

[Banking and Finance Law Daily Wrap Up, TOP STORY—New York challenges OCC’s decision to grant fintech charter applications, \(Sept. 17, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By [Thomas G. Wolfe, J.D.](#)

The Superintendent of the New York State Department of Financial Services (NYDFS) has filed a complaint seeking declaratory and injunctive relief against the Office of the Comptroller of the Currency in connection with the OCC’s July 2018 decision (Fintech Charter Decision) to immediately begin accepting applications from, and grant special-purpose national bank charters to, financial technology (fintech) companies—including companies that do not accept deposits. The NYDFS’s [complaint](#), which was filed on Sept. 14, 2018, in the U.S. District Court for the Southern District of New York, contends that the Fintech Charter Decision exceeds the OCC’s authority under the National Bank Act (NBA) and violates the Tenth Amendment to the Constitution. In addition, the NYDFS maintains that the OCC’s regulation covering special-purpose national banks is null and void because the agency exceeded its authority by defining the "business of banking" to include non-depository institutions (*Vullo v. Office of the Comptroller of the Currency*, Docket No. 18-cv-8377).

Previously, in May 2017, the NYDFS sued the OCC in the same federal district court to block the agency from creating new special-purpose fintech charters (see [Banking and Finance Law Daily](#), May 15, 2017). However, the court later determined that the New York regulator’s challenge was premature and failed on standing and ripeness grounds because the OCC had not yet reached a *final* decision on whether to grant special-purpose national bank charters to fintech companies (see [Banking and Finance Law Daily](#), Dec. 13, 2017).

Now, the landscape for special-purpose national bank charters has changed with the OCC’s Fintech Charter Decision (see [Banking and Finance Law Daily](#), July 31, 2018). Also, a banking startup, Varo Money, Inc., recently announced that it was granted "preliminary approval" of its application for a national bank charter by the OCC, pending Varo’s completion of standard conditions (see [Banking and Finance Law Daily](#), Sept. 5, 2018).

Complaint. Generally, the September 2018 complaint by the NYDFS characterizes the OCC’s Fintech Charter Decision not only as "lawless, ill-conceived, and destabilizing of financial markets that are properly and most effectively regulated by New York State," but also as placing New York financial consumers "at great risk of exploitation by federally-chartered entities improperly insulated from New York law." According to the NYDFS, the OCC’s special-purpose charters in the fintech field would impose preemptive powers over state law and state interests to the detriment of New York consumers and businesses.

More specifically, in asserting that the OCC’s Fintech Charter Decision is "legally indefensible" because it grossly exceeds the agency’s statutory authority under the "Business of Banking" clause of the NBA (12 U.S.C. §24), the NYDFS’s complaint maintains that:

- the lack of any authorization by Congress for the OCC’s Fintech Charter Decision "indisputably deprives preemptive effect" to the OCC’s actions;
- the OCC impermissibly redefined the scope of the "business of banking" definition in its promulgated regulation (12 CFR §5.20(e));
- federal courts have previously struck down the OCC’s administrative efforts to authorize national banks that do not accept deposits;
- contrary to the clear intent of Congress, the OCC is empowering itself to charter non-depository institutions; and

- New York is a global financial center and "effectively a global financial regulator," and the Fintech Charter Decision will severely undermine New York's ability to protect its financial markets, businesses, and residents;

Relief requested. In keeping with the allegations in its complaint that the OCC's Fintech Charter Decision and its regulation (12 CFR §5.20(e)) exceed the OCC's proper statutory authority, the NYDFS is requesting the court to declare both the Fintech Charter Decision and the OCC regulation unlawful, to set them aside, and to prevent the OCC and Comptroller Joseph Otting from taking any further actions to implement their respective provisions. Further, the NYDFS asks the court to declare the Fintech Charter Decision null and void because it violates the Tenth Amendment's constitutional protections of state rights in connection with New York's "police power" to regulate financial services and products.

Attorneys: Matthew L. Levine, Executive Deputy Superintendent for Enforcement at the New York State Department of Financial Services, for Maria T. Vullo, in her official capacity as Superintendent of the New York State Department of Financial Services.

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