

Alert

OCC Now Open to Receiving National Payments Charter Applications, But State Banking Regulators Mull a Legal Challenge

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According to an Aug. 31, 2020 article published by *Politico*,¹ acting comptroller of the Office of the Comptroller of the Currency (“OCC”) Brian Brooks has indicated that the OCC is ready to begin processing applications for what is being referred to as the OCC’s “payments charter.” The payments charter is presumably being offered as a new type of special purpose national bank (“SPNB”) charter, and would be expected to gain interest from state-licensed money transmitters as well as payment processors and financial technology (“fintech”) companies that do not seek to take deposits or lend money. In the article, Mr. Brooks is quoted as saying, “We’ve satisfied ourselves that we don’t need a new regulation or a new statute [to offer the payments charter].” These recent comments and developments have elicited negative reaction from state banking regulators across the country, including the New York State Department of Financial Services (“NYDFS”), which last year won a U.S. District Court case blocking the OCC from granting its previously proposed SPNB charter for fintechs, better known as the “fintech charter.”² That case is currently on appeal.³

As provided in our June 29, 2020 *Alert*,⁴ Mr. Brooks previously indicated that there would be two versions of the payments charter — Version 1.0 would be a “national version of a state money transmission license” and Version 2.0, which could be rolled out approximately 18 months later, would involve chartered companies having direct access to the Federal Reserve System (“Fed”). While his recent comments do not explicitly touch upon there being two distinct versions of the payments charter, Mr. Brooks told *Politico* that he would expect it to take one to two years of Fed supervision before the Fed would be comfortable granting such companies direct access.

In response to Mr. Brooks’ recent comments, John Ryan, President and CEO of the Conference of State Bank Supervisors (“CSBS”), the national trade association which represents the nation’s state banking regulators, issued a press release stating that CSBS is opposed to the OCC moving ahead with its payments charter.⁵ In its release, CSBS emphasized that state banking regulators are opposed to the OCC’s “unconstitutional expansion of power” and noted that the payments charter “is no different than the [previously proposed] fintech charter already rejected in federal court and subject to a nationwide order preventing the OCC from accepting applications from a company that does not take deposits.”

¹ See <https://www.politico.com/news/2020/08/31/currency-comptroller-reshape-banking-406393>.

² *Lacewell v. Office of the Comptroller of the Currency*, 2019 U.S. Dist. LEXIS 182934 (S.D.N.Y. Oct. 21, 2019).

³ On appeal as *Lacewell v. Office of the Comptroller of the Currency*, case number 19-4271, in the U.S. Court of Appeals for the Second Circuit.

⁴ See <https://www.srz.com/resources/occ-s-brooks-indicates-national-payments-charter-to-be-offered.html>.

⁵ See <https://www.csbs.org/newsroom/csbs-state-regulators-are-opposed-occs-payments-charter>.

Margaret Liu, deputy general counsel at CSBS, also told *Politico* that the state banking regulators believe that the OCC is stepping outside its authority by trying to charter non-depository institutions.

These developments have also specifically drawn the attention of the NYDFS. As noted above, the OCC has been blocked from granting any fintech charters while it appeals the judgment rendered against it by the U.S. District Court for the Southern District of New York to the U.S. Court of Appeals for the Second Circuit. Mr. Brooks acknowledged the ruling to *Politico*, but noted that it does not apply on a nationwide basis. A few hours after the *Politico* article was published, NYDFS Superintendent Linda Lacewell retweeted the following post made by Graham Steele, director of the Corporations and Society Initiative at Stanford Graduate School of Business, regarding Mr. Brooks' comments: "A few months into his service in an acting capacity, a bank regulator (and former cryptocurrency lawyer) pushes ahead with a legally dubious plan to give tech companies banking charters." In her retweet, Superintendent Lacewell also pointed out that the OCC's appeal is "fully briefed and pending in the Second Circuit."

Such opposition does not appear to deter Mr. Brooks, who noted that it "seems really weird" to him that the OCC "can supervise the payments activities of JPMorgan, but [it] can't supervise the payments activity of Square." Mr. Brooks also told *Politico* he is "increasingly thinking of [the OCC] as an activities regulator, not an entity regulator." Mr. Brooks' recent comments are likely to continue to keep the interest of both industry stakeholders and regulators. In the meantime, it is likely that, as with the fintech charter (which was originally proposed in 2016 and finalized in 2018, but has not elicited a single applicant), potential payments charter applicants will be deterred until the Supreme Court definitively rules on whether the OCC has the power to grant such non-depository charters.

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