws. According to CSBS, special purpose fintech banks would benefit unfairly from their eligibility to become members of the Federal Reserve System, exclusion from the definition of "bank" under the Bank Holding Company Act, exemption from the enforcement authority of the Securities and Exchange

Commission, and exclusion from the supervisory authority of the Consumer Financial Protection Bureau (depending on the activities of the fintech bank). Competitors are subject to those laws to differing degrees; for instance, state-licensed non-bank entities are not eligible to become members of the Federal Reserve System, and insured depository institutions are "banks" under the Bank Holding Company Act.

- ***Effects on innovation.*** CSBS and NYSDFS argue that the OCC will be picking winners and losers in the marketplace by granting special purpose fintech charters – along with regulatory advantages associated with the charters – to a select few applicants. Moreover, CSBS and NYSDFS argue that successful applicants are likely to be established technology firms, and startups will be placed at a disadvantage to the large incumbent players, which will stifle innovation.

- ***Unique risks.*** NYSDFS argues that fintech companies tend to present unique risks that the OCC, unlike state regulators, does not have experience addressing. For instance, NYSDFS states that non-depository institutions are cash intensive businesses that have frequent changes to their product mix, location, and beneficial owners, and do not have ongoing customer relationships, which could increase the risk that those institutions are used to finance terrorism or perpetuate fraud.

These arguments echo many of the concerns that U.S. Senators Sherrod Brown (D-OH) and Jeff Merkley (D-OR) raised in a comment letter to the OCC, which we discussed in a previous post.

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