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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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