

**XI. *Healthy Competition or Dual-Banking Disaster? OCC Litigation over Special-Purpose National Bank Charters***

**A. Introduction**

Since the 2008 financial crisis, consumer confidence in and satisfaction with large traditional banks and depository institutions has declined.<sup>1</sup> Indeed, Millennial consumers are even more disenchanted with traditional banks than their Gen-X counterparts.<sup>2</sup> Increasingly, to fill this consumer demand for alternative financial products, technology companies have developed financial solution technologies, colloquially known as “fintech.”<sup>3</sup> Fintech companies have been changing the landscape of financial services for the past decade, and with the change has come confusion as to where these firms fit in the larger banking picture, both at a national and state level.<sup>4</sup>

The purpose of this paper is to trace and discuss the current litigation between the Office of the Comptroller of the Currency (OCC) and state bank chartering institutions and summarize the status of this litigation.<sup>5</sup> These cases point toward larger issues in federal and state financial regulation and how regulators are attempting to deal with

---

<sup>1</sup> Erika Vause, *This Is Why So Many People Don't Trust Banks*, WEEK (Nov. 22, 2016), <http://theweek.com/articles/661895/why-many-people-dont-trust-banks> [<https://perma.cc/ZR4J-L2B9>] (“The 2015 Edelman Trust Barometer, a yearly survey of attitudes across 27 industrialized nations, indicated that . . . only the media is less trusted than banking and finance.”).

<sup>2</sup> Michael Hill, *Half of Millennials Don't Trust Traditional Banking Methods*, INFO SECURITY (June 22, 2016), <https://www.infosecurity-magazine.com/news/half-of-millennials-dont-trust/> [<https://perma.cc/W4JA-5Y6W>] (reporting on a survey showing half of 18–24 year-olds distrust banks compared to 17 percent of 55–64 year-olds).

<sup>3</sup> See generally Falguni Desai, *The Evolution of Fintech*, FORBES (Dec. 13, 2015, 5:35 AM), <https://www.forbes.com/sites/falgunidesai/2015/12/13/the-evolution-of-fintech/2/#2ab664d13dd0> [<https://perma.cc/XXK5-EGKM>] (summarizing the history of fintech and its development).

<sup>4</sup> Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 6 (2017) (“Indeed, fintech is clouding the very nature of what it means to be a bank.”).

<sup>5</sup> See, e.g., *Vullo v. OCC*, No. 17-CV-03574, (S.D.N.Y. 2017) (discussing a recent complaint filed against the OCC regarding non-bank charters); *Complaint at 2–4*, *Conference of State Bank Supervisors v. OCC*, No. 17-CV-00763 (D.D.C. Apr. 26, 2017) [hereinafter CSBS Complaint] (arguing the OCC overstepped its authority by proposing national charters for non-bank institutions).

fintech companies.<sup>6</sup> There are two key players battling the OCC in recent cases involving the dual-banking system and fintech. First is the New York State Department of Financial Services (NYSDFS), which grants state banks the authority to operate within the state of New York and potentially outside the purview of the Federal Reserve System.<sup>7</sup> The second entity is the Conference of State Banking Regulators (CSBS), a national group of state banking commissioners and officials who support and advance state interests in the country's dual-banking system.<sup>8</sup> Section B will first give a brief introduction into the system of federal and state banking regulation (referred to as the "dual banking system") and how fintech regulation could complicate this framework. Section C will discuss what makes fintech regulation an important and relevant topic in financial regulation. Section D will analyze two recent cases dealing with the authority of the OCC to issue charters to non-bank financial institutions and make a prediction as to the future of this type of litigation.<sup>9</sup>

### **B. A Brief History of Fintech Regulation**

The term fintech has taken on various meanings in academic and popular circles, but in this article, the term will refer to technology firms that improve, assist, or augment the transfer or management of money in some way. Fintech can alternatively be defined as "companies whose line of business combines software and technology to deliver financial services."<sup>10</sup> Examples of popular companies considered as fintech firms are Venmo (a platform for individuals to transfer

---

<sup>6</sup> See generally CSBS Complaint, *supra* note 5 (establishing the tension between federal and state banking regulators and indicating difficulties with fintech regulation in the dual-banking framework.)

<sup>7</sup> *Who We Supervise*, N.Y. STATE DEP'T OF FIN. SERVS., <http://www.dfs.ny.gov/about/whowesupervise.htm> [<https://perma.cc/CE53-UE2D>] (last visited Mar. 18, 2018).

<sup>8</sup> *About*, CONFERENCE OF STATE BANKING REGULATORS, <https://www.csbs.org/about> [<https://perma.cc/E7MM-PWKA>] (last visited Feb. 17, 2018).

<sup>9</sup> See generally *Vullo*, No. 17-CV-03574; *Conference of State Bank Supervisors v. OCC*, No. 17-CV-00763.

<sup>10</sup> U.S. DEP'T OF COMMERCE INT'L TRADE ADMIN., 2016 TOP MARKETS REPORT: FINANCIAL TECHNOLOGY 3 (2016), [https://www.trade.gov/top-markets/pdf/Financial\\_Technology\\_Top\\_Markets\\_Report.pdf](https://www.trade.gov/top-markets/pdf/Financial_Technology_Top_Markets_Report.pdf) [<https://perma.cc/9K8Y-DTFJ>].

money between one another quickly),<sup>11</sup> Acorns (an app connecting to banking accounts and rounding purchases up to the nearest dollar, putting the difference in a mutual fund),<sup>12</sup> or Mint (a budgeting platform that “talks” to your bank accounts and credit cards to constantly update).<sup>13</sup> Although fintech companies provide many innovative products to the financial and banking space, they do not have licenses to operate as depository institutions, and thus cannot hold deposits and can only lend or transfer money.<sup>14</sup> Currently, these companies function more as a boon to depository institutions than actual banks.<sup>15</sup> In recent years, fintech firms have sought federal banking charters to expand their reach into the deposit-taking space.<sup>16</sup>

Traditional depository institutions can be regulated by several entities at both the federal and state levels.<sup>17</sup> Traditional depository institutions can generally choose whether to obtain a charter from the state or from the OCC at the federal level.<sup>18</sup> Obtaining a charter grants

---

<sup>11</sup> *About*, VENMO, <https://venmo.com/about/product/> [<https://perma.cc/X8V2-KZ87>] (last visited Mar. 20, 2018).

<sup>12</sup> ACORNS, <https://www.acorns.com/> [<https://perma.cc/3SUF-WVLW>] (last visited Mar. 20, 2018).

<sup>13</sup> MINT, *How Mint Works*, <https://www.mint.com/how-mint-works> [<https://perma.cc/EV24-CAHP>] (last visited Mar. 20, 2018) (describing Mint’s budgeting tools and services).

<sup>14</sup> Van Loo, *supra* note 4, at 6. (“The vast majority [of fintech firms] do not have banking licenses, which means that any money they hold for consumers must not be for deposits, but instead for other purposes—such as transferring or lending.”)

<sup>15</sup> Edward Robinson, *Big Banks Poised to Scoop up Fintech Startups, Report Finds*, BLOOMBERG (Apr. 5, 2017, 7:01 PM), <https://www.bloomberg.com/news/articles/2017-04-05/big-banks-poised-to-scoop-up-fintech-startups-report-finds> [<https://perma.cc/E6LF-QN59>] (indicating many fintech firms’ plans to enter into strategic partnerships or mergers with large banks).

<sup>16</sup> Telis Demos, *Fintech Firm Backed By Warburg Pincus Files For Bank Charter*, WALL ST. J. (July 25, 2017, 7:19 A.M.), <https://www.wsj.com/articles/fintech-firm-backed-by-warburg-pincus-files-for-bank-charter-1500981409> (discussing Varo Money and their recent application for a federal bank charter).

<sup>17</sup> JAY B. SYKES, CONG. RESEARCH SERV., R45081, BANKING LAW: AN OVERVIEW OF FEDERAL PREEMPTION IN THE DUAL BANKING SYSTEM 1 (2018) (describing the U.S. dual banking system, “in which banks can choose to apply for a charter from a state banking authority or a charter from the [OCC]”).

<sup>18</sup> *Id.* at 4–5 (“[B]anks have had the option of applying for a national charter from the OCC or a state charter from the state’s primary banking regulator.”).

banks the license to take deposits, and an entity might choose a state over federal charter for several reasons, and vice versa.<sup>19</sup>

The OCC “charters, regulates, and supervises all national banks and federal savings associations, as well as federal branches and agencies of foreign banks.”<sup>20</sup> The OCC was created in 1863 and has been the primary federal regulator of traditional banks.<sup>21</sup> Although a federal charter offers protection from state regulations that could be considered restrictive in some cases,<sup>22</sup> the OCC charges high supervisory fees that could be seen as a barrier to entry to smaller institutions. Another important agency regulating national banks is the Federal Deposit Insurance Corporation (FDIC). The FDIC provides insurance on customers’ deposits for depository institutions with a federal charter.<sup>23</sup> The FDIC, born out of the Great Depression, provides federally guaranteed insurance of up to \$250,000 on customers’ deposits, which instills confidence in the banking system and “[limits] the effect on the economy and the financial system when a bank or thrift institution fails.”<sup>24</sup> The FDIC also regulates 4,000-plus banks in the United States, and they are generally the federal regulator of banks that are not members of the Federal Reserve System.<sup>25</sup> The Federal Reserve, another major player in banking regulation, is the United States’ version of a central bank which, among other functions, supervises all national and some state banks.<sup>26</sup>

State banks that do not hold federal charters are regulated by the state institution that granted them the charter, such as the Division

---

<sup>19</sup> *Id.* at 5 (summarizing the advantages and disadvantages of each charter).

<sup>20</sup> *Mission*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.gov/about/what-we-do/mission/index-about.html> [<https://perma.cc/5Z5U-J8C4>] (last visited Mar. 18, 2018).

<sup>21</sup> *History*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.gov/about/what-we-do/history/index-history.html> [<https://perma.cc/YF45-NTU8>] (last visited Mar. 15, 2018).

<sup>22</sup> SYKES, *supra* note 17, at 5 (“A bank may select a national charter in order to benefit from federal preemption of certain unfavorable state regulations.”).

<sup>23</sup> *About*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/learn/symbol/> [<https://perma.cc/VJP8-NTZK>].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> BD. OF GOVERNORS OF THE FED. RES. SYS., SUPERVISING AND REGULATING FINANCIAL INSTITUTIONS AND ACTIVITIES 77, [https://www.federalreserve.gov/aboutthefed/files/pf\\_5.pdf](https://www.federalreserve.gov/aboutthefed/files/pf_5.pdf) [<https://perma.cc/7MS6-ZNKD>].

of Banks in Massachusetts<sup>27</sup> or the Office of Banking in Michigan,<sup>28</sup> and either the FDIC or the Federal Reserve.<sup>29</sup> State-chartered banks that do not hold federal charters are not supervised by the OCC, but are still federally regulated and insured by the FDIC.<sup>30</sup> State banks may elect to become members of the Federal Reserve System and become subject to regulation by the Federal Reserve.<sup>31</sup> This separate state and federal chartering system is referred to as the dual-banking system, the goal of which is to promote competition between state and national regulators and provide checks and balances to the nation's banking system as a whole.<sup>32</sup>

To the disdain of state banking agencies, fintech firms have been seeking charters which allow entities to comply with only one set of banking regulations while operating nation-wide.<sup>33</sup> Federal regulators seek a national solution to both clarify regulatory confusion and 'expand financial inclusion, empower consumers, and help families take more control of their financial matters.'<sup>34</sup>

---

<sup>27</sup> THE DIVISION OF BANKS, <https://www.mass.gov/orgs/division-of-banks> [<https://perma.cc/D3RS-XSE4>] (last visited Mar. 18, 2018).

<sup>28</sup> THE DIVISION OF INS. & FIN. SERVS., *Office of Banking*, [http://www.michigan.gov/difs/0,5269,7-303-13047\\_32588---,00.html](http://www.michigan.gov/difs/0,5269,7-303-13047_32588---,00.html) [<https://perma.cc/TX4G-4PAN>] (last visited Mar. 20, 2018).

<sup>29</sup> *National Banks*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <https://www.helpwithmybank.gov/national-banks/national-banks.html> [<https://perma.cc/YE4U-UKKN>] (last visited Mar. 20, 2018) (explaining that state-chartered banks are regulated by either the FDIC or the Fed, along with state banking regulators).

<sup>30</sup> *Id.*

<sup>31</sup> *About the Fed: State Banks as Members*, BOARD OF GOVERNORS OF THE FED. RES. SYS., <https://www.federalreserve.gov/aboutthefed/section9.htm> [<https://perma.cc/HU3Q-GEBS>] (last visited Mar. 30, 2018) (describing the application process for state banks to become Federal Reserve members).

<sup>32</sup> *See The Dual Chartering System-Benefits of the State Charter*, WASH. STATE DEP'T OF FIN. INSTITUTIONS, <https://dfi.wa.gov/credit-unions/dual-charter> [<https://perma.cc/5S5U-HGC4>] (last visited Mar. 20, 2018).

<sup>33</sup> James Rufus Koren, *'Fintech' Firms Notch Win as Regulator Allows Them to Seek Federal Bank Charters*, L.A. TIMES (Dec. 2016, 1:35 PM), <http://www.latimes.com/business/la-fi-fintech-charters-20161202-story.html> [<https://perma.cc/HBX4-YSUC>].

<sup>34</sup> *Id.*

### C. Relevance in Modern Banking Regulation

The future of fintech regulation is an important and relevant topic in the banking space for several reasons. First, there is a federalism concern: can the federal government supersede states' ability to regulate their own depository institutions?<sup>35</sup> The concern about federal preemption of state law dates back to the 1800s, and there are bipartisan concerns about federal chartering generally.<sup>36</sup> Competition in banking services and consumer protection are concerns making this fintech litigation an important element.<sup>37</sup>

Recent scholarly work has discussed solutions to improve competition in the banking sector.<sup>38</sup> But with potential improvement in the competitive landscape, there is concern about allowing fintech companies to operate unchecked, which some scholars and regulators believe could lead to another financial crisis.<sup>39</sup> The potential for increased competition from fintech firms may not outweigh the potential risk to the financial system as a whole.<sup>40</sup>

Further, the chartering of fintech companies is an important issue because of the crucial services fintech could provide for underserved populations.<sup>41</sup> The usage of mobile banking services has increased steadily since 2012, and smart-phone usage is becoming

---

<sup>35</sup> See J.W. Verret, *A Dual Non-Banking System? Or a Non-Dual Non-Banking System? Considering the OCC's Proposal for a Special Purpose National Charter for Fintech Companies, Against an Alternative Competitive Federalism System, For an Era of Fintech Banking* 12–14 (George Mason Univ. Law & Econ. Research Paper Series, Working Paper No. 17-05) (discussing federal preemption in terms of the dual-banking system).

<sup>36</sup> See *id.* at 2.

<sup>37</sup> See generally Van Loo, *supra* note 4.

<sup>38</sup> See *id.*

<sup>39</sup> See William Magnuson, *Regulating Fintech* (Tex. A&M Univ. School of Law, Working Paper, 2017) (arguing fintech companies are small, disaggregated actors that could be the cause of the next financial crisis, if regulated incorrectly).

<sup>40</sup> *Id.* at 3 (“[F]intech poses a set of unique challenges to financial regulation, challenges that require us to question many of our fundamental understandings about the creation and propagation of systemic risk in the economy.”).

<sup>41</sup> BD. OF GOVERNORS OF THE FED. RES. SYS., CONSUMER AND MOBILE FINANCIAL SERVICES 2016 2–3 (2016) (suggesting underbanked and unbanked consumers could benefit from mobile banking services).

increasingly saturated in the U.S. population.<sup>42</sup> Because of the vastly increased usage of cell phones and mobile banking, a national charter for fintech companies could allow for uniform regulations and a reduction in wasteful spending on the uncertainty of compliance.<sup>43</sup>

Despite the potential advantages, there could be several problems with a national fintech charter. First, granting fintech firms a national charter could lead to massive corporations creating “fintech divisions” and filing for national bank charters. While this may seem innocuous, this could allow companies like Apple, Google, or Amazon to function as depository institutions, which would grant them financial backing by the Federal Reserve and access to lending at the Federal Reserve discount window rate.<sup>44</sup> If large corporations like this had access to the Federal Reserve Discount Rate and operated banking entities without the same oversight as traditional banks, a special purpose national bank charter like the one proposed for fintech firms could promote the creation of another “shadow banking system.”<sup>45</sup>

To further conceptualize the potential risk of granting federal charters to non-bank institutions, consider a parallel between a national fintech charter and an Industrial Loan Company (ILC).<sup>46</sup> An ILC is a financial services company that can be “owned by a commercial firm

---

<sup>42</sup> 67 percent of consumers aged 18 to 29 used mobile banking services in the past twelve months in 2015, as compared to 45 percent in 2011. *Id.* at 9–16.

<sup>43</sup> Koren, *supra* note 33 (discussing the potential advantages of a national fintech charter).

<sup>44</sup> For an explanation on discount window lending in the United States, see *Discount Window Lending*, BOARD OF GOVERNORS OF THE FED. RES. SYS., <https://www.federalreserve.gov/regreform/discount-window.htm> [<https://perma.cc/E629-EGK4>] (last visited Mar. 20, 2018).

<sup>45</sup> Julie Stackhouse, *Fintech Interest in Industrial Loan Company Charters: Spurring the Growth of a New Shadow Banking System?*, FED. RES. BANK OF ST. LOUIS: ON THE ECON. BLOG (Oct. 24, 2017), <https://www.stlouisfed.org/on-the-economy/2017/october/fintech-interest-industrial-loan-company-charters-spurring-new-shadow-banking-system> [<https://perma.cc/B434-GG8K>].

<sup>46</sup> See Lalita Clozel, *Square’s Bid to be Industrial Bank Inflames ILC Debate*, AM. BANKER (Sept. 6, 2017), <https://www.americanbanker.com/news/square-to-apply-for-industrial-bank-inflaming-ilc-debate> [<https://perma.cc/6N2L-V8F7>] (expressing the concern that ILCs are less heavily regulated than state or national banks and the fear that fintech companies could operate with the same lack of oversight if not properly chartered).

that is not regulated by a federal banking agency.”<sup>47</sup> ILCs have a special charter, and observers question whether mixing banks and commerce in this way is conducive to either financial stability or consumer protection.<sup>48</sup> In the early days of the ILC, corporations, if approved to become an ILC, would provide loans to their employees (people who often would not qualify for loans at a traditional bank) and would charge much higher interest rates than a traditional depository institution.<sup>49</sup> Along with being able to charge higher interest rates than banks to low-income hourly workers, the ILCs were able to receive FDIC insurance, which insulated them from most of the financial risk of borrowers defaulting on their loans.<sup>50</sup> In essence, ILCs could reap the benefits of high interest rates, loan to a population that would not qualify for loans at commercial banks, and then shift the burden of these high-risk loans to the federal government in the case of default.<sup>51</sup> ILCs could make money hand-over-fist while taking on minimal risk, and, naturally, this arrangement caused a disruption in the financial services sector in the mid-1980s.<sup>52</sup>

Although ILCs are not able to operate in this way today,<sup>53</sup> regulators are likely fearful that, if companies like Google or Amazon were able to get special-purpose national bank charters, the country would face a similar crisis as it did during the ILC’s early days. From a consumer protection standpoint, it is concerning to pave the way for

---

<sup>47</sup> *The FDIC’s Supervision of Industrial Loan Companies: A Historical Perspective*, FED. DEPOSIT INS. CORP., [https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum04/industrial\\_loans.html](https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum04/industrial_loans.html) [https://perma.cc/47DP-VYXL] (last visited Mar. 18, 2018).

<sup>48</sup> Michael Nonaka, *Industrial Loan Companies after the Moratorium*, LAW360 (Feb. 1, 2008), <https://www.cov.com/-/media/files/corporate/publications/2008/02/industrial-loan-companies-after-the-moratorium.pdf> [https://perma.cc/HU4Z-MRXX].

<sup>49</sup> *The FDIC’s Supervision of Industrial Loan Companies: A Historical Perspective*, *supra* note 47 (“These early industrials operated more or less like finance companies, providing loans (at a high interest rate) to wage earners who could not otherwise obtain credit.”).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (detailing the failure of many ILCs due to, among other things, the difficulty the FDIC had in obtaining necessary information to confirm the safety and soundness of ILC entities).

<sup>53</sup> Nonaka, *supra* note 48 (describing the FDIC’s self-imposed moratorium on new ILC applications in 2008 and outlining law makers’ more conservative approach to these entities in recent years).



powerful corporations to monopolize and control the banking industry, whose services are relied on by most Americans.<sup>54</sup>

#### D. Current Regulation and Cases

Recent cases involving the OCC and state bank chartering organizations have highlighted this long-standing tension between local and federal financial regulation.<sup>55</sup> In short, the issue the state banking regulators have with the OCC's possible over-extension of authority is that it reduces what scholars have called "competitive federalism."<sup>56</sup> State banking regulators have been historically against state banks extending their branches outside their state of charter.<sup>57</sup> There are two recent cases between that highlight both the federalism issue and the tension inherent in the dual-banking system, and further underscore the difficulty in regulating fintech companies.<sup>58</sup>

##### I. NYSDFS v. OCC

In early 2017, the NYSDFS filed a lawsuit against the OCC after the OCC attempted to create a special-purpose banking charter for fintech companies.<sup>59</sup> The lawsuit is in response to a final rule regarding receiverships for uninsured national banks, and in their response to comments, the OCC stated it was considering offering special purpose charters to fintech companies.<sup>60</sup> Along with the

---

<sup>54</sup> Madeline Farber, *The Percentage of Americans Without Bank Accounts is Declining*, FORBES (Sept. 8, 2016), <http://fortune.com/2016/09/08/unbanked-americans-fdic/> [<https://perma.cc/S73D-FE7J>] (indicating the percentage of Americans that are "unbanked" was only 7 percent in 2015).

<sup>55</sup> Conference of State Bank Supervisors v. OCC, No. 17-CV-00763 (D.D.C. Apr. 26, 2017); Vullo v. OCC, No. 17-CB-03574, (S.D.N.Y. 2017).

<sup>56</sup> Verret, *supra* note 35, at 3.

<sup>57</sup> *Id.* at 36.

<sup>58</sup> See CSBS Complaint, *supra* note 5, at 2–3 (explaining fintech firms have grown and OCC involvement could have negative economic consequences for states); Complaint at 2, Vullo v. OCC, No. 17-CB-03574, (S.D.N.Y. 2017) [hereinafter Vullo Complaint] (arguing the OCC would be overstepping its authority by granting special-purpose charters to fintech companies because federally chartered banks have historically been "confined solely to the 'business of banking'").

<sup>59</sup> Vullo Complaint, *supra* note 58, at 1–2.

<sup>60</sup> Receiverships for Uninsured National Banks, 81 Fed. Reg. 92,594, 92,596 (Dec. 20, 2016) (to be codified at 12 C.F.R. pt. 51) ("The OCC has recently

response to the comments, the OCC issued a white paper, in which the first line of the introduction states “The OCC’s chartering authority includes the authority to charter special purpose national banks.”<sup>61</sup> Concerned the OCC would be exceeding the power granted to it by its congressional mandate by issuing federal charters to non-banks, the NYSDFS filed suit in response to both the comment and white paper.<sup>62</sup> Though no fintech firms had applied for a charter, and the OCC had not issued a rule or process detailing a fintech charter, the NYSDFS claimed the OCC’s assertion in its white paper that it had the power to grant fintech charters was a violation of the Tenth Amendment.<sup>63</sup>

Ultimately, the case was dismissed in December of 2017.<sup>64</sup> Judge Buchwald of the New York District Court stated that “without a final decision that such licenses will be considered and potentially granted, the application process remains purely hypothetical.”<sup>65</sup> However, the case was dismissed without prejudice, so if the OCC decides to issue a final decision on granting special purpose national banking charters to non-bank institutions like fintech companies, the NYSDFS would have proper standing to sue again in the future.<sup>66</sup>

## 2. CSBS v. OCC

The D.C. District Court is facing a similar lawsuit in *Conference of State Bank Supervisors v. OCC*.<sup>67</sup> Paralleling the lawsuit filed by the NYSDFS, the CSBS argued in its complaint the OCC exceeded its congressionally granted authority by considering granting charters

---

published and invited comment on a paper discussing [special purpose national bank charters].”).

<sup>61</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 2 (2016).

<sup>62</sup> Vullo Complaint, *supra* note 58.

<sup>63</sup> *Id.* at 19 (claiming a special purpose national bank charter would preempt and conflict with state law, and thus be a violation of the Tenth Amendment).

<sup>64</sup> Order of Dismissal at 26–27, *Vullo v. OCC* No. 17-CB-03574 (S.D.N.Y. 2017) (dismissing the case without prejudice for lack of subject matter jurisdiction).

<sup>65</sup> John Heltman, *Court Throws out New York Regulator’s Suit Against Fintech Charter*, AM. BANKER (Dec. 12, 2017), <https://www.americanbanker.com/news/court-throws-out-new-york-regulators-suit-against-occ-fintech-charter> [<https://perma.cc/MT5K-M7GS>].

<sup>66</sup> *Id.*

<sup>67</sup> *See generally* CSBS Complaint, *supra* note 5.

to non-banks.<sup>68</sup> The complaint further argues that case law and the National Bank Act itself permits the OCC only to charter institutions that are in the “business of banking,” which “requires, at a minimum, engaging in receiving deposits.”<sup>69</sup> John Ryan, President of the CSBS even went so far as to say the proposal “threatens state sovereignty” because it would be “an unauthorized expansion of its authority,”<sup>70</sup> and has called the Fintech Special-Purpose Charter “unlawful” and “harmful.”<sup>71</sup> The OCC filed a motion to dismiss and has argued their own regulations allow them to charter banks that do not receive deposits.<sup>72</sup> Most recently, the case has been reassigned to a different judge in the D.C. District Court.<sup>73</sup> Although the case is still pending, it is possible the case will be dismissed on the same grounds as *Vullo v. OCC*, as the OCC has not made a final determination on whether they will actually grant special purpose national charters for fintech firms.<sup>74</sup>

### 3. *The Significance of Litigation*

The ultimate outcomes of these two situations could be significant. Tension between state and federal banking regulators has existed since the inception of the dual-banking system, and litigation between state and federal entities calls into question the efficacy of

---

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.*

<sup>70</sup> Neil Ainger, *States Gang up to Kill U.S. Fintech Charter and Offer Alternative ‘Vision 2020,’* CNBC (May 15, 2017), <https://www.cnbc.com/2017/05/15/states-gang-up-to-kill-us-fintech-charter-and-offer-alternative-vision-2020.html>.

<sup>71</sup> *Id.*

<sup>72</sup> Motion to Dismiss at 4, *Conference of State Bank Supervisors v. OCC*, No. 17-CV-00763, 2017 (D.D.C. Aug. 2, 2017).

<sup>73</sup> Kilpatrick Townsend & Stockton LLP, *3 Key Developments: Further Exploration of National Bank Charters for Fintech Companies*, LEXOLOGY, (Dec. 21, 2017), <https://www.lexology.com/library/detail.aspx?g=38a6730a-b33b-45a4-bf68-42c8ef3932d5> [<https://perma.cc/N2FA-3SKW>] (“On December 5, the case was reassigned to Judge Dabney L. Friedrich. The OCC’s motion to dismiss in that case remains pending.”).

<sup>74</sup> Scott M. Pearson, *OCC Moves to Dismiss NYDFS Lawsuit Challenging Special Purpose National Bank Charter for Fintech Companies*, BALLARD SPAHR LLP, (Aug. 24, 2017) <https://www.consumerfinancemonitor.com/2017/08/24/occ-moves-to-dismiss-nydfs-lawsuit-challenging-special-purpose-national-bank-charter-for-fintech-companies/> [<https://perma.cc/B7MN-QWK6>].

such a system.<sup>75</sup> Other developed countries have streamlined, national banking regulation, simplifying fintech regulation issues. Cases like *CSBS* and *Vullo* pose the question of whether simplification is warranted.<sup>76</sup> Further, because fintech companies could potentially provide unbanked or underbanked persons with access to financial services, a national fintech charter could greatly impact banking for many Americans.<sup>77</sup>

### E. Conclusion

The fintech boom does not appear to be slowing down anytime soon. Finding a way to regulate fintech that fosters competition and innovation while maintaining the integrity of the financial system will be crucial to the U.S. economy.<sup>78</sup> Traditional depository institutions may fear competition from non-traditional sources, while fintech startups push regulators to introduce innovative solutions.<sup>79</sup> The two cases discussed in this article indicate a looming problem with integrating fintech companies into the traditional banking framework.<sup>80</sup> Fintech firms have caused such a disruption, and customers are so frequently unhappy with their experiences with traditional banks, the United States will likely see significant regulatory changes in the near future.<sup>81</sup>

Benjamin Nimphie<sup>82</sup>

---

<sup>75</sup> See Verret, *supra* note 35, at 15.

<sup>76</sup> For a sample of financial regulatory schemes in other developed countries, see *About*, FIN. CONDUCT AUTH., [www.fca.org.uk/about/the-fca](http://www.fca.org.uk/about/the-fca) [https://perma.cc/3YT2-QLB9] (last visited Mar. 17, 2018); MONETARY AUTH. OF SINGAPORE, [www.mas.gov.sg/](http://www.mas.gov.sg/) [https://perma.cc/FU5G-9HZG].

<sup>77</sup> BD. OF GOVERNORS OF THE FED. RES. SYS., *supra* note 41, at 2–3.

<sup>78</sup> See Van Loo, *supra* note 4, at 3 (arguing “robust fintech competition may lessen the problem of too big to fail banks”).

<sup>79</sup> DELOITTE, FINTECHS AND REGULATORY COMPLIANCE: UNDERSTANDING RISKS AND REWARDS 3–4 (2017).

<sup>80</sup> CSBS Complaint, *supra* note 5, at 4; *Vullo* Complaint, *supra* note 58, at 11.

<sup>81</sup> Kelley Holland, *Only 23% of Customers Happy With Their Bank: Study*, CNBC (May 19, 2015), <https://www.cnbc.com/2015/05/19/cent-of-customers-happy-with-their-bank-study.html> [https://perma.cc/ADP8-SC83].

<sup>82</sup> Student, Boston University School of Law (J.D. 2019).