

The OCC's New FinTech National Banking Charter

December 6, 2016

On Friday, December 2nd, Comptroller Thomas J. Curry of the Office of the Comptroller of the Currency (“OCC”) announced that the OCC will move forward with chartering financial technology (“FinTech”) companies that offer bank products and services and meet the OCC’s chartering requirements. However, while encouraging, the announcement, and the OCC paper released with it, left many issues unresolved.

The OCC did not provide a timeline for accepting or issuing the proposed special purpose national bank charters. In addition, while recognizing that FinTech charters will be different, the OCC did not clarify whether or how those differences would be reflected in the chartering process, standards, or subsequent supervision. The OCC simply stated that the standard chartering process would apply.

Accompanying the announcement, the OCC published a paper entitled “Exploring Special Purpose National Bank Charters for Fintech Companies” (“December Paper”). The paper discusses the issues considered by the OCC in approving national bank charters and how some of those might apply to FinTech businesses, and poses a series of questions for public comment. Written comments are requested by January 15, 2017.

Unfortunately, while Comptroller Curry’s announcement is promising, the tentative nature of the paper and its similarity to the March 2016 white paper entitled “Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective”, illustrate that it is unlikely that the OCC will actually charter a FinTech special purpose national bank anytime soon.¹

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¹ OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016), <https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>.



This new announcement builds on an OCC consultation process that began in August 2015 with outreach to the FinTech industry and other financial regulators, and then followed up with the publication of the March 2016 white paper, the release of a new Charters booklet for the Comptroller's Licensing Manual to permit the chartering of national trust or special purpose banks without deposit insurance, and the creation of the OCC's Office of Innovation.²

FinTech Charters – But What Will They Mean?

The OCC is statutorily authorized to charter national banks to conduct the “business of banking.” The OCC, in the past, has broadly construed the “business of banking” and the “incidental powers” necessary to carry on banking.³ The OCC has chartered special purpose national banks, which may limit their businesses to fiduciary, payments, credit card activities, or any other business within the business of banking. In framing how the OCC proposes to evaluate potential FinTech charters, the December Paper reiterated that a special purpose bank conducting activities other than fiduciary activities must conduct at least one of the three “core banking functions: receiving deposits, paying checks, or lending money.” So long as the special purpose bank engages either in fiduciary activities or one of the three “core banking functions”, the OCC stated that there is “no legal limitation on the type of “special purpose” for which a national bank charter may be granted.” The OCC noted that it would review new activities “on a case-by-case basis” for their permissibility under a special purpose charter. Perhaps most significantly, the OCC stated that the National Bank Act is “sufficiently adaptable to permit national banks – full service or special purpose – to engage in new activities as part of

the business of banking or to engage in traditional activities in new ways.” This clearly evinces an OCC willingness to consider innovative uses of the charter.

The OCC did not announce specific standards for the new charters or application requirements. The December Paper expressly stated that the OCC's standard chartering process would apply. The agency emphasized that it will hold the chartered FinTech companies “to the same rigorous standards of safety and soundness, fair access, and fair treatment of customers that apply to all national banks and federal savings associations.”⁴ However, as Comptroller Curry noted in his remarks, the OCC will be learning from their experiences with other special purpose charters in crafting and applying the supervisory expectations for the applications.

No timeline was set for when the agency would either start accepting these applications or when they would begin granting the charters. The December Paper and request for comments raised some potentially challenging issues, as discussed in more detail below. Overall, with no clear differences in standards and some more challenging requirements, it is unclear how welcoming the OCC's chartering process will be for FinTech companies.

Supervisory Expectations

The OCC expects that in an application for a special purpose national bank charter, a FinTech company must meet certain “baseline”⁵ supervisory expectations:

- **A Robust Business Plan.** As would be expected for any national bank charter, the OCC will require a thoughtful rationale for the application, a detailed description of proposed bank's activities, and a “summary of how the proposed bank will organize its resources to meet its goals and objectives and how it will measure progress.”⁶ The plan must also define the market for the proposed bank and demonstrate the bank has a

² See Cleary Gottlieb, *Alert Memorandum: Moving Towards a FinTech National Banking Charter?* (Oct. 3, 2016); OCC, *OCC Issues Responsible Innovation Framework* (Oct. 26, 2016), <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-135.html>.

³ See 12 U.S.C. §1 et seq. ; OCC Interpretations and Actions available at www.occ.gov/topics/licensing/interpretations-and-actions/index-interpretations-and-actions.html.

⁴ OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 2.

⁵ *Id.* at 8.

⁶ *Id.* at 9.

reasonable chance of success. The business plan must cover a minimum of three years and include detailed plans for capital contributions and how it would maintain capital and liquidity resources, and monitor its operations through best and worst case scenarios.

- **Governance Structure.** As with other national banks, the governance structure of a proposed FinTech bank must be tailored to the risks of its proposed activities. The standards described in the December Paper parallel those normally applied by the OCC, which are to ensure that management and the board of directors have the expertise and risk management framework to operate the bank in a safe and sound manner.
- **Capital.** As Comptroller Curry noted during the announcement, the OCC will tailor the capital requirement for individual companies, the activities and services they provide, and the risks they face. However, while recognizing that the capital standards applied to a commercial bank should not apply to a special purpose bank, the OCC did not provide any specific guidance on the standards it would apply. The OCC did comment that it may apply a “specific minimum level of capital”, which could be adjusted to account for off-balance sheet activities, for the absence of deposit funding or for other risks posed by the bank’s specific business model. Further details on the analysis will be needed before potential applicants can evaluate the viability of a national charter for FinTech businesses.
- **Liquidity.** Like other charter applicants, a FinTech company’s application would have to provide detailed analyses to show adequate liquidity commensurate with the risk and complexity of the proposed activities. If the proposed special purpose national bank would not have access to insured deposits, this would be a consideration for the OCC in evaluating the access to and cost of funding for the proposed FinTech business.
- **Compliance Risk Management.** Each FinTech company applying for a bank charter must demonstrate a “top-down ... culture of

compliance” with systems to supervise the compliance process and sufficient resources for an effective program.⁷ Applicants should expect to have a significant OCC focus on the proposed compliance program for anti-money laundering, Bank Secrecy Act, and related compliance issues.

- **Financial Inclusion.** Although special purpose banks that are not insured depository institutions are not subject to the CRA, the OCC will look for a FinTech company’s application to demonstrate how it will promote financial inclusion, the fair access to financial services, and the fair treatment of customers. It must also illustrate how it will help meet the needs of the entire community it serves. However, the OCC did not specify how the applicant should define the community or customer base and appears to leave that open for further development with applicants. The OCC also did not describe what types of inclusive efforts or other consumer outreach it will require.⁸
- **Recovery and Resolution Plans.** A FinTech company’s application should include a recovery plan that describes the potential risks in stressed scenarios and proposed options the company could take to restore the company’s viability. Additionally, the company should set out “specific financial or other risk triggers that would prompt the Board and management’s determination to unwind the operation in an organized manner.”⁹ Finally, the OCC may require the proposed bank to have a “clear exit strategy” if the recovery plan fails.¹⁰

In creating these requirements, the OCC will be coordinating with other financial regulators, as those

⁷ *Id.* at 11.

⁸ *See id.* at 12; OCC, COMPTROLLER’S LICENSING MANUAL: CHARTERS (2016), fn. 58, at 96, (noting, “the CRA does not apply to uninsured banks or special purpose banks that will not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incidental to their specialized operations”),

<https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

⁹ *Id.* at 13.

¹⁰ *Id.*

agencies may have oversight roles as well depending on the structure of the FinTech company. Specifically, almost every national bank must be a member of the Federal Reserve System. Additionally, Federal Deposit Insurance Corporation regulations would apply to those FinTech companies seeking to accept insured deposits, and Consumer Financial Protection Bureau regulations would apply to those engaged in consumer-focused activities.

Generally, the laws and regulations that apply to full-service national banks also apply to special purpose national banks. State laws that apply to special purpose national banks generally would include anti-discrimination laws, fair lending laws, tax laws, criminal laws, tort laws, and unfair or deceptive customer treatment laws.

Request for Comments

The OCC is requesting comments on a broad array of issues implicated by the plan to charter national special purpose banks. The questions for comment focus on the risks and benefits of the charter, the appropriate capital, liquidity, risk management, and supervisory approaches, application requirements, and financial inclusion standards. Written comments are requested by January 15, 2017.

Responses of State Regulators

On Monday, December 5, 2016, the Conference of State Bank Supervisors (“CSBS”) and the Superintendent Maria T. Vullo of the New York Department of Financial Services (“Superintendent”) released statements strongly criticizing the OCC’s proposed national special purpose banking charter. CSBS contended that the OCC’s proposed special purpose charter “is fatally flawed, and represents a direction that threatens to damage the U.S. financial system.”¹¹ The statement went on to posit that the charter will result in the OCC picking winners and

losers in the FinTech industry, will allow the OCC to expand its mandate without statutory authority, and will ultimately harm consumers. Similarly, the Superintendent argued that state regulators, including the DFS, are best suited to protect consumers through the regulation of non-bank financial companies and that the DFS opposes any effort to transfer their power into the hands of federal regulators. The Superintendent’s statement concluded that “[h]istory has demonstrated that states, not the federal government, have the requisite knowledge and experience to effectively regulate nondepository financial service providers and guard against predatory and abusive practices.”¹²

Unfortunately, these statements do not suggest a coordinated national strategy for complementary federal and state regulation and supervision. The absence of such a strategy could hinder innovation and make a clear understanding of the regulatory landscape in the United States more difficult. The statements may also reflect some uncertainty, and perhaps pre-emptive positioning, about the policies that federal regulators, including the OCC, may adopt on these issues in light of the senior leadership changes that will occur following the 2016 elections.

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¹¹ Conference of State Bank Supervisors, *Statement by the Conference of State Bank Supervisors on Comptroller’s Announcement of New Federal Charters* (Dec. 2, 2016), <https://www.csbs.org/news/press-releases/pr2016/Pages/120216.aspx>.

¹² New York State Department of Financial Services, *Press Release: Statement by DFS Superintendent Maria T. Vullo Regarding the OCC Special Purpose National Bank Charters for Fintech Companies* (Dec. 2, 2016), <http://www.dfs.ny.gov/about/press/pr1612021.htm>.