

# OCC Begins Accepting Applications for FinTech Charters

August 9, 2018

On July 31<sup>st</sup>, the Office of the Comptroller of the Currency (“OCC”) announced that it would begin accepting applications for a special purpose national bank charter (“FinTech Charter”) from nonbank financial technology (“FinTech”) companies that offer bank products and services, meet the OCC’s chartering requirements (the “[FinTech Charter Policy Statement](#)”) and adhere to the OCC’s supplemental Licensing Manual (the “[Comptroller’s Manual Supplement](#)” or the “[Supplement](#)”).<sup>1</sup> Hours earlier, the Treasury Department (“Treasury”) released its fourth and final report in response to President Trump’s [Executive Order 13772](#). The report, entitled “A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation” (the “[Report](#)”), recommends that the OCC move forward with the FinTech Charter.<sup>2</sup>

Consistent with existing statutory and regulatory requirements, the FinTech Charter Policy Statement confirmed that the OCC will consider applications for “companies that are engaged in the business of banking but do not take deposits”. However, neither the OCC’s statement nor the Comptroller’s Manual Supplement otherwise defined permissible businesses for FinTech Charters. Follow-up discussions have confirmed that payments and other similar businesses are considered in scope but that no final decision has been made by the OCC on whether the new FinTech Charter will be available for virtual currency-focused businesses.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

WASHINGTON D.C.

**Michael Krimminger**  
T: +1 202 974 1720  
[mkrimminger@cgsh.com](mailto:mkrimminger@cgsh.com)

**Derek M. Bush**  
T: +1 202 974 1526  
[dbush@cgsh.com](mailto:dbush@cgsh.com)

**Patrick A. Fuller**  
T: +1 202 974 1534  
[pfuller@cgsh.com](mailto:pfuller@cgsh.com)

NEW YORK

**Pamela L. Marcogliese**  
T: +1 212 225 2556  
[pmarcogliese@cgsh.com](mailto:pmarcogliese@cgsh.com)

**Colin D. Lloyd**  
T: +1 212 225 2809  
[clloyd@cgsh.com](mailto:clloyd@cgsh.com)

LONDON

**Knox McIlwain**  
T: +44 20 7615 2204  
[kmcilwain@cgsh.com](mailto:kmcilwain@cgsh.com)



## FinTech Charter: Key Takeaways

- **The National FinTech Charter.** Treasury recommends that the OCC move forward with the proposed special purpose national bank (“SPNB”) charter for FinTech companies, which was initially explored by the OCC [in a white paper](#) from December of 2016 and a [draft supplement to the Comptroller’s Manual](#) published in March of 2017. Shortly after the release of Treasury’s Report on July 31, 2018, the OCC announced it would begin accepting new FinTech Charter applications. However, the OCC has not yet decided whether the FinTech Charters will be available for virtual currency-focused businesses, such as exchanges, buy and hold wallets or custodial operations. The OCC is currently focused on issuing these FinTech Charters for payments-related businesses, such as Square and similar companies.

Notably, Treasury also recommends in the Report that the Board of Governors of the Federal Reserve System (“Federal Reserve”) consider whether these SPNBs should be able to access the federal payment system. The Comptroller’s Manual Supplement does not address potential access to the payments system. It remains to be seen whether companies that have sought industrial loan company charters will instead pursue a FinTech Charter.

- **Flexibility as a Special Purpose National Bank.** To date, non-depository FinTech companies have been licensed and regulated principally by the states and principally through existing money transmitter laws. Some states, such as New York, have adopted legal frameworks specifically applicable to FinTech businesses, including those engaged in virtual currency activities. While some progress has been made to provide a common application framework, the licensing process can be time-consuming, expensive and complex given the different state requirements. In some cases, different states have interpreted and applied the same statutory language in significantly different

ways to various products and services. Many FinTech companies have expressed frustration with this state-by-state regulatory process and concern that it could impair the development of the market, as well as product and service innovations.

Offering an SPNB charter to qualifying FinTech companies will create regulatory efficiency and facilitate the growth and variety of services and products available to consumers. As SPNBs, FinTech-Chartered banks would not be subject to different state interest rate caps and certain state consumer protections and licensing regimes. As a result, FinTech-Chartered banks would be able to compete with state- and nationally-licensed financial services operations across the country.

- **A Tailored Financial Inclusion Commitment, Rather Than Community Reinvestment Act Compliance.** Because SPNBs that do not take deposits are not subject to the Community Reinvestment Act of 1977 (“CRA”), the FinTech Charter application and supervisory process involves a “Financial Inclusion Commitment”. This commitment is described in guidance attached to the Comptroller’s Manual Supplement. Unlike the Financial Inclusion Plan originally proposed in the draft Supplement to the Comptroller’s Licensing Manual released in March 2017 (“2017 Supplement”), a fully developed Financial Inclusion Commitment is not required as a component of the applicant’s business plan and can be completed and submitted after receiving initial approval from the OCC on the basis of limited financial inclusion information. With the OCC actively considering revisions to the CRA, the structure and substance of the FinTech Charter’s Financial Inclusion Commitment may offer an indication of the OCC’s preferences for CRA reform.
- **State Regulatory Authorities Express Strong Opposition to Treasury’s Proposals and the OCC’s FinTech Charter.** The New York State Department of Financial Services (“NYDFS”)

quickly [released a same-day statement](#) opposing Treasury's "regulatory sandbox" initiative and the OCC's FinTech Charter, which John W. Ryan, the President of the Conference of State Bank Supervisors ("CSBS"), later called "a regulatory train wreck in the making."

### The FinTech Charter: Overview

Consistent with existing statutory and regulatory provisions, the new FinTech Charter requires SPNBs to conduct at least one of the three core banking functions of taking deposits, paying checks or lending money.<sup>3</sup> In defining the new FinTech Charter, the OCC effectively requires that a FinTech Charter recipient must either pay checks or lend money since the OCC directly states that the FinTech Charter will only be available to companies that do not take deposits.

In the past, while the OCC has not always required national charters to take deposits, the OCC has defined the "business of banking" to include exercising fiduciary duties along with a variety of activities, such as discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, lending, issuing debit cards or engaging in other means of facilitating payments electronically.<sup>4</sup>

As noted above, the OCC has not yet decided whether the new FinTech Charter will be available for virtual currency-focused businesses, such as exchanges, buy and hold wallets or custodial operations. The OCC appears currently to be focused on issuing these FinTech Charters for payments-related businesses, such as Square and other similar companies.

The final FinTech Charter application process largely resembles the substance of the OCC's earlier proposals, with some tweaks to the organization of the Comptroller's Manual Supplement.

The FinTech Charter Policy Statement establishes that the standards and supervisory expectations applicable to FinTech Charter applicants are largely consistent with the OCC's expectations for all other federally-chartered banks. However, the OCC provides that entities granted the FinTech Charter will also be required to develop a contingency plan that addresses

significant financial stress situations that could adversely impact the bank.

The Comptroller's Manual Supplement provides more granular detail regarding the OCC's supervisory expectations. In particular, the Comptroller's Manual Supplement reorganizes the 2017 Supplement to provide greater clarity through a step-by-step approach. Consistent with the process for typical national bank applications, SPNBs adhere to the same four-phase process,<sup>5</sup> which includes (1) the prefiling phase, (2) the filing phase, (3) the review phase and (4) the decision phase.

In the **prefiling phase**, the Comptroller's Manual Supplement provides that applicants are encouraged to contact the OCC's Office of Innovation to initiate conversation with OCC officials before filing an application. The OCC's Licensing Department may request additional meetings and information during this time, including a discussion of the proposed bank's business plan and proposed activities, an underlying market analysis supporting the business plan, the capital and liquidity needs of the operation and a contingency plan to remain viable when under significant financial stress.

In the **filing phase**, an applicant must file a charter application following the same procedures applicable to any other national bank.

In the **review phase**, the OCC will begin review immediately upon receipt of an application. The Supplement articulates the key considerations involved in the OCC's review process, which are developed in addition to those considerations applicable to all other national bank applications, such as whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether the OCC will foster healthy competition by approving the charter. While the OCC will review all aspects of an applicant's individual business model, governance structure and risk profile, the OCC has highlighted a few particular considerations in the OCC's process:

- **Organizers, Management and Directors.** The OCC will specifically consider whether these key figures have relevant technological and financial

expertise and experience to implement the proposed bank's business plan.

- **Business Plan.** A comprehensive plan should include significant detail about the proposed bank's activities and should raise any applicable questions about the permissibility of the activities in the charter application. The business plan should include the bank's proposed market, written goals and objectives, risk management framework, internal controls, risk assessment that includes the proposed bank's risk appetite and any other details required by typical applications for nationally chartered banks. Notably, proposals from companies without an established business record will be subject to greater scrutiny to evaluate to the proposed bank's likelihood of long-term success.

The Comptroller's Manual Supplement notes specifically that applicants proposing business activities that have not previously been approved should "request a legal opinion from the OCC's Chief Counsel's Office".

- **Capital and Liquidity.** FinTech Charters will be subject to the minimum leverage and risk-based capital requirements that apply to all national banks. The OCC will expect minimum and ongoing capital levels to be commensurate with the risk and complexity of the proposed activities. The application should propose a minimum level of capital that the bank should meet or exceed at all times, as well as a capital adequacy assessment that considers qualitative and quantitative factors. Organizers should also consider discussing on- and off-balance sheet composition, credit risk, concentration risk, market risk, operational risk, compliance risk, proposed activities and anticipated volume, plans and prospects for growth, the stability of sources of funds and access to capital. Additionally, organizers should address liquidity and funds management, particularly given that SPNBs will not accept FDIC-insured deposits.

The OCC's flexibility in adapting capital and liquidity standards to the actual risks and complexity of operations will be an important consideration for potential applicants. Some state authorities already have struggled with defining the relationship between non-depository trust companies and the perception of risks in new activities.

- **Financial Inclusion.** The final Supplement replaces the draft's Financial Inclusion Plan with a new section, which requires applicants to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services. The application should describe its commitment to financial inclusion with supporting information, including goals, approaches, activities, milestones, community measures and metrics, all of which are further described in the OCC's Financial Inclusion Commitment Guidance found in the Comptroller's Manual Supplement's Appendix B.

To the extent that a FinTech Charter application does not propose to perform commercial or retail banking services by granting credit to the public in the ordinary course of business, FinTech-Chartered banks would not be subject to the CRA as excluded SPNBs.<sup>6</sup> Additionally, while the 2017 Supplement's proposed "Financial Inclusion Plan" included a footnote requiring banks to consider community service obligations within the bank application's business plan, the Financial Inclusion Commitment Guidance contained in the final Comptroller's Manual Supplement does not.<sup>7</sup>

FinTech Charter applicants will be required in the application to identify and describe products and services that the applicant plans to offer to underserved markets. Only after the OCC grants preliminary approval, will the applicant be required to develop policies and procedures that address the applicant's implementation of its financial inclusion commitment. Since the scope of any CRA or similar requirement has been a concern for FinTech companies considering an

OCC charter, the Comptroller's Manual Supplement should be viewed as a positive step.

- **Contingency Planning.** The final Supplement also introduces this section, which requires the development and submission of a plan to address significant financial stress that could threaten the viability of the bank. This plan will be a condition for preliminary approval of a charter and must be delivered during the bank's organizational phase. Final approval will require implementation of, and adherence to, the contingency plan.
- **Other Important Considerations (such as Coordination With Other Regulators and Continuation of Remedies).** The OCC will also coordinate with other regulators to determine if approvals may be required from other agencies. The OCC will not permit companies subject to a corrective program or enforcement action by another regulator to avoid the consequences of that program or action. Pending actions may be grounds for denial of an application.

In the **decision phase**, the OCC will grant approval first as a preliminary conditional approval, followed by a final approval if the preliminary conditions are met. Following the preliminary conditional approval, the bank may proceed with the organization of the bank according to the bank's business plan and the OCC's conditions for approval. As a condition of approval, the OCC will also impose assessments on the bank based on factors tailored to the business model of the bank.

The final publication of the Comptroller's Manual Supplement largely revises the organization of the 2017 Supplement to provide a clear, step-by-step presentation of the application process. Substantive changes include the addition of contingency planning to the review and the removal of specific requirements to include plans related to the proposed bank's information technology program, recordkeeping and customer data protections.

...

CLEARY GOTTLIB

<sup>1</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS (July 31, 2018), at

<https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf>; OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (July 2018), at <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-considering-charter-applications-fintech.pdf>

<sup>2</sup> THE DEPARTMENT OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES NONBANK FINANCIALS, FINTECH, AND INNOVATION (July 31, 2018), at

<https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi...pdf>

<sup>3</sup> See 12 CFR 5.20(3)(1)(i).

<sup>4</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL DRAFT SUPPLEMENT: EVALUATING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (Mar. 2017), at

<https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf>; OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (Dec. 2016), at <https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>.

<sup>5</sup> See 12 CFR 5.20(1)(1).

<sup>6</sup> See 12 CFR 25.11(c)(3).

<sup>7</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (Mar. 2017), at

<https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf> (citing 12 CFR 5.20(f)(1)).