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VIRTUAL CURRENCIES AND INNOVATION IN THE DUAL BANKING SYSTEM

In recent years, state banking authorities have been more hospitable to companies engaged in virtual currency activities than their federal counterparts. In this article, the author discusses and contrasts the federal and state responses to the development of virtual currencies. He concludes that although the federal government initially seemed poised to take a lead on a new regulatory framework for virtual currency activities, it quickly lost ground to the states, and for the first time in decades state governments made state banking charters more attractive to banking institutions than federal charters.

By Arthur S. Long *

Until quite recently, it appeared that the U.S. dual banking system, in which both the federal and state governments are authorized to grant bank charters, had lost some of its balance, with the national bank charter becoming more and more predominant. Of the nation's 10 largest banks in asset size, for example, eight are national banks, and only two, Truist and Bank of New York Mellon, are state chartered.[1] National associations also constitute much of the next tier in asset size, and in recent years, more non-U.S. banks have chosen federal licenses for their U.S. branch and agency operations, even though traditionally most such institutions have been state licensed.[2] In the last few years, however, companies engaged in virtual currency activities have begun a new type of disruption – finding state banking authorities more hospitable to their businesses; these companies sought, and received, state trust company and specialized virtual currency charters. These developments, in turn, spurred action by the Office of the Comptroller of the Currency ("OCC") at the end of the Trump Administration, with the OCC accepting conversion applications from two virtual currency firms with state trust company charters and a *de novo* trust bank charter application from a third virtual currency firm.[3] With the Biden OCC revisiting these developments, innovation may continue to breathe life into the state banking charter.

THE DUAL BANKING SYSTEM

The United States has had dual bank chartering authorities for over 150 years, when the need to fund the Civil War led to the enactment of the National Bank Act

[1] The eight are JPMorgan Chase, Bank of America, Citibank, Wells Fargo, US Bank, PNC Bank, TD Bank, and Capital One.

[2] UBS AG and MUFG Bank, Limited are two very significant non-U.S. banks with federally licensed branches.

[3] OCC News Release 2021-6 (January 13, 2021) (Anchorage Digital Bank, National Association); OCC News Release 2021-19 (February 5, 2021) (Protego Trust Bank, National Association); and OCC News Release 2021-49 (April 23, 2021) (Paxos National Trust).

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in 1863.[4] Congress modeled this statute after the New York Banking Law, New York then being the preeminent state chartering authority.[5] At different times in the nation's history, a particular charter, federal or state, has appeared to have advantages over the other, with the effect that soon the other chartering authority adapts, or the relevant legislature adapts its governing law, in order to match those advantages. For example, in 1918 Congress amended the Federal Reserve Act to enlarge the fiduciary activities of national banks, so that they might better compete with state trust companies.[6] Similarly, many states have enacted so-called "wild card" statutes, which permit state-chartered banks to enjoy the same powers as national banks.[7] Many states offer charters and licenses identical to those offered at the federal level – banks, trust companies, and, for non-U.S. banking institutions, branches and agencies.[8]

DEVELOPMENTS IN THE DUAL BANKING SYSTEM PRIOR TO THE ADVENT OF VIRTUAL CURRENCIES

The last two decades have seen a shift toward the popularity of national charters and licenses granted by the OCC. There were several reasons for this development. First, the OCC's Legal Division was creative in its interpretations of the National Bank Act, finding an increasing number of business activities to be part of the "business of banking" under that statute's incidental powers clause.[9] For example, the OCC interpreted that provision not only to permit national banks to engage in derivatives activities with respect to assets like equity securities, which are generally not bank-permissible investments, but also to permit national banks to acquire equities when hedging permissible derivatives.[10] Second, although Congress had amended the Federal Deposit Insurance Act in the 1980s to give it preemptive force with respect to the activities of FDIC-insured state banks,[11] the OCC's Legal Division issued far more – and very beneficial – preemption interpretations for national banks than the FDIC did for the banks it supervised.[12] Third, in New York, a jurisdiction with a significant number of large state-chartered institutions, the Department of Financial Services was perceived to have become much more of an enforcement agency, one that levied significant civil money penalties on its subject institutions, particularly New York-licensed branches of non-U.S. banks.[13]

VIRTUAL CURRENCIES, AND THE FINTECH CHARTER

As virtual currencies developed, the OCC seemed poised to take a leadership position with respect to them as well. Interest in Bitcoin increased substantially during President Obama's second term, and in 2016, as that President was leaving office, his Comptroller of the Currency, Thomas Curry, announced that the OCC had the authority to grant "Fintech" charters – that is, national bank charters to institutions that engaged in only one of three traditional banking functions, and not necessarily deposit-taking.[14] A

[4] https://www.occ.treas.gov/about/who-we-are/history/founding-occ-national-bank-system/index-founding-occ-national-banking-system.html.

[5] E. Symons, The "Business of Banking" in Historical Perspective, 51 Geo. Wash. L. Rev. 676, 689 (1983) ("The New York Free Banking Act of 1838 was a principal model for the provisions of the National Bank Act in 1863.").

[6] Walter S. Logan, "Amendments to the Federal Reserve Act," The Annals of the American Academy of Political and Social Science, Vol. 99, *The Federal Reserve System – Its Purpose and Work* (January 1922), pp. 114-121.

[7] *See, e.g.*, New York Banking Law, Section 12-a.

[8] *See, e.g., id.* Articles 3 & 5.

[9] 12 U.S.C. § 24(SEVENTH).

[10] OCC Interpretive Letter 652 (September 13, 1994); OCC Interpretive Letter 892 (September 13, 2000).

[11] 12 U.S.C. § 1831d.

[12] *See, e.g.*, OCC Interpretive Letter 803 (October 7, 1997) (certain home equity loan fees are interest and benefit from the interest rate exportation provision of the National Bank Act).

[13] https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1411181 (aggregate fine on The Bank of Tokyo Mistubishi-UFJ amounting to $565 million).

[14] Remarks By Thomas J. Curry, Comptroller of the Currency, Regarding Special Purpose National Bank Charters for Fintech Companies, Georgetown University Law Center, December 2, 2016. The three traditional banking functions, in the OCC's view, are receiving deposits, paying checks, and lending money.

regulation to this effect had been adopted in 2003,[15] but never acted on, and Comptroller Curry's action suggested that this regulation might have new application as technologies developed.

Although a Fintech charter was theoretically available, the supervisory issues raised by virtual currency companies were complicated, and the OCC, like many regulators, was not willing to embrace innovation fully before it had considered all the potential risks that it might cause. As a result, President Trump's Comptroller, Joseph Otting, did not take any action with respect to the national Fintech charter. This inaction also likely was influenced by the fact that state banking regulators had sued the OCC shortly after Comptroller Curry's announcement, arguing that the National Bank Act did not permit the OCC to grant a charter to a non-deposit taking institution.[16]

THE OCC REVISITS SPECIAL PURPOSE CHARTERS AND ENLARGES ITS TRUST COMPANY INTERPRETATIONS

Comptroller Otting resigned in May 2020, and President Trump appointed Brian Brooks as Acting Comptroller in his place. Acting Comptroller Brooks was a strong proponent of innovation in the banking system, including through the use of special purpose charters, the types that had been previously advocated by Comptroller Curry.[17] After Brooks' appointment, Figure Technologies, Inc., a company engaged principally in home equity lending, applied for a national bank charter to engage in lending activities, but Figure's business plan for the bank did not contemplate accepting FDIC-insured deposits.[18] Figure took the position that national banks were not required to have FDIC insurance, but this position was controversial, and somewhat predictably, state banking supervisors resurrected their lawsuits against the OCC, arguing once again that the National Bank Act did not authorize the OCC to grant a charter to a non-insured deposit-taking institution.[19]

Acting Comptroller Brooks was more successful with respect to virtual currency firms, because he could rely on a type of charter that Congress had explicitly authorized: the national trust bank charter.[20] The National Bank Act provides that a national bank is not impermissibly chartered if it limits its activities only to fiduciary activities.[21] In early 2021, the OCC granted conditional approval to two state-licensed trust companies, Anchorage and Protego, to convert their charters to a national trust bank charter;[22] a few months later, the OCC granted a *de novo* trust bank charter to a New York institution, Paxos Trust.[23]

As a legal matter, these conditional approvals relied on interpretation not of the National Bank Act's powers clause, 12 U.S.C. § 24(SEVENTH), but rather on its fiduciary powers provision, 12 U.S.C. § 92a. That provision provides:

> The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, *or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks, are permitted to act under the laws of the State in which the national bank is located.*
>
> Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.[24]

An OCC Chief Counsel's Opinion accompanying the first conditional approvals clarified the meaning of 12 U.S.C. § 92a.[25] The Opinion broke from existing OCC precedent since 1983[26] and stated that "a bank performing in a fiduciary capacity for purposes of state law and operating consistent with the parameters provided for in relevant state laws and regulations may

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[15] 12 C.F.R. § 5.20(e)(1).

[16] *Vullo v. Office of the Comptroller of the Currency*, 17 Civ. 3574 (NRB), 2017 WL 6512245.

[17] https://www.politico.com/news/2020/08/31/currency-comptroller-reshape-banking-406393.

[18] https://www.figure.com/blog/why-figure-applied-for-the-us-national-bank-charter-and-what-it-means-for-the-industry/.

[19] https://www.csbs.org/system/files/2020-12/Complaint.pdf.

[20] 12 U.S.C. § 27(a).

[21] *Id.*

[22] OCC News Release, supra n. 3.

[23] OCC News Release 2021-49 (April 23, 2021) (Paxos National Trust).

[24] 12 U.S.C. § 92a (emphasis added).

[25] OCC Interpretive Letter 1176 (January 11, 2021).

[26] *Id.* n. 5.

be deemed to be performing in a fiduciary capacity for purposes of 12 U.S.C. § 92a;"[27] as a result, a party seeking a national trust charter would no longer be required to demonstrate, before undertaking such a state law analysis, that its business activities were also "fiduciary" under the OCC's regulations.[28] Because the virtual currency activities in question had been permitted under state law, this made them permissible under 12 U.S.C. § 92a.[29]

As a result of the Chief Counsel's Opinion, national banks with fiduciary powers are now permitted to engage in the following virtual currency activities as a fiduciary, if those activities are permissible under the laws of the states in which the banks operate:

- custody of virtual currency assets;
- custody of fiat currency (using a subcustodian);
- on-chain governance services allowing clients to participate in the governance of the underlying protocols on which their assets operate;
- operating validator nodes, providing staking as a service, and providing clients the ability to delegate staking to third-party validators;
- settling transactions facilitated by brokers and clients;[30]
- determining whether a customer should claim forked assets;
- staking its customers' assets to earn rewards;
- participating in the governance of certain blockchains that permit participants to use their digital assets to cast votes for decisions regarding blockchain protocols;
- running a client-to-client trading platform for assets under custody;
- running a client-to-client lending platform as an agent for its clients;
- operating a platform for the origination and issuance of new digital assets whereby asset owners can digitize existing and prospective assets;
- custody and management of USD stablecoin reserves; and
- providing "know your customer" as a service, which includes customer identification, sanctions screening, enhanced due diligence, and customer risk rating.[31]

In addition to the foregoing powers, the Chief Counsel Opinion made two important clarifications about national trust bank powers. First, the opinion stated that there is no minimum amount of fiduciary activities in which a national trust bank must engage.[32] Second, it affirmed that, although it is not required to, a national trust bank may, in addition to its fiduciary powers, engage in activities that are part of the "business of banking" under 12 U.S.C. § 24(SEVENTH), such that a national trust bank that engages in the virtual currency activities described above would also have the power to engage in traditional lending activities.[33] This principle applies to New York trust companies as well, as some of New York's most well-known banks have been trust companies with banking powers.[34]

A CHANGE OF ADMINISTRATIONS: THE OCC IN POTENTIAL RETREAT

Following the election of President Biden, the OCC has indicated that it may not be fully comfortable with Acting Comptroller Brooks' actions. A new Comptroller of the Currency has not been confirmed by the Senate, but a career Federal Reserve official,

[27] *Id.* at 3-4.

[28] *Id.* n. 5. Such a result flows from a natural reading of the statute, but, as noted, it had not been the OCC's interpretation since 1983. OCC Interpretive Letter No. 265, reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCP) ¶ 85,429 (July 14, 1983) (concluding that the OCC will only look to state law to determine whether a fiduciary capacity of national bank is permissible after the activity is determined to be "fiduciary" within the meaning of 12 U.S.C. § 92a). The statute and the OCC's regulation thereunder contain a limited set of fiduciary activities.

[29] OCC Interpretive Letter 1176 (January 11, 2021).

[30] Under this power, brokers and clients can instruct the trust bank to receive digital assets into and to transfer digital assets out of their vaults from and to external accounts or digital asset addresses controlled by third parties, including but not limited to transfers made in connection with the settlement of a purchase or sale of digital assets.

[31] OCC News Releases, supra note 3.

[32] OCC Interpretive Letter 1176 (January 11, 2021).

[33] *Id.*

[34] For example, Morgan Guaranty Trust Company of New York.

Michael Hsu, has been appointed Acting Comptroller. Shortly after being appointed, Acting Comptroller Hsu stated that he had asked the staff of the OCC to revisit the interpretations of the National Bank Act that permitted the virtual currency trust bank charters.[35] Moreover, in certain public statements, Acting Comptroller Hsu has highlighted the risk of virtual currency assets, comparing them to the way that derivatives were abused in the years before the Financial Crisis.[36]

Just before Thanksgiving 2021, the federal banking agencies declared that they had finished a "sprint" to reach conclusions on virtual currency regulation, with action said to come in 2022.[37] As part of that sprint, the OCC affirmed its three virtual currency trust bank approvals.[38] At the same time, however, it signaled that it would have a more cautious approach than the OCC under Acting Comptroller Brooks: the OCC emphasized that it will consider safety and soundness issues whenever a federally licensed institution seeks to engage in virtual currency activities, such that applicants need to demonstrate that their virtual currency activities will not pose such risks in order to obtain approval.[39] In addition, the OCC appeared to walk back somewhat its interpretation of 12 U.S.C. § 92a in Interpretive Letter 1176 by indicating that although "a bank performing in a fiduciary capacity for purposes of state law and operating consistent with the parameters provided for in relevant state laws and regulations *may be deemed to be* performing in a fiduciary capacity for purposes of 12 U.S.C. § 92a,"[40] the OCC still had discretion to take an opposite view and deem the activity non-fiduciary for purposes of federal law.[41] The OCC also took a conservative view of the national trust bank charter when it joined the President's Working Group on the Financial Markets' Stablecoin Report, which called for federal legislation that would limit stablecoin issuers to FDIC-insured depository institutions.[42] And in mid-December 2021, Figure announced that it would be amending its OCC application to accept FDIC-insured deposits.[43]

A LIMIT ON THE STATES: THE FEDERAL RESERVE BOARD AND THE PAYMENTS SYSTEM

At the same time that the OCC may be reconsidering joining the states on virtual currency innovation, there is another federal overlay that may put certain state entities at a disadvantage compared with a national charter. That is having full access to the U.S. payments system through the Federal Reserve System, for which a Master Account at a Federal Reserve Bank is necessary. Under the Federal Reserve Act, all national banks – including national trust banks – must be members of the Federal Reserve System.[44] State-chartered institutions, by contrast, must be accepted for membership.[45] And although certain state-chartered trust companies are member banks and do have Federal Reserve Master Accounts, it is not clear that these privileges would be extended to every state-chartered non-depository trust company, given that under the Federal Reserve Act, the Federal Reserve Banks have exercised substantial discretion regarding what services they will make available to certain member institutions.

The Board of Governors of the Federal Reserve System is the gatekeeper to the U.S. payments system, and in May 2021, it proposed guidelines regarding how the Federal Reserve Banks should evaluate requests for accounts and services.[46] Accounts and services are open to member banks, Edge and Agreement corporations, branches and agencies of non-U.S. banks, and other

[35] https://www.law360.com/articles/1390258/occ-s-hsu-says-crypto-charters-on-the-table-in-review.

[36] Michael Hsu, Acting Comptroller of the Currency, "Cryptocurrencies, Decentralized Finance, and Key Lessons from the 2008 Financial Crisis," Remarks to Blockchain Association (September 21, 2021).

[37] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Joint Statement on Crypto-Asset Policy Sprint Initiative and Next Steps (November 23, 2021).

[38] OCC Interpretive Letter 1179 (November 18, 2021).

[39] *Id.* ("[A] bank should not engage in the activities until it receives written notification of the supervisory office's non-objection. In deciding whether to grant supervisory non-objection, the supervisory office will evaluate the adequacy of the bank's risk management systems and controls, and risk measurement systems, to enable the bank to engage in the proposed activities in a safe and sound manner.").

[40] *Id.* (emphasis in the original).

[41] *Id.* n.13. The OCC did not cite any part of 12 U.S.C. § 92a as support for this discretion.

[42] *See infra* Part VII.

[43] https://www.bankingdive.com/news/figure-updates-charter-application-to-avoid-legal-roadblock/611723/.

[44] Federal Reserve Act, § 2.

[45] 12 U.S.C. § 321.

[46] Federal Reserve Board, *Proposed Guidelines for Evaluating Account and Services Requests*, 86 Federal Register 25,865 (May 11, 2021).

institutions that meet the definition of a "depository institution" under Section 19(b) of the Federal Reserve Act.[47] The preamble to the proposed guidelines takes note of the recent developments in bank chartering, and then states that "as a result, the Reserve Banks are receiving an increasing number of inquiries and requests for access to accounts and services from novel institutions."[48] The preamble goes on to argue that,

> given the increase in the number and novelty of such inquiries, . . . a more transparent and consistent approach to such requests should be adopted by the Reserve Banks. Given that access decisions made by individual Reserve Banks can have implications for a wide array of Federal Reserve System (Federal Reserve) policies and objectives, a structured, transparent, and detailed framework for evaluating access requests would benefit the financial system broadly. Such a framework would also help foster consistent evaluation of access requests, from both risk and policy perspectives, across all twelve Reserve Banks."[49]

The framework that the Federal Reserve Board has proposed would establish six principles to guide the Federal Reserve Banks in making decisions about access to Federal Reserve accounts and services:

1. *Eligibility and Operations.* Each institution requesting an account or services must be eligible under the Federal Reserve Act or another federal statute to maintain an account at a Federal Reserve Bank and receive Federal Reserve Bank services, and should have a well-founded, clear, transparent, and enforceable legal basis for its operations.

2. *Risk to the Federal Reserve Bank.* Provision of an account and services to an institution should not present or create undue credit, operational, settlement, cyber, or other risks to the Federal Reserve Bank.

3. *Risk to Payment System.* Provision of an account and services to an institution should not present or create undue credit, liquidity, operational, settlement, cyber, or other risks to the overall payment system.

4. *Risk to Financial System.* Provision of an account and services to an institution should not create undue risk to the stability of the U.S. financial system.

5. *Risk to Economy.* Provision of an account and services to an institution should not create undue risk to the overall economy by facilitating activities such as money laundering, terrorism financing, fraud, cybercrimes, or other illicit activity.

6. *Monetary Policy.* Provision of an account and services to an institution should not adversely affect the Federal Reserve System's ability to implement monetary policy.[50]

If the guidelines are ultimately adopted, they could provide needed transparency regarding the availability of Federal Reserve accounts and could benefit state charters by reducing the discretion of a particular Federal Reserve Bank to deny a state non-depository trust company – or other type of state-chartered banking entity – that has applied for and been approved for membership in the Federal Reserve System access to Federal Reserve accounts and services. At the writing of this article, in late December 2021, however, the guidelines are still under consideration. In addition, even if they are adopted, it will be necessary for the Federal Reserve Banks to implement them in a consistent manner,[51] particularly for state non-depository trust companies that are member banks. Otherwise, federally chartered and FDIC-insured institutions will have a competitive advantage.

CERTAIN STATES INNOVATE WHILE THE FEDERAL GOVERNMENT LOOKS TO CENTRALIZE

While the OCC was considering how to supervise virtual currency firms, several states began to view virtual currency companies, which were proliferating, as attractive businesses that nonetheless required regulation, and adapted their regulatory landscape to them. In June 2015, New York developed its Bit License regime for virtual currency companies, and, as a

[47] *Id.*

[48] *Id.* at 25,866.

[49] *Id.*

[50] *Id.* at 25,867 – 25,869.

[51] *See, e.g.*, Federal Reserve Board Vice Chair Randal K. Quarles, "Between the Hither and Farther Shore: Thoughts on Unfinished Business," Remarks at The American Enterprise Institute (December 2, 2021) ("As I look ahead to the future of supervision at the Federal Reserve, I believe that if the Fed maintains its commitment to openness and transparency in how it conducts supervision, it will be more effective in overseeing banks and promoting the stability of the financial system.").

result, licensed many such firms.[52] The BitLicense regulations were adopted pursuant to provisions of the New York Financial Services Law that granted the New York Department of Financial Services the authority to regulate financial products and services in New York.[53] The BitLicense regulations provide for a bank-like licensing regime for companies engaged in the following virtual currency activities: receiving virtual currency for transmission or transmitting through a third party; custody; buying and selling virtual currency as a customer business; retail virtual currency conversion services; and controlling, administering, or issuing virtual currency.[54] Companies that seek to engage in any of these activities in New York or with New York residents must apply for and receive a Bit License, and, once licensed, are subject to capital requirements, anti-fraud and consumer protection provisions, surety bond and reserve requirements, and requirements relating to cybersecurity and anti-money laundering.[55] In addition, some New York virtual currency companies operate under a New York trust company charter,[56] and other states, such as South Dakota, Washington, and Wyoming, have authorized non-depository banks or trust companies to engage in a full range of virtual currency activities.

Innovation has continued at the state level, in states as disparate as Wyoming, Nebraska, and Connecticut. Wyoming offers the "speedy" ("SPDI" – special purpose depository institution) charter. This charter permits a banking institution to receive deposits and conduct other activity incidental to the business of banking, including custody, asset servicing, fiduciary asset management, digital asset activities, and related activities.[57] SPDIs may also serve as a vehicle for business cash management and operational accounts, but they are generally prohibited from making loans with customer deposits of fiat currency, and they must at all times maintain unencumbered Level 1 high-quality liquid assets valued at 100% or more of their depository liabilities.[58] Wyoming does not require SPDIs to obtain FDIC insurance, but they are permitted to apply for it.[59] Four such charters have been granted, for Kraken, Commercium Financial, Avanti, and Wyoming Deposit and Transfer.[60] All four institutions seek to offer digital and asset services.

Earlier in 2021, Nebraska enacted legislation that creates new special purpose digital asset charters. The law permits the creation of "digital asset depository institutions," special purpose institutions that do not accept demand deposits and generally are prohibited from a lending business, but which may engage in digital asset transactions.[61] The legislation also provides for "digital asset depository" charters, which institutions would focus on digital asset custody activities.[62] The law gives such institutions the power to apply to become a Federal Reserve member bank,[63] and requires such institutions "at all times, . . . [to] maintain unencumbered liquid assets denominated in United States dollars valued at not less than one hundred percent of the digital assets in custody."[64]

As for Connecticut, for some time it has granted charters to banks that do not accept retail deposits, defined as deposits made by individuals who are not accredited investors under federal securities regulations.[65] A Connecticut uninsured bank is required to maintain a minimum of $5 million in equity capital, unless the Connecticut Commissioner of Banking establishes a different capital requirement based upon a bank's proposed activities.[66] Currently, one such bank exists, UPS Capital Business Credit, a more traditional lending institution.[67] In Illinois, a proposal to permit special purpose trust companies and expand virtual

[52] 23 N.Y.C.R.R. Part 200.

[53] New York Financial Services Law, §§ 102, 104, 201, 206, 301, 302, 309, 408.

[54] 23 N.Y.C.R.R. § 200.2(q).

[55] *Id.* §§ 200.8-9, 200.15-17, 200.19.

[56] https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities.

[57] https://wyomingbankingdivision.wyo.gov/banks-and-trust-companies/special-purpose-depository-institutions.

[58] *Id.*

[59] *Id.*

[60] https://www.coindesk.com/business/2021/08/11/commercium-financial-becomes-fourth-wyoming-chartered-crypto-bank/.

[61] Nebraska Financial Innovation Act, Nebraska Revised Statutes § 8-3005 (2021).

[62] *Id.*

[63] *Id.*

[64] *Id.* § 8-3009.

[65] https://portal.ct.gov/DOB/Financial-Institutions-Division/FID/Organization-of-a-Connecticut-Bank.

[66] *Id.*

[67] https://portal.ct.gov/DOB/Bank-Information/Bank-Information/Banks-in-Connecticut.

currency activities passed the state's House of Representatives in 2021 but has not yet become law.[68]

In contrast to state development in innovation, the most recent federal effort on virtual currencies has been toward centralization. In early November 2021, the President's Working Group for Financial Markets, joined by the OCC and the FDIC, issued its report on virtual currency stablecoins.[69] Stablecoins are virtual currencies that seek to maintain a stable asset value (e.g., $1) by claiming to be 100% backed by high-quality liquid assets. There has been doubt about certain issuers' statements in this regard, with the Commodity Futures Trading Commission having recently brought an enforcement action against one stablecoin issuer.[70] Asserting that stablecoins pose certain significant risks, the report called for Congress to enact legislation that would require stablecoin issuers to be *insured depository institutions* – FDIC-insured banks or thrifts – as opposed to special purpose banks, trust companies, or state BitLicensees.[71] Bank-centric, and Federal Reserve-centric, regulation would thereby apply to stablecoins, as the issuers would be regulated by a federal bank regulator and their parents would generally be regulated by the Federal Reserve.[72] The report also recommended federal legislation that would require both stablecoin issuers and digital wallet providers to be subject to restrictions on affiliations with commercial companies in the same way that most banks are under the Bank Holding Company Act.[73]

CONCLUSION

Although the federal government initially seemed poised to take the lead on a new regulatory framework for virtual currency through the OCC's "Fintech" charter, it quickly lost ground to the states. For the first time in decades, state governments advanced developments that made state banking charters more attractive to challenger firms. Although some have drawn parallels between these state law developments and the "wildcat banking" era of the 1840s and 1850s,[74] we have yet to see large-scale harms – or even small-scale ones – from state innovation. After over 30 years of a steady progression in favor of the federal government, the dual banking system has moved more towards equipoise. With national banking institutions still dominating at the largest asset levels, a more balanced dual banking system has the potential to become an antidote to perceived reductions in competition in the financial realm, in addition to bolstering innovation.[75] ■

[68] https://www.illinoispolicy.org/illinois-may-become-2nd-state-allowing-financial-services-run-on-cryptocurrency/.

[69] https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf.

[70] *In the Matter of: Tether Holdings Limited, Tether Operations Limited, Tether Limited, and Tether International Limited*, Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 22-04 (October 15, 2021).

[71] https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf.

[72] *Id.* The Stablecoin Report does not discuss FDIC-insured industrial banks, which are state-chartered, FDIC-insured banks, the parent companies of which benefit from an explicit exemption from Federal Reserve supervision and regulation in the Bank Holding Company Act. The FDIC has finalized a rule that subjects industrial bank parent companies to some FDIC supervision and regulation, but it is more limited than Federal Reserve supervision and regulation of bank holding companies.

[73] *Id.*

[74] *See, e.g.*, https://www.wsj.com/articles/secs-gensler-doesnt-see-cryptocurrencies-lasting-long-11632246355.

[75] *See, e.g.*, https://www.politico.com/news/2021/04/19/progressives-biden-bank-merger-threat-483183.