UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and JOSEPH M. OTTING, in his official capacity as Comptroller of the Currency, Defendants.	Civil Action No. 1:18-CV-02449 (DLF)

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM

Defendants Office of the Comptroller of the Currency and Joseph M. Otting in his official capacity as Comptroller of the Currency (together, "OCC"), by and through undersigned counsel, hereby move to dismiss this action for lack of jurisdiction and for failure to state a claim upon which relief can be granted under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The reasons supporting this motion are set forth in the accompanying Memorandum of Points and Authorities and attached exhibits. A proposed order is also attached for the Court's consideration.

THEREFORE, the OCC respectfully requests that the instant motion be GRANTED and that this action be DISMISSED.

Date: January 7, 2019

Respectfully submitted,

/s/Gregory F. Taylor

JONATHAN V. GOULD
BAO NGUYEN
CHARLES M. STEELE
GREGORY F. TAYLOR
D.C. Bar No. 417096
PETER C. KOCH
DOUGLAS B. JORDAN
ASHLEY W. WALKER
GABRIEL A. HINDIN
MICHAEL K. MORELLI
Office of the Comptroller of the Currency
400 7th Street S.W.
Washington, D.C. 20219
(202) 649-6300 – phone
(202) 649-5709 – fax
gregory.taylor@occ.treas.gov
peter.koch@occ.treas.gov
douglas.jordan@occ.treas.gov
ashley.walker@occ.treas.gov
gabriel.hindin@occ.treas.gov
michael.morelli@occ.treas.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and JOSEPH M. OTTING, in his official capacity as Comptroller of the Currency, Defendants.	Civil Action No. 1:18-CV-02449 (DLF)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM

JONATHAN V. GOULD
Senior Deputy Comptroller and Chief Counsel
BAO NGUYEN
Principal Deputy Chief Counsel
CHARLES M. STEELE
Deputy Chief Counsel
GREGORY F. TAYLOR
Director of Litigation
DC Bar No. 417096
PETER C. KOCH
DOUGLAS B. JORDAN
ASHLEY W. WALKER
GABRIEL A. HINDIN
MICHAEL K. MORELLI
Office of the Comptroller of the Currency
400 7th Street S.W.
Washington, D.C. 20219

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

The essential legal question raised by Plaintiff Conference of State Bank Supervisors ("CSBS") presents a narrow issue of statutory construction: whether the National Bank Act authorizes the Office of the Comptroller of the Currency ("OCC") to issue a national bank charter to companies that pay checks or lend money, but do not take deposits (hereinafter, "Special Purpose National Bank Charter" or "SPNB Charter"). The OCC—and, one may safely presume, CSBS—acknowledges that an authoritative resolution of this question would benefit the parties and the banking industry as a whole. But the Court's ability to resolve this dispute—and the statutory interpretation issue that underlies it—must wait. For the second straight year, CSBS has acted prematurely and has once again filed a lawsuit that should be dismissed due to lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). At the present time, the OCC has not approved any application for an SPNB Charter, the regulatory milestone that the Court held must first be reached before CSBS has standing to sue. *See CSBS v. OCC*, 313 F. Supp. 3d 285 (D.D.C. 2018) ("*CSBS I*").

Looking past this clear jurisdictional bar, the issue of whether the Comptroller of the Currency may reasonably construe the National Bank Act fits within a much broader historic legacy of the OCC adapting to address the evolution of the industry that it regulates. Courts have accorded the Comptroller of the Currency the necessary and appropriate level of flexibility in the interpretation of the OCC's authority "to permit the use of new ways [to] conduc[t] the very old business of banking." *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977). Many services or products that we now take for granted, such as ATMs, remote check capture, and online banking, were at one time cutting-edge advances. Innovation in the banking industry is inevitable, and "[t]he federal banking system must adapt to the rapid

technological changes taking place in the financial services industry to remain relevant and vibrant and to meet the evolving needs of the consumers, businesses, and communities it serves."[1]

The OCC respectfully submits that, at such time as the Court has jurisdiction to reach the merits, the Court should conclude that the OCC's longstanding special purpose bank chartering regulation, 12 C.F.R. § 5.20(e)(1), is a reasonable construction of the National Bank Act that is entitled to *Chevron* deference. The conclusion that a national bank need only be engaged in one of the three core banking functions—receiving deposits, paying checks, *or* lending money—in order to be engaged in the "business of banking" aligns with the context and structure of the National Bank Act and controlling Supreme Court and D.C. Circuit caselaw. CSBS's other arguments based upon the Administrative Procedure Act ("APA") and the Tenth Amendment are similarly without force. Therefore, CSBS's claims should be appropriately dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

I. OCC CHARTERING AUTHORITY AND LIMITED PURPOSE NATIONAL BANKS

The OCC is an independent bureau of the U.S. Department of the Treasury, with primary supervisory responsibility over national banks under the National Bank Act of 1864, codified at 12 U.S.C. § 1 *et seq.*, as amended. The OCC is charged with the responsibility of ensuring that national banks (and other institutions subject to its jurisdiction) operate in a safe and sound

[1] OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS (2018) ("Policy Statement"), attached hereto as Exhibit A.

manner, comply with applicable laws and regulations, offer fair access to financial services, and provide fair treatment of customers. *Id.* § 1(a). As the agency with the authority to charter national banks, a key part of the OCC's mission includes receiving applications and, when appropriate, granting charters to associations that are formed to carry out the "business of banking." *See id.* §§ 21, 26, 27. In implementing the OCC's chartering authority, "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." *Id.* § 93a.

Under the National Bank Act, the OCC may grant a charter "[i]f . . . it appears that such association is lawfully entitled to commence the business of banking." 12 U.S.C. § 27(a). Reflecting the variety of ways an association seeking a charter can engage in the "business of banking," national banks may be chartered to carry out differing activities. New banks may be chartered to carry out a full complement of the powers accorded to national banks under the National Bank Act or they may seek authority for more focused "special purpose" operations, such as those of trust banks, credit card banks, bankers' banks, community development banks, cash management banks, and other business models based on limited activities.[2] In some instances, such as the limited purpose charter granted to trust banks, 12 U.S.C. § 27(a), Congress has expressly recognized and ratified the OCC's authority to grant a limited purpose national bank charter. In other instances, the OCC properly relies upon its broad discretion to interpret the National Bank Act in order to determine whether a particular set of banking activities is consistent with the statutory meaning of being engaged in the "business of banking" for the purpose of granting a limited or special purpose charter.

[2] OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL, CHARTERS 1 (2016) ("Charters Booklet"), https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf (last accessed Jan. 3, 2019).

Fifteen years ago, the OCC adopted the current version of its regulation that sets forth the OCC's authority to grant a national bank charter to an institution that is engaged in some, but not all, of the core banking functions. 68 Fed. Reg. 70122 (Dec. 17, 2003). This regulation provides that the OCC may charter a "special purpose bank" that conducts activities other than fiduciary activities if it engages in at least one "core banking function"—receiving deposits, paying checks, or lending money. The regulation states:

> The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 *et seq*. The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money.

12 C.F.R. § 5.20(e)(1). Since its adoption, the OCC has not used 12 C.F.R. § 5.20(e)(1) to charter a national bank that engages in one of the two core banking activities of paying checks or lending money, but does not take deposits. *See* Declaration of Stephen A. Lybarger, Deputy Comptroller for Licensing, Office of the Comptroller of the Currency, in Support of the OCC's Motion to Dismiss ("Lybarger Decl."), at ¶ 7, attached hereto as Exhibit B.

II. THE OCC'S FINTECH INITIATIVE

On July 31, 2018, the OCC announced that it would start accepting applications from financial technology companies ("fintechs") for special purpose bank charters for national banks that engage in one of the two core banking activities of paying checks or lending money, but do not take deposits. *See Press Release, Office of the Comptroller of the Currency, The OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies* (July 31, 2018) ("July 31 Announcement"), attached hereto as Exhibit C. The OCC's application of its established chartering authority to grant special purpose bank charters in the fintech area emerged out of an initiative launched in 2015 by former Comptroller of the Currency Thomas J.

Curry. This initiative examined the broader question of how the OCC could best support responsible innovation in the financial services industry. In December 2016, the OCC published a white paper on the topic, *Exploring Special Purpose National Bank Charters for Fintech Companies*.[3] The OCC solicited comments on its white paper and, after reviewing the comments that it received, the agency issued the *Comptroller's Licensing Manual Draft Supplement*[4] in March 2017, again inviting public comment.

The OCC's July 31 Announcement coincided with a report issued by the Department of the Treasury ("Treasury Report")[5] that expressed strong support for the OCC's efforts in the fintech area. The Treasury Report noted the advantages to the OCC's SPNB Charter, concluding that it "may provide a more efficient, and at least a more standardized, regulatory regime than the state-based regime in which [fintech companies] operate." Treasury Report at 70. The Department of Treasury recommended that "the OCC move forward with prudent and carefully considered applications for special purpose national bank charters." *Id.* at 73, 201.

The OCC's July 31 Announcement was accompanied by a finalized version of the *Comptroller's Licensing Manual Supplement, Considering Charter Applications from Financial*

---

[3] OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016), https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf (last accessed Jan. 3, 2019).

[4] OFFICE OF THE COMPTROLLER OF THE CURRENCY, EVALUATING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (2017), https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf (last accessed Jan. 3, 2019).

[5] U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES – NONBANK FINANCIALS, FINTECH, AND INNOVATION (2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf (last accessed Jan. 3, 2019).

Technology Companies ("Licensing Manual Supplement"), attached hereto as Exhibit D, as well as a statement of OCC policy, *Policy Statement on Financial Technology Companies Eligibility to Apply for National Bank Charters* ("Policy Statement"), *see* Exhibit A, that enunciates the OCC's regulatory approach and expectations associated with SPNB Charters.

III. PRIOR LITIGATION BROUGHT BY CSBS

This case represents CSBS's second attempt to challenge the OCC's SPNB chartering authority in this forum. On April 30, 2018, the Court dismissed CSBS's first challenge for lack of constitutional standing as well as lack of prudential ripeness. *See CSBS I*, 313 F. Supp. 3d at 299-300. The Court noted that in the case of representational standing, as asserted by CSBS, there is a "baseline requirement to identify a particular member of the organization that was injured." *Id.* at 299. The Court concluded that neither CSBS nor its members would suffer any cognizable harm until the OCC grants final approval for an SPNB Charter. *Id.* at 299-300.

The Court only needed "to reach the first requirement [for establishing standing]—injury in fact—to resolve this case." *Id*. at 295. The Court noted that Supreme Court authority emphasized that threatened injury must be "certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Id.* (citation omitted). Against this standard, the Court reviewed CSBS's allegations of threatened injury: "risks to traditional areas of state concern," "disrupt[ion]" of the system of "dual bank enforcement," obstruction of state enforcement and regulation abilities, and threats to state sovereign interests. *Id.* at 296. The Court characterized CSBS's allegations as "filled with speculative and conclusive language." *Id.* The Court further acknowledged that the averred harms might state an injury in fact once realized, but noted that "each of those harms is contingent on whether the OCC charters a Fintech." *Id.* (citing to a similar observation by the district court for the Southern District of

New York in the related case *Vullo v. OCC*, No. 17 Civ. 3574, 2017 WL 6512245, at *7-8 (S.D.N.Y. Dec. 12, 2017)). The Court also observed that

> [s]everal contingent and speculative events must occur before the OCC charters a Fintech: (1) the OCC must decide to finalize a procedure for handling those applications; (2) a Fintech company must choose to apply for a charter; (3) the particular Fintech must substantively satisfy regulatory requirements; and (4) the OCC must decide to grant a charter to the particular Fintech.

Id. Because the OCC had not yet decided to "grant a charter to [a] particular Fintech" this "chain of speculative events" failed to clear the bar posed by the "certainly impending" test or the alternative "substantial risk" test. *Id.* at 297.

The Court also distinguished cases where regulatory injuries like preemption may satisfy the tests because "the OCC's national bank chartering program does not conflict with state law until a charter has been issued." *Id.* at 298. In addition, even if CSBS could show that the OCC "w[as] sufficiently likely to issue a charter to some particular Fintech, the complaint would remain inadequate" because of CSBS's failure to identify which particular member of its organization had been harmed. *Id*. at 298-99.

Separately, the Court also concluded that the case was constitutionally unripe for the same reason that CSBS lacked standing, and that considerations of prudential ripeness weighed in favor of deferring adjudication. *Id.* at 299-300. "This dispute would benefit from a more concrete setting and additional percolation. In particular, this dispute will be sharpened if the OCC charters a particular Fintech—or decides to do so imminently." *Id.* at 300.

IV. AT PRESENT, THE OCC HAS NOT GRANTED AN SPNB CHARTER

While the OCC has announced that it will begin accepting applications for SPNB Charters, it has not yet approved an application for an SPNB Charter to a fintech bank that does not take deposits. *See* Lybarger Decl., Ex. B, at ¶ 7. In terms of satisfying the Court's four prerequisites for when CSBS might have standing to sue, the parties are still at stage one: "the

OCC must decide to finalize a procedure for handling those applications." *CSBS I*, 313 F. Supp. 3d at 296. To date, none of the other prerequisites have come to pass: no fintech company has submitted an application for a charter and the OCC had not decided to grant a charter. Lybarger Decl., Ex. B, at ¶¶ 6, 7.[6]

ARGUMENT

I. CSBS LACKS STANDING TO SUE

A. Issue Preclusion Bars CSBS from Re-Litigating Whether It Has Article III Standing to Sue or Whether Its Claims Are Ripe for Judicial Review

Issue preclusion prevents "successive litigation of . . . issue[s] of fact or law actually litigated and resolved" that were "essential to the prior judgment," *Taylor v. Sturgell*, 553 U.S. 880, 892 & n.5 (2008), including threshold jurisdictional issues such as standing and ripeness, *see, e.g., Underwriters Nat'l Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982). As discussed above, CSBS has already litigated the issue of whether, absent a grant of an SPNB Charter, CSBS has Article III standing to sue or whether their claims are prudentially ripe. The Court should conclude that CSBS cannot re-litigate the Court's holding in *CSBS I* to avoid the inevitable conclusion that CSBS's claims are *still* premature.

[6] In deciding to dismiss a claim under Rule 12(b)(1) for lack of jurisdiction, a court may consider documents outside the pleadings, including sworn declarations. *See CSBS I*, 313 F. Supp. 3d at 294; *Garnett v. Zeilinger*, 323 F. Supp. 3d 58, 64-65 (D.D.C. 2018). In deciding to dismiss a claim under Rule 12(b)(6), a court may consider (1) facts alleged in the complaint, (2) documents attached as exhibits or incorporated by reference in the complaint, and (3) matters subject to judicial notice. *See, e.g., Ahuja v. Detica Inc.*, 742 F. Supp. 2d 96, 102 (D.D.C. 2010). Defendants' Exhibits A, C, and D, are documents attached to, referred to, or relied upon in the Complaint. Defendants' Exhibit B is a sworn declaration from the OCC's Deputy Comptroller for Licensing of facts relevant to standing. Defendants' Exhibit E, is a docket sheet from the U.S. District Court for the Middle District of Florida, of which the court may take judicial notice. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). Similarly, the court may take judicial notice of the official OCC materials referenced in footnotes 2, 3, 4, 5, and 7 and available on government public websites. *See, e.g., Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014).

Although the issue preclusion doctrine contains a "curable defect" exception permitting the re-litigation of certain jurisdictional dismissals, the exception does not apply here because CSBS has not demonstrated "a material change following dismissal cur[ing] the original jurisdictional deficiency" identified in the earlier suit. *See Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 786 F.3d 34, 41 (D.C. Cir. 2015). CSBS attempts to avoid the force of the *CSBS I* decision—and the operation of issue preclusion—by suggesting that changed circumstances justify a different outcome, Compl. ¶¶ 7, 16, but the only change CSBS can identify is the OCC's decision to entertain applications for SPNB Charters. The Court's analysis in *CSBS I* makes clear that the decision to accept applications—the first of the four chartering-process milestones identified by the Court—does not, on its own, create an injury in fact, rendering that change immaterial to the Court's conclusion regarding standing. Therefore, issue preclusion applies to the issues reached and resolved in *CSBS I.*

B. CSBS Still Lacks Article III Standing to Sue

The Court should dismiss CSBS's Complaint because CSBS has still not satisfied Article III's case-or-controversy requirement, which necessitates that a plaintiff have standing to sue. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The "irreducible constitutional minimum" for standing contains three elements: "injury in fact," "causation," and "redressability." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). CSBS, as the party invoking this Court's jurisdiction, bears the burden of establishing each element. *Id.* at 103-04. CSBS has not met this burden because it has not shown how the OCC's decision to accept applications for SPNB Charters has injured any particular CSBS member. Consequently, CSBS has not met its burden of showing a "concrete," "actual or imminent" injury-in-fact, and hence cannot show causation or redressability. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409

(2013); *see also CSBS I*, 313 F. Supp. 3d at 295. Therefore, CSBS's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

As before, none of the harms CSBS references can materialize, or even be identified with the requisite certainty, until the OCC issues a SPNB Charter and the charter recipient commences the business of banking. And although "certainly impending" threats of future injury constitute injury-in-fact for standing purposes, *Clapper*, 568 U.S. at 409, the OCC remains several steps removed from issuing any such charter, *see CSBS I*, 313 F. Supp. 3d at 296; *see also* Lybarger Decl., Ex. B, at ¶¶ 6-20. Because no charter has been issued, and because no issuance is currently imminent, CSBS's chief alleged harm—the preemption of state law—has not occurred. *Cf. West Virginia ex rel. Morrisey v. U.S. Dep't of Health & Human Servs.*, 827 F.3d 81, 84 (D.C. Cir. 2016) (explaining that even if a federal government action "created a theoretical breach of State sovereignty," states must still establish "a *concrete* injury-in-fact"). To be sure, CSBS might be able to identify an injury-in-fact once the OCC issues a final SPNB Charter, depending in part on the identity of the national bank charter recipient and where the recipient conducts business. The resulting national bank would be entitled to the protections of federal law, including the preemption of conflicting state laws, which plausibly could cause harm to one or more CSBS members. But the prospect that a hypothetical statute in a hypothetical state might be preempted because of a future OCC decision imposes no "certainly impending" or imminent harm. *See CSBS I*, 313 F. Supp. 3d at 297.

CSBS's attempts to conjure additional supposed harms to its members, Compl. ¶¶ 137-147, also lack force. Each of the alleged harms CSBS identifies are (1) speculative, and (2) predicated on a fintech's operation as a national bank, which will not occur until such time as the OCC grants final approval for an SPNB Charter. *CSBS I*, 313 F. Supp. 3d at 298 ("The OCC's

national bank chartering program does not conflict with state law until a charter has been issued."). Equally problematic, CSBS has not identified *which* of its members have been harmed. *Id.* at 298-99.

CSBS's allegations also remain insufficient to establish injury-in-fact under the "substantial risk" test. *See Clapper*, 568 U.S. at 414 n.5. This test considers costs incurred by a plaintiff to "mitigate or avoid" future harm, *id.*, but nevertheless focuses on "the ultimate alleged harm . . . as the concrete and particularized injury." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017). CSBS has not identified any efforts to mitigate or to avoid the alleged harm. *See CSBS I*, 313 F. Supp. 3d at 297. Moreover, CSBS's claims depend on the OCC's potential regulation of future third-party applicants, meaning that CSBS must allege or show that these third-party applicants will indeed submit successful applications in a way that creates the substantial risk. *See Lujan*, 504 U.S. at 562. CSBS cannot make this showing. *See Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 7 (D.D.C. 2018).

C. This Matter Remains Unripe for Judicial Review

Article III demands that a case be ripe for judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Ripeness has both constitutional and prudential aspects. *See Atl. States Legal Found. v. Envtl. Prot. Agency*, 325 F.3d 281, 284 (D.C. Cir. 2003). CSBS's claims remain both constitutionally and prudentially unripe because, as the Court emphasized in *CSBS I*, the OCC has not issued an SPNB Charter. *CSBS I*, 313 F. Supp. 3d at 300-01. First, this matter remains constitutionally unripe because CSBS does not face a sufficiently "imminent" injury in fact. *See Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (noting that ripeness "shares the constitutional requirement of standing that an injury in fact be certainly impending"). CSBS has not established any such injury because the OCC remains

several stages away from actually granting an SPNB Charter. *See supra* pp. 9-11.

Second, this matter remains prudentially unripe because the OCC has not finalized its decision to issue an SPNB Charter to a particular applicant. *See Gardner*, 387 U.S. at 148-49. The prudential ripeness doctrine "protect[s] . . . agencies from judicial interference until an administrative decision has been formalized *and* its effects felt in a concrete way by the challenging parties." *Id.* (emphasis added). To that end, when evaluating prudential ripeness, courts look to two factors: the "fitness of the issues for judicial decision" and the extent to which the court's withholding of a decision will cause "hardship to the parties." *Id.* at 149.

Here, neither factor has been met because the OCC has not issued an SPNB Charter. Specifically, the issues in this dispute remain unfit for judicial review because the OCC has not "charter[ed] a particular Fintech—or decide[d] to do so imminently." *CSBS I*, 313 F. Supp. 3d at 300. The fitness prong turns on, among other things, "whether the agency's action is sufficiently final." *Atl. States Legal Found.*, 325 F.3d at 284 (quoting *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998)). In this case, courts would benefit from "a more concrete setting to resolve the[se] legal disputes" by waiting until "the OCC elects to adopt and *apply* a regulatory scheme to a *particular*" applicant. *CSBS I*, 313 F. Supp. 3d at 301 (emphasis added). Otherwise, the OCC could potentially face a "new legal challenge every time [it] takes a step towards a result disfavored by" organizations like CSBS, *id.* at 301, the precise situation the ripeness doctrine is meant to prevent, *see Gardner*, 387 U.S. at 148-49.

Nor will the Court's withholding of a decision impose an "immediate and significant" hardship on the parties. *See Sec. Indus. and Fin. Mkts. Ass'n v. Commodities & Futures Trading Comm'n*, 67 F. Supp. 3d 373, 413 (D.D.C. 2014) (quoting *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 427 (D.C. Cir. 2007)). Because CSBS has not suffered any actual, concrete injury,

any hardship caused by the deferral of the case would be insufficiently direct and immediate, especially when compared to the hardship the OCC would experience should "each minor step towards a potential agency policy [be] litigated one-by-one." *CSBS I*, 313 F. Supp. 3d at 301. Accordingly, this matter remains unripe for judicial review.

II. BECAUSE THE JULY 31, 2018 ANNOUNCEMENT WAS NOT A FINAL AGENCY ACTION, COUNT IV FAILS TO STATE A CLAIM OF ARBITRARY AND CAPRICIOUS ACTION UNDER THE APA

CSBS asserts in Count IV of its Complaint that the OCC failed to consider the effect of its actions on state regulatory authority, and that this purported failure rendered the OCC's action arbitrary, capricious, and an abuse of discretion under the APA. This count lacks merit. First, the Court should conclude that the true target for CSBS's challenge is not the July 31 Announcement but, rather, its interpretive core: the OCC's special purpose bank regulation, 12 C.F.R. § 5.20(e)(1). As discussed more fully below, an APA challenge to the OCC interpretive regulation, to the extent it constitutes a final agency action, would be unavailing because it was promulgated *fifteen years ago* pursuant to notice and comment rulemaking. *See* 68 Fed. Reg. 70122 (Dec. 17, 2003). Any challenge to the regulation is now time barred. *See infra* pp. 15-16.

Second, Count IV fails because only final agency actions are subject to judicial review under the APA's arbitrary and capricious standard, 5 U.S.C. §§ 704, 706, and the OCC's July 31 Announcement does not represent a final agency action within the meaning of that Act. *See Gardner*, 387 U.S. at 140. Agency action becomes "final," and hence reviewable, when it satisfies both prongs of the two-part test stated in *Bennett v. Spear*, 520 U.S. 154 (1997): the agency action must (1) "mark the consummation of the agency's decision-making process," and (2) be one "by which rights or obligations have been determined, or from which legal

consequences will flow." *Id.* at 177-78; *see also Southwest Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). Neither *Bennett* requirement has been satisfied. The July 31 Announcement is not an OCC action from which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The July 31 Announcement is a statement of general policy of the OCC's readiness to accept charter applications from fintech companies. The announcement does not control the outcome of any chartering process—the OCC's statutes, regulations, and formal policies regarding the formation of a national bank govern the final disposition of an application. As recognized in *CSBS I*, no actual legal consequences apply to CSBS's members as a result of the OCC's threshold decision to accept SPNB Charter applications. *See also Peoples Nat'l Bank v. OCC*, 362 F.3d 333 (5th Cir. 2004) (finding no reviewable final agency action when a bank challenged OCC banking bulletin limiting the scope of OCC Ombudsman review of examination ratings because the bank did not use bulletin review process). At this time, however, no such charter has been issued. Accordingly, the OCC's chartering activity "should not be reviewed by a court until it has" actually occurred "and resulted in a final agency action." *Id.* at 337.

Third, the Court should dismiss Count IV because the issuance of "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," like the July 31 Announcement, do not require notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A); *see also Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (the "most important factor" in differentiating between legislative rules and nonbinding actions such as a general statement of policy is "the actual legal effect (or lack thereof) of the agency action in question"); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) ("An agency action that merely explains how the agency will enforce a statute or

regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy."). On July 31, 2018, the OCC announced that it will use its existing statutory authority, under its existing 2003 regulation, to accept and consider SPNB Charter applications. This announcement is not a legislative rule with legal effect binding the OCC or any other party. Therefore, the announcement is exempt from the APA notice-and-comment requirement. *See, e.g., Clarian Health West, LLC v. Hargan*, 878 F.3d 346, 356-59 (D.C. Cir. 2017) (Department of Health and Human Services' 2010 instruction manual regarding the means of calculating reimbursements for Medicare providers was a general statement of policy, concerning the implementation of a 2003 regulation on authority to reconcile payments, leaving the agency free to exercise its discretion). Finally, the APA does not require the OCC to conduct cost-benefit analysis, and CSBS fails to identify any other statute that imposes such an obligation in this instance. *See Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011); *see also Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 & n.30 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," and has used "specific language" to express that intent). Accordingly, Count IV should be dismissed for failure to state a claim.

III. BECAUSE CSBS'S FACIAL CHALLENGE TO THE OCC'S REGULATION IS TIME-BARRED, IT SHOULD BE DISMISSED

To the extent CSBS's claims present a facial challenge to the regulation at 12 C.F.R. § 5.20(e)(1), the cause of action is time-barred by the statute of limitations applicable to civil actions against the United States and federal agencies. "Except as provided [in the Contract Disputes Act of 1978], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C.

§ 2401(a). A cause of action under the APA accrues on the date of the final agency action. *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). "Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (citations omitted). Here, any cause of action challenging the OCC's adoption of the amendments to Section 5.20(e)(1) accrued on January 16, 2004, when the Final Rule became effective. 68 Fed. Reg. 70122 (Dec. 17, 2003). Accordingly, the time for filing a facial challenge to the regulation expired in January 2010, and the Court lacks jurisdiction over the cause of action.

IV. THE OCC HAS NOT MADE A PREEMPTION DETERMINATION WITH RESPECT TO THE SPNB CHARTER, NOR IS A DETERMINATION REQUIRED

CSBS erroneously claims under Count III that the OCC has made a preemption determination with respect to SPNBs by relying on statements made in the OCC's 2016 white paper without following the procedures required by 12 U.S.C. §§ 25b and 43. Further, CSBS argues that the OCC must make a formal determination to preempt state law, and to provide notice and opportunity to comment, within the meaning of §§ 25b and 43, before granting an SPNB Charter. *See* Compl. ¶¶ 127-130. But Count III fails to state a claim, as it is premised on a misapprehension of the operation, scope, and applicability of the cited statutes. There is no support for the proposition that § 25b imposes a mandatory duty on the Comptroller to conduct a preemption determination when chartering a national bank (or in any other circumstance).

First, nothing in the statute remotely supports CSBS's position that, as a condition of granting an SPNB Charter, the Comptroller must make a preemption determination covering all of the state consumer financial laws that could be preempted every time a new national bank is

launched and begins operations. Apart from the absurdity of such a position, the statute itself makes plain that the decision of whether (and when) the OCC will issue a formal preemption decision rests with the Comptroller. Section 25b's operative language uses the word "may"—not compulsory language such as "shall' or "must"—when it provides that a preemption determination "*may* be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law." 12 U.S.C. § 25b(b)(1)(B) (emphasis added).

Second, no preemption determination has been made by the OCC that would trigger the requirements of either §§ 25b or 43b. Neither the July 31 Announcement, Ex. C, nor the Licensing Manual Supplement, Ex. D, address preemption nor do they propose the preemption of any *particular* state laws. *See id.* § 25b(b)(1)(B) (preemption determination made on a "case-by-case basis"); § 25b(b)(3)(A) ("case-by-case basis" defined as "a determination pursuant to this section made by the Comptroller concerning the impact of a *particular* State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms" (emphasis added)). Similarly, the OCC's 2016 white paper discusses preemption in general terms, but does not (as is required to trigger the application of § 25b) address or even suggest the preemption of a particular state consumer financial law. Rather these statements simply restate existing law regarding the application of state laws to *all* national banks (*i.e.*, no new determination has been made).[7]

Third, § 25b's scope is limited to the preemption of State consumer financial laws. 12 U.S.C. § 25b(b)(1); *see also Office of Thrift Supervision Integration; Dodd-Frank Act*

[7] EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES, *supra* n.3, at 5 ("State law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank.").

Implementation, 76 Fed. Reg. 43549, 43551 (July 21, 2011). Therefore, the statute does not apply to the OCC's chartering decision because the question of whether granting a proposed national bank will result in the preemption of any particular state consumer financial law is not relevant to the chartering process; the OCC focuses instead on the proposed institution's prospects and whether it will operate in a safe and sound manner. *See* 12 C.F.R. § 5.20(f)(1); Licensing Manual Supplement, Ex. D, p. 5. When an SPNB Charter application is filed, the only question before the OCC will be whether or not to grant the application, not whether State consumer finance laws are preempted.

CSBS's reliance on 12 U.S.C. § 43 is equally unavailing. Section 43 simply provides that whenever a "Federal banking agency" seeks to issue an "opinion letter or interpretive rule" concluding that "Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches," the agency must publish a notice in the Federal Register and seek written comments. 12 U.S.C. § 43(a); *see also New Mexico v. Capital One Bank (USA), N.A.*, 980 F. Supp. 2d 1314, 1322 (D.N.M. 2013) ("Congress has expressly recognized the OCC's power to preempt *particular* state laws by issuing opinion letters and interpretive rulings, subject to certain notice-and-comment procedures." (emphasis added)).

Again, neither the OCC's July 31 Announcement nor the Licensing Manual Supplement addresses preemption, nor do they propose the preemption of any particular state laws. Likewise, the OCC's 2016 white paper discusses preemption in general terms, but does not (as is required to trigger the application of Section 43) address or suggest the preemption of a particular state law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches. The question before the OCC after receiving an SPNB

Charter application will be whether to grant or deny the application, not whether a particular state consumer protection law should be preempted. Accordingly, § 43 is inapposite.

V. ALTERNATIVELY, BECAUSE THE OCC REASONABLY INTERPRETED THE AMBIGUOUS NATIONAL BANK ACT TERM "BUSINESS OF BANKING," COUNTS I, II, AND IV SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Should the Court ultimately deem it proper to reach CSBS's claims related to the OCC's statutory authority, the Complaint should be dismissed for failure to state a claim because, under the framework articulated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), Section 5.20(e)(1) represents a reasonable OCC interpretation of the undefined and ambiguous statutory term "business of banking."

The Supreme Court has repeatedly applied the deferential *Chevron* framework to the OCC's interpretation of the National Bank Act. *Cuomo v. Clearing House, Ass'n, LLC*, 557 U.S. 519, 525 (2009); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) ("*NationsBank*"); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). The *Chevron* framework proceeds in two analytical steps. "Where a statute is clear, the agency must follow the statute." *Cuozzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). "But where a statute leaves a 'gap' or is 'ambigu[ous],' [courts] typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Id.* (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001)); *Chevron*, 467 U.S. at 843.

At the outset, CSBS's assertion that the OCC's interpretation of the National Bank Act is not entitled to *Chevron* deference because it "define[s] the scope of [the OCC's] own regulatory authority" lacks merit. *See* Compl. ¶ 126. *Chevron* recognizes that when Congress leaves a gap or an ambiguity in a statutory scheme that has been entrusted to an agency's administration,

Congress has implicitly delegated to that agency the power to reasonably fill the gap or resolve the ambiguity. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). There is no *Chevron* exception for interpretive decisions involving the scope of an agency's statutory authority. *City of Arlington, Texas v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 298 (2013). "The reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has." *Id.* at 299; *see also Montford & Co., Inc. v. Sec. & Exch. Comm'n*, 793 F.3d 76, 82 (D.C. Cir. 2015); *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 635 (D.C. Cir. 2014).

Contrary to CSBS's assertion that the statute is unambiguous, the term "business of banking" has neither an express definition nor a plain meaning in the National Bank Act. Under *Chevron*, the OCC therefore possesses discretion in addressing that ambiguity or "gap" in the statute by enacting rules that are "reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Tech.*, 136 S. Ct. at 2142. Moreover, the OCC's interpretation is reasonable and entitled to deference: the OCC's interpretation is not precluded by statutory text, is supported by judicial authority—including Supreme Court and D.C. Circuit precedent—and is consistent with the text, nature, and purpose of the statute. Accordingly, Counts I, II, IV, and V should be dismissed for failure to state a claim.

A. Because the Statutory Text Has No Plain Meaning under *Chevron* Step One, the OCC Has Discretion in Reasonably Interpreting "Business of Banking"

An examination of the relevant text of the National Bank Act makes clear that, under the *Chevron* framework, the term "business of banking" is ambiguous, having no fixed meaning that precludes the OCC's interpretation set forth in Section 5.20(e)(1). Section 27, the general chartering provision, states as follows:

> If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller . . . it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate . . . that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business.

12 U.S.C. § 27(a). The National Bank Act does not set forth any mandatory activity[8] that must be performed in order for a bank to be engaged in the "business of banking." Indeed, the text is permissive and therefore consistent with an expansive grant of discretion to the Comptroller in assigning content to the term.

The term "business of banking" appears in several other provisions of the National Bank Act, but these references offer no definition or textual elaboration that would provide a more specific meaning of the term. *See* 12 U.S.C. § 21 ("Associations for carrying on the business of banking . . . may be formed by any number of natural persons, not less in any case than five."); § 24(Seventh) (dealing with bank powers); § 26 (stating that the requirements of "title 62 of the Revised Statutes" must "be complied with before an association shall be authorized to commence the business of banking"); § 27(b)(1) (specifying that the Comptroller of the Currency may issue a "certificate of authority to commence the business of banking" to a banker's bank). In addition, a similar term, "the general business of each national banking association" is contained in a geographic restriction in 12 U.S.C. § 81 ("The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any . . . ."). Accordingly, given the undisputed absence of an express statutory definition, nothing in the National Bank Act's text expressly or

[8] Section 27 also recognizes two forms of special purpose national banks: trust banks, 12 U.S.C. § 27(a), and bankers' banks, 12 U.S.C. § 27(b)(1).

implicitly precludes the OCC's interpretation of the term "business of banking" as laid out in 12 C.F.R. § 5.20(e)(1)(i).

1. In *NationsBank*, the Supreme Court Recognized the OCC's Authority to Interpret the Ambiguous Term "Business of Banking"

These statutory references to the "business of banking" have rarely been the subject of litigation that could add interpretive meaning, with the notable exception of that in § 24(Seventh), which reference has been litigated throughout the history of the National Bank Act. *See, e.g., Merchants' Nat'l Bank v. State Bank*, 77 U.S. 604 (1870) (power to certify checks); *First Nat'l Bank of Charlotte v. Nat'l Exch. Bank*, 92 U.S. 122 (1875) (power to purchase securities in the course of settling a claim); *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913) (power to pay state taxes on depositors' accounts); *Colo. Nat'l Bank of Denver v. Bedford*, 310 U.S. 41 (1940) (power to operate a safe deposit business); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (power to advertise). Section 24(Seventh) provides that national banks are authorized:

> To exercise . . . *all such incidental powers as shall be necessary to carry on the business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes [and provisions limiting securities and stock sales].

12 U.S.C. § 24(Seventh) (emphasis added). The Supreme Court explicated this text definitively in *NationsBank* and recognized the Comptroller's broad discretion in defining which powers are necessary to carry on the "business of banking."

In *NationsBank*, the OCC had interpreted § 24(Seventh)'s text as permitting the Comptroller to authorize national banks to sell annuities to bank customers. *NationsBank*, 513 U.S. at 254. An insurance agents' association challenged that interpretation, arguing that the text

should instead be read to limit the scope of permissible banking powers under § 24(Seventh) to activities connected with the five statutorily enumerated powers: discounting, deposit-taking, trading in exchange and money, lending, and dealing in notes. Under the association's implicit *expressio unius est exclusio alterius* statutory-structure argument, the general authorization to "exercise . . . all such incidental powers as shall be necessary to . . . the business of banking" would have been circumscribed by the succeeding text listing specific powers. *Id.* at 256. The Supreme Court, however, expressly and emphatically rejected that argument.

First, the Court reviewed the OCC's interpretation through the framework of *Chevron* deference. *Id.* at 256-57. "As the administrator charged with supervision of the National Bank Act, see [12 U.S.C.] §§ 1, 26-27, 481, the Comptroller bears primary responsibility for surveillance of the 'business of banking' authorized by § 24 Seventh." *Id.* at 256.

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Id. at 256-57 (quoting *Clarke*, 479 U.S. at 403-04).

Applying this standard, the Court affirmed the OCC's construction of the § 24(Seventh) phrase—"incidental powers . . . necessary to carry on the business of banking"—as an independent grant of authority not limited by the specified enumerated grants of authority, *id.* at 257, thus rejecting the insurance agents' arguments to the contrary:

> We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments—for example, operating a general travel agency—may exceed those bounds.

Id. at 258 n.2. This analysis resolved the question of whether there is a distinction between "business of banking" and "all such incidental powers as shall be necessary to carry on the business of banking." By equating § 24(Seventh)'s text with the "business of banking," *NationsBank* established that the analysis is a unitary inquiry.

NationsBank marked a watershed in construing the term "business of banking," resolving an analytical dispute that had sharply divided courts of appeals for two decades. On one side of the divide, the D.C. Circuit had prefigured *NationsBank* by rejecting a narrow interpretation of § 24(Seventh) and, instead, deferring to the "expert financial judgment" of the Comptroller. *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (municipal bond insurance part of the business of banking). On the other side of the divide, two courts of appeals had adopted a more restrictive test limiting the scope of permissible powers to those related to the enumerated powers in § 24(Seventh). *See M&M Leasing Corp.*, 563 F.2d at 1382 (stating the power "must be 'convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act'") (equipment leasing); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) (holding the test is whether the activities were "directly related to one or another of a national bank's express powers") (travel agency not authorized). *NationsBank* rejected that test, implicitly superseding *Arnold Tours*, *M&M Leasing*, and other decisions that had relied upon them.[9] Accordingly, the reasoning of any "business of banking" decisions that preceded *NationsBank* is subject to reconsideration in light of the Supreme Court's holding.

[9] While the *NationsBank* holding displaced the test applied by *M&M Leasing, NationsBank* fully vindicated the policy observation articulated in *M&M Leasing:* "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.*, 563 F.2d at 1382.

2. The D.C. Circuit Has Confirmed That There Are No Mandatory National Bank Powers

Just as the OCC received deference in *NationsBank* when broadly interpreting the general powers of national banks under the "business of banking," the OCC has received similar deference when it approved a charter providing for a national bank to exercise a narrow range of banking powers. *Indep. Cmty. Bankers Ass'n of S.D., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 820 F.2d 428 (D.C. Cir. 1987) ("*ICBA v. FRB*"). Nominally a suit against the Federal Reserve Board, the *ICBA v. FRB* case focused in part on an OCC decision to issue a national bank charter that authorized the exercise of limited banking powers. The charter limited the bank's deposit-taking powers in order to comply with state-law restrictions on interstate banking made applicable by the then-current version of the Bank Holding Company Act ("BHCA"). At the time, the BHCA accorded states some control over the ability of bank holding companies to acquire a national bank outside the institution's home state. *Id.* at 430-31. South Dakota law limited the operations of such national banks, in particular the deposit-taking function, in order to protect state-chartered institutions from competition. *Id.* at 431.

Specifically, *ICBA v. FRB* focused on the OCC's issuance of a charter to a credit card national bank with curtailed powers in order to conform to the South Dakota restrictions.[10] The D.C. Circuit noted that the Comptroller's decision to charter the limited purpose bank was consistent with an earlier OCC chartering decision reflected in a Federal Reserve order, *Citicorp*, 67 Fed. Res. Bull. 181 (1981). There, the Comptroller had noted that the grant of authority to

[10] The national bank charter application at issue in *ICBA v. FRB*, while proposing the primary activity of the new bank to be credit card services, also proposed to provide limited deposit-taking, lending, and checking services to the local community to the extent permitted under state law. 820 F.2d at 439. Nothing in the opinion's reasoning indicates that the D.C. Circuit placed any weight on the existence of those nominal activities.

national banks under § 24(Seventh) is "permissive, rather than mandatory," and that a national bank "rarely contemplates engaging in the full range of permissible activities." *ICBA*, 820 F.2d. at 439. The Comptroller found that the decision to operate as a limited service bank so as to avoid conflict with a state statute was "a business decision." *Id.*

Like CSBS, ICBA argued that there is "no such institution as a 'special purpose' national bank," and that a limited national bank charter was otherwise inconsistent with federal law. *Id.* at 438-40. The D.C. Circuit rejected those arguments and held that there are no "mandatory" national bank powers and that the Comptroller has the discretion to grant a national bank charter with limited powers:

> We have no doubt but that the Comptroller's construction and application of the National Bank Act in this context is reasonable. There is nothing in the language or legislative history of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory. Restriction of a national bank's activities to less than the full scope of statutory authority conflicts with the purposes of the Act only if it undermines the safety and soundness of the bank or interferes with the bank's ability to fulfill its statutory obligations. That judgment requires consideration of the particular legal and business circumstances of the individual banks—a judgment within the particular expertise of the Comptroller and reserved to his chartering authority.

Id. at 440. Accordingly, the *ICBA* court's reasoning supports the OCC's authority to promulgate Section 5.20(e)(1) and illustrates that the legal concept of a special purpose national bank charter is not novel or unprecedented, but rather follows a decades-old OCC practice.

Shortly after *ICBA* was decided, Congress amended the BHCA to create an exception from the definition of "bank" applicable to credit card banks. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (August 10, 1987), *codified at* 12 U.S.C. § 1841(c)(2)(F). Congress, however, did not amend the OCC's chartering authority—there remains no express statutory chartering authority for credit card banks in the National Bank Act.

Instead, the OCC has chartered credit card banks relying on the general statutory authority endorsed in *ICBA v. FRB*.

B. Under *Chevron* Step II, the OCC Reasonably Interpreted the Statutory Term "Business of Banking" by Reference to Three Core Banking Functions Identified in the National Bank Act

In its Complaint, CSBS frames its objection to Section 5.20(e)(1) by arguing that the OCC has attempted to use the rule to expand its chartering authority beyond that delegated by statute. Compl. ¶ 155. To the contrary, case law supports the reasonable choices made by the OCC in interpreting the "business of banking" in the manner reflected by the regulation in its current form. In considering the 2003 amendment of Section 5.20(e)(1), *see supra* pp. 4, 15-16, the OCC weighed the ways in which to give content to the statutory term "business of banking" in determining eligibility for a national bank charter. The OCC's Final Rule provides that "[a] special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: [r]eceiving deposits; paying checks; or lending money." 12 C.F.R. § 5.20(e)(1).

In the preamble to the Final Rule that promulgated amendments to 12 C.F.R. § 5.20(e)(1) in 2003, the OCC explained that it added the "core banking functions" requirement by reference to 12 U.S.C. § 36, which defines a national bank "branch" as a branch place of business "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). While § 36 does not include the term "business of banking," the OCC took guidance from a Supreme Court decision construing the statutory phrase the "general business of each national banking association" in 12 U.S.C. § 81 by reference to the core activities of § 36. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 389 (1987) ("*Clarke v. SIA*"). Section 81 restricts the locations at which a national bank may conduct business: "The *general business of each national banking association*

shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of [12 U.S.C. § 36]." 12 U.S.C. § 81 (emphasis added). In *Clarke v. SIA*, the Supreme Court deferred to the OCC's reasonable interpretation of what constitutes the "general business" of each bank. Because of the close textural resemblance of the "business of banking" to the concept of the "general business" of a bank, the OCC drew on its prior analysis regarding "core activities" under § 36 to inform its interpretation of the OCC's chartering authority in § 27.

In *Clarke v. SIA*, the OCC had approved a national bank's application to offer discount brokerage services at, *inter alia*, non-branch locations both inside and outside the bank's home state. A securities trade association challenged the OCC's approval, arguing that § 81's reference to the "general business" of each banking association should be read more broadly than the § 36 activities and should include all activities statutorily authorized for national banks, including the sale of securities, which would therefore limit where such sales could be conducted. *Clarke*, 479 U.S. at 406. The Supreme Court rejected that argument. The Court found that the phrase "the general business of each national banking association" is ambiguous and held that the Comptroller's interpretation was entitled to deference. *Id.* at 403-04. The Court also observed that national banks engage in many activities, and there was no evidence that Congress intended all of those activities to be subject to the geographical limitations of §§ 81 and 36. *Id.* at 406-09. Instead, the Court found the OCC's conclusion was reasonable that the general business of the bank under § 81 included only "core banking functions," and not all incidental services that national banks are authorized to provide. *Id.* at 409. The Court also held that the OCC reasonably equated "core banking functions" with the activities identified in § 36,

which defined "branch" as any place "at which deposits are received, or checks paid, or money lent." *Id.*

The Court's endorsement of the OCC's analysis—that national banks engage in many activities, but that only these three activities represent "core banking functions" and so define the "general business" of the bank—supports treating any one of these same three activities as the required core activity for purposes of the chartering provisions. Just as the "general business" of each national bank is undefined in the location restriction of § 81, the "business of banking" is undefined in the chartering provisions of §§ 21 and 27(a). The natural reading of the two phrases is similar in meaning, which supports the reasonableness of using § 36(j) as a common source for the interpretation of each one.

Equally important, because § 36's terms are linked by "or" and not "and," performing only *one* of the activities is sufficient to meet the statutory definition and to cause the location restrictions to apply. *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 135 (1969) (stating that because the activities element of the definition "is phrased in the disjunctive, the offering of any one of the three services . . . will provide the basis for finding that 'branch' banking is taking place"). This interpretation provides symmetry and consistency between the chartering and the location provisions of the National Bank Act.

VI. BECAUSE CSBS'S ARGUMENTS THAT THE OCC LACKS STATUTORY AND CONSTITUTIONAL AUTHORITY TO ISSUE AN SPNB CHARTER ARE MERITLESS, COUNTS I, II, IV, AND V FAIL TO STATE A CLAIM

The CSBS Complaint outlines a variety of arguments against the OCC's proposed use of Section 5.20(e)(1) to charter as a national bank an entity that does not take deposits. These arguments are predicated on CSBS's misinterpretation of the National Bank Act and rely on defunct and inapposite case law and the irrelevant requirements of statutes other than the

National Bank Act. Given the authority under the National Bank Act to grant SPNB Charters, Tenth Amendment constitutional infirmities alleged by CSBS are nonexistent, and Counts I, II, IV, and V are properly dismissed for failure to state a claim.

A. CSBS's Arguments Construing the National Bank Act Lack Merit

1. No Provision in the National Bank Act Identifies Deposit Taking as an Indispensable Function for an Association to Engage in the Business of Banking

CSBS wrongly claims that provisions of the National Bank Act pertaining to the more ministerial aspects of the chartering process—the filing of an "organization certificate" pursuant to 12 U.S.C. § 21 through § 23—give a "clear indication" that deposit taking is an indispensable function to carry on the business of banking. Compl. ¶ 68. The one thing that is clear from the statutory language cited by CSBS is that these provisions are silent as to the indispensable nature of deposit taking.

CSBS attempts to bootstrap an argument that deposit-taking is a mandatory national bank power from the unremarkable fact that the National Bank Act requires a bank's "organization certificate" to identify the place where its operations of "discount and deposit" are to be conducted. CSBS's arguments overstate the case. Part of the process of forming a new national bank includes the execution of an "organization certificate" by the bank's organizers. The certificate recites basic information, such as the name of the bank, its location, the amount of stock, and the names of initial shareholders. *See* 12 U.S.C. §§ 21-23. Section 22 states as follows:

> The persons uniting to form such an association [a National Bank] shall, under their hands, make an organization certificate, which shall specifically state: . . . [t]he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county, city, town, or village.

CSBS characterizes this requirement—that a bank's organization certificate supply notification designating where a bank will discount notes or take deposits—as an affirmative requirement that a bank must take deposits.

CSBS's interpretation is insupportable. Historically, the reference to operations of "discount" and "deposit" would have fixed the city where these two activities, traditionally requiring repeated retail contact with bank customers, would take place. Nothing in the language of the statue makes the discounting of notes or deposit operations mandatory. Rather, the statute simply requires the organizers to identify the place where these activities would be conducted if a particular bank engages in them. Under CSBS's logic, national banks would also be required to discount notes, an activity that banks have not undertaken in the modern era.

2. Judicial Authority and Statutory Context Defeat CSBS's *Expressio Unius* Argument

CSBS's next foray into interpreting the National Bank Act is to posit that the Comptroller's chartering authority under 12 U.S.C. § 27 is tightly circumscribed by Congress with respect to his ability to determine what it means to be engaged in the "business of banking." Without identifying the legal canon explicitly, CSBS asks the Court to apply the *expressio unius est exclusio alterius* canon of statutory construction that was rejected in *NationsBank* to conclude that because Congress specifically authorized the chartering of particular types of special purpose banks—trust banks, banker's banks, and credit card banks—it creates the inference that Congress intended to withhold the authority of the Comptroller to charter other types of special purpose banks. Compl. ¶¶ 79-85. This argument lacks merit.

Section 27's text does not reflect the structural pattern that triggers the canon's application. "As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are

members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also U.S. v. Vonn*, 535 U.S. 55, 65 (2002). No such inference is available for § 27. The three examples CSBS cites do not present an "associated group or series." Instead, they are each manifestly different in kind: a general chartering authority, a specific chartering authority (banker's banks), and a ratification of a type of charter issued under the Comptroller's general chartering authority (trust banks).

Moreover, the timeline for the passage of each of the provisions in question establishes that the statute's present structure is not the product of a single Congress to which any intent can be attributed. Rather, the distinct provisions reflect discrete legislation by different Congresses, widely separated in time and responding to disparate reasons for legislation. The general chartering authority dates from 1864, the recognition of trust banks was added by legislation in 1978,[11] and the authority for banker's banks was added in 1982. "The possibilities either of [congressional] neglect or of implied delegation to the agency grow more likely as the contrasted contexts grow more remote from each other." *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990). "[T]he canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (quoting *Vonn*, 535 U.S. at 65).

[11] The trust bank text in part retroactively ratified previously issued charters. This text therefore should be read as a *post-hoc* congressional endorsement of the OCC's authority to issue special purpose charters under its general chartering authority.

Additionally, because the canon of *expressio unius* is inherently statute-specific, no meaningful inference can be drawn from the provisions of non-National Bank Act statutes such as the credit card bank exception in the BHCA heavily relied upon by CSBS. *See* 12 U.S.C. § 1841(c)(2)(F).[12] Finally, in *NationsBank*, as discussed *supra* pp. 22-24, the Supreme Court rejected an implicit *expressio unius* argument with respect to the enumerated express powers in § 24(Seventh) that, "as an associated group or series," would more plausibly satisfy the legislative pattern associated with application of the canon than does the structure of § 27.

More generally, the Supreme Court and the D.C. Circuit have repeatedly expressed caution in applying the canon, especially in an administrative context. "The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (2014) (quoting *Cheney R.R. Co. v. Interstate Commerce Comm'n*, 902 F.2d 66, 68-69 (D.C. Cir. 1990)); *see also Mobile Commc'ns Corp. of Am. v. Fed. Commc'ns Comm'n*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (holding that a maxim, unsupported by arguments based on the statute's structure and legislative history, was "too thin a reed" to support the conclusion that Congress had clearly resolved the issue); *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (same). For all these reasons specific to the statutory text and structure, the doctrine of *expressio unius* is unavailing to CSBS's position.

[12] Indeed, the BHCA exception for credit card banks in 12 U.S.C. § 1841(c)(2)(F) is at odds with CSBS's theory of the case because there is no corresponding chartering authority for credit card banks in the National Bank Act. Notwithstanding the absence of any such specific National Bank Act authorization for credit card banks, the OCC has chartered such credit card banks and has been sustained in so doing. *See* discussion of *ICBA v. FRB*, *supra* pp. 25-27.

3. The Principal Cases Cited by CSBS Are Not Entitled to Weight

The Court may quickly dispose of two district court cases CSBS cites for the proposition that the OCC lacks authority to charter a limited-purpose national bank that does not take deposits. Compl. ¶¶ 80, 82. The first, *National State Bank of Elizabeth, N.J. v. Smith*, No. 76-1479, 1977 U.S. Dist. LEXIS 18184 (D.N.J. Sept. 16, 1977), was reversed by the Third Circuit. *Nat'l State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 227 (3d Cir. 1979). In *Smith*, the OCC issued a charter to a national bank limited to the business of a commercial bank trust department and related activities. The district court concluded that the charter was "contrary to law and invalid," though the reasoning supporting that conclusion is unreported. *Id.* at 228. After the district court decision, and during the appeal, Congress amended 12 U.S.C. § 27(a) to recognize trust banks, retroactively and going forward. *Id.* at 231. On appeal, the Third Circuit reversed the district court, applying the terms of the newly amended § 27(a). Significantly, the Court declined to address the correctness of the district court decision when entered, and opined that the legislation had "validated the Comptroller's action." *Id.* at 231-32. Accordingly, this district court decision ceased to have any force and effect in 1979, the correctness of its reasoning was not endorsed by the Third Circuit, and therefore merits no weight in this Court.

In the second case, *Independent Bankers Ass'n of America v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. Lexis 22529 (M.D. Fla. Feb. 15, 1985) ("*Conover*"), banks and trade associations challenged the OCC's authority under § 27(a) to charter a "nonbank bank"—an institution that would either not accept demand deposits or make commercial loans, or both, so as to avoid the definition of "bank" in the BHCA and attendant restrictions on interstate operations. *Id.* at *2. In awarding the plaintiffs a preliminary injunction against final approval of a nonbank bank charter, the court characterized disapprovingly nonbank banks as taking

advantage of a statutory definition to structure themselves so as to "escape regulation" under the BHCA. *Id.* at *3. And in determining that the plaintiffs had a likelihood of success on the merits, the court looked to the "historical understanding in law and custom" of the term "business of banking." *Id*. at *23.

Like *Smith, Conover* is not good law. First, the ruling in *Conover* was an interim preliminary injunction order that was subsequently vacated when the case was dismissed before final judgment. *See* Docket Entry No. 137 (Sept. 11, 1987) (attached hereto as Exhibit E). Second, the analysis in *Conover* stands in substantial conflict with the later decision of the D.C. Circuit in *ICBA v. FRB* as to the OCC's authority to issue a limited purpose charter, *supra* pp. 25-27, and with the expansive test for "business of banking" established in *NationsBank, supra* pp. 22-24 . Third, a Supreme Court decision the year following *Conover* discounted the "intentional avoidance of regulation" justification partly relied upon in *Conover* to issue an injunction. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (rejecting Federal Reserve Board's argument that its expansive regulation was justified to prevent exploitation of statutory loopholes). Because the district court ruling never reached final judgment, because it stands in conflict with a later decision by the D.C. Circuit, and because parts of its rationale were superseded by legislation and by the Supreme Court decisions in *NationsBank* and *Dimension*, the *Conover* opinion also merits no weight in this Court.

4. No Other Authority Identified by CSBS Supports the Position that Deposit-Taking Is an Essential Function for an Association to be Chartered as a National Bank

The OCC does not dispute that deposit-taking is among the core banking functions that comprise the business of banking. *See* 12 C.F.R. § 5.20(e)(1). CSBS, however, identifies no

authority either within the National Bank Act or within other applicable law to support the proposition that a national bank *must* take deposits to be engaged in the business of banking.

CSBS's Complaint cites an OCC administrative decision approving a 1984 application from Deposit Guaranty National Bank to establish a branch in Gulfport, Mississippi. Compl. ¶ 69 (citing 1985 OCC QJ LEXIS 812). In analyzing the application, the OCC concluded unsurprisingly that a branch of a national bank that, like savings associations chartered under Mississippi law, accepted demand deposits, made commercial and other non-mortgage loans, and accepted time and savings deposits would be offering products and services that "appear to be essential to the banking business." 1985 OCC QJ LEXIS at *27. But the OCC's analysis and characterization of the scope of powers for Mississippi savings associations under state law has no bearing on assessing the minimum activities required for a financial institution to be considered carrying on the business of banking under the National Bank Act.

The remaining caselaw cited in the Complaint, ¶¶ 69, 70, 76, similarly conveys general references to the scope of the business of banking while addressing issues other than the acceptance of deposits as a necessary feature of an individual national bank. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 326 (1963) (delineating relevant product market in banking antitrust cases); *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 730 (9th Cir. 2012) (dealing with preemption of state law applied to the posting of transactions for purposes of calculating overdraft fees); *Bank of Am. v. City and Cty. of S.F.*, 309 F.3d 551, 563 (9th Cir. 2002) (ruling on preemption of ordinances prohibiting banks from charging ATM fees to non-depositors); *Dep't of Banking & Consumer Fin. v. Clarke*, 809 F.2d 266, 270 (5th Cir. 1987) (overturning district court injunction against the OCC's administrative decision related to Mississippi branch application in 1985 OCC QJ LEXIS 812, and stating that "[t]he Comptroller did not incorrectly

interpret the controlling statutory provisions. His interpretation was more than a mere 'permissible construction,' all that is required in order to secure this court's deference."); *Davis v. W.J. West & Co.*, 127 Ga. 407 (1907) (individual who engaged in the money-lending business discounting notes and advertised himself as a bank, but did not take deposits and was not chartered as a bank, was not a bank).[13] These sources do not impugn the reasonableness of the OCC's interpretation of what activities are required to be deemed engaged in the business of banking under the National Bank Act or banking generally. *See supra* pp. 27-29. Indeed, the Supreme Court has recognized, near in time to the passage of the National Bank Act, that engaging in lending or payment functions is sufficient for an entity to be considered a bank. *See Oulton v. German Sav. & Loan Soc.*, 84 U.S. 109, 119 (1872) (stating that an institution is a bank "in the strictest commercial sense" if it engages in only one of the three functions of deposit taking, discounting, or circulation).

B. CSBS Improperly Invokes Statutory Provisions Outside the National Bank Act

CSBS floods its Complaint with allegations that the OCC's interpretation of the "business of banking," as used in the National Bank Act, conflicts with a host of other federal banking laws. *See* Compl. ¶¶ 67, 71-78, 125. To be clear, the OCC based its decision to accept applications for SPNB Charters solely on its interpretation of the National Bank Act, an Act over which it possesses administrative authority. *See Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). The OCC did *not* base its decision, as CSBS suggests it should, on

[13] CSBS also cites 12 U.S.C. § 378, Compl. ¶ 76, which makes it unlawful for an entity not chartered as a bank to take deposits. The statute does not establish the converse, *i.e.*, that a bank must take deposits.

statutes over which it does not possess administrative authority, both because the National Bank Act sets forth the OCC's chartering authority and because the extraneous statutory provisions cited by CSBS do not speak to the scope of that chartering authority.[14] Thus, CSBS's position—that every passage, amendment, or interpretation of a later-enacted federal banking statute requires the parallel reconsideration of existing National Bank Act interpretations—lacks both legal support and practical workability.

1. The OCC's Interpretation of the National Bank Act Does Not, and Should Not, Depend on the Bank Holding Company Act

At a loss to construct an argument based upon the National Bank Act, CSBS argues that national banks must take deposits because the BHCA classifies a "bank" as either "[a]n insured bank" as defined in Section 3(h) of the Federal Deposit Insurance Act or "[a]n institution . . . which . . . accepts demand deposits" and "is engaged in the business of making commercial loans." 12 U.S.C. § 1841(c)(1)(A)-(B). Both aspects of the definition, CSBS argues, either presume or require that an entity will take deposits in order to be considered a "bank" for BHCA purposes. Compl. ¶¶ 74-75. Governing case law, however, holds that interpretations of the National Bank Act do not depend on the terms of the BHCA.

The D.C. Circuit's decision in *Independent Insurance Agents v. Ludwig* illustrates the point. 997 F.2d 958 (D.C. Cir. 1993), *rev'd on other grounds by Indep. Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 732 (D.C. Cir. 1992). There, the D.C. Circuit rejected arguments that the OCC's interpretation of Section 92 of the National Bank Act must be harmonized with a later-enacted amendment to the BHCA. *Id.* at 962. Acknowledging materials suggesting that

[14] *Cf. Am.'s Cmty. Bankers v. Fed. Deposit Ins. Corp.*, 200 F.3d 822, 833 (D.C. Cir. 2000) (stating that when an agency's interpretation "derive[s] principally from" an organic statute, "the two-step *Chevron* inquiry [remains] appropriate"); *see also Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 250 F.3d 778, 782 (D.C. Cir. 2001).

Congress intended the BHCA amendment to "parallel" Section 92, the D.C. Circuit nonetheless deferred to an OCC interpretation of Section 92 that directly contradicted the Federal Reserve Board staff's interpretation of the "parallel" BHCA provision. *Id.* The D.C. Circuit also reiterated the district court's conclusion that "[t]he [National Bank Act and BHCA] were enacted over sixty-five years apart and deal with two different types of banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies." *Id.* (quoting *Nat'l Ass'n of Life Underwriters v. Clarke*, 736 F. Supp. 1162, 1171 (D.D.C. 1990)). The D.C. Circuit further cited to an earlier case where it rejected a similar argument suggesting that the OCC was obligated to follow the BHCA: "the Comptroller derived his authority solely under the [National Bank Act], and it was his responsibility to determine issues under that Act, not under the BHCA." *Id.* at 962 (citing *Am. Ins. Ass'n*, 865 F.2d at 287).

CSBS's reliance on *Whitney v. National Bank of New Orleans & Trust Co.* fails for related reasons. 379 U.S. 411 (1965). In that case, Whitney National Bank of New Orleans ("Whitney") planned to establish a new national bank in another parish of Louisiana. *Id.* at 413. To do so, Whitney sought approval from the Federal Reserve Board of its plan to organize itself as a bank holding company. *Id.* After the Federal Reserve Board approved the plan, Whitney's competitors filed a declaratory judgment action seeking a determination that the Comptroller of the Currency had no power to issue a certificate of authority for the new bank because of state bank branching laws made applicable by the BHCA. *Id.* The Supreme Court, however, held that the Federal Reserve Board and the OCC have distinct roles with respect to newly established national banks proposed to be owned by bank holding companies. In the Court's words, the authorization for the new national bank was "the sole function of the Comptroller, requiring his appraisal of the bank's assets, directorate, etc., and his action is therefore necessary in addition to

that of the Board approving the organization by the holding company." *Id*. at 417. Separately, the Court noted that "[t]he Bank Holding Company Act makes the Board's approval of a holding company arrangement binding upon the Comptroller." For that reason, the Comptroller could be stayed from issuing a certificate pending Federal Reserve Board action, but only in "exceptional circumstances." *Id.* at 426 n.7; *see also Am. Ins. Ass'n*, 865 F.2d at 287-88 (*per curiam* on petitions for rehearing) (declining to find such "exceptional circumstances").

In that same vein, CSBS ignores *Whitney*'s key observation that "it is the ownership of [the new bank] by the holding company that is at the heart of the project, not the permission to open for business which is acted upon routinely by the Comptroller once the authority to organize is given by the Board." *Whitney*, 379 U.S. at 423. Thus, the BHCA governs affiliations between "banks," as defined for BHCA purposes, and other companies—in particular nonfinancial commercial companies. *Id.* The BHCA does not, however, speak to the nature or type of national banks the OCC can charter—an authority governed exclusively by the National Bank Act.[15]

2. Neither the Federal Reserve Act nor the Federal Deposit Insurance Act Require National Banks to Accept Deposits and Acquire Deposit Insurance

CSBS improperly relies on provisions of the Federal Reserve Act ("FRA") and the Federal Deposit Insurance Act ("FDIA") when it argues that all nationally chartered banks must accept deposits because they are required to have federal deposit insurance. Compl. ¶¶ 71-73. When read in the proper context, nothing in these Acts require national banks to acquire deposit insurance and, by extension, to accept deposits. To be sure, the FRA states that "[e]very national

[15] Similarly, CSBS does not identify any authority where a court relied on provisions of the Federal Deposit Insurance Act to interpret terms in the National Bank Act. *Cf. In re Cmty. Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) (reading provisions of the FDIA with the aid of the National Bank Act, not the reverse); *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir. 1992) (doing the same).

bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located," become a member of the Federal Reserve System and "shall thereupon be an insured bank" under the FDIA. 12 U.S.C. § 222. But the text, structure, and history of that and other related provisions demonstrate the discretionary, rather than mandatory, nature of the deposit-taking function for a given institution. Neither the FDIA nor the FRA imposes conditions on or limit the Comptroller's discretion when determining what it means to be engaged in the business of banking for purposes of the National Bank Act. Nor do the cited FDIA and FRA provisions require every national bank to take deposits or to be insured.

To demonstrate, the plain text of the current FDIA provision governing the deposit insurance application process does not impose any corresponding deposit insurance requirement for all national banks. *See* 12 U.S.C. § 1815(a)(1). Section 1815(a)(1) specifies that, absent two exceptions not relevant here, "any depository institution which is engaged in the business of receiving deposits other than trust funds . . . , upon application to and examination by the Corporation and approval by the Board of Directors, may become an insured depository institution." *Id.* The statute's language leaves open the possibility of the existence of banking institutions that would not be insured because they are not "engaged in the business of receiving deposits other than trust funds." *Id.*

A careful parsing of the statutory language bears this reasoning out. Nothing in § 1815 suggests that a non-depository institution *must* become an insured depository institution. Instead, § 1815(a)(1) applies with respect to "depository institution[s] . . . engaged in the business of receiving deposits other than trust funds" who "*may* become . . . insured depository institution[s]." *Id.* (emphasis added). Section 1815(a)(1)'s separation of "depository institution[s]" from "insured depository institution[s]" is no accident: the FDIA defines both

terms, and notes that the former "means any bank or savings association" while the latter "means any bank or savings association the deposits of which are insured." *Id.* § 1813(c)(1)-(2). Other FDIA provisions echo this distinction, and expressly envision the existence, operation, and supervision of uninsured banks. *See id.* § 1813(h) (defining "noninsured bank" for purposes of the Act); § 1818(b)(5) (noting that the OCC's authority to issue cease-and-desist orders extends "to any national banking association chartered by the Comptroller of the Currency, *including an uninsured association*" (emphasis added)).

Similarly, FDIA provisions dealing with the cessation of a national bank's insured status contemplate situations where a banking institution may operate without deposit insurance and without taking deposits. While the FDIA states that insured national member banks cannot voluntarily surrender their deposit insurance, 12 U.S.C. § 1818(a)(1), the prohibition yields when these entities stop accepting deposits other than trust funds. For example, a national bank's insured status *shall* terminate if it no longer receives deposits other than trust funds, 12 U.S.C. § 1818(p), or if another institution assumes its deposits, 12 U.S.C. § 1818(q). But these provisions do not *require* the OCC to terminate a national bank's charter if or when that bank loses its insured status because it no longer accepts deposits. Instead, these provisions show that the link between being a national bank and having deposit insurance applies only to those national banks that actually hold deposits other than trust funds.

Nor does 12 U.S.C. § 222 support CSBS's argument. Section 222 states that a national bank "shall . . . become a member of the Federal Reserve System" and, after becoming a member, "shall thereupon be an insured bank" under the FDIA. 12 U.S.C. § 222. CSBS relies on this latter phrase to argue that every national bank must be insured and, by implication, must take deposits. But when read in its proper context, the provision expresses a descriptive, rather

than prescriptive, function and purpose. Under § 222, national banks need not take any specific action to become an "insured bank." The lack of any specific mandate stands in stark contrast to the detailed requirements that § 222 instructs national banks to meet in order to become members of the Federal Reserve System. *Id.* (instructing national banks to become Federal Reserve System members by "subscribing and paying for stock in the Federal Reserve bank of its district"); *see also* 12 U.S.C. § 282 (outlining the Federal Reserve bank stock subscription process). Thus, § 222 should be read as simply conferring the status of "insured bank" on those national banks that need to obtain deposit insurance under 12 U.S.C. § 1815(a)(1), *i.e.*, on those national banks that take deposits other than trust funds.

This reading also aligns with § 222's historical role in the deposit insurance sphere. Congress added the provision at issue in contemplation of Alaska entering the Union. Pub. L. No. 85-508, § 19, 72 Stat. 339, 350 (1958). National banks located in states are required to be member banks. 12 U.S.C. § 282. National banks located in U.S. territories are not. 12 U.S.C. §§ 143, 466. Congress amended § 222 to facilitate the transition of national non-member banks in Alaska and Hawaii to the status of member banks and insured banks by virtue of, among other things, automatic eligibility for deposit insurance. *See* H.R. Rep. No. 85-624, at 2933 (1957) (noting that the enactments would "enable Alaska to achieve full equality with existing states, not only in a technical juridicial sense, but in practical economic terms as well"). Stated differently, § 222 allowed national nonmember banks in Alaska and Hawaii to become member banks—and, without further action, "insured banks"—at a time when all newly chartered national member banks engaged in the business of receiving deposits other than trust funds would have been required to be insured and been granted insurance automatically upon receiving a charter. *See* 12 U.S.C. § 1814(b) (prior to amendments by Pub. L. No. 101-73, § 205, 103 Stat.

183, 195 (1989) and Pub. L. No. 102-42, § 115(b), 105 Stat. 2236, 2249 (1991)). This automatic process, however, was modified in part by the amendments imposed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), and altered by § 1815(a)(1)'s deposit insurance application system. Accordingly, § 222 should not be read as currently imposing any deposit-insurance requirement or, more importantly, a deposit-taking requirement.

C. Neither Section 5.20(e)(1) nor Any SPNB Charter Issued in the Future Would Violate the Supremacy Clause or the Tenth Amendment

In the 153-year history of the national bank system, it has been repeatedly established that the Supremacy Clause operates in concert with the National Bank Act to displace state laws or state causes of action that conflict with federal law or that prevent or significantly interfere with national bank powers. *See, e.g., Barnett Bank of Marion Cty. v. Nelson,* 517 U.S. 25 (1996); *Franklin Nat'l Bank v. New York,* 347 U.S. 373 (1954). As a federal regulation, Section 5.20(e)(1) preempts contrary state law. *See, e.g., Smiley,* 517 U.S. at 735 (1996); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141 (1982). Under these lines of authority, a fintech chartered as a national bank under Section 5.20(e)(1) would be entitled to the protections of the National Bank Act against state interference.

> It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking Act. So long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, therefore, the Comptroller has the power to preempt inconsistent state law.

CSBS v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983).

The Tenth Amendment is not implicated when the Constitution assigns authority to the federal government. "If a power is delegated to Congress in the Constitution, the Tenth

Amendment expressly disclaims any reservation of that power to the States." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." *Id.* Accordingly, the Tenth Amendment has no application to either Section 5.20(e)(1), or to any SPNB Charter issued in the future.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed on all counts for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

Date: January 7, 2019

Respectfully submitted,

/s/Gregory F. Taylor

JONATHAN V. GOULD
BAO NGUYEN
CHARLES M. STEELE
GREGORY F. TAYLOR
DC Bar No. 417096
DOUGLAS B. JORDAN
PETER C. KOCH
ASHLEY W. WALKER
GABRIEL A. HINDIN
MICHAEL K. MORELLI
Office of the Comptroller of the Currency
400 7th Street S.W.
Washington, D.C. 20219
(202) 649-6300 – phone
(202) 649-5709 – fax
gregory.taylor@occ.treas.gov
douglas.jordan@occ.treas.gov
peter.koch@occ.treas.gov
ashley.walker@occ.treas.gov
gabriel.hindin@occ.treas.gov
michael.morelli@occ.trea.gov

Attorneys for Defendants

EXHIBIT A

Office of the Comptroller of the Currency

Washington, DC 20219

Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters

July 31, 2018

It is the policy of the Office of the Comptroller of the Currency (OCC) to consider applications for national bank charters from companies conducting the business of banking, provided they meet the requirements and standards for obtaining a charter. This policy includes considering applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits.

This policy statement is based on broad authority granted to the OCC by the National Bank Act,[1] as implemented in existing regulation[2] and established OCC procedures.[3]

The OCC is issuing this policy statement to clarify its intent to exercise its existing chartering authority. The OCC also recognizes the importance of supporting responsible innovation in the federal banking system to better enable the system to

- evolve to meet the needs of the consumers, businesses, and communities it serves;
- operate in a safe and sound manner;
- provide fair access to financial services;
- treat customers fairly; and
- promote economic opportunity and job creation.

The OCC recognizes that the business of banking evolves over time, as do the institutions that provide banking services. As the banking industry changes, companies that engage in the business of banking in new and innovative ways should have the same opportunity to obtain a national bank charter as companies that provide banking services through more traditional means. The OCC will require these new entrants to the national banking system to adhere to the same high standards that apply to all national banks.

The OCC adopts this policy after careful consideration of the extensive stakeholder feedback and public comment received over the past two years.

---

[1] See 12 USC 21, 26, and 27.

[2] See 12 CFR 5.20.

[3] See *Comptroller's Licensing Manual*, specifically the "Charters" booklet (September 2016) and the *Comptroller's Licensing Manual* Supplement, "Considering Charter Applications From Financial Technology Companies" (July 2018).

OCC Chartering Authority

The National Bank Act gives the OCC broad authority to grant charters for national banks to carry on the "business of banking." This authority extends to special purpose national banks. As defined in the OCC's regulations, the "business of banking" includes any of the three core banking functions of receiving deposits, paying checks, or lending money. Section 5.20 of the OCC's regulations provides that, to be eligible for a national bank charter, a special purpose national bank must conduct at least one of these three core banking functions. Thus, the OCC has authority to grant a national bank charter to a fintech company that engages in one or more of those core banking activities.

OCC Support for Responsible Innovation

The federal banking system must adapt to the rapid technological changes taking place in the financial services industry to remain relevant and vibrant and to meet the evolving needs of the consumers, businesses, and communities it serves. The OCC encourages all national banks and federal savings associations to develop strategies that incorporate responsible innovation to address the changing operating environment and evolving needs and preferences of their customers. The OCC has developed an agency-wide framework to support responsible innovation throughout the federal banking system and established the Office of Innovation to serve as a clearinghouse for innovation-related matters and a point of contact for OCC staff, banks, and nonbanks to facilitate innovation-related activities.

Considering applications from fintech companies for national bank charters is one important way that the OCC supports responsible innovation in the federal banking system. Companies engaged in the business of banking should have a path to become a national bank, provided they meet the rigorous standards necessary to become and succeed as a national bank.

Chartering a qualified fintech company as a national bank would also have important public policy benefits. The national bank charter provides a framework of uniform standards and robust supervision. Applying this framework to fintech companies that qualify can level the playing field with regulated institutions and help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities. In addition, applying the OCC's uniform supervision over national banks, including fintech companies, will help promote consistency in the application of laws and regulations across the country and ensure that consumers are treated fairly. More broadly, providing a path for fintech companies to become national banks promotes consumer choice, economic growth, modernization, and competition—all of which strengthen the federal banking system and support the nation's economy.

Chartering Standards and Supervisory Expectations

The decision to consider national bank charter applications from qualifying fintech companies is consistent with the OCC's longstanding chartering standards and supervisory expectations. The OCC will use its existing chartering standards and procedures for processing applications from fintech companies as outlined in the *Comptroller's Licensing Manual*. As with all national banks, the OCC will consider whether a proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will treat customers fairly, and will comply with applicable laws and regulations. The OCC will also consider whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving the charter will foster healthy competition.

A fintech company that receives a national bank charter will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC would tailor these standards based on the bank's size, complexity, and risk profile, consistent with applicable law. In addition, a fintech company with a national bank charter will be supervised like similarly situated national banks, including with respect to capital, liquidity, and risk management.

The OCC also expects a fintech company that receives a national bank charter to demonstrate a commitment to financial inclusion. The nature of that commitment will depend on the company's business model and the types of products, services, and activities it plans to provide. By providing a high standard similar to the Community Reinvestment Act's expectations for national banks that take insured deposits, the financial inclusion commitment will help ensure that all national banks provide fair access to financial services and treat customers fairly.

In addition, a fintech company approved for a national bank charter will be required to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. The plan would outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective. The specific considerations related to supervision, capital, liquidity, financial inclusion, and contingency planning are described in the agency's supplement to the *Comptroller's Licensing Manual*, "Considering Charter Applications From Financial Technology Companies."

While the OCC is open and receptive to charter applications from qualified fintech companies, the OCC will not approve proposals that are contrary to applicable law, regulation, policy, or safety and soundness. Exercising the OCC's existing authority to grant special purpose charters does not alter existing barriers separating banking and commerce. Further, proposals that include financial products and services that have

predatory, unfair, or deceptive features or that pose undue risk to consumer protection, would be inconsistent with law and policy and would not be approved.

//signed//
_____
Joseph M. Otting
Comptroller of the Currency

July 31, 2018
_____
Date

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and JOSEPH M. OTTING, in his official capacity as Comptroller of the Currency, Defendants.	Civil Action No. 1:18-CV-02449

DECLARATION OF STEPHEN A. LYBARGER, DEPUTY COMPTROLLER FOR LICENSING, OFFICE OF THE COMPTROLLER OF THE CURRENCY, IN SUPPORT OF THE OCC'S MOTION TO DISMISS

I, Stephen A. Lybarger, do hereby declare:

1. I am Deputy Comptroller for Licensing with the Office of the Comptroller of the Currency (OCC). I have held this position leading the OCC's Licensing Division since October 1, 2010. I joined the OCC as a bank examiner in 1984 and have performed licensing work since 1989.
2. The Licensing Division is responsible for assuring that the corporate structure of national banks and Federal savings associations is established and maintained in accordance with the principles of a safe and sound banking system. In this role, pursuant to authority

delegated from the Comptroller, the Licensing Division receives, analyzes, and decides applications to establish, change the structure of, or change the activities performed by national banks, Federal savings associations, and Federal branches and agencies. The Licensing Division works closely with the OCC's supervisory and legal divisions to render independent decisions, supported by a strong record of facts and in compliance with applicable laws and regulations.

3. As Deputy Comptroller for Licensing, I lead the day-to-day activities of the OCC's Licensing Division. I oversee a staff of approximately forty-one (41) OCC employees located in Washington, D.C., at OCC headquarters, and located in the OCC's four district offices around the United States. Of those approximate 41 members of the Licensing Division, approximately twenty-nine (29) employees perform work related to processing applications for charters for national banks, Federal savings associations, and Federal branches and agencies.

4. In my capacity as Deputy Comptroller for Licensing, I am aware of all applications for national bank charters. Additionally, based on communications between the Licensing Division and potential applicants, I am aware of all applications that the OCC anticipates receiving. This knowledge includes all submitted and anticipated applications for special purpose national bank charters from financial technology companies that propose to engage in one or more of the core banking activities of paying checks or lending money, but would not take deposits ("SPNB Charters").

5. In my capacity as Deputy Comptroller for Licensing, I also have firsthand knowledge of the process and timeframes for receiving, processing, and potentially approving applications for national bank charters, including SPNB Charters.

6. As of this date, no application for an SPNB Charter has been filed with the OCC.

7. As of this date, the OCC has not, pursuant to 12 C.F.R. 5.20(e)(1), chartered a national bank that engages in one of the two core banking activities of paying checks or lending money, but does not take deposits.

8. The process and procedures for preparing to file an application for a national bank charter, including SPNB Charters, are described at 12 C.F.R. Part 5, Subpart B and in the Comptroller's Licensing Manual available at https://www.occ.gov/publications/publications-by-type/licensing-manuals/index-licensing-manuals.html, specifically in the Charters Booklet (rev. Sept. 2016), available at https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf

9. Application of these general processes and procedures to financial technology companies seeking SPNB Charters is further explained in the Comptroller's Licensing Manual Supplement published July 31, 2018 and entitled Considering Charter Applications From Financial Technology Companies, available at https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-considering-charter-applications-fintech.pdf .

10. The process for applying for an SPNB Charter involves several phases, including (a) the pre-filing phase, which may include the opportunity for a potential applicant to submit a draft application for feedback from the OCC; (b) the filing phase; (c) the review phase; and (d) the approval phase, involving (i) preliminary approval, (ii) organization, (iii) pre-opening examination, and (iv) final approval.

11. Only with final approval is a national bank issued a charter and authorized to open for business. *See* 12 C.F.R. §§ 5.20(d)(3), (i)(5)(ii)(B).

12. To initiate the pre-filing phase, those contemplating applying for an SPNB Charter are directed to contact the OCC's Office of Innovation to initiate a dialogue concerning the requirements to become a special purpose national bank and to discuss proposed business models. Supplement at 2, 4. Exploratory meetings with appropriate OCC staff, including the Licensing Division, will be scheduled to give a potential applicant an opportunity to understand the application process, to explain its proposal and reasons for seeking a charter, and to become acquainted with the bank regulatory environment. *Id.* If a company decides it may wish to pursue an SPNB Charter, it will meet with the Licensing Division in additional pre-filing meetings to more formally discuss the proposed bank's business plan, including a description of the proposed activities, the underlying marketing analysis supporting the business plan, the capital and liquidity needed to support the business plan, and the company's commitment to financial inclusion. *Id.*; Charters Booklet at 31-32.

13. At the discretion of the OCC, a potential applicant may be invited or allowed to submit a draft application during the pre-filing phase if it will help the OCC and the potential applicant better understand potential challenges inherent in unusual or complex proposals. The review of a draft application does not entail all steps involved in review of an application in the filing phase and the OCC's review of a draft application does not obligate the OCC to grant preliminary approval to an application subsequently filed.

14. If, after the pre-filing phase, a party remains interested in pursuing an SPNB Charter, it will then enter the filing phase. In the filing phase, the organizers of a proposed national bank will file an application with the Licensing Division that must detail the experience and expertise of the organizing group, management, and directors; contain a comprehensive business plan; address capital, liquidity, and funds management; and describe the proposed bank's commitment to financial inclusion.

15. The applicant must "publish a public notice of its filing in a newspaper of general circulation in the community in which the applicant proposes to engage in business, on the date of the filing, or as soon as practicable before or after the date of the filing." 12 C.F.R. § 5.8(a). Generally, a public comment period runs for 30 days following published notice. 12 C.F.R. § 5.10.

16. In the review phase, the OCC will analyze the application to assess whether the proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair treatment of customers, will ensure compliance with laws and regulations, and will foster healthy competition. 12 C.F.R. § 5.20(f); Supplement at 5. The OCC generally seeks to decide whether to grant preliminary conditional approval to a charter application within 120 days of filing or as soon as possible thereafter. Charters Booklet at 34, 39. An applicant may withdraw a charter application at any time.

17. At the conclusion of the review phase, the OCC will either deny the charter application or grant preliminary conditional approval. Charter Booklet at 39. A grant of preliminary conditional approval is not an assurance that the OCC will grant final approval for a bank charter. *Id.* Rather, preliminary conditional approval allows the OCC to impose standard and special requirements and conditions that the organizing group must satisfy before receiving a charter, *id.*, such as attaining minimum capital levels and developing a recovery and resolution plan. Supplement at 9-11.

18. Following preliminary conditional approval, the organizing group of the proposed national bank raises capital and prepares for opening for business. Preliminary conditional approval expires if a proposed national bank does not raise the required capital within 12 months from the date the OCC grants preliminary approval, absent an extension. 12 C.F.R. § 5.20(i)(5)(iv). Preliminary conditional approval also expires if a proposed national bank is not prepared to commence business within 18 months of the preliminary approval being issued. *Id.*

19. The OCC's bank examiners will visit the proposed national bank at least 14 days before its proposed opening to perform an examination to determine if the proposed national bank has met the conditions of the preliminary approval and to evaluate whether management and the board of directors are prepared for operations to commence. The OCC will not grant a final approval, and thus will not issue a charter, unless the proposed national bank passes this exam. Charters Booklet at 47.

20. Until final approval is granted and a charter issued, the OCC may alter, suspend, or revoke preliminary conditional approval should the OCC deem that any interim development warrants such action. Charters Booklet at 48. The OCC will issue a final approval once it determines that all key phases of organizing the bank have been completed, all requirements and conditions for final approval have been met, and the organizers have received any other necessary regulatory approvals. Supplement at 12.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Executed January 7, 2019 in Washington, D.C.

Stephen A. Lybarger

EXHIBIT C

Office of the Comptroller of the Currency
U.S. Department of the Treasury

NR 2018-74

FOR IMMEDIATE RELEASE
July 31, 2018

Contact: Bryan Hubbard
(202) 649-6870

OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies

WASHINGTON — The Office of the Comptroller of the Currency (OCC) today announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking.

"Over the past 150 years banks and the federal banking system have been the source of tremendous innovation that has improved banking services and made them more accessible to millions. The federal banking system must continue to evolve and embrace innovation to meet the changing customer needs and serve as a source of strength for the nation's economy," said Comptroller of the Currency Joseph M. Otting. "The decision to consider applications for special purpose national bank charters from innovative companies helps provide more choices to consumers and businesses, and creates greater opportunity for companies that want to provide banking services in America. Companies that provide banking services in innovative ways deserve the opportunity to pursue that business on a national scale as a federally chartered, regulated bank."

The OCC's decision is consistent with bi-partisan government efforts at federal and state levels to promote economic opportunity and support innovation that can improve financial services to consumers, businesses, and communities. The decision was documented in a policy statement and supplement to the OCC's *Comptroller's Licensing Manual*, both published today. The OCC's decision follows extensive outreach with many stakeholders over a two-year period, and after reviewing public comments solicited following the publication of *Exploring Special Purpose National Bank Charters for Fintech Companies* in December 2016, and *Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies* in March 2017.

In announcing the decision, the policy statement and *Comptroller's Licensing Manual Supplement* stress:

- Every application will be evaluated on its unique facts and circumstances.
- Fintech companies that apply and qualify for, and receive, special purpose national bank charters will be supervised like similarly situated national banks, to include capital, liquidity, and financial inclusion commitments as appropriate. Fintech companies will be expected to submit an acceptable contingency plan to address significant financial stress that could threaten the viability of the bank. The plan would outline strategies for restoring the bank's financial strength and options for

selling, merging, or liquidating the bank in the event the recovery strategies are not effective.
- The expectations for promoting financial inclusion will depend on the company's business model and the types of planned products, services, and activities.
- New fintech companies that become special purpose national banks will be subject to heightened supervision initially, similar to other de novo banks.
- The OCC has the authority, expertise, processes, procedures, and resources necessary to supervise fintech companies that become national banks and to unwind a fintech company that becomes a national bank in the event that it fails.

The OCC has statutory authority, regulations, and policies that govern its review and decision making with respect to chartering national banks, including special purpose national banks. That authority includes companies that engage in one of the core banking functions (paying checks, lending money, or taking deposits) and is described at 12 CFR 5.20(e)(1). That authority does not require the bank to take deposits within the meaning of the Federal Deposit Insurance Act and therefore would not require insurance from the Federal Deposit Insurance Corporation.

Qualifying fintech companies also may apply for federal charters under the OCC's authority to charter full-service national banks and other special purpose banks, such as trust banks, banker's banks, and credit card banks.

A national bank charter is only one option among many for companies engaged in the business of banking. Other options include pursuing state banking charters, appropriate business licenses, and partnerships with other federal or state financial institutions. The option to apply for a national bank charter allows these companies to choose the best business model and regulatory structure for their business and strategic goals, which will help them meet the needs of their customers throughout the nation.

"Providing a path for fintech companies to become national banks can make the federal banking system stronger by promoting economic growth and opportunity, modernization and innovation, and competition," Comptroller Otting said. "It also provides consumers greater choice, can promote financial inclusion, and creates a more level playing field for financial services competition."

Related Links

- OCC Policy Statement (PDF)
- *Comptroller's Licensing Manual Supplement: Considering Charter Applications From Financial Technology Companies* (PDF)

# # #

EXHIBIT D

Office of the
Comptroller of the Currency

COMPTROLLER'S LICENSING MANUAL SUPPLEMENT

Considering Charter Applications From Financial Technology Companies

July 2018

Contents

Introduction

Technological innovations have revolutionized the way financial products and services are delivered and have enabled the development of new products and services. Today, many financial products and services are more accessible, easier to use, and more tailored to the needs of customers than ever before. The Office of the Comptroller of the Currency (OCC) has determined that companies that offer innovative technology-driven products and services may be eligible for a national bank charter, provided they meet the chartering requirements and standards applicable to all national banks.[1] Those requirements and standards are established by statute at 12 USC 21, 26, and 27, and by the OCC's regulations at 12 CFR 5. Comprehensive, publicly available OCC guidance explains how the OCC applies these requirements and standards.

The requirements and standards that govern applications for a national bank charter do not change if the applicant's business model incorporates new delivery channels or mechanisms using new technology to meet evolving customer needs. Financial technology —or fintech— companies may seek to comply with those requirements and standards in ways tailored to their business models, their delivery channels, and the products and services they offer. This document describes the key factors the OCC will consider in evaluating charter applications from fintech companies that have nontraditional or limited business models, do not take deposits, and rely on funding sources different from those relied on by insured banks.

This Supplement to the *Comptroller's Licensing Manual* provides detail on how the OCC would evaluate applications for a special purpose national bank charter from fintech companies and clarifies the OCC's expectations that companies with a fintech business model demonstrate a commitment to financial inclusion. It also explains the contingency planning each bank will be expected to undertake. Finally, the document describes the OCC's approach to supervising newly chartered special purpose national banks.

This Supplement augments, and does not replace, the OCC's existing chartering guidance. *The Comptroller's Licensing Manual* comprises a series of booklets that set out the OCC's policies on bank charters and step-by-step procedures for potential applicants for all charter types, including special purpose national banks.[2] The *Comptroller's Licensing Manual* includes the "Charters" booklet, which is a key resource for those seeking a national bank charter. The "Charters" booklet

- describes OCC policies and procedures used in the charter application process and provides detailed guidance and instructions.
- discusses the factors that the OCC considers in deciding whether to grant a charter.

[1] The requirements and standards discussed in this supplement would also apply to a group of individuals (organizing group) or an unincorporated entity. The reference to "companies" reflects the interest in and inquiries made to the OCC from established fintech companies for a special purpose national bank charter.

[2] See the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*.

- describes the application process, including the prefiling process, filing, OCC review of the application, the decision, and the organization phase of the new bank.
- provides information about the ongoing supervision of a federally chartered bank.
- discusses issues specific to special purpose national banks.

All potential applicants for a special purpose charter should carefully read this Supplement in conjunction with the OCC chartering regulation (12 CFR 5) and the "Charters" booklet.[3]

As with all potential charter applicants, OCC staff stands ready to answer questions, explain the application process, and provide guidance to potential applicants. The OCC invites those contemplating a special purpose national bank charter to contact the OCC's Office of Innovation to begin a dialogue about what it takes to become a special purpose national bank.

What Is a Special Purpose National Bank?

A special purpose national bank is a national bank that engages in a limited range of banking or fiduciary activities, targets a limited customer base, incorporates nontraditional elements, or has a narrowly targeted business plan. Special purpose national banks include those banks whose operations are limited to certain activities, such as credit card operations, fiduciary activities, community development, or cash management activities. Special purpose national banks also include national banks that engage in limited banking activities, including one or more of the core banking functions of taking deposits, paying checks, or lending money.[4]

This Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter a special purpose national bank that would engage in one or more of the core banking activities of paying checks or lending money, but would not take deposits and would not be insured by the Federal Deposit Insurance Corporation (FDIC).[5] We refer to these banks in this Supplement as SPNBs.[6] Fintech companies that seek a national bank

[3] The OCC's regulation, 12 CFR 5, sets forth the OCC's rules, policies, and procedures for the corporate activities of a national bank and a federal savings association. The specific rules that apply to organizing a national bank are set forth in 12 CFR 5.20.

[4] Under 12 CFR 5.20(e)(1), a special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking activities: taking deposits, paying checks, or lending money. Beyond those core activities, the activities of an SPNB are limited to those that are permissible for national banks under a statute, regulation, or federal judicial precedent, or that the OCC has determined to be permissible. See e.g. 12 USC 24(Seventh); 12 CFR 7.5002; *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995).

[5] The OCC views the National Bank Act as sufficiently adaptable to permit national banks to engage in traditional activities like paying checks and lending money in new ways. For example, facilitating payments electronically may be considered the modern equivalent of paying checks. Applicants proposing to engage in activities not already addressed in statute, regulation, or OCC precedent should consult the OCC with respect to the permissibility of those activities.

[6] This Supplement does not apply to other types of special purpose banks. For example, this Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

charter and plan to take insured deposits would be required to obtain FDIC insurance and should apply for a full-service national bank charter.

As a national bank, an SPNB will be subject to the laws, rules, regulations, and federal supervision that apply to all national banks. In addition, all SPNBs will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC will tailor these standards based on the bank's business model, size, complexity, and risks, consistent with applicable law. For example, to approve a charter as an SPNB, the OCC may need to account for differences in business models and activities, risks, and the inapplicability of certain laws resulting from the uninsured status of the bank.

To address some of these differences, companies seeking a charter as an SPNB will be expected to make a commitment to financial inclusion and develop and adhere to a contingency plan that includes options to sell, wind down, or merge with a nonbank affiliate, if necessary.

Application Process: Overview

The OCC charters national banks under the authority of the National Bank Act of 1864, as amended.[7] In evaluating whether to approve an application to establish a national bank, the OCC must determine whether the proposed bank has complied with all statutory and regulatory requirements and has met the OCC's chartering standards.[8] The OCC uses its established chartering standards and procedures as the basis for processing applications for all national banks, including SPNBs.[9]

The OCC's application process for a national bank consists of four phases:

1. A prefiling phase, in which potential applicants engage with the OCC in formal and informal meetings to discuss the proposal, the chartering process, and application requirements.
2. The filing phase, in which the organizers submit a complete application.
3. The review phase, in which the OCC reviews and analyzes the application to assess whether the proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair

[7] See 12 USC 21, 26, and 27.

[8] See 12 CFR 5.20 (describing the OCC's statutory chartering authority and the procedures and requirements governing the OCC's review and approval of an application to establish a national bank, including a bank with a special purpose). Special purpose bank charter applicants generally must provide the information required by the OCC's standard review process. Applicants, however, should tailor the contents of the application to be consistent with the business model of the proposed special purpose bank.

[9] See 12 CFR 5.20(l)(1) (directing applicants for a special purpose charter to adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC). See also the "Charters" booklet of the *Comptroller's Licensing Manual*.

treatment of customers, will ensure compliance with laws and regulations, and will foster healthy competition.[10]

4. The decision phase, in which the OCC decides whether to approve a charter application. The decision phase includes the preliminary conditional approval stage, in which the OCC imposes requirements and conditions for receiving a charter; the organization stage, in which the bank raises capital and prepares for opening; and the final approval stage.

The Supplement highlights key aspects of each phase of the application process. The "Charters" booklet of the *Comptroller's Licensing Manual* includes an in-depth discussion of each of these phases. Potential applicants are encouraged to familiarize themselves with the "Charters" booklet and the requirements for a national bank charter before initiating the application process.

Prefiling Communications

The OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the application process. The OCC strongly encourages potential applicants to engage with the OCC well in advance of filing a charter application to better understand the application process and the OCC's requirements and expectations.

A fintech company interested in an SPNB charter should contact the Office of Innovation, innovation@occ.treas.gov. After the initial dialogue, the Office of Innovation may arrange further discussions with appropriate OCC staff, including the Licensing Department (Licensing), to give the company an opportunity to understand the application process, explain its proposal and reasons for seeking a charter, and become acquainted with the bank regulatory environment.

If the company decides to pursue a charter, one or more additional meetings will be scheduled, as determined by Licensing. For these additional meetings, organizers should be prepared to discuss the proposed bank's business plan, including a description of the proposed activities, the underlying marketing analysis supporting the business plan, the capital and liquidity needed to support the business plan, as well as a contingency plan to remain viable under significant financial stress. The company also should be prepared to address how it proposes to demonstrate a commitment to financial inclusion. These meetings will enable early identification of issues related to the proposed business plan, management, capital, and other requirements for a charter. The meetings will also give the OCC an opportunity to provide feedback on the proposal and discuss any legal, policy, or supervisory issues that may be relevant to the proposal and that would need to be resolved in connection with the final application. Licensing also will determine whether the organizers should submit a draft application before filing a formal application.[11]

[10] See 12 CFR 5.20(f).

[11] The OCC employs the draft application process to better understand the potential challenges inherent in unusual or complex filings and the major obstacles from a policy or risk perspective. Filing a draft application does not guarantee that the OCC will approve a formal application.

Filing a Charter Application

After the prefiling phase, organizers would file a charter application. The filing procedures for an SPNB will be substantially the same as those that would apply to any other national bank. For example, the application must be published[12] and made available to the public for comment.[13] For details on filing and publishing notice of an application, see 12 CFR 5 and the "Charters" booklet of the *Comptroller's Licensing Manual*.

OCC Review of the Application

Key Considerations

The OCC begins the process of reviewing the application as soon as it is filed.[14] In its review, the OCC will consider whether the proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair treatment of customers, and will ensure compliance with laws and regulations.[15] The OCC's regulations set forth additional considerations, including whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving its charter will foster healthy competition.[16]

In evaluating whether the applicant has met these standards, the OCC will consider an applicant's business model and proposed risk profile. It will also consider, among other factors, whether the proposed bank has a business plan that articulates a clear path and timeline to profitability, has adequate capital and liquidity to support the projected volume, and has organizers and management with appropriate skills and experience.[17]

---

[12] The applicant must publish notice of its charter application in the community in which the proposed bank will be located as soon as practicable before or after the date of the filing. See 12 CFR 5.8. Because many SPNBs will operate online and nationally, the OCC will consider and discuss with the applicant alternative locations or methods where publication of this notice would be appropriate.

[13] The public comment period runs for 30 days after publication of the public notice. See 12 CFR 5.10. The OCC maintains a public file of the application and makes it available to any person requesting it; the public file is also available on the OCC's website, and the OCC publishes notice of the application in its Weekly Bulletin. Applicants may request that confidential treatment be afforded to certain parts of the application, for example, those containing proprietary information. See 12 CFR 5.9.

[14] See *Comptroller's Licensing Manual*, "Charters" booklet. The OCC seeks to make a decision on a complete and accurate application within 120 days after receipt or as soon as possible thereafter. The OCC's review of a special purpose charter application, however, may require additional time and scrutiny.

[15] See 12 USC 1(a) and 12 CFR 5.20(f)(1). See also *Comptroller's Licensing Manual*, "Charters" booklet.

[16] See 12 CFR 5.20(f)(2) and *Comptroller's Licensing Manual*, "Charters" booklet.

[17] The "Charters" booklet provides detailed information on each of these factors.

The charter review process is comprehensive and takes into account all aspects of the applicant's individual business model, governance structure, and risk profile. Highlighted below are some of the key considerations the OCC will assess in determining whether to grant an SPNB charter to a fintech company.[18]

Organizers, Management, and Directors

The organizers, managers, and directors are critical to the success of an SPNB, as they are for all banks. The OCC expects them to be well qualified, with diverse experience in relevant areas.[19] Although the OCC would expect some members of the organizing group, the proposed board of directors, and management to have experience in banking or broader financial services, other relevant experience will depend on the specific products or services offered by the proposed bank. In addition, the OCC will consider whether the organizers, managers, and directors have other financial and business expertise and experience in highly regulated industries, including relevant experience needed to implement the proposed bank's business plan. Since fintech companies are technology-driven, having sufficient technical knowledge, skills, and experience will be as necessary as having sufficient banking and financial experience.

OCC regulations and licensing policies, including those outlined in the "Charters" booklet of the *Comptroller's Licensing Manual*, provide additional guidance regarding the qualifications of organizers, managers, and directors, as well as the respective roles of each. These criteria and qualifications are generally applicable to SPNBs, although the OCC may tailor certain criteria as appropriate.

Business Plan

All applicants for a national bank charter must submit a comprehensive business plan to the OCC.[20] Having a comprehensive plan is critical to the OCC's decision on whether to approve a national bank charter. The OCC expects a company seeking any type of national bank charter to articulate why it is seeking a national bank charter and to provide significant detail about the proposed bank's activities. Proposals from companies without an established business record will be subject to a higher degree of scrutiny to evaluate whether the proposed bank has a reasonable likelihood of long-term success.

The business plan is an integral part of the management and oversight of a newly chartered or de novo bank and should establish the bank's written goals and objectives. The plan also

[18] The key considerations contained in this Supplement are based on the OCC's extensive internal review and analysis of whether to entertain SPNB applications, as well as the comments it has received from the public and stakeholders including fintech companies, banks, community and consumer groups, and trade associations.

[19] OCC regulations and licensing policy provide guidance regarding the qualifications of organizers, managers, and directors, as well as the respective roles of each. See 12 CFR 5; the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*; and *The Director's Book*.

[20] See 12 CFR 5.20(h). This regulation details specific items that should be addressed in a business plan, including earnings prospects, management, capital, community service, and safety and soundness.

summarizes and explains how the bank will organize its resources to meet its goals and measure its progress.

The business plan also should describe the bank's proposed activities. Questions about the permissibility of the applicant's proposed activities should be raised by the applicant (and may also be raised by the OCC) early in the discussion of the applicant's proposal. In a case in which the permissibility of an activity has not previously been established, OCC staff may advise the applicant to request a legal opinion from the OCC's Chief Counsel's Office.

In addition, the business plan should clearly define the market that the proposed bank plans to serve and the products and services it will offer. It should identify the proposed bank's customer base and contain realistic forecasts regarding market demand, economic conditions, competition, and financial projections, under normal and stressed conditions. The basis for the applicant's forecasts should also be included.

A key element of the applicant's business plan is a description of the proposed bank's risk management framework to identify, measure, monitor, and control risks. This description should include a discussion of how the board will monitor adherence to the business plan and adjust or amend the plan as appropriate to accommodate significant or material changes.

The business plan should also describe the bank's proposed internal system of controls to monitor and mitigate risk, including management information systems. The discussion of internal controls should include a general description of the controls for ensuring customer transaction and data integrity, security, and auditability, as well as overviews of the operational architecture, security framework, and resiliency structures.[21] Independent testing of the business activities, systems and controls, and compliance management systems should also be addressed.[22] Further, the business plan should address any functions or services that will be outsourced to a third party and the third-party risk management processes that are commensurate with the level of risk and complexity of those third-party relationships.

The applicant should also provide a risk assessment with the business plan. The risk assessment should demonstrate a realistic understanding of risk and describe management's assessment of all risks inherent in the proposed business model and products and services, including risks relating to third-party service providers, cybersecurity, Bank Secrecy Act (BSA) and anti-money laundering (AML) requirements, Office of Foreign Assets Control economic sanctions obligations, consumer protection, and fair lending. The risk assessment should set out the degree of risk the bank intends to assume (its risk appetite) and how it would manage the identified risks. The risk assessment should factor in the target markets'

[21] Applicants should review 12 CFR 30, appendix B, "Interagency Guidelines Establishing Information Security Standards." These guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information and for disposing of consumer information.

[22] Such independent testing may be performed internally or may be outsourced but should be performed by someone independent of the day-to-day functions of the business activities, systems, and controls and who has the requisite skills to identify program or control weaknesses.

economic and competitive conditions, including the proposed products, services, and customers; the targeted geography (e.g., regional, nationwide); and any regulatory considerations regarding serving those markets.[23]

Detailed guidance regarding the business plan is available in the "Charters" booklet of the *Comptroller's Licensing Manual*.[24] Additional information on the OCC's expectations regarding a bank's risk management and corporate governance framework may be found in appendix A to this Supplement, "Supervisory Considerations."

Capital and Liquidity

The OCC's evaluation of a bank's capital is important not only to assess the strength of an individual bank but also to maintain the safety and soundness of the entire banking system. Bank capital also helps to ensure public confidence in the stability of individual banks and the banking system; supports the volume, type, and character of the business conducted; and provides for the possibilities of loss.

For an SPNB, minimum and ongoing capital levels should be commensurate with the risk and complexity of the proposed activities. An SPNB will be subject to the minimum leverage and risk-based capital requirements in 12 CFR 3 that apply to all national banks. These requirements, however, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, set a floor and may not be sufficient for measuring capital adequacy for some SPNBs.

For example, the risks posed by an SPNB with limited on-balance-sheet assets or nontraditional strategies may not be fully captured in its reported assets and off-balance-sheet exposures. To account for this gap, organizers will be expected to propose a minimum level of capital that the bank will meet or exceed at all times. Organizers will determine this minimum level of capital through a capital adequacy assessment that considers quantitative and qualitative factors, such as the volume of off-balance-sheet activity conducted and the risks associated with the applicant's business plan. The OCC will evaluate the applicant's capital adequacy assessment.

Capital adequacy should be addressed in the business plan. Organizers should analyze and support the minimum capital levels the bank will adhere to until it can achieve and sustain

[23] For any SPNB that provides retail bank services, the applicant should describe a BSA/AML compliance program (12 CFR 21.21) reasonably designed to assure and monitor compliance with BSA recordkeeping and reporting requirements, and a consumer compliance program designed to ensure fair treatment of customers and to promote fair access to financial services as well as compliance with section 5 of the Federal Trade Commission Act, the Unfair, Deceptive, and Abusive Acts or Practices prohibitions of the Dodd–Frank Consumer Protection and Wall Street Reform Act of 2010, and all other applicable consumer financial protection laws and regulations.

[24] The "Charters" booklet of the *Comptroller's Licensing Manual* includes a link to the OCC's Business Plan Guidelines. The Business Plan Guidelines provide information on the general elements of a business plan, including a description of the business; marketing plan; management plan; compliance management; the financial management plan; records, systems, and controls; and financial projections.

profitable operations. In addition, organizers should propose minimum capital levels the bank will adhere to after profitability that would be appropriate for its ongoing operations. Organizers also should discuss how the bank would address adverse market conditions that could deplete capital, such as broad market volatility or volatility specific to a business line. Additional factors that organizers should consider include the following:

- On- and off-balance-sheet composition, including credit risk, concentration risk, and market risk.
- Operational risk, including third-party relationships, and compliance risk associated with nontraditional products, services, or operating characteristics.
- Proposed activities and anticipated volume (new accounts, transactions) and impact on capital.
- Plans and prospects for growth, including any material action necessary to address business activity that is either below or above expectations and management's past experience in managing growth.
- Stability or volatility of sources of funds and access to capital.[25]

If the OCC grants preliminary conditional approval for an SPNB charter, that approval will include a condition specifying a minimum capital level the bank must maintain or exceed at all times.[26] This amount would be based on the analysis of quantitative and qualitative factors, including those described above. The OCC expects that capital in an SPNB would increase beyond the initial minimum amount as the size, complexity, and corresponding risks of the bank evolve.

In addition to capital, the organizers should address liquidity and funds management. Liquidity is a bank's capacity to readily meet its cash and collateral obligations at a reasonable cost without adversely affecting either daily operations or the bank's financial condition.[27] Since SPNBs are uninsured and likely to rely on funding that is potentially more volatile in certain environments, organizers should describe how the SPNB can be funded and maintain sufficient liquidity under stressed conditions. The OCC will consider the proposed bank's specific business model when evaluating the bank's liquidity profile and

[25] For additional guidance on capital considerations, please see the "Capital and Dividends" booklet of the *Comptroller's Licensing Manual*.

[26] The OCC tailors capital requirements for other special purpose banks. For example, the OCC typically imposes capital requirements on trust banks in addition to the minimum requirements calculated according to 12 CFR 3. Because trust banks do not make loans or rely on deposit funding, the OCC typically requires them to hold a specific minimum amount of capital, which often exceeds the capital requirements for other types of banks.

[27] For additional details regarding liquidity, applicants may refer to the "Liquidity" booklet of the *Comptroller's Handbook*.

processes for monitoring and mitigating liquidity risk.[28] Based on an analysis of the proposed SPNB's business model, the OCC may impose requirements tailored to the bank's funding model, structure, and risks to ensure it maintains adequate liquidity at all times and in all economic environments. Such requirements could include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

Financial Inclusion

Consistent with the agency's mission to ensure fair treatment of customers and fair access to financial services, the OCC expects any entity seeking an SPNB charter to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers.[29] The nature of that commitment will depend on the proposed bank's business model, and the types of products, services, or activities it intends to provide.

An SPNB applicant should describe the proposed bank's commitment to financial inclusion in its application. The description should include the proposed goals, approaches, activities, milestones, commitment measures, and metrics for serving the anticipated market and community consistent with the bank's activities, business model, and product and service offerings. For more information on the OCC's expectations regarding financial inclusion, see appendix B to this Supplement, "Financial Inclusion Commitment Guidance."

Contingency Planning

Before receiving final approval for a charter, an SPNB will be required to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. The contingency plan should outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective.[30] The format and content of the plan are flexible and should be tailored to the bank's specific business and reviewed and updated as the bank's business evolves.

As a condition for preliminary approval of a charter, an SPNB will be required to develop the contingency plan during the bank's organization phase. The OCC's final approval will require the bank to implement and adhere to the plan. The bank will be expected to review the contingency plan annually and update it as needed. Any significant changes to the contingency plan will require the non-objection of the appropriate supervisory office.

---

[28] National banks, including SPNBs, that meet certain asset thresholds are automatically subject to additional liquidity requirements under 12 CFR 50, including banks with total consolidated assets equal to $250 billion or more, and banks with total consolidated on-balance-sheet foreign exposure equal to $10 billion or more.

[29] See 12 USC 1(a).

[30] "OCC's Guidelines Establishing Standards for Recovery Planning for Certain Large Insured National Banks, Insured Federal Savings Associations and Insured Federal Branches," in 12 CFR 30, appendix E may be a useful resource for SPNBs developing strategies to restore the bank to financial viability.

Other Important Considerations

Coordination With Other Regulators

Depending on the structure of the proposed SPNB, regulators in addition to the OCC may have oversight and supervisory roles over the bank. In considering applications for SPNB charters, the OCC will coordinate as appropriate with other regulators to facilitate consideration of any applications or approvals that may be required by those regulators.

Continuation of Remedies

The OCC does not permit companies that are the subject of a corrective program or enforcement action by another regulator to avoid the consequences of that corrective program or enforcement action. A pending enforcement action with respect to a significant supervisory matter may be grounds for denial of a charter application. Otherwise, after consultation with the other regulator, the OCC will ensure that a company's obligation to remediate or pay penalties for any violations or deficiencies cited or identified by another regulator is carried forward and enforced through conditions imposed on an approval of an SPNB charter.

The Chartering Decision

The OCC grants approval of a charter application in two steps: preliminary conditional approval and final approval.[31] The period between the preliminary conditional approval and final approval is referred to as the organization phase.[32] The OCC will issue a final approval once it determines that all key phases of organizing the bank have been completed, all requirements and conditions for final approval have been met, and the organizers have received any other necessary regulatory approvals.

The OCC imposes certain conditions in connection with the approval of all new national bank charters, including special purpose national banks.[33] The conditions may address a variety of issues, such as guaranteeing maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan. Other conditions include ensuring that the bank does not significantly deviate from the business model proposed in its application without obtaining the OCC's prior non-objection.[34]

The OCC also will impose conditions that are specific to SPNBs or unique to an individual SPNB. For example, because SPNBs are uninsured, the OCC will require the bank to develop a contingency plan that includes options to sell itself, wind down, or merge with a nonbank affiliate, if necessary. In addition, the OCC may impose conditions similar to requirements in statutes that apply by their terms only to insured banks, for instance a condition requiring the bank to demonstrate a commitment to financial inclusion.[35]

---

[31] Following review of the application, the OCC determines whether to grant preliminary conditional approval or deny the application. A preliminary conditional approval determination indicates the OCC's permission to proceed with the organization of the bank according to the business plan set forth in the application and specifies the conditions for approval. Granting preliminary conditional approval provides the organizers of the bank with assurances that the application has passed the first phase of OCC review before the organizers expend additional funds to raise capital, hire officers and employees, and fully develop policies and procedures. It is not an assurance that the OCC will grant final approval for a new bank charter.

[32] For additional information on the organization phase, see the "Charters" booklet of the *Comptroller's Licensing Manual*.

[33] The OCC also imposes a number of requirements on a bank when it grants preliminary conditional approval. Examples of such requirements include establishing appropriate policies and procedures and adopting an internal audit system appropriate to the size, nature, and scope of the bank's activities. The organizers must satisfy these requirements before the OCC grants final approval. These requirements are discussed in the "Charters" booklet of the *Comptroller's Licensing Manual*.

[34] See the "Charters" booklet of the *Comptroller's Licensing Manual* for a discussion of conditions that may be imposed in connection with a charter application. The condition regarding a significant deviation from the business plan is discussed in appendix F, "Significant Deviations After Opening."

[35] Certain provisions in the Federal Deposit Insurance Act, such as section 1831p-1 (safety and soundness standards) and section 1829b (retention of records), only apply to insured depository institutions. When a law does not apply directly, the OCC may, through a charter condition, work with the bank to achieve the goals of a particular statute or regulation, taking into account relevant differences between a full-service bank and a special purpose bank.

In addition, the OCC will impose assessments on an SPNB as a condition of approval. The OCC is funded through assessments and fees charged to the banks it supervises, and SPNBs will be subject to periodic assessments, just as other national banks are.[36] The OCC has modified the assessments it charges to other special purpose national banks to account for the banks' activities and the assets they hold.[37] The OCC would determine assessments for an SPNB based on similar factors tailored to the business model of the SPNB.

These charter conditions are enforceable and generally will remain in place until removed or modified by the OCC.[38] Compliance with these conditions will be reviewed by the OCC during the examination process.[39]

Supervision of Approved SPNBs

After the OCC issues final approval and the bank opens for business, the OCC will supervise the SPNB, as it does all other national banks, under a scheduled supervisory cycle, including on-site examination and periodic off-site monitoring. The OCC sets high expectations for the entities it supervises. Like all de novo institutions, newly chartered SPNBs will be subject to rigorous ongoing oversight to ensure that the bank's management and the board of directors are properly executing their business strategy and the bank is meeting its performance goals.

Key supervisory considerations for SPNBs are highlighted in appendix A to this Supplement. For additional information on specific areas of bank supervision such as internal controls and corporate and risk governance, applicants should refer to the booklets of the *Comptroller's Handbook*.

[36] See 12 USC 16 and 481; and 12 CFR 8.

[37] Additional assessments are required of certain national banks. See, e.g., 12 CFR 8.2(c) and 8.6(c) (additional assessments imposed on independent credit card banks and independent trust banks). As it gains experience, the OCC may amend its rules to address assessments for SPNBs.

[38] Conditions imposed in connection with a charter are considered "conditions imposed in writing" and are enforceable under 12 USC 1818.

[39] These conditions may be imposed in the preliminary approval letter and the final approval letter (together, conditional approval letters). The OCC also may require that the applicant enter into an operating agreement with the OCC. The OCC publishes all conditional approval letters on its website on a monthly basis. The OCC does not generally publish operating agreements. A conditional approval letter, however, will disclose the existence of an operating agreement. The special purpose charters section of the "Charters" booklet of the *Comptroller's Licensing Manual* has additional information on operating agreements and other documents used for some special purpose national trust banks.

Appendixes

Appendix A: Supervisory Considerations

OCC Supervisory Framework

The supervisory framework for SPNBs will incorporate core elements already in place for all national banks. These elements include an assigned supervisory office, an assigned portfolio manager, a supervisory strategy tailored to the bank's business model, and a blend of on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team. In addition to the statutory examination requirements[40] and consistent with longstanding OCC de novo supervision policy, newly chartered SPNBs will be subject to more frequent and intensive supervision in their early years of operation. The scope of supervision activities will follow a risk-based approach commensurate with the size and complexity of the institution, focusing on any elevated risks and unique supervisory challenges presented by a given SPNB. SPNB examination and supervision activities will also include frequent contact with the board of directors and bank management.

OCC executive management will assess the OCC's ability and willingness to supervise an eligible SPNB based on the OCC's risk appetite, resources, and skill sets needed. The executives will collaborate with the Office of Innovation, Legal, and Licensing staff in making their decisions on proposed SPNB charters. Similar to the OCC's supervision framework for existing special purpose banks, the OCC will identify the appropriate supervisory office for ongoing supervision. In addition, each bank will have an assigned portfolio manager who will serve as the primary point of contact and examiner-in-charge for the institution. The portfolio manager and the examination team will have subject matter expertise appropriate for the bank's business model. In addition, licensing and risk specialists, legal staff, and other subject matter experts will be assigned to each bank, as appropriate.

Rating Framework

SPNBs will be subject to the same ratings framework, including applicable specialty ratings, as other national banks. As outlined in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*, national banks are assessed in accordance with the Uniform Financial Institutions Rating System. Composite ratings are based on an evaluation of an institution's managerial, operational, financial, risk management, and compliance performance.

Under this uniform rating system, the OCC ensures that all national banks are evaluated in a comprehensive and uniform manner and that supervisory attention is focused appropriately on those banks that exhibit financial and operational weaknesses or adverse trends. The rating system, commonly referred to as CAMELS, assesses components of a bank's

[40] As national banks, SPNBs will be subject to the statutory examination cycle prescribed by 12 USC 1820(d).

performance including capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk, as well as specialty areas such as information technology, trust (if applicable), and consumer compliance.

Risk Management Framework

The OCC expects every national bank to have an appropriate risk management framework to address all relevant risks to the bank.[41] The structure, sophistication, and oversight of these systems should be commensurate with the complexity and amount of risk a bank assumes. Regardless of the bank's size or complexity, a sound risk management framework should do the following:

- **Identify risk:** Banks must recognize and understand existing risks and risks that may arise from new business initiatives, including risks posed by third-party relationships, by external market forces, or by regulatory or statutory changes. Risk identification should be a continuing process and occur at both the transaction and portfolio levels.
- **Measure risk:** Banks must have effective risk management systems that measure risks accurately and in a timely manner. A bank that does not have an effective risk measurement system has limited ability to control or monitor risk levels.
- **Monitor risk:** Banks must monitor risk levels to ensure timely review of risk positions and exceptions to risk limits. Monitoring reports must be timely, accurate, and relevant, and should be distributed to appropriate individuals to ensure action, when needed.
- **Control risk:** Banks must establish and communicate risk limits through policies, standards, and procedures that define responsibilities and authority. These limits serve as a means to control exposures to the various risks associated with the bank's activities.

The OCC employs a risk-based supervisory philosophy focused on evaluating risk, identifying material and emerging problems, and ensuring that individual banks take corrective action before problems compromise their safety and soundness or result in the unfair treatment of customers. This supervision-by-risk approach provides a consistent definition of risk and a system for assessing risks (known as the Risk Assessment System or RAS), and it integrates risk assessment into the supervisory process. The RAS is applicable to all risks identified across a bank and can include (although it is not limited to) credit risk, information technology systems and controls, operational risk, cybersecurity risk, liquidity and funds management, compliance risk, and strategic and reputation risks. Following risk evaluations, the supervisory office tailors and conducts supervisory activities based on the risks identified, and periodic testing is completed in order to validate a bank's risk assessment.

[41] For additional information on the risk management framework, see the "Corporate and Risk Governance" booklet of the *Comptroller's Handbook*.

Corporate Governance Framework

As with all national banks, the OCC expects the governance structure for any proposed SPNB to be commensurate with the risk and complexity of its proposed products, services, and activities. The OCC expects national banks to have expertise, financial acumen, and a risk management framework that includes governance and well-defined roles among the bank's business units, support functions, and the internal audit function.[42]

The board of directors must have a prominent role in the overall governance structure by participating on key committees and guiding the bank's overall strategy and risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

Ongoing Communication

The OCC is committed to ongoing communication with the banks it supervises and with other banking regulators. This includes formal and informal conversations, meetings, examination reports, and other written communications. At a minimum, the OCC must provide a bank's board of directors a report of examination (ROE) at least once each supervisory cycle. The ROE conveys the bank's overall condition, ratings, and risk assessment summary. It also summarizes examination activities and findings identified during the supervisory cycle.[43]

[42] Internal audit (including co-sourcing and outsourced arrangements) must be an independent function and report directly to the audit committee of the board of directors. For additional information on the audit function, see the "Internal and External Audits" booklet of the *Comptroller's Handbook*.

[43] Additional information about communications can be found in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*.

Appendix B: Financial Inclusion Commitment Guidance

Financial Inclusion Commitment

Consistent with the agency's mission to ensure fair treatment of customers and fair access to financial services, the OCC expects any entity seeking an SPNB charter to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers. The nature of that commitment will depend on the proposed bank's business model, and the types of products, services, or activities it intends to provide.

Considerations

Initial Description

In completing the charter application, each SPNB applicant should identify the financial services needs of underserved markets that could be met by the SPNB's products, services, and activities. An applicant should include a description of its financial inclusion commitment that addresses the proposed bank's

- products, services, and activities.
- anticipated markets and communities, including underserved populations or communities, including low- and moderate-income customers.
- goals, milestones, commitment measures (e.g., the applicant's loan origination volumes for lenders, average pooled account balances and transaction volumes for payment entities), and metrics (e.g., the measure as a percentage of activity in anticipated markets and communities, such as the share of lending to low- and moderate-income borrowers).

Policies and Procedures

During the organization phase, following preliminary conditional approval, the SPNB will develop policies and procedures that address the SPNB's implementation of its financial inclusion commitment.

Before final approval, the OCC will review and evaluate the SPNB's policies and procedures related to the financial inclusion commitment and will consider the following:

- The SPNB's ability, efforts, and commitment to meet various community credit and other financial service needs, including those of underserved populations or communities, based on the applicant's projected financial condition and size, economic conditions in the anticipated markets and communities, and other factors.
- Investments, partnerships, ongoing outreach, and collaboration strategies, or expected participation in governmentally insured, guaranteed, or subsidized loan programs that the SPNB will use to achieve its financial inclusion objectives.

- Other factors that reasonably bear upon the extent to which the SPNB will help meet the credit and other financial services needs of the anticipated market and community, including underserved populations or communities.
- The SPNB's process to meet the needs of the anticipated market and community on a continual basis, including its process to update or modify its financial inclusion commitment in appropriate circumstances, and material changes to the products or services offered or the markets and communities served.

The SPNB's commitment to financial inclusion is ongoing through the life of the charter. Financial inclusion commitment-related conditions imposed as part of any final approval will remain in place and will be reviewed for compliance during the examination process.

EXHIBIT E

DIST.	OFF.	YR.	NUMBER	MO.	DAY	YEAR	ORIG.	FILE NO.	CODE	DEMAND	MAG. NO.	JURY	SEM.	YR.	NUMBER
113A	3	84	1403	12	14	84	3	430	1	Nearest $1,000	J 3A12 M	12031		84	1403

PLAINTIFFS

1.00 INDEPENDENT BANKERS ASSOCIATION OF AMERICA, a corporation;

2.00 COMMUNITY BANKERS OF FLORIDA, INC., a corporation

3.00 FLORIDA BANKERS ASSOCIATION, INC., a corporation

4.00 BARNETT BANK OF JACKSONVILLE, N.A., a national banking association

5.00 BARNETT BANK OF MARTIN COUNTY, N.A., a national association

DEFENDANTS

6.00 C. T. CONOVER, in his official capacity as the Comptroller of the Currency, of the United States

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

5 U.S.C. Section 702. A.P.A. Challenge to Comptroller of the Currency approval of nonbank national banks.

ATTORNEYS

~~(1.00 - 2.00)~~
~~LEONARD J. RUBIN, ESQUIRE~~
(02/27/87)
~~Jones, Day, Reavis & Pogue~~
~~Metropolitan Square - Suite 600~~
~~655 Fifteenth Street, N.W.~~
~~Washington, D.C. 20005-5701~~
~~(202) 879-5400~~

and

~~PHILIP S. CORWIN, ESQUIRE~~
~~Independent Bankers Assn. of America~~
~~1625 Massachusetts Ave., N.W.~~
~~Washington, D.C.~~ (03-25-87)

(3.00) (1.00 - 2.00)
J. THOMAS CARDWELL, ESQUIRE
MICHAEL P. McMAHON, ESQUIRE
Akerman, Senterfitt & Eidson
17th Floor, CNA Tower
Orlando, Florida 32802
(305) 843-7860

(6.00)
DOROTHEA BEANE, ESQUIRE
Assistant U.S. Attorney
P. O. Box 600
Jacksonville, Florida 32202
(904) 791-2682

and

SANDRA M. SCHRAIBMAN, ESQUIRE
CHARLES SORENSON, ESQUIRE
NEIL H. KOSLOWE, ESQUIRE
Dept. of Justice
10th and Pennsylvania Avenue, N.W.
Room 3644
Washington, D.C. 20530
(202) 633-2809
FTS 633-3418

and

EUGENE M. KATZ, ESQUIRE
LISE HAUPT, ESQUIRE
MARK L. LEEMON, ESQUIRE
Litigation Division
Office of the Comptroller of the Currency
Washington, D.C. 20219 (202) 447-1893

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID
SEE ADD. LIST OF ATTY.

DATE	RECEIPT NUMBER	C.D. NUMBER
	CLOSED	

STATISTICAL REPORTS PROCESSED
Filing 01/85
Termination 09-11-87
Change

~~UNITED STATES DISTRICT COURT DOCKET~~

DC-111 (Rev. 7/85)

DATE	NR.	PROCEEDINGS	
.2/14/84	1	VERIFIED COMPLAINT for Declaratory and Injunctive Relief.	jc
DRB	2	MOTION for Preliminary Injunction by Pltfs.	jc
	3	AFFIDAVIT in Support of Motion for Preliminary Injunction by Pltfs.	jc
	*	PROPOSED Order Granting Preliminary Injunction on (2) rec'd.	jc
	*	SUMMONS/NOTICE of Consent issued as to ROBERT W. MERKLE; C. T. CONOVER, Administrator of National Banks; and WILLIAM FRENCH SMITH, Attorney General (Orig. & 2 to Attorney).	jc
	4	MOTION for Permission to File Memo. More Than Twenty Pages in Length by Pltfs.	jc
	*	PROPOSED Memo. of Law in Support of Pltfs.' Motion for Preliminary Injunction rec'd. (4)	jc
	*	PROPOSED Order received on (4).	jc
	5	MOTION to Seal File by Pltfs. (until 9:00 a.m., Mon., 12/17/84.)	jc
	*	PROPOSED Order received on (5).	jc
	6	ORDER that Pltfs.' Motion for Permission to File Memo. More Than Twenty Pages in Length (4), is GRANTED. HTS s/12/14/84. (Counsel Notified)	jc
	7	MEMO. of Law in Support of Pltfs.' Motion for Preliminary Injunction (2), by Pltfs.	jc
	8	ORDER that Pltfs.' Motion to Seal the File until 9:00 a.m., Monday, December 17, 1984 (5), is GRANTED. HTS s/12/14/84 (Counsel Notified)	jc
.2/18/84	9	SUMMONS returned executed as to WILLIAM FRENCH SMITH, ATTORNEY GENERAL on 12/17/84.	jc
	10	SUMMONS returned executed as to C. T. CONOVER on 12/17/84.	jc
.2/19/84	11	NOTICE of Filing Substitute Page by Pltfs. (Page 9)	jc
.2/21/84	12	MOTION to Continue This Court's Hearing on Pltf.'s Motion for A Preliminary Injunction (2), by Deft. Prop. Order rec'd.	jc
	13	ORDER that Deft.'s Motion is hereby GRANTED and that the hearing to consider Pltfs.' Motion for a Preliminary Injunction be set for 01/30/85, at 2:00 p.m., Rm. 511, U.S. Courthouse and Post Office, 311 @. Monroe St., Jacksonville, FL, and it is further ordered that Deft. must file his opposition to Pltfs.' pending Motion for a Preliminary Injunction on or before 01/22/85, and that Pltfs.' reply, if any, must be filed on or before 01/28/85. HWM s/12/21/84. (Counsel Notified) (12) (2)	jc
12/27/84	14	SUMMONS returned executed as to ROBERT W. MERKLE on 12/19/84.	jc

see page 2

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSN. OF AM., et al.	C. T. CONOVER	PAGE 2 OF ____ PAGES

DATE	NR.	PROCEEDINGS	
~~1985~~			
01/18/85	15	MOTION to Waive 20 Page Limit by Deft.	jc
	16	MEMO. of Law In Support of Motion to Waive 20-Page Limit by Deft. (15)	jc
	*	PROPOSED Order received on (15).	jc
01-22-85	17	ORDER: Deft's Motion to Waive 20 Page Limit (15) is GRANTED. HTS s/1/22/85 (counsel ntfd)	ja
	18	MOTION to File Memo. One Day Out of Time by Deft.	jc
	*	PROPOSED Order received on #18.	jc
01/23/85	19	MOTION to Dismiss by Deft.	jc
	20	BRIEF In Support of Defts.' Motion to Dismiss (19) and In Opposition to Pltfs.' Motion for Preliminary Injunction (2), by Deft.	jc
	21	CERTIFICATE of Service by Deft. of Document #19 & 20.	jc
01/28/85	*	REPLY Memorandum of Law in Support of Pltfs.' Motion for Preliminary Injunction (2) and In Opposition to Deft.'s Motion to Dismiss (19), by Pltfs. w/Affidavit received.	jc
	22	MOTION for Leave to Appear as Amicus Curiae by Comptroller of State of Florida.	jc
	*	PROPOSED Amicus Curiae Brief of the Comptroller of the State of Florida received on (23).	jc
01/29/85	23	REPLY MEMO. of Law in Support of Pltfs.' Motion for Preliminary Injunction (2) and In Opposition to Deft.'s Motion to Dismiss (19), by Pltfs.	jc
	24	AFFIDAVIT In Support of Motion for Preliminary Injunction (2), by Pltfs.	jc
01/30/85	25	RECORD OF HEARING: on Pltf.'s Application for Preliminary Injunction. Order Granting Deft.'s Motion to file Memo. of Law One Day Out of Time, filed in Open Court. Amicus Curiae Brief of the Comptroller of the State of Florida, filed in Open Court and GRANTED by the Court. Arguments of Counsel. Counsel to submit briefs by 5:00 P.M. on 02/06/85. Taken under advisement by the Court. Hon. Howell W. Melton.	jc

see page 3

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	DOCKET NO. _____ PAGE 3 OF ____ PAG

DATE	NR.	VOL. 2 PROCEEDINGS	
01/30/85	26	ORDER that this cause before the Court on deft.'s Motion to File Federal Deft.'s Memo. of Law One Day Out of Time (18), & the same having been duly considered, the Motion will be GRANTED. HWM s/01/30/85 (Counsel Ntfd.) (Filed in Open Court)	jc
	27	AMICUS CURIAE BRIEF of the Comptroller of the State of Florida. (Filed in Open Court).	jc
01/31/85	28	TRANSCRIPT of Hearing on Pltfs.' Application for Preliminary Injunction before Howell W. Melton on 01/30/85 at 2:00 P.M.(2)	jc
02-05-85	29	**OPPOSITION** to Deft's Motion to Dismiss by Pltf.(19) (copy)	Pg
02/07/85	30	OPPOSITION to Deft.'s Motion to Dismiss by Pltfs. (19).	jc
02/13/85	31	REPLY to Pltfs.' Oppositions to Deft.'s Motion to Dismiss (29 & 30), by Deft.	jc
02/15/85	32	MEMO. Opinion and ORDER on Deft.'s Motion to Dismiss (19) and On Pltfs.' Motion for Preliminary Injunction (2): (1) Deft.'s Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted is DENIED; (2) Pltf.'s Motion for a Preliminary Injunction enjoining the Comptroller from issuing preliminary approvals for nonbank banks is DENIED. (3) Pltfs.' Motion for a preliminary injunction enjoining the Comptroller from issuing final approvals or charters for nonbank banks is GRANTED. HWM s/02/15/85 (Counsel Ntfd.)	jc
03/01/85	33	ANSWER by C. T. CONOVER to the Complaint.	jc
03/04/85	34	ORDER Directing Counsel to Confer & Pltf. to Report. HWM s/03/01/85. (Counsel Ntfd.)	jc
03/06/85	35	MOTION to Modify Preliminary Injunction by Deft.	jc
	*	PROPOSED Brief In Support of Deft.'s Motion to Modify Preliminary Injunction (35).	jc
03/06/85	36	MOTION to Waive 20-Page Limit by Deft.	jc
	37	MEMO. of Law in Support of Motion to Waive 20-Page Limit (36), by Deft.	jc
	*	PROPOSED Order received on (36).	jc

see page 4

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ DOCKET NO.
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 4 OF

DATE	NR.	PROCEEDINGS	
03/11/85	38	ORDER that this cause came before the Court on Deft.'s Motion to Waive the 20-page limit per Local Rule 3.01(c), and the same having been duly considered, the motion will be GRANTED. HTS s/03/11/85. (Counsel Ntfd.)	jc
	39	BRIEF In Support of Deft.'s Motion to Modify Preliminary Injunction (35), by Deft.	jc
03/15/85	40	MOTION for Leave to File Memo. In Excess of 20 Pages and for Enlargement of Time by Pltfs.	jc
	*	PROPOSED Order rec'd. (40)	jc
03/18/85	41	ORDER that Pltfs.' Motion for Leave to File Memo. in Excess of 20 Pages (40), is GRANTED; and it is ordered that Pltfs. shall have through March 22, 1985, within which to file their Memo. in Opposition to Deft.'s Motion to Modify Preliminary Injunction. (35). HTS s/03/18/85. (Counsel Ntfd.)	jc
03/19/85	42	OPPOSITION to Motion for Enlargement of Time by Deft. (40).	jc
	43	MOTION of the Conference of State Bank Supervisors for Leave to File Brief as Amicus Curiae in Opposition to Deft.'s Motion to Modify Preliminary Injunction. (35)	jc
	*	PROPOSED Brief Amicus Curiae of Conference of State Bank Supervisors in Opposition to Deft.'s Motion to Modify Preliminary Injunction received. (43).	jc
	*	PROPOSED Written Designation and Consent to Act received. (43).	jc
	44	MOTION to Extend Time for Response to Court's Order Dated 03/01/85 (34), by Pltfs.	jc
	*	PROPOSED Order received on (#44).	jc
03/21/85	45	ORDER that the Pltfs.' Motion to Extend Time for Response to Court's Order Dated 03/01/85 (44), is GRANTED, and it is Further Ordered that Pltfs. shall have through 04/03/85, within which to confer with other counsel of record and make the report to the clerk required by the Court's Order. HWM s/03/21/85. (Counsel Notified).	jc
	46	ORDER that Deft. shall file a Memo. in opposition to Motion of the Conference of State Bank Supervisors for Leave to File Brief as Amicus Curiae in Opposition to Deft.'s Motion to Modify Preliminary Injunction (43) on or before Friday, 03/29/85, if said motion is opposed. HWM s/03/21/85. (Counsel Ntfd.)	jc
	47	NOTICE of Hearing on Deft.'s Motion to Modify Preliminary Injunction (35) set for 04/05/85 at 9:30 a.m. HWM s/03/21/85 (Counsel Ntfd.)	jc

see page 5

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 5 OF ___ PAGE

DATE	NR.	PROCEEDINGS	
03/22/85	48	OPPOSITION to Deft.'s Motion to Modify Preliminary Injunction (35) by Pltfs.	jc
04/03/85	49	NOTICE of Change of Address of Counsel for Pltf. INDEPENDENT BANKERS ASSOCIATION OF AMERICA.	jc
	50	NOTICE of Filing Order Directing Counsel to Confer & Pltf. to Report. Est. time to complete discovery- 6 months; est. time for trial- 2 to 3 days; and probability of settlement- 0.	jc
** 04/04/85	51	WRITTEN Designation & Consent to Act by Counsel for Conference of State Bank Supervisors and designates Michael P. McMahon, Esq. to whom all notices and papers can be served.	jc
	52	ORDER: (1) That the Motion of the Conference of State Bank Supervisors for Leave to File Brief as Amicus Curiae in Opposition to Deft.'s Motion to Modify Preliminary Injunction, filed herein on 03/19/85 (43) is GRANTED; (2) That the Clerk of the Court is directed to file herein the Brief Amicus Curiae of Conference of State Bank Supervisors in Opposition to Deft.'s Motion to Modify Preliminary Injunction (35).	jc
	53	BRIEF AMICUS CURIAE of Conference of State Bank Supervisors of In Opposition to Deft.'s Motion to Modify Preliminary Injunction. (35).	jc
04-05-85	54	**RECORD OF HEARING:** Hearing held on Deft's Motion to Modify Preliminary Injunction (35). Arguments by Counsel. Taken under advisement. HWM	Pg
04-08-85	55	**ORDER:** That Deft's Motion to Modify Preliminary Injnction (35) is hereby **DENIED.** s/4/8/85 HWM (Counsel Notified).	Pg
04/10/85	56	**TRANSCRIPT** of Hearing on Deft.'s Motion to Modify Preliminary Injunction before Hon. Howell W. Melton on 04/05/85 at 9:30 a.m.	jc
04/11/85	57	**NOTICE** of Appeal by Deft. C. T. Conover of Memorandum Opinion and Order entered on 02/15/85. (Counsel Notified) (32)	jc
	58	**NOTICE** of Appeal by Deft. C. T. Conover of Order entered on 04/08/85 (55). (Counsel Notified)	jc
	*	**APPEAL** Information Sheet furnished to Mr. Koslowe.	jc
	*	**CERTIFIED** copies of Notice of Appeal, docket entries, Orders #32 & 55 mailed to Clerk, U.S. Court of Appeals.	jc
04/17/85	*	I telephoned Mr. Neil Koslowe, Attorney for Deft. re. a Designation of Record for Appeal and he advised me he would send one to us.	jc

see page 6

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	DOCKET NO. ___ PAGE 6 OF ___

DATE	NR.	PROCEEDINGS	
04/19/85	59	**MOTION** for Stay Pending Appeal by Deft. (to stay the Preliminary Injunction entered by the Court on 02/15/85 (32) and the Order entered by the Court on 04/08/85 (55).	jc
	60	**MEMORANDUM** of Law in Support of Deft.'s Motion for Stay Pending Appeal (59).	jc
	61	**CERTIFICATE** of Service by Deft. (of documents #59 & 60).	jc
04/24/85	62	**LETTER** designating the record on appeal by Mr. Koslowe.	jc
	63	**SUPPLEMENTAL LETTER** designating the record on appeal by Mr. Koslowe.	jc
	64	**STATEMENT** of Issues on Appeal by Deft.	jc
04/25/85	*	I telephoned Brenda Hauck at U.S.C.A. and they have assigned their Case Number - 85-3268.	jc
	*	**RECORD ON APPEAL** mailed to Clerk, U.S.C.A.	jc
04/29/85	*	**FORM LETTER** from the U.S.C.A. requesting the record to be forwarded to them, pursuant to FRAP Rule 11.	jc
	65	**MOTION** to Compel Answers to Interrogatories by Deft. Comptroller of the Currency by Pltfs. **MEMORANDUM OF LAW** in Support of Motion to Compel Answers to Interrogatories by Deft. Comptroller of the Currency attached.	jc
	*	PROPOSED Order received on #65.	jc
04/30/85	66	**MEMORANDUM** of Points and Authorities In Opposition to Deft.'s Motion for Stay Pending Appeal by Pltfs. (59)	jc
05-01-85	67	**ORDER:** That deft's Motion for Stay Pending Appeal, filed herein (59) is **DENIED.** s/5/1/85 HWM (Counsel notified).	Pg
05/03/85	*	**ACKNOWLEDGMENT** from U.S.C.A. of receipt of Record on Appeal.	jc
05/14/85	68	OPPOSITION to Pltfs.' Motion to Compel Answers to Pltfs. First Set of Interrogatories (65), by Deft.	jc
05/20/85	69	**ORDER** that Pltfs.' Motion to Compel Answers to Interrogatories by Deft. Comptroller of the Currency filed on 04/29/85 (65), is **GRANTED** as to interrogatories 2, 3, 10, 12, 13, 15, and 21; otherwise the motion is **DENIED.** Pltfs.' request in the Motion for an award of reasonable expenses including attorneys' fees is **DENIED.** Deft. shall have fifteen days from the date of this Order to answer subject interrogatories. HTS s/05/20/85. (Counsel Notified)	jc

see page 7

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 7 OF ____ PAGES

DATE	NR.	PROCEEDINGS	
05/22/85	70	**MOTION** for Clarification (of Court's preliminary injunction order entered on 02/15/85), by Deft.	jc
05/23/85	71	**NOTICE** of Intervening Event by Pltf., FLORIDA BANKERS ASSOCIATION.	jc
05/28/85	72	**RESPONSE** to Motion for Clarification (70), by Pltf. FLORIDA BANKERS ASSOCIATION.	jc
	73	**MOTION** for Entry of Order Directing Compliance with Injunction by Pltf. FLORIDA BANKERS ASSOCIATION. Appendix in accordian folder	jc
	74	**MOTION** for Permission to File Memo. More Than 20 Pages in Length by Pltf. FLORIDA BANKERS ASSOCIATION.	jc
	*	PROPOSED Memo. of Law in Support of Motion for Entry of Order Directing Compliance with Injunction received.	jc
05/29/85	*	I telephoned Mr. Koslowe and advised him that any pleadings filed after the Record on Appeal was mailed to U.S.C.A., he should designate them if he would like them to go to U.S.C.A.	jc
		VOLUME 3	
05/30/85	75	**ORDER** that the FLORIDA BANKERS ASSOCIATION's Motion for Permission to File Memo. More than 20 Pages in Length filed on 05/28/85 (74), is **GRANTED.** The Clerk of the Court is directed to file, forthwith, the Memo. of Law in Support of Motion for Entry of Order Directing Compliance with Injunction which was submitted with the Motion. HTS s/05/30/85 (Counsel Notified)	jc
	76	**MEMORANDUM OF LAW** In Support of Motion for Entry of Order Directing Compliance with Injunction (73), by Pltf., FLORIDA BANKERS ASSOCIATION.	jc
	77	**MOTION** to Vacate in Part Magistrate's Discovery Order by Deft.	jc
	78	**MEMORANDUM OF LAW** in Support of Deft.'s Motion to Vacate In Part Magistrate's Discovery Order (77), by Deft.	jc
06-10-85	79	**NOTICE** of Entry of Appearance by INDEPENDENT BANKERS ASSOCIATION and COMMUNITY BANKERS OF FLORIDA, INC. of Peri N. Nash replacing Thomas Roberts from the firm of Surrey & Morse.	jc
	80	**MEMORANDUM** of Points and Authorities in Opposition to Deft.'s Motion to Vacate Magistrate's Discovery Order (77), by Pltfs.	jc
06-13-85	81	**NOTICE** of Filing Supplement to Appendix to Motion for Entry of Order Directing Compliance With Injunction (73) by Pltfs.	jc
	82	**SUPPLEMENT** to Appendix to Motion for Entry of Order Directing Compliance with Injunction (73) by Pltf.s	jc

see page 8

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	DOCKET NO. ___ PAGE 8 OF ___

DATE	NR.	PROCEEDINGS	
06-13-85	83	**NOTICE** of Joinder in Motion for Entry of Order Directing Compliance With Injunction (73), by Pltf. FLORIDA BANKERS ASSOCIATION.	jc
06-14-85	*	**LETTER** from U.S.C.A. returning the Record on Appeal (#85-3279 & 85-3268 dismissing the appeal which is issued as and for the mandate.	jc
	84	**VOLUNTARY DISMISSAL OF APPEAL** (#85-3268 & 85-3279) along with **ENTRY OF DISMISSAL** that the Motion of Appellant was dismissed this 12th day of June, 1985. Deputy Clerk, U.S.C.A. M.R. 108/219 and M.R. 108/223.	jc
07-18-85	85	**MOTION** to Intervene as Defts., by SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION, and CONTINENTAL TELECOM, INC.	jc
	86	**MEMORANDUM** in Support of Applicants' Motion to Intervene as Defts. (85).	jc
	*	PROPOSED Motion to Dismiss of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC. received.	jc
	*	PROPOSED MOTION for Permission To File Memorandum More Than Twenty Pages in Length received.	jc
	*	PROPOSED Memorandum in Support of Motion to Dismiss of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC. received.	jc
07-26-85	87	**NOTICE** of Designation and Consent to Act by Counsel for applicants for Intervention appointing Waddell A. Wallace, III, Esq. as local counsel, Smith & Hulsey, 500 Barnett Bank Bldg., Jacksonville, Florida 32202.	jc
07-26-85	88	**STIPULATED MOTION** for Extension of Time to Respond to Motions of Southern National Bank of Broward County, National Bancard Corporation and Continental Telecom, Inc. (85), by Pltfs.	jc
08-01-85	89	**ORDER** that Pltfs.' Stipulated Motion for Extension of Time To Respond to Motions of Southern National Bank of Broward County, National Bancard Corporation, and Continental Telecom, Inc., which Motion for Extensionof time was filed on 07/26/85 (88), is **GRANTED**. Pltfs. shall have up to and including 08/12/85 to respond to the pending Motions of the applicants for intervention. HTS s/08/01/85 (Counsel Notified)	jc

see page 9

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 9 OF ___ PAGES

DATE	NR.	PROCEEDINGS	
08-13-85	90	**STIPULATED MOTION** for Additional Extension of Time to Respond to Motions of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION AND CONTINENTAL TELECOM, INC. (85)	jc
08-19-85	91	**ORDER** that Pltfs.' Stipulated Motion for Additional Extension of Time to Respond to Motions of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC., (90), is **GRANTED** and Pltfs. shall do so by on or before 08/19/85. HTS s/08/19/85 (Counsel Notified)	jc
08-21-85	92	**RESPONSE** to Application for Leave to Intervene, by Pltfs. (85)	jc
	93	**RESPONSE** to Motion to Dismiss of Applicants for Intervention, by Pltfs.	jc
08-23-85	94	**JOINT MOTION** to Stay All Proceedings for Six Months by the parties and Applicants for Intervention.	jc
	*	PROPOSED ORDER received on 94.	jc
08-26-85	95	**ORDER:** All further proceedings in this action are **STAYED** for six months, subject to extension on motion. See Order for further information. HWM s/08/23/85 (Counsel Notified).	jc
1986			
02-28-86	96	**JOINT** Motion for Continuance of the Stay of All Proceedings for Thirty Days.	
02-28-86	*	**RECEIVED** Proposed Order (96).	jc
03-04-86	97	**ORDER** that Pltfs.' Motion to Stay Proceedings for an additional 30 days beginning 02-28-86 and continuing through 03-30-86, is **GRANTED**. HWM s/03-03-86 (Counsel Notified)	jc
12/29/86	98	**MOTION** to Vacate Preliminary Injunctive (2,32) filed by Deft (With Attached Brief in Support of Motion)	mc
12/31/86	99	**MOTION** for Enlargement of Time Within Which to File Memorandum in Opposition to Deft's Motion to Vacate Preliminary Injunction (98) filed by Pltfs	mc
12/31/86	*	**RECEIVED** proposed Order for Enlargement of Time (99)	mc

(See Page 10)

111A
(v. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSN. OF AMERICA, et al	C.T. CONOVER	PAGE 10 OF ____ PAGES

DATE	NR.	PROCEEDINGS	
1987			
/05/87	100	**ORDER** Enlarging Time to File Memorandum in Response to Motion to Vacate Preliminary Injunction. Pltfs' Motion to Enlarge the Time Within Which Pltfs must respond to Deft's Motion to Vacate Preliminary Injunction (99) is **granted** and Pltfs shall have until **01/25/87** to serve a responsive brief or memorandum. s/HWM 01/05/87 (counsel notified)	mc
/26/87	101	**RESPONSE** to Motion to Vacate Preliminary Injunction (99,100) filed by Pltfs	mc
		VOLUME 4	
1/29/87	102	**NOTICE** of Hearing on Deft's Motion to Vacate Preliminary Injunction (98) scheduled for **03/13/87 at 9:30 a.m.** Courtroom No. 1. Counsel will be limited to 30 minutes per side on argument. (counsel notified, HWM, Courtroom Deputy)	mc
2/12/87	103	**NOTICE** of Intention to Withdraw as Counsel of Record filed by Pltfs INDEPENDENT BANKERS and COMMUNITY BANKERS OF FLORIDA. Said Pltfs will be continued to be represented by J. Thomas Cardwell and Michael P. McMahon. (counsel for Florida Bankers	mc
2/17/87	104	**MOTION** for Substitution of Counsel filed by Pltf's counsel LEONARD J. RUBIN	mc
2/23/87	105	**NOTICE** of Material Developments Affecting Pltfs' Motion For Entry of Order Directing Compliance With Injunction (73) filed by Pltfs	mc
2/27/87	106	**ORDER:** The Motion for Substitution of Counsel (104) is **granted.** Leonard Rubin, Esquire is permitted to withdraw as counsel for Pltf's INDEPENDENT BANKERS and COMMUNITY BANKERS. J. Thomas Caldwell, Esquire and Michael P. McMahon, Esquire shall continue to represent said Pltfs. s/HTS 02/27/87 (counsel notified)	mc
3/03/87	107	**WITHDRAWAL** Of Motion to Intervene (85) filed by Intervenors, SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC.	mc
3/05/87	108	**ORDER.** Southern National Bank of Broward County; National Bancard Corporation; and Continental Telecom, Inc. are **released** from further obligation, re: appearances in this cause. s/03-05-87 HWM (counsel notified)	jf

(See Page 11)

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSN.	C. T. CONOVER	PAGE 11 OF ____ PAGE

DATE	NR.	PROCEEDINGS	
03/09/87	109	**MOTION** For Summary Judgment filed by Deft	mc
03/09/87	110	**MOTION** For Leave to File Brief in Excess of 20 Pages filed by Deft	mc
03/09/87	*	**RECEIVED (proposed) BRIEF** in Support of Motion For Summary Judgment (109) filed by Deft	mc
03/09/87	111	**NOTICE** of Supplementary Authority filed by Pltf	mc
03/12/87	112	**MOTION** For Leave to File Reply to Pltfs' Response to Motion to Vacate Preliminary Injunction (101) filed by Deft	mc
03/12/87	*	**RECEIVED (proposed)** Reply to Pltfs' Response to Motion to Vacate Preliminary Injunction (112) filed by Deft	mc
03/12/87	113	**CERTIFICATE** OF Servive (112) filed by Deft	mc
03/13/87	114	**RECORD** of Hearing on Deft's Motion to Vacate Preliminary Injunction. (98,102) before the Honorable Howell W. Melton. Arguments of counsel. Deft's Motion to File Reply to Pltf's Response to Motion to Vacate Preliminary Injunction (101,112) is **granted.** Deft's Motion to Vacate Preliminary Injunction (98) is taken under advisement.	mc
03/13/87	115	**REPLY** to Pltfs' Response to Motion to Vacate Preliminary Injunction (101, 112) filed by Deft	mc
03/16/87	116	**TRANSCRIPT** of Hearing on Deft's Motion to Vacate Preliminary Injunction (98,102) (See Separate Folder) (114) held before the Honorable Howell W. Melton on 03/13/87	mc
03/18/87	117	**MOTION** For Extension of Time to Serve Response to Motion For Summary Judgment (109) filed by Pltfs	mc
03/24/87	118	**ORDER.** Deft's Motion for Leave to File Brief in Excess of 20 Pages is GRANTED. (110) Pltfs' Motion for Extension of Time to Serve Response to Motion for Summary Judgment is GRANTED. Pltfs shall have until **04-03-87** within which to do so. (117) (109) s/03-24-87 HTS (counsel notified)	jf
03/24/87	119	**BRIEF** in Support of Deft's Motion for Summary Judgment, by Deft (filed per Order #118)	jf
03/25/87	*	**RECEIVED** attorney Philip S. Corwin's copy of Order (108) **returned** marked: "Return to Sender: Moved, Not Forwardable"	jf
04/01/87	*	**RECEIVED** letter addressed to Hon. Howell W. Melton from Special Litigation Counsel, with proposed memo opinion/order and Committee Print No. 3	jf

(See Page 12)

: 111A
ev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
:NDEPENDENT BANKERS ASSN. OF AMERICA :t al.,	C. T. CONOVER	PAGE 12 OF ____ PAGES

DATE	NR.	PROCEEDINGS	
4-01-87	120	**ORDER** Denying Defendant's Motion to Vacate Preliminary Injunction. s/03-31-87 HWM (counsel notified) (98) (2)	jf
4/06/87	121	**MOTION** for Leave to File Memo of Law in Excess of Twenty Pages by Pltfs	jf
4/06/87	*	**RECEIVED** proposed "Response to Deft's Motion for Summary Judgment," (121)	jf
4/06/87	*	**RECEIVED** letter addressed to Hon. Howell W. Melton from attorney Mahon, with attachment	jf
4/09/87	122	**ORDER.** Pltfs' Motion for Leave to File Memo in Excess of 20 Pages is GRANTED. (121) s/04-09-87 HTS (counsel notified)	jf
4/09/87	123	**RESPONSE** to Deft's Motion for Summary Judgment, by Pltfs (120)(109) (Filed per Order #122)	jf
4/17/87	124	**MOTION** for Leave to File Brief as Amicus Curiae in Support of (109) Deft's Motion for Summary Judgment, by NEW YORK CLEARING HOUSE	
4/17/87	*	**RECEIVED** proposed "Memo of N.Y. Clearing House amicus curiae" (124)	jf
4/28/87	125	**RESPONSE** to Motion of NEW YORK CLEARING HOUSE ASSN. For Leave to File Brief as Amicus Curiae filed by Pltfs (124)	mc
5/05/87	126	**ORDER:** The Motion of the NEW YORK CLEARING HOUSE ASSN. For Leave to File Brief as Amicus Curiae in Support of Deft's Motion for Summary Judgment (109,124) is **granted.** The Clerk of the Court is directed to file the Memorandum of the NEW YORK CLEARING HOUSE ASSN., Amicus Curiae, in Support of Deft's Motion for Summary Judgment. s/HTS 05/05/87 (counsel notified)	mc
5/05/87	127	**MEMORANDUM,** Amicus Curiae, in Support of Deft's Motion for Summary Judgment (109, 126) filed by NEW YORK CLEARING HOUSE ASSN.	mc
5/18/87	128	**LETTER** from Mr. William Proxmire, Chairman, U. S. Senate, Committee on Banking, Housing and Urban Affairs, to Honorable Howell W. Melton regarding letter dated 03/24/87 from Mr. Neil H. Koslowe (Counsel notified)	mc
6/04/87	129	**NOTICE** of Hearing on Deft's Motion for Summary Judgment (109) scheduled for **08/19/87** at **2:00 p.m.** (Counsel, HWM and Courtroom Deputy notified)	mc

(See Page 13)

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSN. OF AMERICA	ROBERT L. CLARKE, et al	PAGE 13 OF ___ PAGES

DATE	NR.	PROCEEDINGS	
08-12-87	130	**MOTION** For Leave to File Reply to Pltf's Response to Deft's Motion for Summary Judgment (123) by Deft	mc
08-12-87	*	**PROPOSED** Order (130)	mc
08-12-87	*	**PROPOSED** "Reply to Pltf's Response to Deft's Motion to Summary Judgment (130) by Deft	mc
08-12-87	131	**MOTION** to Vacate Preliminary Injunction (2) by Deft	mc
08-17-87	132	**ORDER:** Deft's Motion for Leave to File Reply to Pltfs' Response to Deft's Motion for Summary Judgment (130) is **granted.** The Clerk is directed to file Deft's Reply to Pltfs' Response to Deft's Motion for Summary Judgment. s/HTS 08-17-87 (counsel notified)	mc
08-17-87	133	**REPLY** to Pltfs' Response to Deft's Motion for Summary Judgment (132) by Deft	mc
08-18-87	134	**MOTION** for Entry of Order of Dismissal Without Prejudice by Pltfs	mc
08-18-87	*	**PROPOSED** Order (134)	mc
08-31-87	135	**RESPONSE** to Motion to Vacate Preliminary Injunction (131) by Pltfs	mc
09-04-87	136	**RESPONSE** to Pltfs' Motion for Entry of Order of Dismissal Without Prejudice (134) by Deft	mc
09-04-87	*	**PROPOSED** Order (136)	mc
09-11-87	137	**ORDER** of Dismissal. This cause is before the Court on Pltfs' Motion for Entry of Dismissal Without Prejudice (134). Deft responded (136). ORDERED: That the Memorandum Opinion and Order on Deft's Motion to Dismiss and on Pltfs' Motion for Preliminary Injunction (32) is hereby **vacated.** That all pending motions, other than Pltfs' motion to dismiss (19) are hereby **dismissed** as moot; and, that this action is hereby **dismissed without prejudice,** with each party to bear its own costs and attorneys' fees. s/HWM 09-11-87 (counsel notified) MR 112/509-510.	mc

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and JOSEPH M. OTTING, in his official capacity as Comptroller of the Currency, Defendants.	Civil Action No. 1:18-CV-02449 (DLF)

[PROPOSED] ORDER

THIS MATTER having come before the Court on Defendants' Motion to Dismiss and the opposition thereto, and the Court having considered the matter, it is hereby:

ORDERED that Defendants' Motion to Dismiss is GRANTED and this action is hereby DISMISSED.

SO ORDERED.

Dated: _____

_____
DABNEY L. FRIEDRICH
United States District Judge

CERTIFICATE OF SERVICE

In accordance with LCvR 5.3, I certify that on January 7, 2019, a true and correct copy of the foregoing Defendants' Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim, supporting brief, and proposed order, in the matter *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, et al.*, Civil Action No. 1:18-CV-02449 (DLF), was served on all counsel of record through the Court's CM/ECF system.

Respectfully submitted,

/*s*/Gregory F. Taylor

Gregory F. Taylor
Director of Litigation
DC Bar No. 417096
Litigation Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219
(202) 649-6300 – phone
(202) 649-5709 – fax
gregory.taylor@occ.treas.gov

Attorney for Defendants