

# Future of Fintech Charter Unclear

## Publications

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A legal battle over a charter to allow Fintech companies to become special purpose national banks has been put on pause. But for how long will the future of the charter remain in limbo? On June 16, 2021, the Conference of State Bank Supervisors (the CSBS) and the Office of Comptroller of the Currency (OCC) agreed to stay the litigation, and the district court approved a motion formalizing the parties' agreement to put the litigation on hold for 90 days,[1] though some analysts have warned that the fate of the charter still may not be easily resolved.[2]

The pause follows the recent dismissal of a similar case in the Southern District of New York. In *Lacewell v. Office of the Comptroller of the Currency*, the New York Department of Financial Services (DFS) was attempting to block the OCC's special purpose national bank charter (the "Fintech charter"). The Fintech charter would allow certain non-depository Fintech companies to operate as "special purpose national banks" under the National Bank Act (NBA). Accordingly, the Fintech companies would not be subject to state-by-state regulation and licensing. DFS argued that the charter is unlawful because it exceeds the OCC's authority under the NBA.[3]

The case had been pending on appeal in the Second Circuit since April of 2020, after the district court denied the OCC's motion to dismiss and found that DFS had standing to sue.[4] The Second Circuit heard oral argument in March 2021, and reversed the lower court's ruling on June 3, holding that DFS lacked standing to challenge the Fintech charter.[5] It remanded the case to the district court with instruction to dismiss without prejudice.[6]

The dismissal of *Lacewell* and the agreement between the CSBA and OCC comes at a time when the acting Comptroller, Michael Hsu, has signaled that he may slow down efforts to implement the Fintech charter, noting that the OCC needs to determine how to charter Fintech firms in a "safe and sound way, where we can adapt to the innovation." [7]

While the future of the Fintech charter is unclear, were the OCC to succeed in court and move forward with the charter, it could have significant implications for both Fintech companies as well as consumers. For example, the charter would preempt state money transmitter and lender licensing laws, among other state laws. This would also mean that Fintech companies operating pursuant to this charter would be subject to a single regulator and with a single set of regulatory requirements. On the other hand, these regulatory requirements may be more onerous than their

state-law counterparts. Additionally, because a Fintech company operating under the charter would be a special purpose national bank, it may be considered a “bank” within the meaning of that term under the Securities Act of 1933.[8] If so, securities issued by a Fintech company operating pursuant to this charter would be exempt from the registration requirements of the Securities Act.

For consumers, the charter could potentially expand access to financial services. In its white paper on the Fintech charter, the OCC concluded that the charter would expand banking services to the underserved.[9] Notably, **applicants for the charter are encouraged to explain how they intend to foster financial inclusion.**[10] Comments the OCC received to its white paper revealed that the market reaction was one of agreement “that the innovation that has occurred and is occurring in the financial services marketplace is moving the market toward affordability and ease of access in a manner that is much more tailored to the needs of individual consumers and small businesses, leading to inclusion of many more consumers and small business owners.”[11]

[1] *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, et al.*, No. 1:20-cv-03797-DLF (D.C. 2020).

[2] Brendan Pedersen, *OCC, States Declare Cease-fire in Fintech Charter Case. Will it Hold?*, Am. Banker (June 18, 2021), <https://www.americanbanker.com/news/occ-states-declare-ceasefire-in-fintech-charter-case-will-it-hold>.

[3] *Vullo v. Off. of Comptroller of Currency*, 378 F. Supp. 3d 271, 280 (S.D.N.Y. 2019), *rev'd and remanded sub nom. Lacewell v. Off. of Comptroller of Currency*, No. 19-4271, 2021 WL 2232109 (2d Cir. June 3, 2021).

[4] *Id.* at 300.

[5] *Lacewell v. Off. of Comptroller of Currency*, No. 19-4271, 2021 WL 2232109, at \*13 (2d Cir. June 3, 2021)

[6] *Id.*

[7] ABA Banking J., *OCC's Hsu Says Fintech Firms Should Be Chartered in 'Safe and Sound Way'* (May 19, 2021), <https://bankingjournal.aba.com/2021/05/occs-hsu-says-fintech-firms-should-be-chartered-in-safe-and-sound-way/>.

[8] 15 U.S.C. § 77a *et seq.*, available at <https://www.govinfo.gov/content/pkg/COMPS-1884/pdf/COMPS-1884.pdf>.

[9] Office of the Comptroller of Currency, *Exploring Special Purpose National Bank Charters for Fintech* at 2 (Dec. 2016), <https://www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html>.

[10] *Id.* at 12.

[11] Christina Gattuso, *How an OCC Fintech Charter Could Benefit the Underserved*, BankDirector.com (April 17, 2017), <https://www.bankdirector.com/issues/how-occ-fintech-charter-could-benefit-underserved/>.

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