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ALERT MEMORANDUM

Moving Towards a FinTech National Banking Charter?

October 3, 2016

Over the past two weeks, the Office of the Comptroller of the Currency ("OCC") has taken two important steps potentially towards the chartering of national trust or special purpose banks focused on FinTech businesses. While clearly of interest to those who may seek a FinTech national trust or special purpose bank, these steps are also important because they reflect a broad interest among regulators in the regulatory implications of FinTech developments. While the U.S. has not, to date, pursued the "sandbox" approach used in some other countries, regulators' focus on FinTech initiatives may help spur future FinTech opportunities through a reconsideration of some existing regulatory standards to provide additional flexibility for innovation.

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OCC Receivership Proposal for Uninsured National Banks

First, on September 13th, the OCC published its notice of proposed rulemaking on Receiverships for Uninsured National Banks. While this proposal affects a very small subset of existing national banks – and the OCC noted it has not placed an uninsured national bank into receivership since the Great Depression – it does address a key issue if the OCC is planning to charter new uninsured national trust or special purpose banks to foster FinTech innovation. In fact, the preamble to the proposed rules quite explicitly references the OCC's ongoing consideration of a special purpose FinTech charter. By proposing a roadmap to allow an orderly wind-down of any uninsured national bank, the Sept. 13th proposal addresses an issue – how the bank would be wound down if insolvent – that has been a prime focus since the 2008-09 financial crisis. By doing so, the proposed rulemaking could be another step in filling in the outlines of an OCC FinTech option.

OCC Allows Uninsured National Bank Charters

Second, on Wednesday, Sept. 28th, the OCC released a revised version of its Charters booklet for the Comptroller's Licensing Manual. This revised version pointedly contemplates the chartering of national trust banks and special purpose banks without requiring deposit insurance. This partially reverses the OCC's 2013 decision to require all future national trust banks to have deposit insurance. At the time, the OCC indicated that one reason for requiring deposit insurance was to apply the clearer receivership rules under the Federal Deposit Insurance Act since the receivership rules for uninsured national banks were more uncertain. The new OCC proposal for receivership rules for uninsured national banks addresses this gap.

In the context of the OCC's expressed interest in exploring FinTech issues, the combination of the new proposed receivership rules and the new Charters booklet appears to build a regulatory framework for uninsured national banking charters. If the OCC ultimately allows national trust bank or special purpose bank charters tailored to FinTech businesses – and includes some flexibility on ownership, chartering, and regulatory and supervisory standards – this could provide a significant boost to the options for innovation.

Among the advantages potentially offered through conducting FinTech businesses in a national bank charter is that federal law broadly preempts conflicting or even parallel state law that might affect the national bank's operations. In addition, as noted in the Charters booklet, uninsured banks are not subject to the Community Reinvestment Act, and national trust banks (that do not hold deposits or make commercial loans) are not subject to the Bank Holding Company Act's activities and other limitations. Similarly, banks have certain exemptions from the federal securities laws, including an exemption from the requirement to register as a "clearing agency" if registration would otherwise be required "solely by reason of functions performed by such institutions as part of customary banking . . . activities".[1]

Implications

Based upon recent conversations, it appears that the OCC has not yet finalized its thinking on the use of a national trust bank or special purpose bank charter for FinTech businesses. However, we understand that the OCC should make its plans clear by the end of 2016.

Currently, while the Charters booklet does not explicitly limit its scope, we understand that the relief from the requirement of deposit insurance for new trust or special purpose banks applies only in two situations: 1) where the national trust or special purpose bank is owned by another national bank as an operating subsidiary or owned by a federal savings association or (2) where the national trust or special purpose bank is owned by a bank holding company or financial holding company, whose lead bank is under OCC jurisdiction. To be useful, further steps toward a national FinTech charter will require a broader opening for the chartering of uninsured national trust or special purpose banks.

The possibilities for an uninsured national trust bank or special purpose bank charter have been much discussed in the marketplace since the March 2016 release of the OCC's white paper entitled "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective" and subsequent speeches by Comptroller Curry. The OCC has emphasized that it is considering a broad array of issues in evaluating the appropriate role that the OCC can play in fostering innovation within its mission.

Among the key questions going forward are the following.

- Will a national trust bank or special purpose bank charter be approved specifically for FinTech businesses? If so, how will the chartering process differ from that applied to other national banks?

[1] Section 3(a)(23)(B) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(23)(B).

- Will the OCC expand the flexibility of this charter option by eliminating any requirement of deposit insurance for stand-alone FinTech charters? Or will this charter option require some affiliation with an insured national bank or a bank holding company or financial holding company?
- Will the OCC provide regulatory relief for FinTech national trust banks or special purpose banks in order to improve the attractiveness of this charter option?
- How will the OCC define the capital and liquidity requirements for an uninsured national FinTech charter? The example of existing national trust banks and special purpose banks suggests these requirements will be significantly different from those applied to national banks that are commercial banks. How will they be adjusted for FinTech businesses?

It appears likely that the OCC will approve uninsured national trust bank and special purpose bank charters for FinTech businesses in some form, but the significance of this step will be much influenced by the regulatory and supervisory framework that the OCC chooses.

We will provide future updates as they develop.

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