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ALERT

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"BUSINESS OF BANKING" REQUIRES DEPOSIT-TAKING—COURT ALLOWS NY-DFS CHALLENGE TO PROCEED

"It is unambiguous [under the National Bank Act ("NBA")] that receiving deposits is an indispensible part of the 'business of banking,'" wrote a New York federal court in a May 2nd decision denying the Office of the Comptroller of the Currency's ("OCC") motion to dismiss a case initiated by the New York Department of Financial Services ("NY-DFS"). *Vullo v. Office of the Comptroller of the Currency,* No. 18-cv-0377 (S.D.N.Y. May 2, 2019). The NY-DFS is challenging the OCC's authority to offer a special purpose national bank charter to non deposit-taking Fintechs ("Fintech Charter")

A different judge in the same court had dismissed the NY-DFS's prior case against the OCC on the same topic without prejudice on December 12, 2017, finding that the action was not yet ripe for adjudication. Since then, the OCC has announced that it will begin accepting and reviewing applications for the Fintech Charter and anticipates the first such application "soon."

The OCC filed a motion to dismiss the NY-DFS's second attempt to challenge the Fintech Charter for lack of subject matter jurisdiction and failure to state a claim. With respect to subject matter jurisdiction, the court denied the OCC's motion concluding that, at this juncture, the NY-DFS has demonstrated a substantial risk that the harm will occur. The court noted that the over 600 nonbank financial services firms currently regulated by the NY-DFS are at risk of becoming null and void because the court presumed that all New York-regulated nonbanks will be eligible to obtain a Fintech Charter and could be regulated by the OCC. The court determined that the OCC has a clear expectation of issuing a Fintech Charter given the "common-sense observation" that the OCC has spent numerous years developing the Fintech Chart and coordinating the charter's creation with other federal banking regulators. The court found that the case is now ripe for decision.

Next, the court turned to the OCC's argument that the NY-DFS's lawsuit fails to state a claim. Specifically, the OCC argued that the "business of banking" is ambiguous under the NBA and that per the *Chevron* framework the court should defer to the OCC's reasonable interpretation of the "business of banking," which does not require a bank to take deposits to obtain a national bank charter. The court disagreed.

The "business of banking" under the NBA, read in light of its plain language, history and legislative context, unambiguously requires that, absent a statutory provision to the contrary, only depository institutions are eligible to receive national bank charters from the OCC, the court said. Therefore, the court is not required to analyze whether the OCC's interpretation of the NBA's definition of "business of banking" is reasonable and the OCC's motion should be denied.

In its analysis, the court started by noting that a term is not ambiguous solely because a statute lacks an express definition of a term. The court looked at (i) the statutory predecessors to the NBA provision that gives the OCC authority to charter national banks and (ii) definitions of "bank" or "banking" from 19th-century dictionaries to try to determine whether Congress intended "business of banking" to cover only depository institutions. The court analyzed other provisions of the NBA, which the court observed are predicated on a national bank's deposit-taking powers. In addition, the court noted that on two prior occasions when the OCC issued national bank charters to a type of non-depository institution (trust banks and banker's banks), Congress had first amended the NBA to authorize the OCC to issue such charters. The court inferred that the Congress at the time of these two enactments understood that the "business of banking" requires deposit-taking and non-depository institutions would not be eligible to obtain a national bank charter but for specific Congressional action.

The court distinguished a U.S. Supreme Court case cited by the OCC that found the term "business of banking" to be ambiguous under the NBA. The court characterized this case as determining the outermost bounds of the phrase "business of banking" by analyzing whether the sale of annuities is the "business of banking," which is a different task from determining the threshold requirements to be deemed in the "business of banking." The court found the NBA text unambiguous as it relates to the component of receiving deposits as a prerequisite for OCC's issuance of national bank charter under the NBA.

As a result, the court allowed the NY-DFS's case to proceed in the courts. A similar case initiated by the Conference of State Bank Supervisors is pending in D.C. district court. We will keep you updated on the status of the Fintech Charter. ❑

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