UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--x
MARIA T. VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Plaintiff,

-- against --

Civil Action No. 18-cv-8377

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

and

JOSEPH M. OTTING, in his official capacity as U.S. Comptroller of the Currency,

Defendants.
--x

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. By this action, plaintiff MARIA T. VULLO ("Plaintiff"), in her official capacity as Superintendent of the New York State Department of Financial Services ("DFS"), challenges the decision of the Office of the Comptroller of the Currency ("OCC") made on July 31, 2018, to immediately begin accepting applications from, and grant special-purpose national bank charters to, a boundless class of undefined and so-called "financial technology" ("fintech") companies, including companies that do not accept deposits ("Fintech Charter Decision"). These newly forged institutions will seek to provide financial services in connection with an unidentified and sweeping array of commercial ventures never before authorized or regulated by the OCC.

2. The Fintech Charter Decision is lawless, ill-conceived, and destabilizing of financial markets that are properly and most effectively regulated by New York State. It also

puts New York financial consumers – and often the most vulnerable ones – at great risk of exploitation by federally-chartered entities improperly insulated from New York law. The OCC's reckless folly should be stopped.

3. Specifically, because the OCC seeks to imbue its special purpose charter with vast preemptive powers over state law, the Fintech Charter Decision creates serious threats to the well-being of New York consumers and businesses alike. The risks include:

- weakening regulatory controls on usury, payday loans, and other predatory lending practices;
- consolidating multiple non-depository business lines under a single federal charter thus creating even more institutions that are "too big to fail;"
- creating an unlevel and unfair playing field to the detriment of New York's strong community banking system that complies with New York law and serves New York's communities throughout the State; and
- creating competitive advantages for large, well-capitalized "fintech" firms, which can overwhelm smaller market players and thereby stunt rather than foster innovation in financial products and services.

4. These and other weighty policy flaws make the Fintech Charter Decision unsustainable as a practical matter. But the OCC's action is legally indefensible because it grossly exceeds the agency's statutory authority. The argument is self-evident. The OCC has determined that national "banks" holding fintech charters will not, and cannot, accept deposits. That proviso violates a fundamental premise of federal banking law. Since 1863, when Congress first enacted the National Bank Act ("NBA") (originally denominated the National Currency Act), the operations of federally chartered banks have been confined solely to the "business of

banking." Yet even the most cursory reading of the NBA's language, history, and purpose reveals that Congress clearly intended the "business of banking" necessarily to include deposit taking. Accordingly, the Fintech Charter Decision does not concern the "business of banking" and is therefore beyond the OCC's jurisdiction to implement.

5. Moreover, the lack of congressional authorization for the Fintech Charter Decision indisputably deprives preemptive effect to the OCC's actions. There is no quarrel that *only* the clearly expressed "purpose of Congress" decides whether federal law displaces state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citations omitted). Here, the congressional silence as to whether the NBA preempts the states' time-honored regulation of non-depository financial service companies is deafening.

6. Still, the OCC has tried to justify the Fintech Charter Decision as an important means of supporting "responsible innovation in the federal banking system." (*See infra* ¶ 40, Exhibit L at 2). Similarly, in issuing the Fintech Charter Decision, the current Comptroller of the Currency, Joseph M. Otting, has extolled the purported benefits of the Fintech Charter Decision as providing "more choices to consumers and businesses, and creat[ing] greater opportunity for companies that want to provide banking services in America." (*See infra* ¶ 39, Exhibit Kat 1). But even if these claims had merit, which they do not, they could not validate the OCC's action. "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that

Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotation marks omitted).

7. Nor is this the first time that the OCC has exceeded its statutory authority by impermissibly redefining the "business of banking." Indeed, federal courts have already twice struck down the agency's administrative efforts to authorize national banks that do not accept deposits. *See Independent Bankers Ass'n of America v. Conover*, 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529 at *32, Fed. Banking L. Rep. (CCH) P86, 178 (M.D. Fla. Feb. 15, 1985); *Nat'l State Bank v. Smith,* No. 76-1479 (D. N.J. Sept. 16, 1977), *rev'd on other grounds*, 591 F.2d 223 (3d Cir. 1979).

8. In the same way, federal courts have repeatedly checked the OCC's unlawful efforts to authorize national banks to sell insurance products in derogation of the NBA's limitations on the "business of banking." *See, e.g.*, *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (crop insurance); *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992) (title insurance); *Saxon v. Georgia Ass'n of Independent Insurance Agents,* 399 F.2d 1010 (5th Cir. 1968) (automobile, home, casualty, and liability insurance). The OCC has even tried unsuccessfully to authorize a national bank to operate a travel agency under the NBA, only to be judicially halted. *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972).

9. The need for the Fintech Charter Decision to meet the identical fate is even more compelling because of the unavoidable and drastic consequences that it will have for New York State, its residents, and its businesses.

10. New York is a global financial center and, as a result, DFS is effectively a global financial regulator. In addition to the 229 state and international banks licensed by New York,

with assets of approximately $2.5 **trillion**, DFS also supervises approximately 600 non-bank financial services firms, with assets of approximately $1 trillion. These non-depository institutions include licensed lenders, real estate lenders, mortgage servicers, sales and premium finance companies, pre-paid card issuers, money transmitters, virtual currency businesses, check cashers, and budget planners. DFS also regulates approximately 1400 insurance companies operating within New York. In all DFS supervises approximately $7 trillion in total assets of entities across banking, insurance, and other financial services.

11. Such companies provide the financial infrastructure for much of the daily life of New York residents and businesses, and New York law has expertly regulated the integrity of those markets. But under the Fintech Charter Decision, many of those same companies could become federally-chartered "banks," purportedly immune through federal preemption rules from New York's heighted financial safety and soundness controls (such as strict capital standards, liquidity requirements, surety bond obligations, and industry-wide insurance fund commitments) as well as the state's strong consumer protection laws (such as tough anti-usury laws, interest-rate caps, and prohibitions on pay-day lending schemes).

12. Recent history graphically illustrates how excessive federal preemption of state law governing mortgage lenders and servicers was a root cause of the global financial collapse. The Fintech Charter Decision presents many similar perils. It gives unscrupulous financial firms another way to skirt local oversight by the states in which they do business and impact consumers. There has been a dramatic rise in small dollar loans to consumers at high interest rates, which loans are then securituzed and sold. Permitting lenders engaged in such conduct to evade state regulation and laws creates great risk similar to what was seen in the 2008 financial crisis.

13. Thus, even if it were legal – which it clearly is not – the OCC's plan to charter special purpose, non-depository institutions is simply not worth the risk. In short, financial centers like New York, which have developed comprehensive and well-functioning regulatory bodies, should not needlessly bear the harmful brunt of an overreaching federal agency.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 701 *et seq.* (Administrative Procedure Act), and 28 U.S.C. § 2201 (Declaratory Judgment Act).

15. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

16. Plaintiff is the Superintendent of DFS. DFS is the New York governmental agency statutorily charged with the "enforcement of the [state's] insurance, banking and financial services laws." N.Y. Fin. Serv. L § 102. In forming DFS in 2011, the legislature declared that one of the purposes for consolidating the departments of insurance and banking was "to provide for the effective and efficient enforcement of the banking and insurance laws." N.Y. Fin. Serv. L § 102(c). DFS is headquartered at One State Street Plaza, New York, NY 10004.

17. As the Superintendent of DFS, Plaintiff is responsible for supervising "the business of, and the persons providing, financial products and services, including any persons subject to the provisions of the insurance law and the banking law." N.Y. Fin. Serv. L. § 201(a). In carrying out this supervisory function, the legislature directed the Superintendent to "take such actions as the superintendent believes necessary to: … (2) ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services; … (4) protect

users of financial products and services from financially impaired or insolvent providers of such services." N.Y. Fin. Serv. L. § 201(b).

18. Plaintiff possesses "the rights, powers, and duties in connection with financial services and protection in this state, expressed or reasonably implied by [the financial services law] or any other applicable law of this state." N.Y. Fin. Serv. L. § 202(a). Plaintiff has broad authority under the Financial Services Law, the Banking Law, and the Insurance Law to enforce the laws of the state including the power to take "such actions as the superintendent deems necessary to educate and protect users of financial products and services." N.Y. Fin. Serv. L. § 301(c)(1).

19. Defendant Office of the Comptroller of the Currency is a bureau of the United States Department of the Treasury and functions as the primary supervisor of federally chartered national banks. Its offices are located at 400 7th Street S.W., Washington, DC 20219.

20. Defendant JOSEPH M. OTTING is the current United States Comptroller of the Currency. Mr. Otting was nominated by President Trump for this office on June 5, 2017, and was confirmed by the United States Senate on November 27, 2017. Prior to the appointment of Mr. Otting, Kenneth Noreika, was the Acting Comptroller of the Currency. Thomas J. Curry, who served in the position from April 9, 2012 until May 5, 2017, was the last individual before Mr. Otting to be confirmed by the United States Senate to serve as the Comptroller of the Currency. The OCC is a bureau within the United States Treasury Department that "is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction." 12 U.S.C. § 101(a). As Comptroller, Defendant JOSEPH M. OTTING is the "chief officer" of the OCC. 12 U.S.C. § 101(b)(1).

STATUTORY AND REGULATORY FRAMEWORK

21. In relevant part, Chapter 12, section 24 of the United States Code enables the OCC to charter national banking associations by granting them "all such incidental powers as shall be necessary to carry on the *business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes . . . ." 12 U.S.C. § 24 (Seventh) (emphasis added).

22. The "Business of Banking" Clause in § 24 (Seventh) ("BOB Clause") has been an anchor provision of the NBA since that statute was first enacted in 1863. It is long-settled that the historical phrase "business of banking" and its essential meaning define the scope of financial activities in which a national bank charted by the OCC may or must engage. From the earliest days of the NBA, banks were understood to be "of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation." *Bank of Savings v. Field*, 70 U.S. 495, 512 (1865). The Supreme Court emphasized that it "is an important part of the business of banking to receive deposits." *Bank of the Republic v. Millard*, 77 U.S. 152, 155 (1869). Indeed, the Court noted that, "[s]trictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution," underscoring that "[o]riginally the business of banking consisted only in receiving deposits." *Oulton v. Savings Institution*, 84 U.S. 109, 118 (1877).

23. The NBA's language, history, structure, judicial construction, and relationship to other key federal banking statutes make plain that – at a minimum – the BOB Clause requires that OCC-chartered banks receive deposits. In short, "the National Bank Act authorizes national banks to receive deposits without qualification or limitation." *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 376 (1954).

24. The OCC has promulgated regulations for the organization of national banks. *See* 12 C.F.R. § 5.20. In 2003, the OCC amended its regulations to create, *for the first time in nearly 140 years*, a new category of nationally chartered institutions described as "special purpose" banks. *See* 68 Fed. Reg. 70122-01 (Dec. 17, 2003). To date, the OCC has never applied this rule to non-depository institutions now subject to the OCC Fintech Decision. According to the amended rule, an OCC-chartered firm could "be a special purpose bank that limits its activities to fiduciary activities *or to any other activities within the business of banking*." 12 C.F.R. § 5.20(e)(1)(i) (emphasis added). The amended regulation further provides that a "special purpose bank that conducts activities other than fiduciary activities must conduct *at least one* of the following core banking functions: Receiving deposits, paying checks, *or* lending money." *Id.* (emphasis added).

25. Under the OCC's Fintech Charter Decision, the OCC now seeks to utilize 12 C.F.R. § 5.20(e) – in stark violation of the BOB Clause and the clear intent of Congress – *to empower itself* to charter non-depository institutions. If validated by the courts, this agency sleight-of-hand, practiced on the barest of administrative records, *see* 68 FR 70122-01 (Dec. 17, 2003), plus a "whitepaper" and a manual (discussed below), would upend almost one and a half centuries of established federal banking law and displace a nation of 50 state financial regulators that annually supervise hundreds of billions of dollars in non-bank transactions. There is absolutely no evidence that Congress ever intended, much less expressly authorized, any such seismic shift in the allocation of established regulatory responsibility. For over 150 years, there has been dual authority, split between the federal and state governments, but the business of non-depository, non-bank institutions has been entirely regulated by the states.

26. In fact, before the Fintech Charter Decision, the OCC had never sought to charter a "special purpose bank" under the authority of 12 C.F.R. § 5.20(e). The OCC's fourteen-year reluctance has been warranted. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks and citations omitted).

27. That "measure of skepticism" should grow exponentially when any such new-found power also claims to preempt states from regulating financial actors over which they have previously exercised 150 years of nearly exclusive jurisdiction.

THE OCC's CONSIDERATION OF FINTECH CHARTERS

28. Although the Fintech Charter Decision was issued on July 31, 2018, its origins date back to March 2016, when the OCC published a white paper entitled, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective.* (available at https://www.occ.gov/publications/ publications-by-type/other-publications-reports/pub-responsible-innovation-banking -system-occ-perspective.pdf) (annexed hereto as Exhibit A). The publication identifies the impact of fast-paced developments in financial services technology as a much needed subject of regulatory inquiry.

29. Six months later, the OCC first publicly stated that it was "considering whether a special-purpose charter could be an entity for the delivery of banking services in new ways." Proposed Rulemaking, *Receiverships for Uninsured National Banks*, 81 Fed. Reg. 62,835, 62,837 (Sept. 13, 2016).

30. Soon thereafter, in December 2016, the OCC published another white paper, this one entitled, *Exploring Special Purpose National Bank Charters for Fintech Companies*

("Fintech White Paper") (available at https://www.occ.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf) (annexed hereto as Exhibit B). The Fintech White Paper asks "whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company" and concludes that "it may be in the public interest to do so." Fintech White Paper at 2. The agency expressly roots its sole authority for chartering a fintech company in 12 C.F.R. § 5.20(e), *see id.* at 3 & n. 4, and insists that such institutions would be immune to state law and visitorial authority "in the same way and to the same extent" as "a full-service national bank," Fintech White Paper at 5.

31. The OCC received numerous comments to the Fintech White Paper strongly opposing the agency's fintech charter proposal. Just a few of the officials and institutions that objected to the Fintech White Paper include:

- The New York State Department of Financial Services (a true and correct copy of the letter from the Hon. Maria T. Vullo to the Hon. Thomas J. Curry, dated January 17, 2017, is annexed hereto as Exhibit C);
- The Conference of State Banking Supervisors (a true and correct copy of the letter from John W. Ryan, Esq. to the Hon. Thomas J. Curry, dated January 13, 2017, is annexed hereto as Exhibit D);
- The Independent Community Bankers of America (a true and correct copy of the letter from Christopher Cole, Esq. and James Kendrick to the Hon. Thomas J. Curry, dated January 17, 2017, is annexed hereto as Exhibit E);
- U.S. Senators Sherrod Brown (Ranking Member, Senate Committee on Banking, Housing, and Urban Affairs) and Jeffrey A. Merkley (a true and correct copy of

the letter from the Hon. Sherrod Brown and the Hon. Jeffrey A. Merkley to the Hon. Thomas J. Curry, dated January 9, 2017, is annexed hereto as Exhibit F); and

- The Illinois Department of Financial and Professional Regulation (a true and correct copy of the letter from the Hon. Bryan A. Schneider to the Hon. Thomas J. Curry, dated January 17, 2017, is annexed hereto as Exhibit G).

32. These objections collectively set forth, in great detail, numerous regulatory gaps, threats to consumer protection, and risks to the safety and soundness of the financial services industry created by the OCC's fintech charter proposal. Moreover, each one of these objections specifically challenged the OCC's statutory authority to grant a fintech charter. As summarized by Senators Brown and Merkley:

> Because many of these [fintech] firms do not intend to accept deposits, it is far from clear whether the OCC has the authority to grant national bank charters to them. Congress has given the OCC a very narrowly-defined authority to charter only three special-purpose national banks (bankers' banks, credit card banks, and trust banks) that do not accept deposits. . . . An alternatively chartered firm that does not take deposits by offering transactions or savings accounts, and therefore does not encourage the fundamental banking act of building wealth by encouraging savings, should not be able to refer to itself as a "bank."

Exhibit F at 2-3.

33. The Independent Community Bankers of America ("ICBA") – a nationwide association of nearly 6000 state and *federally* chartered banks of all sizes – echoed these concerns:

> ICBA does not believe that the OCC has the necessary authority for establishing a special purpose national bank charter that engages exclusively in non-depository core banking functions. . . . [T]here is no explicit authority under the National Bank Act to charter a fintech company as a special purpose bank. . . . Congress needs to consider all the policy implications of a fintech charter, including the scope of such a charter and how the business of banking should be defined under federal law.

Exhibit E at 2. In response to the OCC's July 2018 announcement that it is proceeding with the Fintech Charter Decision, ICBA stated:

> ICBA remains concerned that instituting a special-purpose national bank charter for fintech firms would create an unlevel regulatory playing field. The Office of the Comptroller of the Currency should procure explicit statutory authority from Congress before it issues fintech charters.

Independent Community Bankers of America, Press Release *ICBA Statement on Treasury, OCC Regulatory Announcements* (Aug. 1, 2018) *available at* https://www.icba.org/news/press-releases/2018/08/01/icba-statement-on-treasury-occ-regulatory-announcements.

34. In March 2017, while the OCC was still under the direction of Comptroller Thomas J. Curry, the OCC responded to the comments that it received on the Fintech White Paper. *See OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Fintech Companies* ("Summary of Comments") (available at www.occ.treas.gov/topics/bank-operations/innovation/summary-explanatory-statement-fintech-charters.pdf) (annexed hereto as Exhibit H).

35. The Summary of Comments did not address many of the objections raised to the OCC fintech charter. The Summary states the agency's position that: (1) it would be in the public interest for the OCC to grant fintech charters; (2) that entities granted such charters would not take deposits; and (3) 12 C.F.R. § 5.20(e), on its own, gave the OCC the necessary chartering authority. *See* Summary of Comments at 2, 3, 14-15.

36. On March 15, 2017, the agency issued a draft supplement to the Comptroller's Licensing Manual, entitled *Evaluating Charter Applications from Financial Technology Companies* ("Draft Manual Supplement") (available at

http://www.occ.treas.gov/publications/publictions-by-type/;icensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf.) (annexed hereto as Exhibit I).

37. On April 14, 2017, DFS sent an additional letter to the prior OCC Comptroller further opposing the publication of the Draft Manual Supplement and the OCC's issuance of a special purpose national bank charter to non-depository institutions (a true and correct copy of the letter from the Hon. Maria T. Vullo to the Hon. Thomas J. Curry, dated April 14, 2017, is annexed hereto as Exhibit J).

38. Between March 15, 2017 and July 31, 2018, the OCC was allegedly evaluating whether non-depository fintech companies – *i.e.*, those companies engaged in only paying checks and/or lending money but not taking deposits – should be chartered by the OCC as special purpose national banks. According to the OCC, a final decision was not made until July 31, 2018.

39. On July 31, 2018, the OCC announced the Fintech Charter Decision in a Press Release titled "OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies" (a true and correct copy of the OCC's July 31, 2018 Press Release is annexed hereto as Exhibit K). According to the July 31 Press Release, the OCC "today announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking." Id. Lest there was any prior doubt, there now is no doubt that the OCC's July 31, 2018 announcement constitute's the agency's final decision to proceed with the unlawful Fintech Charter.

40. In addition to the Press Release, the OCC also published on July 31, 2018, a "Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters" ("OCC Fintech Policy Statement") and the "Comptroller's Licensing Manual Supplement:

Considering Charter Applications from Financial Technology Companies" ("Final Manual Supplement") that implemented the Fintech Charter Decision. (A true and correct copy of the OCC Fintech Policy Statement is annexed hereto as Exhibit L and a true and correct copy of the Final Manual Supplement is annexed hereto as Exhibit M.)

41. The OCC Fintech Policy Statement states that the OCC will immediately accept applications from a broad range of Fintech businesses including those that do not accept deposits: "It is the policy of the Office of the Comptroller of the Currency (OCC) to consider applications for national bank charters from companies conducting the business of banking, provided they meet the requirements and standards for obtaining a charter. This policy includes considering applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking <u>but do not take deposits</u>." Ex. L at 1 (emphasis added).

42. The focal point of the Fintech Charter Decision is on the federal licensure -- and concomitant but unprecedented state law preemption -- for <u>non-depository</u> fintech companies that seek licensure as a "special purpose national bank." Indeed, the entire Final Manual Supplement is devoted to providing the OCC's rules for "consideration of applications from fintech companies to charter a special purpose national bank that would engage in one or more of the core banking activities of paying checks or lending money, but would not take deposits and would not be insured by the Federal Deposit Insurance Corporation." Ex M at 2. After the Fintech Charter Decision was issued, the OCC immediately invited interested parties including Fintech startup companies to come to the OCC's office in New York to discuss, among other items, the new special purpose national bank charter.

THE FINTECH CHARTER DECISION WILL SEVERELY UNDERMINE NEW YORK'S ABILITY TO PROTECT ITS FINANCIAL MARKETS AND CONSUMERS

43. The economic fallout in New York from the Fintech Charter Decision will be destructive. Because the OCC has set the bar for fintech-charter eligibility so low, *i.e.*, firms that are merely "engaged in paying checks or lending money," Manual Supplement at 5, the full scope of regulatory disruption is difficult to ascertain. Most non-depository financial service firms that are presently subject to New York regulatory oversight and state-law enforcement proceedings are, however, in some form, "engaged in paying checks or lending money." *Id.* And because the OCC maintains that "[s]tate law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank," Fintech White Paper at 5, federal preemption claims will surely proliferate among fintech charter-holders in response to New York misconduct charges.

44. Nevertheless, two examples of concrete harm to New York's financial market stability and consumer protection controls – which are directly attributable to the Fintech Charter decision – are readily identifiable. To start, as regulated by Plaintiff, New York law imposes bonding requirements, liquidity and capitalization standards, and payment obligations to the New York State Transmission of Money Insurance Fund upon state-licensed money transmitters in order to protect consumers against loss in the event that such an institution fails.

45. Under the Fintech Charter Decision, New York-licensed money transmitters using technologically innovative operating platforms could qualify for an OCC special purpose charter and thereby escape New York's regulatory requirements. Yet, "a fintech company with a special purpose national charter that does not take deposits . . . is not insured by the Federal Deposit Insurance Corporation." Fintech White Paper at 2. The Fintech Charter Decision therefore strips customers of non-depository money transmitters of critical financial protections otherwise

guaranteed by New York law. This result is especially troubling when you consider that a disproportionate number of consumers who use money transmitters are the most economically vulnerable.

46. Similarly, the Fintech Charter Decision effectively negates New York's strict interest-rate caps and anti-usury laws. Federal law provides that a bank chartered under the NBA "may take, receive, reserve, and charge on any loan . . . or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. Consequently, under the Fintech Charter decision, marketplace lenders that use the Internet can now gouge New York borrowers by receiving an OCC special purpose charter and locating in any number of other states that authorize interest rates considered usurious in New York. *See* Exhibit C at 5 ("Giving federal bank charters to online lenders would create a race to the bottom where online lenders could set up shop in a state with lax consumer protection rules and flood more consumer protective states with dangerous, high interest loans.").

47. This perverse regulatory outcome – which Congress plainly did not authorize – could realistically lead in New York to the proliferation of prohibited payday lending by out-of-state OCC chartered entities seeking to import their usurious trade into the state to exploit financially vulnerable consumers. These platforms charge exorbitant interest rates that trap consumers in a cycle of high-interest borrowing that they can never repay, leading to the sort of economic and social devastation like that seen in the recent foreclosure crisis.

48. In New York, payday and other high-interest, small-dollar lending is illegal under both state civil and criminal usury statutes. New York has aggressively enforced the state's usury laws to stop predatory loans in the state. Some lenders have attempted to skirt New York's prohibition on payday lending by offering usurious loans to New Yorkers over the internet, often

by affiliation with federally chartered or federally recognized institutions. New York's usury laws apply to online payday lenders when those loans are offered or made in New York. Moreover, the courts have agreed with the DFS position when payday lenders have attempted to stop DFS from taking any action to protect New York consumers from payday lenders. DFS has led in successfully fighting these practices through effective regulation and should not be forced by the Fintech Charter Decision to capitulate now.

49. The Fintech Charter Decision would exempt its new fintech chartered entities from existing federal standards of safety and soundness, liquidity and capitalization. New York has for years regulated non-depository institutions including those using financial technology and has clear laws addressing their safety and soundness. DFS has dedicated staff that specializes in licensing, supervising and examining non-depository institutions. These specialized examiners have extensive experience examining the unique compliance challenges presented by these institutions and have the tools needed to supervise these entities, including training and examination protocols that are tailored to non-depository institutions. DFS has been examining and supervising these entities for decades and has brought enforcement actions against those that have Bank Secrecy Act and Anti-Money Laundering ("BSA-AML") deficiencies. DFS has also issued transaction monitoring regulations that apply to its nonbank regulated entities that establish specific regulatory requirements for their BSA-AML programs.

50. Finally, the OCC's actions will also injure DFS in a directly quantifiable way. Pursuant to statute, DFS operating expenses are funded by assessments levied by the agency upon New York State licensed financial institutions. *See, e.g.*, N.Y. Fin. Serv. L § 206(a) ("Persons regulated under the banking law shall be assessed by the superintendent for the operating expenses of the department that are solely attributable to regulating persons under the

banking law in such proportions as the superintendent shall deem just and reasonable."). For example, as of December 31, 2016, $13.5 million of DFS annual assessments for 2016-17 were collected from New York State licensed financial services firms, such as money transmitters and check cashers. For that same period, $13.1 million of DFS annual assessments were collected from New York State licensed mortgage banks and servicers. Other DFS-licensed non-depository institutions are similarly assessed.

51. The negative fiscal implications of the Fintech Charter Decision for DFS are thus immediately obvious. Every non-depository financial firm that receives an OCC special purpose charter in place of a New York license to operate in the state deprives DFS of crucial resources that are necessary to fund the agency's regulatory function. Regardless of intent, the OCC's actions pose an insidious threat to the health of New York's regulatory environment that seeks to protect New York's markets and consumers.

DFS's PRIOR RELATED CIVIL ACTION AGAINST THE OCC

52. On May 12, 2017, Plaintiff Maria T. Vullo commenced a similar action in this Court against the OCC and then Acting Comptroller Noreika. See *Vullo v. Office of the Comptroller of the Currency et al*., Case No. 17-cv-3574-NRB (S.D.N.Y.). This related case was assigned to the Honorable Naomi Reice Buchwald, United States District Judge, and, like the present action, also sought a declaratory judgment that the OCC's issuance of a license to a non-depository "fintech" company was illegal under the National Bank Act, and an injunction preventing the OCC and then acting Comptroller Noreika from issuing a special purpose charter pursuant to 12 C.F.R. § 5.20(e)(1).

53. On August 18, 2017, the Defendants OCC and Acting Comptroller filed a motion to dismiss on ripeness and other grounds. At the oral argument on the motion to dismiss held on

November 29, 2017, counsel for Defendants OCC and Acting Comptroller admitted that litigation over the validity of the OCC's Fintech Charter actions would become ripe at the moment that the OCC decided to go ahead and accept charter applications:

> THE COURT: I don't see any point in going through this a second round. At some point we ought to get clarity. Maybe [the OCC's] arguments are good now, but at some point they are going to evaporate. I mean, they have to evaporate at some point, if you decide to go ahead. If you never go ahead, they are happy, I'm happy; I don't know how you feel, but in any event, we are done. ***But if the comptroller says, we have decided to go ahead and we will accept applications, would that not be the perfect time to decide the merits*** before the fintech companies spend all of the money, time and effort to put in applications? They may decide to go ahead, but at least at that moment they are on notice that it's possible that a court is going to say you have just wasted your time.
>
> MR. CONNOLLY: ***Correct***.

Transcript of November 29, 2017 Oral Argument, Case No. 1.17-cv-03574-NRB, Docket Entry No. 27 at 12:7 - 20, annexed hereto as Exhibit N (emphasis supplied).

54. On December 12, 2017, the Court granted the Defendant's motion only to the extent that it determined that the prior action was not yet ripe, and thus determined that it lacked jurisdiction and declined to rule on the motion's other grounds. The prior related case was then dismissed without prejudice. Mem. and Order, Case No. 1.17-cv-03574-NRB, Docket Entry No. 30 at 26-27 (Dec. 12, 2017).

CLAIMS FOR RELIEF

COUNT I

THE FINTECH CHARTER DECISION EXCEEDS THE OCC'S AUTHORITY UNDER THE NBA

55. Plaintiff repeats and re-alleges paragraphs 1-54 of the complaint as if fully set forth here.

56. The NBA empowers the OCC to charter national banks that engage in the "business of banking," which at a minimum requires taking deposits unless Congress has expressly authorized otherwise.

57. The Fintech Charter Decision purports to authorize the establishment of special purpose, non-depository banks for which there is no express congressional authorization.

58. The Fintech Charter Decision therefore exceeds the OCC's statutory authority, and the Court should declare it unlawful, set it aside, and enjoin Defendants from taking any further actions to implement its provisions.

COUNT II

12 C.F.R. § 5.20(e)(1) IS NULL AND VOID BECAUSE IT EXCEEDS THE OCC'S AUTHORITY UNDER THE NBA

59. Plaintiff repeats and re-alleges paragraphs 1-58 of the complaint as if fully set forth here.

60. In promulgating 12 C.F.R. § 5.20(e)(1), the OCC improperly defined the "business of banking" to include non-depository institutions.

61. The definition included in 12 C.F.R. § 5.20(e)(1) lacks any express congressional authorization.

62. The OCC therefore exceeded its statutory authority in approving the rule, and the Court should declare 12 C.F.R. § 5.20(e)(1) unlawful, set it aside, and enjoin Defendants from taking any further actions to implement its provisions.

COUNT III

THE FINTECH CHARTER DECISION VIOLATES THE TENTH AMENDMENT TO THE U.S. CONSITUTION

63. Plaintiff repeats and re-alleges paragraphs 1-62 of the complaint as if fully set forth here.

64. The Tenth Amendment to the U.S. Constitution provides that each state retains those sovereign powers not expressly delegated under the U.S. Constitution to the federal government. The police power to regulate financial services and products delivered within a state's own geographical jurisdiction is among a state's most fundamental sovereign powers.

65. Federal law preempts state law under the Supremacy Clause of the U.S. Constitution, provided only that Congress has clearly expressed its intent to do so.

66. The Fintech Charter Decision conflicts with state law insofar as it claims to insulate OCC-chartered non-depository institutions from state regulation.

67. Because Congress did not authorize the OCC to charter fintech companies that provide non-depository financial services, it did not intend to preempt state regulation of such entities.

68. Accordingly, the Fintech Charter Decision violates the U.S. Constitution and the Court should declare it null and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment and order:

69. Declaring that the Fintech Charter Decision exceeds the OCC's statutory authority under the NBA because it creates federal special-purpose charters for non-depository financial service providers.

70. Declaring 12 C.F.R. § 5.20(e)(1) null and void because its promulgation exceeded the OCC's statutory authority under the NBA.

71. Declaring the Fintech Charter Decision null and void because it violates the Tenth Amendment of the U.S. Constitution.

72. Permanently enjoining Defendants from implementing the Fintech Charter Decision and issuing any other special purpose charter pursuant to 12 C.F.R. § 5.20(e)(1).

73. Awarding such other and further relief as the Court deems just and proper.

Date: September 14, 2018

Respectfully submitted,

/s/ Matthew L. Levine
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Exhibit A

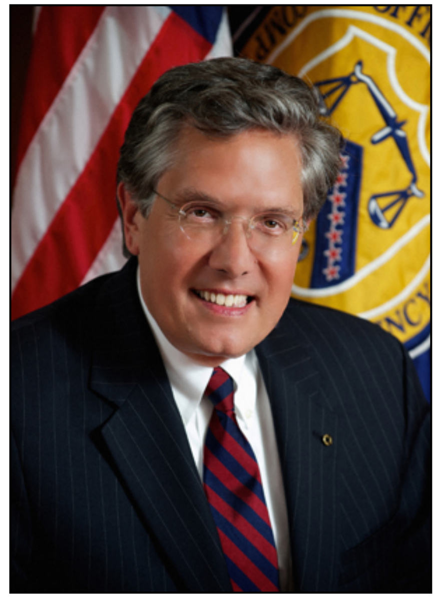
Office of the Comptroller of the Currency

Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective

Office of the Comptroller of the Currency
Washington, D.C.

March 2016

Preface by the Comptroller of the Currency



Innovation has been a hallmark of the national banking system since its founding in 1863 by President Lincoln. That innovative spirit has been especially evident in recent decades as national banks and federal savings associations have led the way in developing and adapting products, services, and technology to meet the changing needs of their customers.

While banks continue to innovate, rapid and dramatic advances in financial technology (fintech) are beginning to disrupt the way traditional banks do business. As the prudential regulator of the federal banking system, we want national banks and federal savings associations to thrive in this environment and to continue fulfilling their vital role of providing financial services to consumers, businesses, and their communities.

Our diverse system of banks has many advantages in developing and adapting financial innovations. Federally chartered institutions have stable funding sources, capital, and extensive customer relationships. They also have a long history of risk management that has led to enhanced information security capabilities, mature credit modeling and underwriting processes, and compliance programs that help protect consumers. These capabilities lay a foundation for innovation in the 21st century, and are major reasons the federal banking system still serves as a source of strength for the nation after 153 years.

At the Office of the Comptroller of the Currency (OCC), we are making certain that institutions with federal charters have a regulatory framework that is receptive to responsible innovation along with the supervision that supports it.

Innovation holds much promise. Technology, for example, can promote financial inclusion by expanding services to the underserved. It can provide more control and better tools for families to save, borrow, and manage their financial affairs. It can help companies and institutions scale operations efficiently to compete in the marketplace, and it can make business and consumer transactions faster and safer.

'At the OCC, we are making certain that institutions with federal charters have a regulatory framework that is receptive to responsible innovation along with the supervision that supports it.'
– Comptroller of the Currency Thomas J. Curry

Innovation is not free from risk, but when managed appropriately, risk should not impede progress. Indeed, effective risk management is essential to responsible innovation. Banks and regulators must strike the right balance between risk and innovation.

This paper describes the OCC's vision for responsible innovation in the federal banking system and discusses the principles that will guide the development of our framework for evaluating new and innovative financial products and services. We welcome your feedback.

OCC Innovation Initiative

In August 2015, Comptroller of the Currency Thomas J. Curry announced an initiative to develop a comprehensive framework to improve the OCC's ability to identify and understand trends and innovations in the financial services industry, as well as the evolving needs of consumers of financial services.[1] This framework is intended to improve how the OCC evaluates innovative products, services, and processes that require regulatory approval and identifies potential risks associated with them. Even when approval of an innovation is not necessary, enhancing the agency's understanding will enable it to be a more effective resource to institutions, particularly community banks and thrifts, interested in innovation. The framework also will help clarify lines of communication between the agency and the industry regarding emerging technology and new products, services, and processes.

As part of that initiative, the OCC formed a team of policy experts, examiners, lawyers, and other agency staff members to gain a better understanding of emerging technology and new approaches in financial services and then use that information to design the OCC's framework for evaluating financial innovation. To obtain a broad perspective, the team met with a variety of groups to discuss the changes in the financial services industry and the opportunities and challenges for banks to participate fully in this evolving landscape. These discussions included bankers from community, midsize, and large banks; innovators in various fields; consumer groups; academics; other regulators; and OCC employees.

Some common themes emerged from these meetings as well as from other research the OCC team conducted. For example, many participants, including both banks and nonbanks, suggested that the "rules of the road" governing the development of innovative products and services are unclear. Banks, particularly smaller ones, also expressed uncertainty about the OCC's expectations regarding partnerships with nonbanks and third parties. Many nonbanks also indicated a desire to understand regulatory requirements and the supervisory environment as they seek to expand their relationships with banks.

Opportunities and Challenges for National Banks and Federal Savings Associations

The financial services industry in the United States is undergoing rapid technological change aimed at meeting evolving consumer and business expectations and needs. Mobile payment services and mobile wallets are changing the way consumers make retail payments. New distributed ledger technology has the potential to transform how transactions are processed and settled. New technology services offer the prospect of a banking relationship that exists only on a smartphone, tablet, or personal computer. Marketplace lending has the potential to change how loans are underwritten and funded. In addition, automated systems are competing with traditional financial advisors, and crowdfunding sites are raising equity capital for new and existing companies.

Many of these innovations are taking place outside the banking industry, often in unregulated or lightly regulated fintech companies. Fintech companies are growing rapidly in number, and they are attracting increasing investment. In 2015, the number of fintech companies in the United States and United Kingdom increased to more than 4,000,[2] and investment in fintech companies since 2010 has surpassed $24 billion worldwide.[3]

Demographic changes also are influencing customer needs and expectations in dramatic ways. One of the most important changes in the United States involves the millennial generation, which includes nearly

[1] See Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Federal Home Loan Bank of Chicago. August 7, 2015 (http://www.occ.gov/news-issuances/speeches/2015/pub-speech-2015-111.pdf).

[2] "The Fintech Boom and Bank Innovation," *Forbes*. December 14, 2015 (http://www.forbes.com/sites/falgunidesai/2015/12/14/the-fintech-revolution/#2715e4857a0b502b478836da).

[3] "Is the Fintech Sector Overheating?" *American Banker*. September 25, 2015 (http://www.americanbanker.com/news/bank-technology/is-the-fintech-sector-overheating-1076982-1.html).

80 million people. Millennials have the majority of their financial lives ahead of them, and they have demonstrated great receptivity to technical innovation in financial services.[4]

National banks and federal savings associations are seizing the opportunities and meeting these challenges in different ways. Some are working in their own laboratories and technology incubators to develop innovative ways to improve services and make their operations more efficient. Others are combining forces through consortiums and other collaborative arrangements to share the cost of developing and acquiring new technologies. Some banks are investing in fintech firms or new financial technology, and a growing number of banks are partnering with leading fintech companies and start-ups to develop the applications of tomorrow—applications that could eventually be revolutionary in their own ways.

In today's financial services environment, banks and fintech companies have different advantages when it comes to innovation. Banks have large and often loyal customer bases that contribute to diverse and stable funding that most fintech companies do not have. Banks also have capital that enables them to deal with losses and continue serving their customers throughout the fluctuations of an economic cycle. Banks often have extensive customer information, networks of physical locations, access to the payment system, and sophisticated underwriting, modeling, and risk management capabilities. Many banks benefit from name recognition, well-established marketing functions, and enterprise-wide compliance frameworks. They also have experience operating in complex regulatory environments.

Fintech companies and other nonbank innovators have their own advantages. Start-ups with few investors and one or two big ideas often can sometimes move faster than larger and more established organizations. They can focus their energy and resources on a single opportunity. Start-ups do not have legacy technology systems or large brick-and-mortar infrastructures that can be costly to maintain or change. Nonbank innovators also may have specialized technical knowledge, experience, and skills with respect to emerging technology and trends.

By employing their respective advantages, banks and nonbank innovators can benefit from collaboration. Through strategic and prudent collaboration, banks can gain access to new technologies, and nonbank innovators can gain access to funding sources and large customer bases.

[4] "The 2014 ICBA American Millennials and Community Banking Study," Independent Community Bankers of America. October 2014 (https://www.icba.org/files/ICBASites/PDFs/ICBAMillennialsandCommunityBankingStudyWhitePaper.pdf).

The OCC Perspective on Responsible Innovation

The OCC's mission is to ensure that national banks and federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations. Supporting a financial system that innovates responsibly is central to the OCC's mission.

Definition of Responsible Innovation

While innovation has many meanings, the OCC defines responsible innovation to mean:

> *The use of new or improved financial products, services, and processes to meet the evolving needs of consumers, businesses, and communities in a manner that is consistent with sound risk management and is aligned with the bank's overall business strategy*.

This definition recognizes the importance of banks' receptivity to new ideas, products, and operational approaches to succeed in meeting the needs of consumers, businesses, and communities in the rapidly changing financial environment.

The definition also emphasizes effective risk management and corporate governance. As we learned in the financial crisis, not all innovation is positive. The financial crisis was fueled in part by innovations such as option adjustable rate mortgages, structured investment vehicles, and a variety of complex securities that ultimately resulted in significant losses for financial institutions and their customers and threatened the entire financial system. The OCC will support innovation that is consistent with safety and soundness, compliant with applicable laws and regulations, and protective of consumers' rights.

Guiding Principles for the OCC's Approach to Responsible Innovation

The agency has formulated eight principles to guide the development of its framework for understanding and evaluating innovative products, services, and processes that OCC-regulated banks may offer or perform. These principles call for the OCC to:

1. Support responsible innovation.
2. Foster an internal culture receptive to responsible innovation.
3. Leverage agency experience and expertise.
4. Encourage responsible innovation that provides fair access to financial services and fair treatment of consumers.
5. Further safe and sound operations through effective risk management.
6. Encourage banks of all sizes to integrate responsible innovation into their strategic planning.
7. Promote ongoing dialogue through formal outreach.
8. Collaborate with other regulators.

Each principle is discussed below more fully.

1. Support responsible innovation.

To support responsible innovation, the OCC is considering various reforms to improve its process for understanding and evaluating innovative financial products, services, and processes. The goal is an improved process that will provide a clear path for banks and other stakeholders to seek the agency's views and guidance. To meet its goal, the OCC is exploring changes to coordinate decision making more effectively within the OCC and expedite review whenever possible, while ensuring a thoughtful assessment of associated risks.

Currently, banks and nonbanks use a variety of formal and informal entry points to communicate with the OCC. For example, a bank interested in an innovative process to speed payments may approach its examiners with a proposal, request a legal opinion from the OCC, file any required application with the appropriate licensing office, or contact one of the agency's experts on credit, compliance, payments, cybersecurity, or modeling. While providing flexibility, the current process can result in some inconsistencies and inefficiencies.

To address this concern, one possible approach is to create a centralized office on innovation. The office could serve as a forum to vet ideas before a bank or nonbank makes a formal request or launches an innovative product or service. Other responsibilities could include holding meetings with interested stakeholders and appropriate OCC officials and coordinating among OCC examiners and experts to identify supervisory, policy, legal or precedent-setting issues, or concerns early in the process. To maintain an ongoing understanding of financial industry innovation, the office also could hold regular meetings with fintech innovators. In addition, the office could develop educational materials on innovation for banks and OCC personnel.

Alternatively, the OCC could adopt a less formal process where an existing unit within the OCC assumes the responsibility as the agency's central point of contact on innovation. That unit could be responsible for ensuring appropriate OCC staff and experts are involved early when considering innovative proposals by banks and nonbanks.

To be effective, the improved process should clarify agency expectations. Banks and nonbanks suggested a need for more guidance, particularly with respect to third-party relationships, including partnerships between banks and nonbanks.

To clarify these expectations and promote better understanding of the regulatory regime, the OCC will evaluate existing guidance on new product development and third-party risk management and assess whether additional guidance is appropriate to address the needs of banks and their customers in the rapidly changing environment.

To expedite decision making, the OCC is evaluating whether it can streamline some of its licensing procedures, where appropriate, or develop new procedures where existing procedures may not work for certain innovative activities.

Another idea touted by banks and nonbanks is to allow banks to test or pilot new products and services on a small scale before committing significant bank resources to a full rollout. Such a program could entail board approval and appropriate limitations that would protect consumers and would not involve giving banks a safe harbor from consumer laws and regulations during the testing phase of a new product. By analogy, the OCC recently issued guidance permitting banks to offer loans that exceed supervisory loan-to-value limits in communities targeted for revitalization under certain circumstances. Although that guidance did not involve technological innovation, the OCC recognized that supporting long-term community revitalization could benefit from innovative lending programs.

2. Foster an internal culture receptive to responsible innovation.

A key component of a successful framework is an agency culture that is receptive to responsible innovation. When researching this project, the OCC gathered perspectives from OCC-supervised institutions and others in the financial services industry and conducted focus groups with agency employees. Many employees shared an interest in a culture that is more receptive to responsible innovation. The common perceptions about the agency that emerged from those discussions include 1) a low risk tolerance for innovative products and services; 2) a deliberate and extended vetting process that can discourage innovation inadvertently; 3) a need for increased awareness and education; and 4) a desire by employees for additional expert resources and easier access to those resources.

The OCC will evaluate its policies and processes, define roles and responsibilities with respect to evaluating innovation, identify and close knowledge and expertise gaps, and enhance communication within the agency and with outside stakeholders. The agency has taken several steps to foster a more receptive culture and to improve the awareness and knowledge of financial innovations. For example, the OCC has established a dedicated Payment Systems Policy Group that provides examination support, training, and guidance to examiners and acts as a resource to OCC-supervised institutions on innovative and traditional payment structures. Additionally, the OCC has formed an internal working group on marketplace lending to monitor developments in that sector.

The agency will develop or augment existing training to reinforce the agency's receptiveness to responsible innovation and develop additional expertise to evaluate the opportunities and risks related to specific types of innovation. The OCC is considering establishing dedicated internal Web pages describing resources and training opportunities on innovation for all employees.

3. Leverage agency experience and expertise.

The OCC will rely heavily on the breadth and depth of knowledge of existing staff in implementing its responsible innovation framework. The agency's examiners, policy and compliance experts, legal staff, information technology professionals, and economists have a deep understanding of the financial system and a growing understanding of the emerging technology that can bring innovative products, services, and processes to businesses and consumers. The agency will continue to develop expertise in this important area.

Examiners are often the first and primary points of contact for banks considering new products or services, and they play a critical role in supporting responsible innovation. The OCC assigns a designated examiner or team of examiners to every institution under its supervision depending on its size and complexity. Examiners develop a robust understanding of each bank's activities, business strategies and goals, and risk appetite. That knowledge guides the OCC's supervisory strategy for that bank. The examiner also understands the local economy and the operating conditions in specific markets. As banks progress into new products or services, examiners can be important sources of information.

Ongoing communication with OCC examining staff provides the opportunity for banks to discuss the most recent trends and information that may affect the institution. These discussions include the introduction of new products, services, third-party relationships, changes in risk management or audit activities, and other planned corporate activities. These activities and ongoing dialogue help ensure effective supervision and early identification of evolving opportunities and risks. They also help resolve supervisory concerns as early as possible.

Industry stakeholders also benefit from the agency's expertise in other areas. OCC compliance policy experts support agency examiners and assist the banks they supervise on issues related to a variety of consumer protection and banking laws, such as the Bank Secrecy Act (BSA). Community reinvestment experts advise supervised institutions on community development issues. The OCC's Payments Systems Policy Group provides expertise in payments systems including traditional bank payments systems and distributed ledger technologies. Legal staff interprets banking laws and rules. Technology professionals help assess bank technology systems and cyber risks facing the industry. Economists provide expertise on modeling and quantitative analysis that assists in evaluating the effects of emerging technology and new programs and services and their implications for banking policy. All these experts play important roles in helping banks and nonbanks interested in innovation navigate the complex regulatory environment.

The OCC also will consider designating lead experts on responsible innovation who could support bank supervision and provide advice based on a broad view of innovation trends and developments across the federal banking system. The agency has an effective lead expert program in retail and commercial credit, compliance, bank information technology, asset management, and operational risk to support examiners and supervised banks.

In addition, the OCC will regularly evaluate whether it has the appropriate resources to supervise innovation within the federal banking system.

4. Encourage responsible innovation that provides fair access to financial services and fair treatment of consumers.

Responsible innovation among banks should help them fulfill their public purpose by promoting fair access to financial services and fair treatment of consumers. Current innovations in the financial industry hold great promise for increasing financial inclusion of underserved consumers, who represent more than 68 million people and spend more than $78 billion annually.[5] Data suggest underserved communities are more likely to use mobile banking technology than fully banked communities.[6] Social media use, in particular, appears disproportionately popular among demographic groups likely to be underserved, including young adults, low- and moderate-income consumers, and minorities compared with the population as a whole.[7]

Brick-and-mortar branches are a stabilizing force in low-income neighborhoods, and innovative technology should not be seen as a substitute for a physical presence in those communities. However, the OCC believes there is great potential for responsible innovation to broaden access to financial services by delivering more affordable products and services on suitable terms to unbanked, underbanked, and low- to moderate-income consumers. Examples of products cited by some that could help address unmet financial services needs of the unbanked and underbanked include

- online and mobile banking, saving, budgeting, and financial management tools.
- small dollar, unsecured consumer loans.
- small business loans.
- credit consolidation or refinancing of consumer or student loans.
- use of behavioral models to improve automated underwriting models that could expand the pool of eligible consumers.
- improved payment services.

Innovations in lending are not limited to digital services and could include new ways to extend credit or provide other types of financial services. Social responsibility funds, for example, can expand opportunities in affordable housing and community or economic development.

Innovation also can encourage fair access by spurring small business and community investment that improves services and provides community redevelopment resources. Small business investment funds can attract capital for start-ups and businesses located in low- and moderate-income communities. Mortgage- or asset-backed securities backed by Community Reinvestment Act-qualified investments can provide liquidity for loans that benefit low- and moderate-income individuals or small businesses. Tax credit programs can promote investment in renewable energy, historic preservation, economic development, and affordable housing.

To encourage responsible innovations that provide fair access to financial services and fair treatment, the OCC plans to share success stories describing how national banks and federal savings associations have innovated to increase access to unbanked and underbanked populations; to increase the speed, efficiency, effectiveness, and transparency of financial transactions; and to lend and invest in ways designed to address the credit needs of low- and moderate-income individuals and communities.

The OCC may also issue guidance on its expectations related to products and services designed to address the needs of low- to moderate-income individuals and communities and may encourage innovative approaches to financial inclusion by promoting awareness of other activities that could qualify for Community Reinvestment Act consideration.

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[5] "Financial Technology Trends in the Underbanked Market," Center for Financial Services Innovation. May 2013.

[6] "Assessing the Economic Inclusion Potential of Mobile Financial Services," Federal Deposit Insurance Corporation. June 30, 2014 (https://www.fdic.gov/consumers/community/mobile/Mobile-Financial-Services.pdf).

[7] "Financial Technology Trends in the Underbanked Market," Center for Financial Services Innovation. May 2013.

5. Further safe and sound operations through effective risk management.

Effective risk management and good corporate governance are fundamental for banks to develop new products, services, and processes successfully. The OCC's framework must consider how national banks and federal savings associations identify and address risks resulting from emerging technology.

The OCC's research found that banks, nonbanks, and bank customers believe that cyber risk is one of the most significant risks facing the financial industry as it implements new technologies. In addition, risk to customer data through data aggregation and third-party use is increasing. Innovating through in-house development, third-party collaboration, or business combinations also presents different risks that require effective corporate governance, due diligence, risk identification and measurement, and internal controls.

Banks of all sizes should ensure that effective corporate governance and risk management meet supervisory expectations when considering new products, services, and processes. This includes expectations described in OCC guidance related to strategic planning, evaluating new products and services,[8] using models,[9] operational risk, cybersecurity,[10] and managing third-party relationships.[11]

The OCC also will continue to improve its ability to understand and monitor emerging risks in the financial industry. Over the past several years, the OCC has improved its internal governance and risk identification capabilities through enhancements to the OCC's National Risk Committee and several committees focused on particular risks such as credit, operational, and compliance. The National Risk Committee structure is designed to assess current and emerging risks and to communicate that information to examiners and banks. The National Risk Committee also publishes the OCC's *Semiannual Risk Perspective*[12] on current and emerging risks in the federal banking system. The OCC is considering ways to leverage the work of the National Risk Committee in its responsible innovation framework.

6. Encourage banks of all sizes to integrate responsible innovation into their strategic planning.

The agency's framework for evaluating new and innovative financial products and services must consider how banks integrate innovation in their strategic planning processes. Sound strategic decisions are essential for any bank to achieve its business goals and successfully meet the needs of the consumers, businesses, and communities it serves.

A bank's decision to offer innovative products and services should be consistent with the bank's long-term business plan rather than following the latest fad or industry trend. Pursuit of emerging technology and other innovation should align with customer needs and the bank's strategic plan as well as its risk management capabilities. A bank collaborating with a nonbank to offer innovative products and services should also consider whether such a partnership helps the bank achieve its strategic objectives.

When discussing innovation, banks are reminded that traditional strategic planning criteria such as those listed below still apply:

- Consistency with the bank's corporate governance, business plan, and risk appetite.
- Realistic financial projections.

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[8] See OCC Bulletin 2004-20, "Risk Management of New, Expanded, or Modified Bank Products and Services." May 10, 2004 (http://www.occ.gov/news-issuances/bulletins/2004/bulletin-2004-20.html).

[9] See OCC Bulletin 2011-12, "Supervisory Guidance on Model Risk Management." April 4, 2011 (http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12.html).

[10] See OCC Bulletin 2015-31, "FFIEC Cybersecurity Assessment Tool." June 30, 2015 (http://www.occ.gov/news-issuances/bulletins/2015/bulletin-2015-31.html).

[11] See OCC Bulletin 2013-29, "Third-Party Relationships." October 30, 2013 (http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html).

[12] See http://www.occ.gov/publications/publications-by-type/other-publications-reports/index-semiannual-risk-perspective.html.

- Adequate staff, both in number and expertise.
- Technology support.
- Consideration of all applicable risks, including reputation and compliance, and appropriate risk management systems and practices.
- Exit strategies.

7. Promote ongoing dialogue through formal outreach.

Outreach is a key component of encouraging and supporting responsible innovation, and the OCC intends to incorporate formal outreach into its framework. An ongoing dialogue with all stakeholders, including banks, nonbank innovators, and consumer groups, will enable the agency to

- stay abreast of current trends and developments, including new products, services, process improvements, and partnerships.
- understand the underlying reasons and customer needs that drive such developments.
- promote awareness and understanding of its expectations related to responsible innovation.
- identify opportunities to improve its ability to respond more quickly, efficiently, and effectively to inquiries regarding new products and services, including licensing requests.
- serve as a more effective resource to institutions interested in innovation.
- solicit feedback on how its actions encourage or impede responsible innovation.

As part of its ongoing outreach activities, the OCC plans to bring together banks, nonbanks, and other stakeholders through a forum and a variety of workshops and meetings to discuss responsible innovation in the financial industry. The agency also intends to host “innovator fairs” to bring together banks and nonbank innovators with OCC experts to discuss regulatory requirements and supervisory expectations in the financial services industry. In addition, the OCC will provide resources, information, and guidance through its Web sites, including OCC.gov and BankNet.gov, which may include links to future papers and other resources on responsible innovation for those who want to engage with the OCC.

8. Collaborate with other regulators.

Supervision of the financial services industry involves regulatory authorities at the state, federal, and international levels. Exchanging ideas and discussing innovation with other regulators are important to promote a common understanding and consistent application of laws, regulations, and guidance. Such collaborative supervision can support responsible innovation in the financial services industry.

The OCC will work with agencies like the Consumer Financial Protection Bureau (CFPB) on innovations promoted by or affecting banks subject to OCC and CFPB supervision. Because the missions of the CFPB, the OCC, and other bank regulatory agencies intersect and agencies share the goal of minimizing unnecessary regulatory burden, the agencies implemented a number of memorandums of understanding that describe how to interact and work with one another to supervise industry participants. Such coordination gives banks greater confidence that regulators who share responsibilities will consider innovative ideas consistently.

The banking agencies already collaborate successfully on a number of issues and could create additional workgroups to further that coordination and increase communication about this important topic. Collaboration on responsible innovation should include the following actions:

- Establish regular channels of communication.
- Identify information to share on an ongoing basis or upon request.
- Provide other agencies with such advance notice as is reasonably possible regarding upcoming innovation activities that may be of common interest.
- Use best efforts to avoid inconsistent communications with supervised entities.

Conclusion and Request for Comments

As the OCC continues to develop its framework to support responsible innovation in the federal banking system, it seeks feedback on all aspects of this paper. The OCC also solicits responses to the questions below. The OCC requests that respondents provide written comments on these questions and other topics presented in this paper by May 31, 2016. Submissions should be e-mailed to innovation@occ.treas.gov.

1. What challenges do community banks face with regard to emerging technology and financial innovation?
2. How can the OCC facilitate responsible innovation by institutions of all sizes?
3. How can the OCC enhance its process for monitoring and assessing innovation within the federal banking system?
4. How would establishing a centralized office of innovation within the OCC facilitate more open, timely, and ongoing dialogue regarding opportunities for responsible innovation?
5. How could the OCC provide guidance to nonbank innovators regarding its expectations for banks' interactions and partnerships with such companies?
6. What additional tools and resources would help community bankers incorporate innovation into their strategic planning processes?
7. What additional guidance could support responsible innovation? How could the OCC revise existing guidance to promote responsible innovation?
8. What forms of outreach and information sharing venues are the most effective?
9. What should the OCC consider with respect to innovation?

Exhibit B

Office of the Comptroller of the Currency

Exploring Special Purpose National Bank Charters for Fintech Companies

Office of the Comptroller of the Currency
Washington, D.C.

December 2016

Preface by the Comptroller of the Currency

When President Abraham Lincoln signed the law creating the national banking system and the Office of the Comptroller of the Currency (OCC), the very notion of establishing a national bank charter was itself innovative. Our country's leaders provided the Comptroller with the authority to grant a national charter because they recognized the public value of a robust, unified, and nationwide system of banks.

The national banking system became a source of strength for the nation and our economy. National banks and, later, federal savings associations became anchors of their communities and the predominant providers of financial services for consumers and businesses. The system flourished because it enabled and encouraged national banks and federal savings associations to adapt to the changing needs of their customers and the market.

More than 150 years later, we have a diversified and evolving financial services industry. New technology makes financial products and services more accessible, easier to use, and much more tailored to individual consumer needs. At the same time, consumer preferences and demands are evolving, driven by important demographic changes: for example, the entry of 85 million millennials into the financial marketplace in the United States. Responding to those market forces are thousands of technology-driven nonbank companies offering a new approach to products and services. Five years ago these services either were available only from traditional banks or not available at all. Initially, many of these nonbank providers of financial services viewed themselves as competitors of banks. Now, some financial technology—or fintech—companies are considering whether to become banks.

These industry developments raise fundamental policy questions. Is the nation better served when banking products are provided by institutions subject to ongoing supervision and examination? Should a nonbank company that offers banking-related products have a path to become a bank? And, what conditions should apply if a nonbank company becomes a national bank?

I challenged staff at the OCC to explore these important questions when I asked them to examine the agency's authority to grant special purpose national bank charters to fintech companies and the conditions under which we might do so. This paper summarizes that work, describes the OCC's legal authority to grant a special purpose charter, and articulates what the OCC considers to be necessary conditions if the OCC is to exercise that authority. It makes clear that if we decide to grant a national charter to a particular fintech company, that institution will be held to the same high standards of safety and soundness, fair access, and fair treatment of customers that all federally chartered institutions must meet.

Public comment will help inform our consideration of these issues. We welcome your feedback on all of the issues raised in this paper and on the specific questions included at the end.

Introduction

The OCC's chartering authority includes the authority to charter special purpose national banks. In fact, many special purpose national banks are operating today—primarily trust banks and credit card banks. A question raised by technological advances in financial services and evolving customer preferences is whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company. For a number of reasons, the OCC believes it may be in the public interest to do so.

First, applying a bank regulatory framework to fintech companies will help ensure that these companies operate in a safe and sound manner so that they can effectively serve the needs of customers, businesses, and communities, just as banks do that operate under full-service charters. Second, applying the OCC's uniform supervision over national banks, including fintech companies, will help promote consistency in the application of law and regulation across the country and ensure that consumers are treated fairly. Third, providing a path for fintech companies to become national banks can make the federal banking system stronger. The OCC's oversight not only would help ensure that these companies operate in a safe and sound manner, it would also encourage them to explore new ways to promote fair access and financial inclusion and innovate responsibly. Fintech companies vary widely in their business models and product offerings. Some are marketplace lenders providing loans to consumers and small businesses, others offer payment-related services, others engage in digital currencies and distributed ledger technology, and still others provide financial planning and wealth management products and services.

If the OCC decides to grant a charter to a particular fintech company, the institution would be held 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. The OCC acknowledges, however, that to approve a fintech charter the agency may need to account for differences in business models and the applicability of certain laws. For example, a fintech company with a special purpose national charter that does not take deposits, and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC), would not be subject to laws that apply only to insured depository institutions.

Where a law does not apply directly, the OCC may, nonetheless, work with a fintech company to achieve the goals of a particular statute or regulation through the OCC's authority to impose conditions on its approval of a charter, taking into account any relevant differences between a full-service bank and special purpose bank. In this way, the OCC could advance important policy objectives, such as enhancing the ways in which financial services are provided in the 21^{st} century, while ensuring that new fintech banks operate in a safe and sound manner, support their communities, promote financial inclusion, and protect customers.

This paper explores these and other issues related to the OCC's consideration of charter applications from fintech companies. The OCC welcomes comments about how it can foster responsible innovation in the chartering process while continuing to provide the robust oversight that its mandate requires.

Background

The OCC's responsible innovation work to date

In August 2015, the OCC began an initiative to better understand innovation occurring in the financial services industry and to develop a framework supporting responsible innovation. To gain a broad perspective, the OCC conducted extensive research and had discussions with fintech companies, banks, community and consumer groups, academics, and other regulators. This work led to the publication of a white paper in March 2016 that outlined clear principles to guide the development of a framework to support responsible innovation in the federal banking system.[1] In October 2016, the OCC announced plans to implement its framework for responsible innovation, including the establishment of an Office of Innovation to serve as the central point of contact and clearinghouse for requests and information related to innovation.[2] The office also will conduct outreach and provide technical assistance and other resources for banks and nonbanks on regulatory expectations and principles.

Chartering authority

The OCC has authority to grant charters for national banks and federal savings associations under the National Bank Act and the Home Owners' Loan Act, respectively.[3] That authority includes granting charters for special purpose national banks. A special purpose national bank may limit its activities to fiduciary activities or to any other activities within the business of banking. A special purpose national bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money.[4]

Special purpose national bank charters have been in use for some time. The most common types of these charters are trust banks (national banks limited to the activities of a trust company) and credit card banks (national banks limited to a credit card business).[5] Though the focus of this paper is on fintech companies in particular, there is no legal limitation on the type of "special purpose" for which a national bank charter may be granted, so long as the entity engages in

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[1] "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective" can be found at https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf.

[2] "Recommendations and Decisions for Implementing a Responsible Innovation Framework" can be found at https://www.occ.gov/topics/bank-operations/innovation/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf.

[3] See 12 USC 1 et seq. and 1461 et seq. The OCC also has authority, under the International Banking Act, 12 USC 3102, to license a foreign bank to operate a federal branch or agency in the United States.

[4] See 12 CFR 5.20(e)(1). This paper focuses on the national bank charter, because it has more flexibility than the federal savings association charter. Federal savings associations are subject to asset and investment limitations and are required to have deposit insurance. See 12 CFR 160.30 and 5.20(e)(3).

[5] The OCC also has chartered other special purpose national banks including bankers' banks, community development banks, and cash management banks.

fiduciary activities or in activities that include receiving deposits, paying checks, or lending money. As the next section describes, the OCC has the legal authority to construe these activities to include bank-permissible, technology-based innovations in financial services.

Features and attributes of a national bank charter

Corporate structure

A national bank charter is a federal form of corporate organization that authorizes a bank to conduct business on a nationwide basis and subjects the bank to uniform standards and rigorous federal oversight. All national banks, including special purpose national banks, are organized under, and governed by, the National Bank Act. The corporate organization and structure provisions of the National Bank Act (e.g., classes of shares, voting rights, number of directors, and term of office) govern the corporate structure of a special purpose national bank.

Bank-permissible activities

A special purpose national bank may engage only in activities that are permissible for national banks. Bank-permissible activities are identified in statutes, in the OCC's regulations, and in legal opinions and corporate decisions that the OCC regularly publishes.[6] The OCC and the courts that have considered the scope of bank-permissible activities also recognize that the business of banking develops over time as the economy and business methods evolve.[7]

Consistent with legal precedent, the OCC views the National Bank Act as 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.[8] For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically are the modern equivalent of paying checks. The OCC would consider on a case-by-case basis the permissibility of a new activity that a company seeking a special purpose charter wishes to conduct.

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[6] See OCC Interpretations and Actions at https://www.occ.gov/topics/licensing/interpretations-and-actions/index-interpretations-and-actions.html.

[7] See generally NationsBank of North Carolina, N.A. v. Variable Life Annuity Co., 513 U.S. 251 (1995); M&M Leasing Corp. v. Seattle First National Bank, 563 F.2d 1377 (9th Cir. 1977), cert. denied, 436 U.S. 987 (1978); OCC Conditional Approval No. 267 (January 12, 1998) (certification authority and repository and key escrow are part of the business of banking); OCC Interpretive Letter No. 494 (December 20, 1989) (allowing national banks to purchase and sell financial futures for their own account).

[8] See, e.g., 12 CFR 7.5002 (OCC regulation authorizing national banks to use electronic means to conduct activities they are otherwise authorized to conduct, subject to appropriate safety and soundness and compliance standards and conditions).

Rules and standards applicable to a special purpose national bank

In general, a special purpose national bank is subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks. Statutes that by their terms apply to national banks apply to all special purpose national banks, even uninsured national banks. These laws include, for example, statutes and regulations on legal lending limits and limits on real estate holdings.[9]

Other laws that apply to special purpose banks include the Bank Secrecy Act (BSA), other anti-money laundering (AML) laws, and the economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). In addition, special purpose national banks generally are subject to the prohibitions on engaging in unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act and unfair, deceptive, or abusive acts or practices under section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The OCC's chartering regulation and licensing policies and procedures also would apply to a special purpose national bank. The established charter policies and procedures are set forth in 12 CFR Part 5 and the "Charters" booklet of the *Comptroller's Licensing Manual* and are discussed in the Chartering process section below.[10]

A special purpose national bank also has the same status and attributes under federal law as a full-service national bank.[11] State law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank. Limits on state visitorial authority also apply in the same way. A special purpose national bank would look to the relevant statutes (including the preemption provisions added to the National Bank Act by Dodd-Frank), regulations (including the OCC's preemption regulations), and federal judicial precedent to determine if or how state law applies. For example, under these statutes, rules, and precedents, state laws would not apply if they would require a national bank to be licensed in order to engage in certain types of activity or business. Examples of state laws that *would* generally apply to national banks include state laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, and torts. In addition, any other state laws that only incidentally affect national banks' exercise of their federally authorized powers to lend, take deposits, and engage in other federally authorized activities are not preempted. Moreover, the OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers apply to national banks.[12]

Many other federal statutes apply to any bank, financial institution, or other type of entity based on the activities in which the entity engages. For example, banks that engage in residential real

[9] See 12 USC 84 and 12 CFR 32 (lending limits) and 12 USC 29 and 12 CFR 7.1000 (limits on holding real estate).

[10] See 12 CFR Part 5 and the "Charters" booklet of the *Comptroller's Licensing Manual* (September 2016), https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf.

[11] A special purpose national bank has the same charter as a full-service national bank. It limits its activities through the bank's articles of association or through OCC-imposed conditions for approving the charter.

[12] The OCC looks to the substantive content of the state statute and not its title or characterization to determine whether it falls within this category.

estate lending must comply with the Truth in Lending Act, Real Estate Settlement Procedures Act, Home Mortgage Disclosure Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Housing Act, Servicemembers Civil Relief Act, and Military Lending Act.

Some statutes, however, apply to a national bank only if it is FDIC-insured and, therefore, would not apply to an uninsured special purpose national bank. For example, certain provisions in the Federal Deposit Insurance Act (FDIA), such as section 1831p-1 (safety and soundness standards) and section 1829b (retention of records), only apply to insured depository institutions.[13] In addition, if a national bank is not insured, the provisions in the FDIA governing the receivership of insured depository institutions would not apply. The OCC recently issued a proposed rule that would address this regulatory gap by establishing a framework for the receivership of an uninsured national bank under the receivership provisions in the National Bank Act.[14] The proposed rule primarily focuses on uninsured national trust banks, but specifically contemplates application to other special purpose national banks. The Community Reinvestment Act (CRA) is an example of another law that only applies to insured institutions.[15]

As discussed in the Chartering process section below, the OCC could impose requirements on an uninsured special purpose bank as a condition for granting a charter that are similar to certain statutory requirements applicable to insured banks, if it deems the conditions appropriate based on the risks and business model of the institution.[16]

Coordination among regulators

The OCC is the primary prudential regulator and supervisor of national banks. Depending on the structure of the bank and the activities it conducts, other regulators will have oversight roles as well. A fintech company considering a special purpose national bank charter likely would need to engage with other regulators in addition to the OCC. The OCC traditionally coordinates with other banking regulators on charter-related activities and would continue to coordinate and communicate where appropriate with other regulators in the case of an application by a fintech company for a special purpose national bank charter.

Federal Reserve: With rare exceptions, all national banks, including insured and uninsured trust banks and other special purpose national banks, are required to be members of the Federal

[13] While certain provisions of the FDIA do not apply to uninsured national banks, the OCC can address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices under its other supervisory and enforcement authorities. The FDIA's principal enforcement section, 12 U.S.C. 1818, generally would apply to any national banking association, including an uninsured national bank. See 12 USC 1818(b)(5).

[14] The proposed rule was published in the Federal Register at 81 Fed. Reg. 62835 (September 13, 2016) and is available at https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-110a.pdf.

[15] 12 USC 2901 et seq. See also 12 CFR Part 25 (OCC CRA regulations).

[16] Such conditions are conditions imposed in writing by the OCC in connection with any action on any application, notice, or other request under 12 USC 1818(b)(1). As such they are enforceable under 12 CFR 1818.

Reserve System.[17] National banks become member banks by subscribing for the stock of the appropriate Federal Reserve Bank.[18] Since most special purpose national banks would be member banks, the statutes and regulations that apply to member banks also would apply to them.[19] These statutes and regulations are administered by the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Federal Reserve Banks.

In addition, the Federal Reserve Board administers and interprets the scope and requirements of the Bank Holding Company Act (BHCA). If a fintech company interested in operating as a special purpose national bank has or plans to have a holding company that would be the sole or controlling owner of the bank (and investors would, in turn, own shares in the holding company), the BHCA could apply. A national bank is a "bank" for purposes of the BHCA if (A) it is either (i) an FDIC-insured bank or (ii) a bank that both accepts demand deposits and engages in the business of making commercial loans and (B) it does not qualify for any of the exceptions from the definition of "bank" in the BHCA.[20]

Federal Deposit Insurance Corporation: A fintech company that proposes to accept deposits other than trust funds would be required to apply to, and receive approval from, the FDIC. Generally, a bank must be engaged in the business of receiving deposits other than trust funds for the FDIC to consider granting deposit insurance.[21] For example, some national trust banks engage only in fiduciary and related activities and do not engage in the business of receiving deposits other than trust funds. As a result, they are not FDIC-insured.[22] If the OCC chartered another type of special purpose national bank that did not receive deposits other than trust funds, such as a fintech company, that new bank also would not be eligible for FDIC insurance.

Consumer Financial Protection Bureau: A special purpose national bank that engages in an activity that is regulated under a federal consumer financial law, as defined by Dodd-Frank, may also be subject to oversight by the Consumer Financial Protection Bureau (CFPB). A special purpose national bank that is an insured depository institution generally would be supervised by either the CFPB or the OCC for purposes of all federal consumer financial laws based on its

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[17] See 12 USC 222. National banks located in territories and insular possessions of the United States are not required to be member banks. See 12 USC 466.

[18] See 12 USC 282; 12 CFR 209.2(b).

[19] For example, the Federal Reserve Act imposes quantitative and qualitative restrictions on a member bank's transactions with its affiliates. 12 USC 371c, 371c-1. These restrictions are implemented by the Federal Reserve Board. See 12 CFR Part 223.

[20] See 12 USC 1841.

[21] See 12 USC 1815(a). The FDIC's regulations provide that an institution is engaged in the business of receiving deposits other than trust funds if it maintains one or more non-trust deposit accounts in the minimum aggregate amount of $500,000. 12 CFR 303.14(a).

[22] There are several FDIC-insured trust banks. Currently, four national trust banks have FDIC insurance.

asset size.[23] Under Dodd-Frank, the CFPB would supervise an uninsured special purpose national bank engaged in certain activities for compliance with federal consumer financial law.[24]

Baseline supervisory expectations

All national banks are required to meet high supervisory standards. Consistent with the OCC's mission, these standards include safety and soundness requirements, as well as requirements to provide fair access to financial services, treat customers fairly, and comply with all applicable laws and regulations. The OCC tailors these standards based on the bank's size, complexity, and risks. As a national bank, a special purpose national bank also would be expected to meet these high standards, tailored to its size, complexity, and risks.

The OCC has identified the following baseline supervisory expectations for any entity seeking a national charter. These baseline expectations stress the importance of a detailed business plan, governance, capital, liquidity, compliance risk management, financial inclusion, and recovery and resolution planning. As with other applicants seeking a national bank charter, applicants for a special purpose charter are strongly encouraged, prior to filing an application, to meet with the OCC to discuss these baseline expectations in detail and how the expectations (and any others arising from the particular proposal) apply to their proposed bank. Those meetings enable the OCC to work with the applicant to develop and tailor supervisory standards to each applicant based on the applicant's circumstances including its size, business model, complexity and risk profile.

Robust, well-developed business plan

A well-developed business plan is a key component of any charter proposal.[25] The OCC expects a company seeking any type of national bank charter to clearly articulate why it is seeking a national bank charter and provide significant detail about the proposed bank's activities. The business plan is a written summary of how the proposed bank will organize its resources to meet its goals and objectives and how it will measure progress. As such, the business plan should be comprehensive, reflecting in-depth planning by the organizers, Board of Directors, and management.

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[23] The CFPB has exclusive supervisory authority and primary enforcement authority over special purpose national banks that are insured depository institutions and have assets greater than $10 billion. See 12 CFR 5515. The OCC generally has exclusive supervisory and enforcement authority over special purpose national banks that are insured depository institutions and have assets of $10 billion or less. See 12 USC 5516, 5581(c)(1)(B).

[24] See 12 USC 5514. Section 5514(a) defines the "scope of coverage" for the CFPB's supervisory authority over nondepository covered persons, which does not include all activities governed by a federal consumer financial law. Instead, the "scope of coverage" set forth in subsection (a) includes specified activities (e.g., offering or providing: origination, brokerage, or servicing of consumer mortgage loans; payday loans; or private education loans) as well as a means for the CFPB to expand the coverage through specified actions (e.g., a rulemaking to designate "larger market participants"). 12 USC 5514(a).

[25] See the "Charters" booklet of the *Comptroller's Licensing Manual* for more information on business plan requirements.

The plan should clearly define the market the proposed bank plans to serve and the products and services it will provide.[26] In addition, it should realistically forecast market demand, economic conditions, competition, and the proposed bank's customer base. The plan also must demonstrate a realistic assessment of risk, describing management's assessment of all risks inherent in the proposed products and services, including risks relating to BSA/AML requirements, consumer protection, fair lending requirements, and the design of related risk management controls and management information systems. Additionally, the plan should describe the experience and expertise of proposed management, including the Board, to manage the proposed bank.

The business plan should cover a minimum of three years and provide a full description of proposed actions to accomplish the primary functions of the proposed bank. The description should provide enough detail to demonstrate that the proposed bank has a reasonable chance for success, will operate in a safe and sound manner, and will have adequate capital to support its risk profile. The OCC expects a proposed bank's business plan to outline the plans for initial and future capital contributions, as well as to provide specific information on how the proposed bank intends to maintain and monitor appropriate capital levels. The plan should also identify external sources available to bolster capital levels, if needed. Additionally, the business plan should include comprehensive alternative business strategies to address various best-case and worst-case scenarios (e.g., financial performance, revenue growth, market share). The business plan also should include the organizing group's knowledge of and plans for serving the community, if applicable.

Governance structure

The OCC expects the governance structure for any proposed special purpose national bank to be commensurate with the risk and complexity of its proposed products, services, and activities, as it is for other national banks. The OCC sets high standards for governance and for risk management systems that identify, monitor, manage, and control risk in national banks. The OCC expects national banks to have the expertise, financial acumen, and risk management framework to promote safety and soundness oversight. The Board of Directors must have a prominent role in the overall governance structure by participating on key committees and guiding the risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

Capital

The OCC's evaluation of a bank's capital is important, not only to assess the strength of an individual bank, but also to evaluate the safety and soundness of the entire federal banking system. Bank capital, among other things, helps to ensure public confidence in the stability of individual banks and the banking system; supports the volume, type, and character of the business conducted; and provides for the possibility of unexpected loss.

Minimum and ongoing capital levels need to be commensurate with the risk and complexity of the proposed activities (including on- and off-balance sheet activities). The OCC's evaluation of capital adequacy (initial and ongoing) consider the risks and complexities of the proposed

[26] For example, the business plan for a proposed bank that will engage in payments activities should address how the bank proposes to access various payment systems.

products, services, and operating characteristics, taking into account both quantitative and qualitative factors. Key qualitative elements that influence the determination of capital adequacy include the scope and nature of the bank's proposed activities, quality of management, funds management, ownership, operating procedures and controls, asset quality, earnings and their retention, risk diversification, and strategic planning. In addition to assessing the quality and source of capital, the OCC also considers on- and-off balance sheet composition, credit risk, concentration, and market risks.

Special purpose national bank charter applicants whose business activities may be off-balance sheet would be subject to the OCC's minimum regulatory capital requirements, but the minimum capital levels required may not adequately reflect the risks associated with off-balance sheet activities.[27] To account for this gap, applicants are expected to propose a minimum level of capital that the proposed bank would meet or exceed at all times. For example, national trust banks typically have few assets on the balance sheet, usually composed of cash on deposit with an insured depository institution, investment securities, premises and equipment, and intangible assets. Because these banks do not make loans or rely on deposit funding, the OCC typically requires them to hold a specific minimum amount of capital, which often exceeds the capital requirements for other types of banks. Similarly, the OCC would consider adapting capital requirements applicable to a fintech applicant for a special purpose national bank charter as necessary to adequately reflect its risks and to the extent consistent with applicable law.

Liquidity

The OCC's evaluation of liquidity focuses on a bank's capacity to readily and efficiently meet expected and unexpected cash flows and collateral needs at a reasonable cost, without adversely affecting either daily operations or the financial condition of the bank. As with capital, minimum and ongoing liquidity (both operating and contingent obligations) for a special purpose national bank need to be commensurate with the risk and complexity of the proposed activities. In assessing the liquidity position of a proposed bank, the OCC considers a proposed bank's access to funds as well as its cost of funding. Some key areas of consideration include projected funding sources, needs, and costs; net cash flow and liquid asset positions; projected borrowing capacity; highly liquid asset and collateral positions (including the eligibility and marketability of such assets under a variety of market environments); requirements for unfunded commitments; and the adequacy of contingency funding plans. All aspects of liquidity should address the impact to earnings and capital, and incorporate planned and unplanned balance sheet changes, as well as varying interest rate scenarios, time horizons, and market conditions.[28]

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[27] The OCC's capital requirements are set forth at 12 CFR Part 3.

[28] See the "Liquidity" booklet of the *Comptroller's Handbook* for more information. https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/liquidity.pdf.

Compliance risk management

The OCC expects all national banks to manage compliance risks effectively. A strong compliance infrastructure contributes to a national bank's safe and sound operation, as well as the provision of fair access to financial services, fair treatment of customers, and compliance with applicable laws.

An applicant seeking a special purpose national bank charter, like any applicant for a national bank charter, is expected to demonstrate a culture of compliance that includes a top-down, enterprise-wide commitment to understanding and adhering to applicable laws and regulations and to operating consistently with OCC supervisory guidance. In addition, the applicant would need appropriate systems and programs to identify, assess, manage and monitor the compliance process (e.g., policies and procedures, practices, training, internal controls, and audit), and a commitment to maintain adequate compliance resources.

Appropriate compliance risk management includes a well-developed compliance management system that is commensurate with the risks to the proposed bank and includes:

- a compliance program designed to ensure and monitor compliance with the requirements imposed by the BSA, other AML statutes, and related regulations, as well as OFAC economic sanctions obligations; and
- a consumer compliance program designed to ensure fair treatment of customers and fair access to financial services, as well as compliance with Section 5 of the Federal Trade Commission Act, the unfair, deceptive, or abusive acts or practices prohibitions of Dodd-Frank, and all other applicable consumer financial protection laws and regulations.

The OCC expects any applicant seeking a special purpose national bank charter to provide a sufficient description of the proposed bank's activities for the OCC to fully understand the BSA/AML and compliance risks the proposed bank faces, how it intends to assess, manage, and monitor these risks, and how it would comply with relevant laws, regulations, and requirements.

As with any national bank, the compliance risk management system appropriate for a specific bank should consider the nature of the company's business, its size, and the diversity and complexity of the risks associated with its operations. While this general standard is consistent across all national banks, applying the standard to a fintech company's business model could raise novel considerations. The OCC would consider and address in its evaluation of a fintech charter application whether and how innovative elements of a business model may affect the proposed bank's compliance risk profile.

Financial inclusion

The OCC's statutory mission includes ensuring that national banks treat customers fairly and provide fair access to financial services.[29] This part of the OCC's mission is directly related to

[29] See 12 USC 1.

financial inclusion.[30] For insured depository institutions, this mission is advanced, in part, through the CRA framework, under which the OCC assesses an institution's record of helping meet the credit needs of its entire community, including low- and moderate-income neighborhoods, individuals, and underserved geographic areas. Special purpose national banks that are not insured depository institutions, however, are not subject to the CRA.[31]

Distinct from any direct CRA obligation, the OCC is guided by certain principles in determining whether to approve a charter application to establish a national bank. These principles include "encouraging" the national bank "to provide fair access to financial services by helping to meet the credit needs of its entire community" and "promoting fair treatment of customers including efficiency and better service."[32] The OCC expects an applicant seeking a special purpose national bank charter that engages in lending activities to demonstrate a commitment to financial inclusion that supports fair access to financial services and fair treatment of customers. The nature of the commitment would depend on the entity's business model and the types of loan products or services it intends to provide.

The OCC's chartering regulation generally requires an applicant for a national bank charter to submit a business plan that demonstrates how the proposed bank plans to respond to the needs of the community, consistent with the safe and sound operation of the bank.[33] Although this element of the business plan is not mandatory for all special purpose banks, the OCC expects a special purpose bank engaged in lending to explain its commitment to financial inclusion in its business plan. In developing the financial inclusion component of its business plan, a proposed special purpose bank engaged in lending should consider the following elements:

- an identification of, and method for defining, the relevant market, customer base, or community;
- a description of the nature of the products or services the company intends to offer (consistent with its business plan), the marketing and outreach plans, and the intended delivery mechanisms for these products or services;
- an explanation of how such products and services, marketing plans, and delivery mechanisms would promote financial inclusion (e.g., provide access to underserved consumers or small businesses); and

[30] The problem of financially unserved and underserved sectors of society is a global issue. The World Bank has described "financial inclusion" to mean that "individuals and businesses have access to useful and affordable financial products and services that meet their needs—transactions, payments, savings, credit and insurance—delivered in a responsible and sustainable way." See the World Bank Financial Inclusion Overview page at http://www.worldbank.org/en/topic/financialinclusion/overview. Separately, recent final guidance from the Basel Committee on Banking Supervision addresses financial inclusion, focusing on unserved and underserved customers. See Guidance on the application of the Core Principles for Effective Banking Supervision to the regulation and supervision of institutions relevant to financial inclusion (September 2016) at http://www.bis.org/bcbs/publ/d383.pdf.

[31] See 12 USC 2902 (defining "regulated financial institution" to mean an "insured depository institution"). See also 12 CFR 25.12 (defining "bank" as a national bank with federally insured deposits).

[32] See 12 CFR 5.20(f)(1)(ii) and (iv).

[33] See 12 CFR 5.20(h)(5).

- full information regarding how the proposed bank's policies, procedures, and practices are designed to ensure products and services are offered on a fair and non-discriminatory basis. For example, the OCC may ask an applicant that plans to extend credit to provide the terms on which it plans to lend, including a description of the protections it plans to provide to individuals and small business borrowers.

As with other elements of the applicant's business plan, the OCC may require a company to obtain approval, or no-objection, from the OCC if it departs materially from its financial inclusion plans.

Recovery and exit strategies; resolution plan and authority

As noted above, the OCC expects a proposed bank's business plan to include alternative business and recovery strategies to address various best-case and worst-case scenarios. Simply put, the OCC expects business plans to articulate specific financial or other risk triggers that would prompt the Board and management's determination to unwind the operation in an organized manner. These strategies must provide a comprehensive framework for evaluating the financial effects of severe stress that may affect an entity and options to remain viable under such stress. The business plan must address material changes in the institution's size, risk profile, activities, complexity, and external threats, and be integrated into the entity's overall risk governance framework. Plans must be specific to that entity, aligned with the entity's other plans, and coordinated with any applicable parent or affiliate planning. A plan should include triggers alerting the entity to the risk or presence of severe stress, a wide range of credible options an entity could take to restore its financial strength and viability, and escalation and notification procedures. While the objective of these business and recovery strategies is to remain a viable entity, the OCC may also require a company to have a clear exit strategy.

Chartering process

The OCC's standard process for reviewing and making decisions about charter applications would apply to applications from fintech companies for a special purpose national bank charter. Charter applications are reviewed and processed through the OCC's Licensing Department. The "Charters" booklet of the *Comptroller's Licensing Manual*[34] contains detailed information about that process, which consists of four stages:

- The prefiling stage, in which potential applicants engage with the OCC in formal and informal meetings to discuss their proposal, the chartering process, and application requirements. At this stage, applicants also prepare a complete application, including a business plan.
- The filing stage, in which the organizers submit the application. Organizers also must publish notice of the charter application as soon as possible before or after the date of the filing.
- The review and evaluation stage, in which the OCC conducts background and field investigations, and reviews and analyzes the application to determine whether the proposed bank: has a reasonable chance of success; will be operated in a safe and sound manner; will

[34] See the "Charters" booklet of the *Comptroller's Licensing Manual*.

provide fair access to financial services; will ensure compliance with laws and regulations; will promote fair treatment of customers; and will foster healthy competition.

- The decision stage, which includes three phases:
    - The preliminary conditional approval phase, when the OCC decides whether to grant preliminary conditional approval;
    - The organization phase, when the bank raises capital, prepares for opening, and the OCC conducts a preopening examination; and
    - The final approval phase, when the OCC decides whether the bank has met the requirements and conditions for opening.

The OCC imposes a number of standard requirements on a bank when it grants preliminary conditional approval, such as the establishment of appropriate policies and procedures and the adoption of an internal audit system appropriate to the size, nature, and scope of the bank's activities. The OCC may impose additional conditions for a variety of reasons, including for example to ensure the newly chartered bank does not change its business model from that proposed in the application without prior OCC approval; to mandate higher capital and liquidity requirements; or to require the bank to have a resolution plan to sell itself or wind down if necessary. In addition, in the case of an uninsured bank, the OCC may impose requirements by way of conditions similar to those that apply by statute to an insured bank, to the extent appropriate given the business model and risk profile of a particular applicant. The OCC likely would impose additional conditions in connection with granting a special purpose national bank charter requested by a fintech company based on the fintech company's business model and risk profile.[35]

The OCC recognizes it also may need to tailor some requirements that apply to a full-service national bank to address the business model of a special purpose national bank. The OCC has experience in adapting legal requirements to different types of business models. For example, as noted above, the OCC has modified capital requirements for certain trust banks.[36] Similarly, the OCC would consider adapting requirements applicable to a fintech applicant for a special purpose national bank charter to the extent consistent with applicable law.

The OCC recommends that potential applicants carefully review the OCC chartering regulation and the "Charters" booklet of the *Comptroller's Licensing Manual* for a full description of the charter application process and requirements. The OCC also strongly urges groups or individuals interested in a special purpose national bank charter to engage with the OCC well in advance of filing an application to ensure they understand the requirements. In addition, interested parties

[35] An applicant may be required, as a condition of approval, to enter into an "operating agreement" with the OCC containing the substantive charter conditions. The special purpose charters section of the "Charters" booklet of the *Comptroller's Licensing Manual* has additional information on operating agreements and other documents used for some special purpose national trust banks.

[36] The OCC is funded through assessments and fees charged to the institutions it supervises. See 12 USC 16. Consistent with this authorization, the OCC has modified the assessments it charges an independent trust bank or a credit card bank to account for the scope and activities of the entity and the amount and type of assets that the entity holds. The OCC would determine assessments for a fintech special purpose national bank to account for similar factors.

are advised to consult the *Comptroller's Handbook* for additional information on how the OCC supervises and examines national banks.[37] The Office of Innovation also can be an important resource to fintech companies interested in exploring the possibility of a special purpose national bank charter. Contact information for the Licensing Department and the Office of Innovation may be found on the OCC's website.

Request for comment

As the OCC considers the granting of special purpose national bank charters to fintech companies, it seeks feedback on all aspects of this paper. The OCC also solicits responses to the following questions. Respondents should provide written comments by January 15, 2017 (45 days from this paper's publication). Submissions should be sent to specialpurposecharter@occ.treas.gov.

1. What are the public policy benefits of approving fintech companies to operate under a national bank charter? What are the risks?

2. What elements should the OCC consider in establishing the capital and liquidity requirements for an uninsured special purpose national bank that limits the type of assets it holds?

3. What information should a special purpose national bank provide to the OCC to demonstrate its commitment to financial inclusion to individuals, businesses and communities? For instance, what new or alternative means (e.g., products, services) might a special purpose national bank establish in furtherance of its support for financial inclusion? How could an uninsured special purpose bank that uses innovative methods to develop or deliver financial products or services in a virtual or physical community demonstrate its commitment to financial inclusion?

4. Should the OCC seek a financial inclusion commitment from an uninsured special purpose national bank that would not engage in lending, and if so, how could such a bank demonstrate a commitment to financial inclusion?

5. How could a special purpose national bank that is not engaged in providing banking services to the public support financial inclusion?

6. Should the OCC use its chartering authority as an opportunity to address the gaps in protections afforded individuals versus small business borrowers, and if so, how?

7. What are potential challenges in executing or adapting a fintech business model to meet regulatory expectations, and what specific conditions governing the activities of special purpose national banks should the OCC consider?

[37] *The Comptroller's Handbook* is a collection of booklets that contain the concepts and procedures established by the OCC for the examination of banks. It is available at www.occ.gov.

8. What actions should the OCC take to ensure special purpose national banks operate in a safe and sound manner and in the public interest?

9. Would a fintech special purpose national bank have any competitive advantages over full-service banks the OCC should address? Are there risks to full-service banks from fintech companies that do not have bank charters?

10. Are there particular products or services offered by fintech companies, such as digital currencies, that may require different approaches to supervision to mitigate risk for both the institution and the broader financial system?

11. How can the OCC enhance its coordination and communication with other regulators that have jurisdiction over a proposed special purpose national bank, its parent company, or its activities?

12. Certain risks may be increased in a special purpose national bank because of its concentration in a limited number of business activities. How can the OCC ensure that a special purpose national bank sufficiently mitigates these risks?

13. What additional information, materials, and technical assistance from the OCC would a prospective fintech applicant find useful in the application process?

Exhibit C

January 17, 2017

The Honorable Thomas J. Curry
Comptroller
Office of the Comptroller of the Currency
400 7th Street SW
Mail Stop 9W-11
Washington, DC 20219

Re: *Exploring Special Purpose National Bank Charters for Fintech Companies*

Dear Comptroller Curry,

The New York State Department of Financial Services ("NY DFS") opposes the Office of the Comptroller of the Currency ("OCC")'s proposal to create a new national bank charter for any entity deemed by the OCC to fit within the amorphous category of "fintech" – an exceedingly broad and undefined term – as suggested in its publication of *Exploring Special Purpose National Bank Charters for Fintech Companies* ("Whitepaper"). Technology is not new to financial services and thus using the term "fintech" to potentially sweep all nonbank financial services companies not authorized by the National Bank Act into a new regulatory regime is highly problematic. The Whitepaper does not discuss, or even mention, the existing state regulatory regime covering these areas or identify any deficiency in this regime that needs to be filled. The imposition of an entirely new federal regulatory scheme on an already fully functional and deeply rooted state regulatory landscape will invite serious risk of regulatory confusion and uncertainty, stifle small business innovation, create institutions that are too big to fail, imperil crucially important state-based consumer protection laws and increase the risks presented by nonbank entities.

1. <u>States Already Regulate Nonbank Financial Services Companies</u>

NY DFS was created in 2011 as part of the merger of the New York State Banking and Insurance Departments, and is therefore the successor to the New York State Banking Department, which was created by the New York state legislature on April 15, 1851. In addition to 166 years of regulating traditional banking entities, NY DFS has been regulating nonbank financial services entities for over half a century. Our extensive experience includes the design and oversight of regulation carefully developed and tailored to address the specific risks presented by the types of institutions and activities ostensibly included within the OCC definition of "fintech." NY DFS currently licenses and supervises over 2,000 banking and nonbanking institutions, a significant number of which are nonbanking financial entities. NY DFS's current supervision includes banking and nonbanking entities that use technology as a core part of their business to lend or transfer money, including money transmitters, licensed lenders, sales finance companies, premium finance agencies, mortgage banks and bankers and virtual currency exchanges.[1]

NY DFS supervises and examines each of these entities individually and deploys staff who are experts in these types of business activities, and can respond quickly to innovation. Indeed, NY DFS has a long record of being responsive to technological advancements including promulgation of a virtual currency licensing regime and, a first in the nation cybersecurity regulation. NY DFS opposes the OCC proposal to the extent it seeks to impact state regulatory authority in any way.

2. The Whitepaper Creates Regulatory Uncertainty

NY DFS disputes the OCC's claim that it has the authority under the National Bank Act for this proposed new charter. Nonbank financial institutions are not national banks nor are they similar to the entities encompassed by the National Bank Act. But even if the OCC had jurisdiction, a new charter would not be needed because there are already effective state regulators in place. The Whitepaper threatens to create an entirely new federal regulatory program, creating serious regulatory uncertainty that threatens to invade state authority and sovereignty. The regulatory uncertainty stems from many factors.

First, the Whitepaper creates significant uncertainty regarding the types of entities that could potentially apply for this new "special purpose charter" because it focuses on technology rather than types of financial services. Financial regulation cannot be based on technology – which is ever evolving and not confined to one-size-fits-all regulated entities. The type of regulation that may be appropriate instead depends on the activities that the companies undertake. Money transmitters and check cashers should not be subject to the same rules just because they both solicit new customers over the internet. Rather, the carefully tailored licensing regimes developed by states for these types of institutions address relevant differences on an ongoing basis. Attempting to impose more regulations on these different types of entities risks significant disruption of the existing regulatory regime and will endanger effective prudential oversight.

Second, the Whitepaper proposal threatens regulatory certainty because the OCC does not have clear authority to create a new technology based charter. To propose disrupting an existing regulatory scheme without clear and concrete legislative authorization would risk significant disruption to the regulatory oversight of financial institutions and tread on state sovereignty. Moreover, history has shown that charter changes from state to federal can be followed by serious regulatory omissions, as was demonstrated when HSBC switched from a NY state charter to a

[1] The OCC asks "Are there particular products or services offered by fintech companies, such as digital currencies, that may require different approaches to supervision to mitigate risk for both the institution and the broader financial system?" This question only reinforces that it is state regulators that have the deep experience in this area. Each of the types of financial services has different features and risks, and requires separate laws, regulations and supervisory protocols to address the particular area, as NY law provides. "Fintech" is not a one-size-fits-all category for regulatory or legal purposes.

national charter.[2] Further disruption could be created if the OCC's authority is questioned or limited by either legislative or judicial action.

Third, the Whitepaper creates uncertainty because it would create a class of institutions for which the scope and applicable law is unclear. The Whitepaper raises the possibility that these OCC special purpose chartered technology companies may become member banks under the Federal Reserve, may be required to get FDIC insurance, and "may be subject to oversight by the Consumer Finance Protection Bureau." [Whitepaper at p.7] While the OCC states that it will coordinate among regulators, it does not confirm precisely what laws would apply or clarify how these laws that were designed for banks would apply to nonbank financial services companies.[3]

Fourth, the regulatory uncertainty could be compounded by myriad proposals to revamp the regulatory landscape in Washington, including proposals to repeal Dodd-Frank and other banking regulations, and to reshape the OCC. It is particularly problematic during this time of regulatory uncertainty to propose an unnecessary disruption of existing state regulation by creating a wholly new, federal regulatory program applicable to companies that have never been subject to federal regulation before and which potentially could evade the established and effective system of state regulation. Simply put, if at all, now is not the time to create yet another regulatory regime that would uproot existing regulation that is working and create market uncertainty and disruption.

[2] HSBC Bank US was chartered by NY DFS until June 2004 when it became regulated by the OCC. At the time of the charter switch, HSBC was under a Written Agreement with NY DFS and the Federal Reserve due to shortcomings in its BSA/AML program. HSBC's conversion to a federal charter terminated NY DFS's oversight of the enforcement action and, despite OCC examiners issuing supervisory letters detailing 30 BSA-related Matters Requiring Attention over a 12-month period, the OCC terminated the Written Agreement in 2006. The Senate Permanent Subcommittee on Investigations looked into HSBC's BSA related failures and the OCC's regulatory supervision and found that "OCC's failure to compel HBUS to remedy the AML deficiencies repeatedly identified by its examiners over a six-year period indicates that systemic weaknesses in the OCC's AML oversight model require correction." The Committee's report concluded that to "fulfill its AML obligations, the OCC needs to strengthen its AML oversight and revamp its AML supervisory and enforcement approach." In December 2012, the U.S. Department of Justice ("DOJ") entered into a deferred prosecution agreement with the bank and its UK parent for serious and significant sanctions and BSA violations. In short, the switch in regulators did not enhance supervision of HSBC's faulty compliance program or encourage remediation of the flaws that NY DFS had identified.

[3] The following are among the questions raised by wedging divergent sets of businesses under the federal banking law: Would fintech non-bank banks be eligible to access the Fed discount window? Would they be considered banks under other areas of the federal banking law like the Bank Holding Company Act? Would they be subject to the same consumer and compliance requirements as banks that also offer online services?

3. A National Charter Would Encourage Large "Too Big to Fail" Institutions

The recent financial crisis has reminded us of the risks created by large financial institutions that are too big to fail. These national behemoths, and regulators who empower them, point to efficiency and simplicity, and the advantages of uniform business models and uniform regulation, to make the case for lax regulation. However, bigger does not necessarily mean better and surely does not mean a more secure financial system. Rather, bigger often means less transparency and more risk to the financial system and the public that relies on them for financial security.

One of the most important impacts of the current developments in financial technology is that it is enabling new and different companies to compete to provide services to consumers. It is not in the public interest to have a small number of technology-savvy firms dominate different types of financial services simply because they were able to get a national charter. A national charter would result in increased business lines and personnel crowded under one roof, rather than the development of mono- or dual-line businesses that fill specific consumer needs and provide jobs in our communities. Bigger means management will seek to sweep any violation under the rug as "not material."[4] Bigger may mean more pressure to chase profits at the expense of safety and soundness. More uniform means any defect becomes widely duplicated and infects the entire economy. Size may also bring about the perceived need and potential capacity to bend the rules.

A deregulatory experiment has already been proven to infect the national economy. The unleashing of subprime lending through the vehicles of national banks contributed to a national crisis. The lingering effects of the Great Recession and the failure of large and significant banks are still with us. The sentiment of both the public and many elected representatives is to avoid creating large institutions that pose similar risks to our economy. In the wake of these experiences, the OCC should not rush to grant national status to unknown and unproven business models thereby enabling them to become financial giants. Many of these new technological start-ups will fail. State and federal regulators should work together to make sure that those that fail impact the fewest number of consumers, rather than stretch existing law to give a national platform to a few companies that could cause systemic risk.[5]

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[4] Regulators Danced With Wells Fargo For Years Before Penalties (Sep. 20, 2016) ("The Wells CEO also told Congress he did not err in signing off on quarterly reports filed with the Securities and Exchange Commission that said the company's internal controls were strong, maintaining that the problems did not reflect a material event warranting a notice to investors. "It was not a material event," Stumpf told the Senate Banking Committee in sometimes testy testimony.")

http://www.mcclatchydc.com/news/politics-government/congress/article103008152.html#storylink=cpy

[5] Federal regulators were not the first to identify and prosecute the significant failures at Wells Fargo Bank N.A. Despite having examiners embedded on site at Wells Fargo, and having received complaints as early as March 2012, the misconduct that led to Wells Fargo employees fraudulently opening over 2 million accounts continued for years. The answer to the Wells Fargo debacle is not to create a new national charter that may attempt to undermine the states' effective regulatory reforms. *See* OCC DESERVES MORE SCRUTINY IN WAKE OF WELLS FRAUD, (Oct. 13, 2016), http://www.americanbanker.com/bankthink/occ-deserves-more-scrutiny-in-wake-of-wells-fraud-1091901-1.html

4. A Special Purpose Charter Threatens to Undermine Important Consumer Protections

Allowing fintech companies to obtain special purpose bank charters could permit these companies to engage in regulatory arbitrage and seek to avoid important state consumer protection laws solely on the ground of being a technology company. For example, under the OCC proposal, online lenders might attempt to avoid state usury laws designed to protect consumers from falling into dangerous cycles of debt. While the internet provides choice, it also has allowed lenders to spring up from anywhere and aggressively market fast loans to consumers. In particular, the payday lending industry -- which sometimes charges interest rates in excess of 1,000 percent -- engages in predatory tactics that harm struggling borrowers. Federal and state regulators and consumer advocates have repeatedly reported on the harmful impact of high-interest payday loans that trap consumers in a cycle of increasing debt and predatory collection practices. The answer is not to give these bad actors a possible avenue to skirt state law.

In New York, payday and other high-interest small-dollar lending is illegal under both state civil and criminal usury statutes. New York has aggressively enforced the state's usury laws to stop predatory loans in the state. Some lenders have attempted to skirt New York's prohibition on payday lending by offering usurious loans to New Yorkers over the internet, often by affiliating with federally chartered or federally recognized institutions. New York's usury laws apply to online payday lenders when those loans are offered or made in New York. Moreover, the courts have agreed with the NY DFS position when payday lenders have attempted to stop NY DFS from taking any action to protect New York consumers from online payday lenders.[6]

Giving federal bank charters to online lenders would create a race to the bottom where online lenders could set up shop in a state with lax consumer protection rules and flood more consumer protective states with dangerous, high-interest loans. This would be an unconscionable assault on state consumer protections that would leave Americans in many states newly vulnerable to predatory lending practices. NY DFS will continue to protect New Yorkers from unscrupulous practices and will oppose any attempt to evade New York's laws.

5. Nonbank Financial Institutions Present Unique Risks

The Whitepaper points to the OCC's experience regulating banking institutions, yet, it fails to recognize or discuss the unique challenges presented by nonbank financial service companies which have not previously been regulated by the OCC. Compared to traditional banks, non-depository institutions are cash intensive businesses that have frequent changes to their product mix, location and beneficial owners. In addition, these businesses generally do not have ongoing customer relationships, like depository institutions that by definition open deposit accounts for customers. These factors make compliance processes, including consumer identification and transaction monitoring, particularly challenging and pose significant and unique risks for regulators. As a result, close and expert supervision is particularly important to make sure that

[6] *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.,* 769 F.3d 105 (2d Cir. N.Y. 2014).

these entities are not used to finance terrorism or perpetrate fraudulent schemes targeting the elderly and other vulnerable victims. Any attempt to reduce supervision in this age of great risk is a big mistake.

NY DFS has dedicated staff that specializes in licensing, supervising and examining non-depository institutions. These specialized examiners have extensive experience examining the unique compliance challenges presented by these institutions and have the tools needed to supervise these entities, including training and examination protocols that are tailored to non-depository institutions. NY DFS has been examining and supervising these entities for decades and has brought enforcement actions against those that have BSA-AML deficiencies. NY DFS has also issued transaction monitoring regulations that apply to its nonbank regulated entities that establish specific regulatory requirements for their BSA-AML programs. NY DFS also has coordinated with similar specialists in other states through CSBS and MTRA in conducting multistate examinations.

Similarly, fintech companies obviously present unique and significant cybersecurity risks. For years, NY DFS has had a team of dedicated examiners who have extensive training and expertise that qualifies them to examine both depository and non-depository entities for cybersecurity. NY DFS's long experience in this area has culminated in the publication of a first in the nation cybersecurity regulation that will set minimum standards for these financial services entities. Experience regarding cybersecurity and technology risks is critical when approaching the unique risks presented by technology driven nonbank institutions. Without this critical experience, a new regulatory framework for large national technology based nonbank financial institutions presents substantial risk.

6. The Proposed Charter May Stifle Rather than Encourage Innovation and Small Businesses by Encouraging Large Companies at the Expense of Small Businesses

On October 26, 2016, the OCC announced the establishment of an Office of Innovation to encourage and foster technological advancement in the banking and financial services industry. "By establishing an Office of Innovation, we are ensuring that institutions with federal charters have a regulatory framework that is receptive to responsible innovation and ... the supervision that supports it." NY DFS supports efforts to encourage responsible innovation in the financial services industry. However, such efforts by the OCC should not be used as an excuse to widely extend and expand the OCC's jurisdiction, beyond the National Bank Act's reach, to types of entities, that the OCC has not previously regulated.

Indeed, the creation of a national charter is likely to stifle rather than encourage innovation because it would be an avenue for larger, more dominant firms to control the development of technology solutions in the financial services industry. Currently, small businesses can enter the fintech field and explore different technologies. The ability to start and license a business through a state licensing regime is the appropriate way to foster the development of technological enhancements and encourage small businesses. Numerous fintech companies have already succeeded and grown under this regulatory framework.

Development of new technological solutions by new businesses is also important to the efforts of state regulators like NY DFS to expand financial services to underserved communities. There are many communities and people that are not being served by large nationally licensed institutions and NY DFS is actively working with some of these newer types of nonbanking entities to provide financial services in these markets. Serving communities is squareby within the wheelhouse of state regulators who know their communities, and not a federal regulator necessarily separated from the local communities in every state across the county.

Small business growth and development depends on the on-the-ground work within the states. Separate licensing and supervisory regimes among the states, with coordination and cooperation among state regulators that has existed for decades, provide the opportunity for new entrants to test and develop a business model on a smaller scale, and for many smaller companies to launch. As such companies grow and expand to different states, longstanding state coordination mechanisms exist to help ensure consistent regulatory treatment.[7]

Creation of a national charter would undermine the ability of small firms to enter or remain in the financial services business -- those companies that have the funding to nationalize would have the ability to squelch small business and competition rather than encouraging the development of a broad range of business models. The laboratory of the states is where such firms are given the chance to develop, test alternatives and provide financial services to all communities within the state's borders. The OCC should not rush to help the first company to start the race – or the one or two best funded – to clear the field of robust competition. A national fintech charter could allow a well-funded money-losing fintech company, which underprices its services and skirts state consumer regulatory protections, to profit on the backs of smaller established competitors. Such a result would harm the ability of small businesses to compete, the ability of new entrants to develop new technological solutions, and the rights of consumers to financial choice and protection from predatory practices.

Large-scale national banking operations are one model for delivering banking and other financial services. However, large firms do not meet all financial service needs, and are more likely to drop less profitable customers and lines of business in underserved communities. Smaller institutions can meet a broader range of financial needs, and have a longer term perspective due to their relationship to their communities. In fact, community banks remain the primary source of credit to small businesses, and should not be placed at a disadvantage by a claim that innovation requires a new "fintech" national charter. Critically important, the states know best the needs of consumers who live and work within a state's borders, as recognized by state banking regulation of community banks since this country's founding. When fintech companies chase and then run out of easy growth, they may leave a scarred landscape behind. We must protect the tried-and-true financial services business models that grew with the history of their communities. NY DFS will

[7] The Conference of State Banking Supervisors ("CSBS") and Money Transmitters Regulator Association ("MTRA") are two organizations through which state regulators have long coordinated licensing, examination and supervision of nonbank financial services companies. Through these organizations, state regulators conduct effective oversight of entities that may cross state lines through, among other things, coordinated multistate examinations.

continue to advance innovation while actively supporting access to financial services in all communities in New York State.

7. State Licensing and Supervision Is Attuned to State Needs and Risks

NY DFS and other state regulators are the first responders to the financial regulatory needs of financial services customers and institutions. We are closer to the entities that we regulate and able to spot trends and issues that may not be visible on a national scale. NY DFS pays close attention to developments in every corner of the state, as well as financial innovation that may impact New York consumers. NY DFS has taken the lead in investigating and developing regulations in novel areas such as virtual currency, online lending and cybersecurity. The smaller scale of focus, and the more direct contact with consumers and regulated institutions, often translates to easier and more frequent communications and a quicker response to customer and institution concerns.

As a regulator of national banks, and discrete categories of other types of financial services under specific statutory grants, the OCC does not have the foundation or regulatory framework to regulate these novel types of non-bank financial services. This is compounded where, as here, the OCC would propose to regulate new technology enhancements in these businesses.

Moreover, by its own admission, the OCC would not regulate the majority of these institutions, but rather just the small number that employ internet technology and are capable of achieving a national license. More troubling, the OCC acknowledges that it would not be fashioning comprehensive regulation for these entities, pointing out that it could customize specific requirements in an operating agreement for particular institutions. Thus, the Whitepaper appears to suggest that the OCC would regulate a couple of large and technologically advanced money transmitters, by creating bespoke operating agreements for such entities, while the states continue to regulate the majority of such entities. Such limited and piecemeal regulation is likely to mean lesser regulatory standards and requirements for this important segment of the financial services industry and will not promote regulatory fairness or create the best structure to protect the public.

* * *

In sum, the proposed "fintech" charter substitutes an effort to appear innovative for a complicated, problematic, new regulatory regime. NY DFS opposes any new regulatory regime that impacts state regulation and the protection of our consumers and markets. The proposed OCC special purpose charter fails on each ground.

Sincerely,

Maria T. Vullo
Superintendent
New York State Department of Financial Services

Exhibit D

CSBS
SINCE 1902
CONFERENCE OF STATE BANK SUPERVISORS

January 13, 2017

Office of the Comptroller of the Currency (OCC)
Legislative and Regulatory Activities Division
400 7th Street SW, Suite 3E-218
Mail Stop 9W-11 Washington, DC 20219

Re: Exploring Special Purpose National Bank Charters for Fintech Companies

Dear Comptroller Curry,

The Conference of State Bank Supervisors appreciates the opportunity to comment on the white paper, titled *Exploring Special Purpose National Bank Charters for Fintech Companies*, announcing the Office of the Comptroller of the Currency's (hereinafter "OCC" or "Comptroller") intention to "move forward with chartering financial technology companies that offer bank products and services."

CSBS is the nationwide organization of state banking and financial services regulators from all 50 U.S. states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. For more than a century, CSBS has given state bank and financial services regulators a national forum to coordinate bank and nondepository supervision and to develop regulatory policy. As the chartering, licensing and supervisory authorities for over 75% of the banks in the United States and over 20,000 nondepository financial services providers, State regulators are charged with protecting consumers, ensuring safety and soundness, and encouraging economic prosperity in their states.

As stated in our November 2016 comment letter to the OCC[1], state bank regulators oppose the creation of a special purpose national bank charter for financial technology (fintech) and other nondepository companies because:

1. The OCC lacks statutory authority to issue such a charter;
2. Such a charter will distort the marketplace for financial services, with a federal agency arbitrarily picking winners and losers;
3. The issuance of such a charter creates tremendous uncertainty and risks pertaining to access to critical government resources, including the payments system and the federal safety net; and
4. The preemptive effect of this charter nullifies the states' ability to protect consumers.

This comment letter will provide an overview of the reasons underlying our opposition to the OCC creating a special purpose national bank charter for fintech and other nondepository companies (hereinafter "special purpose national nonbank charter" or "special purpose national nonbank"). Additionally, we have attached a Legal and Policy Assessment that provides a more in-depth discussion of the unlawful and invalid nature of a special purpose national nonbank charter, the many unsettling policy implications resulting from the Comptroller acting outside the confines of its statutory chartering authority, the many legal uncertainties and policy issues stemming from the unlawful nature of a special

[1] CSBS's previous comment letter on the OCC's proposed rule establishing a framework to govern receiverships for uninsured national banks is available at: [CSBS Comment Letter on Proposed Rule on Receiverships for Uninsured National Banks]().

purpose nonbank charter, and the dangerous consequences stemming from the preemption of state laws through such a charter.

I. The OCC's proposed special purpose "fintech" charter is inconsistent with the letter and intent of the National Bank Act.

The OCC claims, citing its chartering regulations, that it has the authority to charter a special purpose bank to conduct any activity within the business of banking so long as it engages in receiving deposits, lending money, or paying checks. Consequently, the OCC claims to have the statutory authority to charter a special purpose national nonbank—that is, a special purpose bank that does not engage in deposit-taking and only engages in lending money or paying checks. However, as CSBS has set out in previous comments to the OCC and reiterates with this letter, the OCC lacks any statutory authority to charter a special purpose national nonbank.

A. Special purpose national nonbanks cannot lawfully be formed under any type of special purpose bank charter.

Courts have held and Congress has made clear that the Comptroller is prohibited from chartering a national bank that does not engage in deposit-taking, unless the charter is for a special purpose bank expressly authorized in statute.[2] The special purpose banks expressly authorized by Congress are trust banks, bankers' banks, and credit card banks. Since Congress has not expressly authorized the Comptroller to issue a special purpose nonbank charter, any attempt to grant a special purpose national bank charter to such an institution would be unlawful and invalid.

B. Special purpose national nonbanks cannot lawfully be formed under a full-service bank charter.

According to the white paper, the Comptroller proposes that these newly chartered entities would have "the same charter as a full-service national bank." However, since a special purpose national nonbank would not be engaged in deposit-taking, the Comptroller is prohibited from granting it a full-service national bank charter.[3] Full-service national banks are chartered to engage in the "business of banking". Engaging in the "business of banking" under the National Bank Act, as a matter of law[4] and as a matter of common sense, requires engaging in deposit-taking. Thus, any attempt to grant a full-service national bank charter to a special purpose national nonbank would be unlawful and invalid.

C. Special purpose national nonbank charters would be unlawful and invalid.

Therefore, since (1) the granting of a special purpose nonbank charter has not been expressly authorized by Congress, and since (2) a special purpose nonbank would not engage in deposit-taking, the

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[2] For a more in-depth analysis of the applicable precedent and applicable federal statutes, see Part I.B.2. of the Assessment.

[3] While the Comptroller may claim that a special purpose nonbank would receive a full-service charter and voluntarily refrain from receiving deposits, such a legal machination does not escape the rule that a charter recipient must exercise the power to receive deposits for the Comptroller to have the authority to grant a full-service national bank charter. Additionally, such a chartering structure places an improper reliance on the OCC's enforcement authority to bolster its chartering authority, as discussed in Part I.B.2. of the Assessment, and will have numerous unsettling policy implications, as discussed in Part II of the Assessment.

[4] *See Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (*IBAA v. Conover*).

Comptroller lacks the authority to charter a special purpose nonbank. Accordingly, regardless of what the Comptroller's regulations provide, any attempt by the Comptroller to charter a special purpose nonbank would be unlawful and invalid.[5] State regulators urge the Comptroller to avoid taking the unlawful action contemplated in the white paper, for the creation of a national nonbank charter would be an unauthorized and unprecedented expansion of the Comptroller's chartering authority, distorting the purpose for which the national banking system was established.

II. The OCC's proposed "fintech" charter destabilizes banking's legal and regulatory structure.

A. Most federal banking laws will not apply to the OCC's proposed special purpose nonbanks.

The special purpose national nonbank that the OCC proposes to charter would not be subject to the clear majority of federal banking laws. For instance, these special purpose nonbanks would be exempt from many of the statutes and regulations that apply to insured depository institutions, including prompt corrective action requirements, source of strength requirements, restrictions on management interlocks, generally applicable prudential safeguards, community reinvestment act requirements, and uniform accounting standards. This notable absence of generally applicable federal banking laws covering special purpose nonbanks clearly evidences that Congress has not contemplated the creation of a special purpose national nonbank charter.

The OCC has intentionally structured the special purpose nonbank charter to evade the application of certain federal banking laws. For instance, a special purpose nonbank is specifically designed to avoid being classified as a "bank" for purposes of the Bank Holding Company Act. Evading this Act means that special purpose nonbanks would not be subject to consolidated supervision by the Federal Reserve and the parent companies of special purpose nonbanks would not be subject to the anti-tying rules, restrictions on proprietary trading, and restrictions on affiliations with commercial companies.

Even under the National Bank Act—the enabling statute that purportedly authorizes the grant of nonbank charters—the treatment of special purpose nonbanks is uncertain. For instance, the scope of the incidental powers granted to a special purpose nonbank cannot be clearly delineated, given that the currently authorized incidental powers were permitted on the basis that they would be exercised by institutions that exercise all the express powers granted under the National Bank Act. There is similar uncertainty surrounding how branching requirements will apply.

Furthermore, whether a special purpose nonbank would be required to be a Federal Reserve member and the consequences of membership for a special purpose nonbank are also unclear. Moreover, it is uncertain whether a special purpose nonbank would be eligible for access to Federal Reserve services, including gaining access to the payments systems and the discount window. As discussed more fully in Part II.B. of the Assessment, state regulators believe it would be unwise to provide unfettered access to Federal Reserve services, particularly the payments systems, to special purpose national nonbanks because they refrain from engaging in the business of receiving deposits.

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[5] The chartering of a special purpose nonbank would not be the first time that the OCC has attempted to charter a special purpose institution which it lacks the authority to charter. For a discussion of the history of the OCC's special purpose chartering authority and Congressional reactions to the OCC's unlawful chartering attempts, see Part I.B.1. of the Assessment.

B. The OCC proposes an ad-hoc, confidential regulatory framework that will create an unlevel playing field.

Even more unsettling is the regulatory and supervisory framework proposed by the OCC to compensate for the legal chasm in which special purpose nonbanks will operate. In the white paper, the OCC states that it will incorporate otherwise inapplicable rules or impose equivalent requirements by entering into operating agreements with charter recipients which are enforceable under the OCC's enforcement authority. In the absence of generally applicable federal banking laws to govern the operations of special purpose nonbanks, the OCC will have absolute discretion as to whether and to what extent otherwise inapplicable rules will be made applicable through operating agreements.

The white paper makes clear that the operating agreements will be completely individualized to the business model of the charter recipient. This lack of transparency and certainty leaves the general public and potential applicants completely in the dark as to the rules and requirements in key areas such as the Community Reinvestment Act, capital, liquidity, and other "baseline supervisory expectations." Furthermore, charter recipients and the industry generally will have no assurance that rules will be applied and enforced in a uniform, impartial manner, and, because the operating agreements will not be made publicly available, no means of verifying any assurances given.

As fully discussed in Part II.A of the Assessment, the inevitable result of the OCC's proposed supervisory framework will be an unlevel playing field to the disadvantage of traditional, full-service banks. Equally important, due to the ad-hoc, opaque nature of the operating agreements, the OCC will have the unchecked power to favor certain applicants over others, thereby picking winners and losers. Most startups do not have profitable business plans, and only a limited number of established financial technology firms have annual profits. These are not the companies who will enjoy the benefits of the proposed charter. Additionally, the lack of transparency and absence of objective requirements in the proposed supervisory framework for special purpose nonbanks will have a deleterious effect on the ability of new financial innovation to emerge going forward. In short, the special purpose nonbank charter proposed by the OCC will benefit large incumbent firms with established business model and create a barrier to entry for the vast majority of emerging fintech firms.

C. Special purpose nonbanks may be exempt from the OCC's enforcement authority under federal securities laws.

The treatment of special purpose national nonbanks under federal securities laws, although not discussed in the white paper, is an issue of major importance. As discussed in more detail in Part III.D. of the Assessment, while special purpose nonbanks will enjoy exemptions under several federal securities laws, there are serious questions as to whether the enforcement authority delegated to the Comptroller under such laws is sufficient to enable the Comptroller to apply and enforce these laws to institutions that refrain from engaging in the business of receiving deposits.

D. Special purpose national nonbanks will not be subject to federal consumer financial laws to the same extent as full-service banks.

Lastly, the applicability of federal consumer financial law to special purpose nonbanks chartered by the Comptroller while relatively less uncertain is telling in that it demonstrates how the Comptroller will generally apply and enforce otherwise inapplicable laws through the proposed operating agreements. The white paper discusses how only a handful of federal consumer financial laws will apply to special purpose nonbanks, namely, those that apply to nondepository covered persons. However, as discussed more fully in Part III.E. of the Assessment, the Comptroller fails to acknowledge and apparently refuses to utilize the broader authority granted to the OCC under the Dodd-Frank Act to apply and enforce the totality of federal consumer financial law under its general enforcement authority. State regulators believe that the OCC's failure to use its enforcement authority to its fullest extent in the consumer protection context does not bode well for the uniform application and robust enforcement of otherwise inapplicable federal banking, securities, and consumer protection laws.

III. The OCC's proposed "fintech" charter eliminates states' consumer protection authority.

State regulators have witnessed OCC preemption determinations hurt consumers through the preemption of anti-predatory lending laws, adjustable rate mortgage restrictions, and state oversight of national bank operating subsidiaries. This consistent effort by the OCC to preempt state consumer protection laws created the legal foundation for the mortgage crisis and prevented states from having the opportunity to respond to lending practices that hurt consumers. Congress recognized this in the Dodd-Frank Act, repealing the OCC's preemption of state supervision of national bank operating subsidiaries, requiring the CFPB to determine whether OCC preemption determinations are tenable, and lowering the agency deference available to the OCC on preemption challenges. Unilateral chartering decisions by the OCC defies the requirements imposed on the OCC by Congress.

In addition to supervising approximately 4,790 state-chartered banks, most state banking departments also regulate a variety of nondepository financial services providers, including money transmitters, mortgage lenders, and consumer lenders. Based on the OCC's description of the "fintech" charter, any of these 20,000 plus companies would qualify for a national bank charter because they pay checks or lend money. Time and again, Congress has made the conscious decision to reserve the licensure and supervision of institutions engaged in these nondepository activities to the states, choosing to pass activity-based laws like the Electronic Funds Transaction Act, not federal chartering laws.

States require nondepositories to meet safety and soundness requirements and conform to both state and federal consumer protection laws through a state licensing process. Multi-state nondepository companies are examined on a collaborative basis with multi-state teams, reducing regulatory burden and improving allocation of resources among states. As proposed, and without any discussion, a special purpose national bank charter will preempt this regulatory framework for any charter recipient.

IV. Conclusion

State bank regulators appreciate the opportunity to comment on the OCC's white paper announcing their intention to charter a special purpose nonbank through an unprecedented expansion of their chartering authority. As discussed above and in the attached Legal and Policy assessment, state regulators have several significant concerns with how the OCC's existing statutory chartering authority could provide any valid basis for the OCC to charter a special purpose nonbank engaged exclusively in nondepository core banking functions. Additionally, state bank supervisors believe significant risks and costs are likely to result from an expansive, unprecedented use of the OCC's chartering authority. Contrary to the OCC's assertions, a level-playing field between the proposed charter type and the financial services industry is not feasible given the lack of both transparency and impartiality inherent in the proposed chartering framework.

As fellow chartering and regulatory authorities, the members of CSBS take great pride in our long history of promoting the strength and vitality of the dual-banking system. As state regulators continue to work with each other and our federal regulatory counterparts to foster a regulatory and supervisory environment that promotes innovative practices in the delivery of financial services, we encourage the Comptroller to respect the balance of federal and state authority in the regulation of financial services and to avoid undermining the effectiveness and impairing the vitality of the dual-banking system.

Sincerely,

John W. Ryan
President & CEO

Attachment: CSBS Legal and Policy Assessment

CSBS

SINCE 1902

CONFERENCE OF STATE BANK SUPERVISORS

CSBS Legal and Policy Assessment

CSBS has attached this legal and policy assessment to our comment letter to discuss, in greater detail, our perspective as to how the Comptroller's unauthorized expansion of its chartering authority will create a multitude of hazards for consumers, the financial services industry, and the broader regulatory community.

In Part I, CSBS discusses the unprecedented and unauthorized nature of the special purpose charter proposed in the white paper in the context of the history and limits of the Comptroller's chartering authority. Part II discusses the unsettling policy implications that State regulators believe are prompted by the Comptroller's proposed expansion of its chartering authority, including the inevitability of an unlevel playing field in favor of the proposed special purpose charter. In Part III, CSBS discusses the tremendous legal uncertainty surrounding the treatment of the proposed type of special purpose charter under federal banking law, federal securities law, and federal consumer protection law. Lastly, in Part IV, State bank regulators share our perspective on the dangers of preempting state laws, including state consumer protection law.

I. Statutory Limits of the OCC's Chartering Authority

In the OCC's white paper, the Comptroller has asserted the authority to charter a new type of special purpose institution, which would not carry on the business of banking and which has not been specifically authorized by Congress. This Part will demonstrate that the Comptroller has no statutory authority under the NBA or other federal banking laws to approve any new type of special purpose charter, and the Comptroller has no authority to issue any regulation that would expand the limits of the chartering authority established by Congress. In the sections that follow, we set out that (1) the Comptroller lacks the requisite statutory authority to charter institutions whose activities are limited to lending money and/or paying checks or functionally similar activities (hereinafter "special purpose nonbank charters" or "special purpose nonbanks"), and (2) due to this insufficient statutory authority, the Comptroller has no power to bootstrap his chartering authority through an unauthorized, unprecedented, and arbitrary reliance on the agency's enforcement authority.

A. *National banks must be chartered either to carry on the business of banking, or to engage exclusively in a special purpose activity expressly authorized by Congress.*

1. <u>Full-service national banks may be formed only to engage in the business of banking which includes, at minimum, engaging in deposit-taking.</u>

Since the enactment of the National Bank Act (NBA) in 1863, the Comptroller has been authorized to charter "associations for carrying on the business of banking" (hereinafter "full-service national banks"). In the NBA, the phrase "business of banking" not only refers to the enumerated and incidental powers of national banks, but also serves to limit what constitutes a valid exercise of the Comptroller's chartering authority.[1] While the business of national banks has evolved and fluctuated over time, it remains as true

[1] *See* 12 U.S.C. §§ 21, 26-27.

today as it did in 1863 that an institution cannot carry on the "business of banking" under the NBA unless it is endowed with and actually exercises the power to receive deposits.

Unlike the many other enumerated powers of national banks, the receiving of deposits has always been recognized as the minimum essential element of, and the necessary condition to carry on, the "business of banking" under the NBA. A private company could conceivably carry on every other activity within the business of banking without obtaining a bank charter. However, when such a company supplements any of those activities by engaging in the business of receiving deposits, the entire character of the institution's business is transformed, for its business thereby becomes intimately connected with the public interest and, accordingly, it is required to obtain a bank charter.[2]

Most importantly, as a necessary condition for "carrying on the business of banking", granting the power to receive deposits to a national bank is a necessary condition for the valid exercise of the Comptroller's chartering authority, in the absence of a specific grant of congressional authority for chartering a special purpose national bank.

2. <u>Special purpose national banks may be formed only to engage in special purpose activities expressly authorized by Congress.</u>

When, as today, the Comptroller has attempted to charter institutions that intend to refrain from receiving deposits, it has been held that specific statutory authorization is required to charter such institutions. Courts have declared that the Comptroller is not empowered by the NBA to charter nondepository institutions that do not carry on the business of banking, unless specifically authorized by Congress. As detailed in this Part, Congress, through narrowly-drawn amendments to the NBA and the Bank Holding Company Act (BHC Act), has specifically authorized the Comptroller to charter certain special purpose institutions that could not otherwise be chartered by the Comptroller because they do not carry on the "business of banking", including trust banks, bankers' banks, and credit card banks.

3. <u>A new type of special purpose charter not expressly authorized by Congress may not be created through the grant of a full-service charter.</u>

In the white paper, the OCC asserts the authority to grant charters to special purpose national banks that limit their activities to any activity within the business of banking as long as they conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money. According to the OCC, it has statutory authority to charter special purpose nonbanks, that is, institutions which refrain from accepting deposits and exclusively engage in the nondepository core banking functions of paying checks or lending money (or functionally similar activities). Presumably, the OCC bases this asserted authority on the false premise that the authority to charter full-service national banks to carry on the business of banking implies the authority to charter special purpose national banks, including special purpose nonbanks. Put differently, the Comptroller incorrectly asserts that an implicit grant of special purpose chartering authority can be derived from its traditional, full-service chartering authority.

B. OCC's special purpose chartering authority is limited in scope and distinct from its full-service chartering authority.

The OCC's framing of its chartering authority fundamentally misconstrues the relationship between its full-service chartering authority and its special purpose chartering authority. This rationale neglects the very essence of the agency's full-service chartering authority and the historical development of its special purpose chartering authority. Since the OCC has repeatedly neglected to outline the nature and limits of

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[2] *See* 12 U.S.C. 378.

its special purpose chartering authority, an overview of the history of the Comptroller's special purpose chartering authority follows.

The historical overview below demonstrates that (1) the OCC's special purpose chartering authority is a separate and distinct grant of explicit chartering authority and cannot be implied from the OCC's full-service chartering authority, and (2) the Comptroller lacks the special purpose chartering authority to charter special purpose nonbanks except for trust banks, bankers' banks, and credit card banks. After outlining the historical development of the OCC's authority to charter special purpose national banks, we will discuss how the Comptroller lacks the authority to use its full-service chartering authority to create a new type of special purpose charter for institutions which do not accept deposits, unless specifically authorized by Congress.

1. The historical development of the OCC's special purpose chartering authority demonstrates its distinct legislative origin and limited nature.

For over a century, the Comptroller's chartering authority was limited to the authority to charter full-service national banks organized for the purpose of "carrying on the business of banking", including the acceptance of deposits. At various points since the mid-1970s, the OCC has attempted to charter institutions that would not carry on the business of banking. Instead, such institutions were chartered to engage in activities that either were not within the business of banking as originally defined in the National Bank Act of 1864 (such as the fiduciary activities of national trust banks) or activities that did not include receiving of deposits from the general public (such as the activities of bankers' banks and credit card banks). The Comptroller's attempts to charter such institutions gave rise to several legal controversies regarding the minimum essential characteristics of the "business of banking" under the NBA. Those earlier controversies have reemerged today as the Comptroller unlawfully asserts in the white paper the authority to charter special purpose nonbanks.

Two federal courts struck down the OCC's attempts to charter institutions that were not engaged in the business of banking, holding that the OCC's chartering of special purpose institutions exceeded the limits of its chartering authority.[3] As a consequence of these legal defeats, the OCC persuaded Congress to authorize or ratify the chartering of special purpose national banks through targeted, narrowly drawn amendments to the NBA or BHC Act.[4] These carefully-targeted legislative grants of authority empowered the Comptroller to charter narrowly defined categories of special purpose national banks that do not carry on the business of banking. Congress' carefully limited grants of chartering authority for special purpose national banks make clear that the OCC's authority to charter special purpose institutions is completely separate and distinct from the Comptroller's traditional authority to charter full-service national banks that accept deposits and engage in "the business of banking."

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[3] *See Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (*IBAA v. Conover*) (special purpose "nonbank banks" were held unlawful). See also *National State Bank of Elizabeth v. Smith*, No. 76-1479 (D.N.J. September 16, 1977) (special purpose trust banks were held unlawful prior to Congress' specific grant of statutory authorization for such institutions), rev'd on other grounds, 591 F.2d 223 (3d Cir. 1979)

[4] *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRIRCA), Pub. L. No. 95-630, § 1504, 92 Stat. 3641 (1978) (codified at 12 U.S.C. § 27(a) (national trust banks); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404, 96 Stat. 1511 (1982) (codified at 12 U.S.C. § 27(b)(1)) (bankers' banks); Competitive Equality in Banking Act of 1987 (CEBA), Pub. L. No. 100-86, § 101, 101 Stat. 552, 554 (1987), codified at 12 U.S.C. § 1841(c) (credit card banks).

a. National trust banks and credit card banks were originally unlawfully chartered and subsequently ratified by Congress.

The creation of the OCC's special purpose chartering authority for national trust banks is illustrative of this pattern. In 1977, the Comptroller issued to City Trust Services a certificate of authority (i.e. charter) to carry on the business of banking as a national bank despite the fact that City Trust's articles of association declared that its activities would be limited to the fiduciary services provided by a trust company.[5] When the proposed charter was challenged, a federal district court held that the charter was invalid because the Comptroller lacked authority to charter an institution that would engage only in fiduciary activities and would not engage in the business of banking, including the acceptance of deposits.[6]

Following this defeat, the Comptroller requested an amendment to the NBA that would specifically authorize the Comptroller to charter national trust banks.[7] Congress adopted the requested amendment in 1978 and thereby gave specific authority for the creation of national trust banks, the first type of special purpose chartering authority conferred upon the OCC.[8] Similar events, in which the OCC exceeded its statutory chartering authority and persuaded Congress to ratify new types of special purpose charters, took place with respect to credit card banks. In each case, Congress gave the OCC a carefully-limited authority to charter a narrowly-defined category of limited-purpose financial institutions, as shown by 12 U.S.C. 27(a), 27(b), 1841(c)(2)(D), and 1841(c)(2)(F).

Today, the Comptroller is once again attempting to usurp the legislative prerogatives of Congress by asserting an unfounded authority to charter a new, broadly-defined class of special purpose national nonbanks for fintech and other nondepository institutions. The OCC has taken this unlawful action in spite of the fact that Congress has not only not authorized, but actually intended to prohibit the chartering of special purpose national nonbanks, whether for fintech companies or any other nondepository.[9]

b. Nonbank banks were unlawfully chartered and subsequently prohibited by Congress.

In the 1980s, the Comptroller was rebuffed by a federal court and by Congress when the Comptroller made a similar attempt to issue national bank charters to special purpose institutions that only engaged in lending and did not accept deposits. A federal district court struck down the Comptroller's attempt as unlawful in *Independent Bankers Ass'n of America v. Conover*.[10] In that case, the court held that the Comptroller lacked the authority to charter such special purpose "nonbank banks" because those special purpose institutions (1) did not accept deposits and thus would not carry on the business of banking and (2) were not otherwise specifically authorized by the NBA or federal banking law.

In 1987, with the passage of CEBA, Congress effectively ratified the court's decision by redefining the term "bank" in the BHC Act to include any institution that either (1) accepts deposits subject to withdrawal on demand or by check and also makes commercial loans, or (2) accepts deposits that are insured by the Federal Deposit Insurance Corporation. The term "bank," as so defined, does not include a special purpose institution that makes loans but does not accept deposits.

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[5] *See National State Bank of Elizabeth v. Smith*, supra note 3.
[6] *See id.*
[7] *See IBAA v. Conover*, at *34, supra note 3.
[8] *See* 12 U.S.C. 27(a), enacted as part of FIRIRCA, supra note 4.
[9] *See IBAA v. Conover*, supra note 3. See also CEBA, supra note 4.
[10] *See IBAA v. Conover*, supra note 3.

As indicated above, the first basis for the court's decision in *Independent Bankers Ass'n of America v. Conover* was that the Comptroller may not validly approve a full-service national bank charter unless the power to receive deposits is conferred and exercised by the chartered institution, because the acceptance of deposits is required in order to carry on "the business of banking" under the National Bank Act. That holding finds clear, indisputable support in applicable judicial precedents and federal banking statutes.[11] The second basis for the court's decision—that the Comptroller could not approve limited purpose charters for "nonbank banks"—relied on the canon of statutory interpretation known as *expressio unius est exlusio alterius* (the expression of one or more items of a class implies that those not identified are to be excluded). Applying that canon, the court reasoned that, since Congress included specific grants of authority in the NBA and the BHC Act that enable the Comptroller to issue special-purpose charters for trust companies and banker's banks, Congress must have intended to prohibit the OCC from chartering other types of special-purpose national banks that were not expressly authorized.[12]

After *IBAA v. Conover*, Congress did not confer the requisite special purpose chartering authority for "nonbank banks" that the OCC had unsuccessfully asserted.[13] On the contrary, as noted above, Congress precluded the Comptroller from chartering special purpose "nonbank banks" by enacting the Competitive Equality in Banking Act of 1987 (CEBA), which closed the "nonbank bank" loophole and made clear that

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[11] *See IBAA v. Conover*, at *25-*26, supra note 3 (citing *Mercantile National Bank v. Mayor*, 121 U.S. 139 (1887); U.S. v. *Philadelphia National Bank*, 374 U.S. 321 (1963)). *See e.g., Opinion of the Attorney General* (March 31, 1915) ("The power to receive deposits, expressly granted to every national bank is, of course, indispensable to the conduct of the business of banking: and the extent of its exercise is in a degree the measure of the success of the bank."); *Warren v. Shook*, 91 U.S. 704 (1875) ("Having a place of business where deposits are received *and* paid out on checks, *and* where money is loaned upon security, is the substance of the business of a banker."); *People v. Utica Insurance Co.*, 15 Johns. 538 (1819) ("The principal attributes of a bank are the right to issue negotiable notes, discount notes *and* receive deposits.").
The court also held that the BHC Act and the NBA should be read together *in pari materia* because they constitute a "joint regulatory scheme". Specifically, the court found that the definition of "bank" in the BHC Act should be construed as a limit on the Comptroller's full-service chartering authority which would prohibit the Comptroller from using this authority to charter an institution which refrained from either receiving deposits or making loans. *See IBAA v. Conover*, at *32, supra note 3; 12 U.S.C. 1841(c)(1) (defining "bank" for purposes of the BHC Act). *See also*, 12 U.S.C. § 22 (requiring organization certificate to specify "place where its operation of discount and deposit are to be carried on."); 12 U.S.C. 378 (prohibiting all persons other than chartered depository institutions from accepting deposits).

[12] For similar decisions striking down unauthorized actions of the Comptroller under the same canon of statutory constructions, see *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1923) (holding, prior to the enactment of the McFadden Act in 1927, that the Comptroller could not give to national banks a general power of establishing branches in view of the narrowly-defined grants of branching authority made by Congress); *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (holding that the Comptroller could not give national banks a broad power to act as insurance agents in view of the narrowly-defined grants of insurance agency authority made by Congress).

[13] Earlier iterations of CEBA in the 1980s would have authorized the Comptroller to charter "consumer banks," but the pertinent language was omitted prior to enactment by Congress. More recently, legislation has been proposed which would provide the OCC with the authority to charter special purpose nondepository institutions, but such legislation has never been enacted by Congress. See FFSCC Charter Act of 2011, H.R. 1909, 112th Cong. (2011); Consumer Credit Access, Innovation, and Modernization Act, H.R. 6139, 112th Cong. (2012). Nevertheless, the fact that proposed legislation was introduced in order to authorize the OCC to charter a special purpose nonbank underscores the need for Congressional authorization with respect to the special purpose nonbank charter currently under consideration.
See also, Peter J. Wallison, *Reform Bills Don't Go Far Enough*, American Enterprise Institute, Oct. 22, 1999 (stating that, absent further legislative reform, "*IBAA v. Conover* would prevent the Comptroller from chartering federal banks as nonbank banks").

financial institutions that do not accept deposits are not "banks."[14] In fact, despite the many major financial services reforms promulgated by Congress in the years and decades that followed, including many amendments to the NBA and the BHC Act, Congress has never given the OCC a general authority to charter special purpose nonbanks.

c. Despite being unlawful and prohibited, the OCC rehabilitated the nonbank bank charter through an invalid regulation.

In the absence of Congressional authorization, the Comptroller decided instead, in 2003, to amend its chartering regulations to enable the chartering of a nondepository institution that ". . . limits its activities . . . to any other activities within the business of banking."[15] When CSBS and other organizations objected to this unauthorized expansion of the Comptroller's chartering authority, the Comptroller added in the final rule the following requirement: "A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money."[16] This unprecedented and unauthorized regulatory expansion of the OCC's special purpose chartering authority continued to lie dormant until the OCC issued its white paper announcing the OCC's intention to create a new special purpose national bank charter for a wide range of nondepository institutions, including fintech firms.

d. The historical development of the OCC's special purpose chartering authority demonstrates that the OCC's chartering regulations are invalid.

Several conclusions can be drawn from the historical development of the Comptroller's chartering authority. First, carrying on the "business of banking" under the NBA—and thereby qualifying for a full-service national bank charter—requires, at a minimum, being empowered to and actually exercising the power to receive deposits. Second, the OCC's authority to charter special purpose national banks is separate and distinct from its authority to charter full-service national banks to carry on the business of banking. The OCC's authority to charter special purpose national banks has been carefully limited by Congress through a series of specific, narrowly drawn legislative authorizations for trust banks, bankers' banks and credit card banks. Finally, Congress has never conferred upon the OCC any type of broad power to grant special purpose nonbank charters for institutions that only lend money or pay checks without accepting deposits.

Based on these conclusions, it is clear that the regulation on which the OCC now relies, 12 C.F.R. 5.20(e)(1)(i), to charter a special purpose nonbank exceeds the statutory bases of the OCC's chartering authority. The chartering regulation does not implement a statute enabling the chartering of special purpose nonbanks—because no such statute exists. Thus, the regulation has no basis in the OCC's special purpose chartering authority. Furthermore, the chartering regulation is not a rational implementation of the OCC's statutory authority to charter full-service banks, because it enables the OCC to charter an

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[14] *See* CEBA, supra note 4 (amending 12 U.S.C. 1841(c)). There is considerable evidence in the several hearings held on the issue of nonbank banks, that advocates of closing the nonbank bank loophole considered the CEBA amendments to make permanent the ruling of the court in *IBAA v. Conover*. See, e.g., Sen. Rept. No. 99-15 (statements of the Federal Reserve Board, Conference of State Bank Supervisors, Independent Bankers Association of America, National Conference of State Legislatures, U.S. League of Savings Institutions, Association of Bank Holding Companies, the National Small Business Association, and the National Federation of Independent Businesses).

[15] *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6371 (Feb. 7, 2003) (proposed rule).

[16] *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 70122, 70126 (Dec. 17, 2003) (final rule).

institution to refrain from engaging in deposit-taking—a function which is indispensable to the business of banking. Thus, Section 5.20(e)(1)(i) is in excess of statutory authority and, accordingly, invalid.

2. <u>The OCC intends to use its enforcement authority in an unauthorized manner to create an unlawful and invalid special purpose nonbank charter.</u>

National banks are authorized and created by the Congress pursuant to the NBA. While authority has been delegated to the Comptroller to grant corporate charters to national banks, Congress retains absolute authority over the National Bank Act and the specific statutory conditions under which the business of national banks may be carried on. The OCC has no authority to issue regulations or orders that expand the powers or immunities of national banks beyond the limits established by Congress.[17] In view of the white paper's assertion of a broad power to grant special purpose charters to national nonbanks, the Comptroller is clearly attempting to usurp authority that has not been granted to him by Congress. The Comptroller has no prerogative to create a special purpose chartering system that lacks any basis in the National Bank Act and other federal statutes and is contrary to the long history of the national banking system.

As mentioned above, the OCC's white paper claims that the authority to charter full-service national banks includes an implicit authority to charter special purpose nonbanks that voluntarily agree to refrain from engaging in deposit-taking or other aspects of the "business of banking." Specifically, the OCC asserts that a special purpose national bank operates under the same charter as a full-service national bank but "voluntarily" agrees to limit its activities by entering into an operating agreement with the OCC. The OCC contends that such an operating agreement is enforceable based on the OCC's general enforcement authority under the Federal Deposit Insurance Act (FDIA).[18]

In addition to the deeply alarming policy implications created by this unlawful method of chartering special purpose nonbanks, discussed more fully in Part II, the OCC's reliance on its enforcement authority to expand the statutory limits of its chartering authority ignores judicial precedent that forbids this method of chartering and contradicts the clear intent of Congress in enacting the enforcement authority upon which the OCC now relies.

a. <u>*Requiring a full-service national bank to refrain from engaging in deposit-taking has been held to be unlawful and invalid.*</u>

In *IBAA v. Conover*, after the court concluded that engaging in deposit-taking was essential to the chartering of national banks under the National Bank Act (except for the specially authorized categories of trust banks and bankers' banks), the Comptroller argued, as it does today, that ". . . even if associations must have the power to accept demand deposits and make commercial loans, the charters [issued] to nonbank banks qualify fully. They are full charters, and [the Comptroller] has placed no conditions on them. If the nonbank banks have relinquished any of their powers, they have done so through voluntary agreement . . . ".[19] The court specifically rejected this argument and held that the OCC cannot condition the approval of a charter to carry on the business of banking by arranging for the applicant to agree to refrain from exercising a power essential to carrying on the business of banking (namely, deposit-taking). According to the court, it was immaterial that the proposed limits on permissible bank activities were

[17] *See*, e.g., *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009); *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1923); *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000).

[18] *See* 12 USC § 1818(b)(1),(5).

[19] *See IBAA v. Conover*, at *38, supra note 3.

contained in operating agreements rather than the approved charters, because, as the court stated, "the substantive effect is the same as if the charters contained terms limiting them."[20]

The court's reasoning is consistent with a fundamental principle of corporate law, which holds that a corporation's authority to amend its charter does not allow the corporation to add provisions that would not be permissible in its original charter.[21] Thus, amendments to corporate charters are generally void if they could not have lawfully been made part of the original charters. Such a principle is intended to prevent usurpations of power by chartering authorities or chartered institutions. For a chartering authority to condition the approval of a charter on the recipient agreeing not to fulfill the purpose for which the charter was granted is an unlawful and blatant attempt to circumvent the statutory limits on the power of the chartering authority itself.

In attempting to enlarge its special purpose chartering authority through an unauthorized reliance on its alleged authority to enforce operating agreements, the Comptroller would allow applicants to organize national banks for a purpose that the Comptroller cannot itself sanction (namely, to engage exclusively in a nondepository business outside the categories that Congress has expressly authorized). The Supreme Court has recently and strongly warned the OCC that it cannot expand its supervisory authority by asserting enforcement powers that have not been granted by Congress and impair the historic public safety and consumer protection functions of the states.[22]

b. Requiring a full-service national bank to enter into an operating agreement to refrain from engaging in deposit-taking would constitute an unauthorized use of the OCC's enforcement authority.

Since, as outlined above, the OCC lacks any statutory authority to charter special purpose nonbanks, the OCC places considerable reliance on Section 8 of the FDI Act to create a new, unauthorized type of special purpose charter. Specifically, the OCC claims that it will grant a full-service national bank charter to a prospective special purpose nonbank and then, in the chartering process, condition the approval of the charter on the applicant entering into an "operating agreement" with the OCC in which the applicant commits to "voluntarily" limit its activities to certain nondepository core banking functions, such as lending money and/or paying checks. This agreement, according to the OCC, is enforceable as a "condition imposed in writing" under Section 8(b)(1) and is authorized with respect to uninsured national banks under Section 8(b)(5).[23]

This framing of the OCC's special purpose chartering authority is premised upon an interpretation of the OCC's enforcement authority which defies the legislative intent underlying the relevant provisions of Section 8 of the FDI Act. The reference to "uninsured associations" in Section 8(b)(5) of the FDI Act was added in 1982 with the passage of the Garn-St. Germain Depository Institutions Act, based on Congress's concerns regarding the Comptroller's lack of explicit enforcement authority with respect to the newly sanctioned but carefully limited categories of special purpose national banks—namely, trust banks and bankers' banks. Based on the clear legislative intent underlying Section 8(b)(5), the FDI Act's principal enforcement provision was extended to cover special purpose national banks to fill an existing gap in the OCC's enforcement authority relative to its newly created special purpose chartering authority, and not to

[20] *See* id.

[21] *See Henry v. Markesan State Bank*, 68 F.2d 554 (C.C.A. 8th Cir. 1934). See generally *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).

[22] *See Cuomo v. Clearing House Ass'n, supra*.

[23] *See* 12 USC § 1818(b)(1),(5).

authorize the OCC to create new types of special purpose charters not specifically authorized by Congress.

II. Policy Issues with the Proposed Supervisory Framework.

As described in Part I, because the Comptroller lacks any statutory authority to charter special purpose nonbanks, the Comptroller intends to use its enforcement authority in an unauthorized manner to expand its special purpose chartering authority beyond the carefully defined limits established by Congress. In addition to the unlawful and invalid nature of a special purpose national nonbank charter, many significant policy considerations counsel strongly against the OCC attempting to create new types of special purpose charters which Congress has not specifically authorized. As discussed in this Part, the OCC's proposed system of regulating special purpose nonbanks through individualized operating agreements not only highlights the benefits of the activities-based focus of State law but also creates great concerns about the near impossibility of maintaining and assuring a level playing field, assuring the protection of consumers, and upholding a safe and sound financial system.

A. *The OCC's proposed approach of regulation by operating agreement creates an opaque legal and regulatory framework inconsistent with federal banking law.*

1. Significant federal banking laws would not apply to the proposed special purpose nonbank.

As stated above, the business of national banks has been considered so intimately connected with the public interest that Congress prescribes, through statute, the conditions under which it may be carried on. However, because the OCC now intends to exceed the confines of its statutory authority by chartering a broad range of special purpose nonbanks, there is an almost complete absence of generally applicable rules prescribing the conditions under which the business of such special purpose nonbanks may be conducted. For instance, special purpose nonbanks would be exempt from many of the rules that apply to insured depository institutions, including prompt corrective action requirements, source of strength requirements, restrictions on management interlocks, generally applicable prudential safeguards, community reinvestment act requirements and uniform accounting standards.

Furthermore, if such special purpose nonbanks are not members of the Federal Reserve System (FRS) they will be exempt from major prudential policies, including restrictions on affiliate transactions, restrictions on insider loans, and generally applicable safety and soundness standards. The fact that such institutions would not be covered by most federal banking laws should not be surprising as Congress did not confer upon the Comptroller the requisite authority to charter special purpose nonbanks and thus did not contemplate their existence in enacting federal banking laws.

2. The OCC's proposed approach of incorporating otherwise inapplicable rules by agreement on an ad-hoc, confidential basis creates an unlevel playing field.

To fill these major gaps, the OCC gives its assurance that it can "impose requirements . . . that are similar to certain statutory requirements applicable to insured banks" by incorporating such requirements into the operating agreement entered into with the special purpose nonbank. However, the OCC gives no assurance that such requirements will be uniform across special purpose nonbanks or comparable to the requirements applicable to full-service national banks. Indeed, the white paper states that the OCC will only incorporate otherwise "inapplicable" rules into an operating agreement for a special purpose national nonbank "if it deems the conditions appropriate based on the risks and business model of the institution". While state regulators agree that tailoring regulatory and supervisory requirements to the size, risk, and complexity of regulated institutions is an important priority, we also believe that the extent of the tailoring planned by the OCC is so extreme and confidential as to raise serious concerns regarding equal treatment, fair competition, and administrative impartiality.

3. The lack of transparency regarding specific regulatory requirements nullifies any promise of a level playing field.

The OCC's white paper provides no meaningful standards or guidelines for determining the circumstances under which the OCC will, or will not, require special purpose national nonbanks to comply with the rules that apply to full-service national banks and competing state banks.

Even if the OCC were to commit to imposing similar requirements on similarly-situated applicants, such a commitment would be a poor substitute for generally applicable rules enacted by Congress and implemented through proper notice-and-comment rulemaking procedures. A special purpose nonbank applicant would have no assurance that the otherwise inapplicable rules incorporated through its operating agreement are incorporated to the same extent as in the operating agreements of other special purpose nonbanks. Such assurance is unobtainable because the OCC will not publicly disclose these operating agreements—despite arguably being required to do so under Section 8 of the FDI Act.[24] Moreover, this lack of transparency means that state regulators and consumers will have no means of verifying that special purpose nonbanks are lawfully entitled to exercise powers purportedly granted in these operating agreements.

Although the OCC may attempt to provide, by means of informal guidance, the requirements or standards that will apply to proposed special purpose nonbanks, any such bank would have no assurance that the OCC will not deviate from such ad hoc requirements or standards. Any such assurance would be illusory because the OCC would be acting outside the authority granted to it by Congress and could not be held accountable for deviations from its informal guidance to the same extent as it could for failing to comply with governing federal statutes.

For decades, the OCC has been criticized for a lack of transparency in its chartering process; to now graft onto that opaque process an informal, ad hoc standard-setting function in which the OCC negotiates every rule governing the operation of the proposed special purpose national nonbank precludes any possibility of maintaining a level playing field.[25] Special purpose national nonbanks, and the banking industry in general, will be required to merely trust, without any means for verification, that the OCC is actually maintaining a level playing field between special purpose nonbanks themselves as well as between special purpose nonbanks and full-service national banks.

B. Activities-based state licensing encourages and enables financial innovation.

The lack of generally applicable law and the lack of uniformity and transparency in the OCC's regulatory and supervisory expectations underscore the benefits of maintaining the viability of the transaction-oriented focus embodied in State laws governing providers of financial services. In the regulation of financial services, three broad regulatory models are recognized: transactional regulation, institutional regulation, and individuated regulation.[26]

Transactional regulation generally regulates any persons that engage in a particular type of transaction (subject to *de minimis* exemptions) without regard to their status as a particular type of financial intermediary. State licensing of nonbank financial services providers is a type of transactional regulation.

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[24] *See* 12 U.S.C. § 1818(u).

[25] *See* generally Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. Chi. L. Rev. 235 (1975).

[26] *See* Governor Daniel K. Tarullo, *Pedagogy and Scholarship in a Post-Crisis World* (Oct. 21, 2016).

Banks—whether state or national and whether commercial or thrift—are generally subject to institutional regulation which imposes a uniform set of rules on institutions with substantially similar business models. Finally, individuated regulation is regulation that applies not because of the business model of the regulated institution, but rather because of the particular, unique characteristics of that institution. Institutions subject to individuated regulation include institutions designated systemically important and, as has been made apparent in the white paper, prospective special purpose nonbanks.

Transactional, activities-based regulation, such as state licensing, is generally more transparent, and more impartial and equitable than individuated regulation. The impartial nature of transactional regulation involved in state licensing of financial services is, in part, what has enabled the emergence of the tremendous financial innovations we are witnessing today. The degree of flexibility accorded state-licensed financial service providers with respect to their business models is precisely what has enabled such institutions to more effectively meet and adapt to the evolving needs of consumers of financial services. Additionally, the transactional focus of state licensing has maintained a level playing field in the financial services industry and thereby has ensured that emerging and innovative financial services providers are not excluded from the market by high barriers to entry erected by large, entrenched industry incumbents.

By contrast, the individuated regulation the Comptroller intends to impose on special purpose national nonbanks will be significantly less transparent and less impartial than the transactional, activities-based approach extant at the state level. The OCC's approach provides no assurance or method of verifying that such charters will be or are granted in an equitable, impartial manner. It is highly probable, as a former OCC senior official recently noted, that only the largest nonbank financial services providers will succeed in obtaining special purpose national nonbank charters,[27] fundamentally distorting the competitive environment for companies seeking to develop and offer innovative financial services. In the end, despite the OCC's assurance that the charter will technically be voluntary, it will be effectively mandatory and the Comptroller will have established his office as the ultimate and final arbiter of financial innovation as well as the self-appointed umpire, effectively picking winners and losers in the fintech industry.

III. Legal Uncertainty and Special Purpose Nonbank Charters.

Given that Congress has not granted to the OCC any authority to issue special purpose national nonbank charters, there is significant uncertainty surrounding the applicability of many federal laws to an institution operating under such a charter, including federal banking law, federal securities law, and federal consumer financial law. The white paper addresses a few of the applicable legal issues in a perfunctory manner, such as the discussion of membership in the FRS, access to Federal Reserve services, and the jurisdiction of the Consumer Financial Protection Bureau (CFPB). In this Part, we will provide the State regulators' perspective on these issues and many other legal uncertainties that the OCC has failed to address.

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[27] *See* Zach Fox, *OCC's fintech charter unlikely to kill bank partnerships*, SNL Financial, (Dec. 2, 2016) (quoting former Deputy Comptroller of the Currency, Jo Ann Barefoot: "I do not expect a stampede of small fintechs into national bank charters . . . I don't think they would try and — even if they do — I don't think they would succeed.").

A. *The uncertain scope of the incidental powers conferred through a special purpose national nonbank charter raises significant safety and soundness concerns.*

The general powers of full-service national banks are expressly delineated in various sections of Title 12 of the U.S. Code, primarily in 12 U.S.C. 24. Section 24(Seventh) expressly authorizes national banks:

> "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes."

In Section 24(Seventh), the "business of banking" is represented by the series of express powers mentioned. However, the first clause, the so-called incidental powers clause, grants banks the power to conduct activities incidental to the business of banking. The "incidental powers" concept has often been used by the Comptroller to justify new powers that might not intuitively be thought of as banking powers. In attempting to craft some sort of limiting principle as to what constitutes an incidental power, courts have generally held that an incidental power must either be "directly related to one or another of a national bank's express powers" or "convenient and useful in connection with the performance of one of [a] bank's established activities".[28] This requirement that a "functional equivalence" be identified between express statutory powers and claimed incidental powers, presents novel issues with respect to special purpose national nonbanks.

As discussed above, the Comptroller claims that a special purpose national nonbank receives the same charter as a full-service national bank, but, as a condition for approving the charter, agrees to refrain from exercising certain enumerated powers in Section 24(Seventh). The question thus arises as to whether a special purpose nonbank that is not authorized to exercise an express power within the business of banking would be authorized to exercise any incidental power that is directly related to the prohibited express power. For instance, if the OCC charters a special purpose national nonbank that agrees to refrain from exercising the express power to receive deposits, there would be no legal basis for such an institution to exercise any incidental power that is related to the express deposit-taking power that has been abdicated.

The legal uncertainty as to the scope of incidental powers that a special purpose national nonbank may exercise presents a serious safety and soundness concern that the OCC has not, to date, addressed. Many of the incidental powers authorized by the Comptroller and sanctioned by the courts since the passage of the NBA were granted on the premise that they would be exercised by a full-service national bank endowed with all the express powers and limitations contemplated by the NBA. State regulators believe that allowing special purpose national nonbanks to exercise incidental powers deemed functionally equivalent to express powers not conferred upon the institution would be irresponsible. State regulators request that the OCC clarify how it intends to ensure that special purpose national nonbanks will refrain from exercising incidental powers that have been permitted only for full-service national banks that operate with entirely different business models.

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[28] *Compare* Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) *with* M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977).

B. *The uncertain status of special purpose nonbanks in the Federal Reserve System raises significant public policy concerns.*

Pursuant to the Federal Reserve Act, a special purpose national nonbank chartered by the OCC would generally be required to become a member of the FRS.[29] The membership of special purpose national nonbanks in the FRS would raise several legal and policy concerns, including whether membership is or should be required and whether such institutions would be subject to regulation by the FRS and would have access to services offered by the FRS, including the discount window and the payments system. These concerns are addressed in the sections that follow.

1. The OCC's proposal lacks clarity on the membership of special purpose nonbanks in the Federal Reserve System.

After stating that national banks are generally required to be members of the FRS, the OCC notes an exception to the membership requirement for national banks located in territories and insular possessions of the United States. While it is unclear whether this reference should be taken as an indication that the OCC intends to charter special purpose nonbanks in territories and insular possessions in order to avoid the membership requirement, such an arrangement would certainly present a number of complications. For instance, despite not being members in the FRS, national banks located in dependencies and insular possessions are generally subject to a reserve requirement under 12 U.S.C. § 143 requiring that such banks have on hand, at all times, an amount equal to 15 percent of the aggregate amount of its deposits.[30]

State regulators believe that the OCC should clarify whether it intends to charter special purpose nonbanks in territories and insular possessions of the United States to avoid the requirement that national banks be members of the FRS. Furthermore, State regulators request that the OCC clarify how a national nonmember bank located in a dependency or insular possession would comply with such a requirement, particularly, for an institution which refrains from engaging in a deposit-taking function.

2. The OCC's proposal lacks clarity on the access of special purpose nonbanks to the federal safety net and critical public resources.

In addition to the membership status of potential special purpose national nonbanks, the issue of whether such institutions qualify as "depository institutions" under the Federal Reserve Act will have very significant consequences due to the bearing that such a designation would have on their access to Federal Reserve services, including access to the Federal Reserve payments systems and access to the discount window. In general, special purpose national banks are prohibited from accessing or significantly limited in their access to such services. Congress intended for access to Federal Reserve services to be a privilege enjoyed by those engaged in the business of receiving deposits, not by nondepository institutions whose activities bear some resemblance to a deposit-taking function but who are ultimately dependent upon the deposit-taking services of institutions *truly* engaged in the business of banking.

The subsections that follow discuss whether a special purpose nonbank of the type contemplated in the white paper would have access to Federal Reserve services and the policy issues pertaining to allowing such institutions to gain access.

a. *The uncertain degree of access afforded special purpose national nonbanks to the FRS payments system raises significant public policy concerns.*

Although not susceptible to precise definition, the term "payments system" generally refers to the clearing and settlement services that are provided by the FRS through the regional Federal Reserve Banks, and by

[29] *See* 12 U.S.C. 222.
[30] *See* 12 U.S.C. § 143.

other clearing and settling organizations that interact with the FRS and carry on their activities under the guidance of the operating rules and procedures established by the Board of Governors of the FRS. Many significant functions are performed by the payments system, including the traditional clearing and settlement of paper checks through the FRS and regional clearinghouses, and the electronic clearance and settlement of the transfer of funds (principally large dollar transfers) through automated clearinghouses or electronic funds transfer services such as the FRS's FedWire.

Generally, direct access to the payments systems has been limited to "depository institutions", including member banks and nonmember banks. Since they do not accept deposits, nonbanks are generally not permitted to have direct access to the FRS payments services, but must instead use these services indirectly as customers of depository institutions. The term "depository institution" is defined in Section 19 of the Federal Reserve Act to mean, in relevant part, ". . . any insured bank as defined in section 3 of the Federal Deposit Insurance Act or any bank which is eligible to make application to become an insured bank under section 5 of such Act; . . .".[31] To be eligible to apply to become an insured bank, a bank must be "engaged in the business of receiving deposits". Given that the OCC seems to indicate in the white paper that it intends to charter a special purpose nonbank that does not accept deposits, such a special purpose nonbank would not be engaged in the business of receiving deposits and therefore would not be eligible to apply to become an insured bank. This ineligibility would entail that the special purpose nonbank would not be a "depository institution" and thus would not be permitted direct access to the FRS payments systems.

The legal barrier preventing special purpose national nonbanks from directly accessing the FRS payments systems due to their nondepository nature accords with legitimate regulatory concerns. Chief among such concerns is the principle that access to the payments systems should be limited to financial institutions that conduct their activities in such a manner as to ensure the proper functioning and safety and soundness of that system. Essential to the willingness of economic actors to accept payment in mediums other than cash is the confidence that, when requested, cash will be received in a timely manner. Were this confidence to be shaken by a disruption to the normal functioning of the payments system—for instance, if a payments systems participant were to default on their obligations or fall victim to a security breach which spread throughout the system—a severe disruption in the normal flow of commerce and finance could ensue.

The likelihood of such disruption is greatly amplified by permitting institutions to directly access the payments systems when they are not subject to the same heightened prudential and safety and soundness regulatory and supervisory framework to which depository institutions are subject. In light of the legal barriers to allowing nonbanks direct access to the FRS payments system and the strong policy rationales for limiting access, State regulators are opposed to allowing special purpose national nonbanks to directly access the FRS payments systems.

b. The proposed special purpose national nonbank's potential access to the discount window raises significant public policy concerns.

As with access to the FRS payment systems, the issue as to whether a special purpose national nonbank would have access to the Federal Reserve discount window is a matter of significant consequence. The concern here is whether a special purpose national nonbank will enjoy the same discounting and borrowing privileges enjoyed by full-service banks under the normal lending authority of the Federal

[31] *See* 12 U.S.C. § 461(b)(1)(A)(i).

Reserve Banks. The issue, again, is whether these special purpose nonbanks will be members of the FRS, and, if not, whether they will be "depository institutions".

If a special purpose nonbank is either a member of the FRS or a nonmember "depository institution", then it will enjoy the same discounting and borrowing privileges traditionally enjoyed by full-service national member banks. However, as discussed above, the special purpose national nonbanks discussed in the white paper will most likely not be "depository institutions" under the Federal Reserve Act provided that the OCC requires such institutions to refrain from exercising a deposit-taking function. A special purpose nonbank which is not a member of the FRS and is not a depository institution will still be eligible to borrow from Federal Reserve Banks, but as a nonmember nonbank will be subject to the relatively more demanding collateral requirements applicable to nonbank entities.[32] State regulators believe that, for special purpose national nonbanks that refrain from deposit-taking, providing such institutions with the same borrowing and discounting privileges conferred upon member and nonmember depository institutions would be unwarranted and inequitable.

C. The OCC's proposed special purpose nonbank charter is structured to evade the coverage of the Bank Holding Company Act.

The OCC has intentionally structured the special purpose nonbank charter to avoid being classified as a "bank" for purposes of the Bank Holding Company Act. Evading this Act means that special purpose nonbanks would not be subject to consolidated supervision by the Federal Reserve and the parent companies of special purpose nonbanks would not be subject to the anti-tying rules, restrictions on proprietary trading, and restrictions on affiliations with commercial companies. Accordingly, the OCC intends, without discussion, to simply violate the fundamental policy goals of Congress in enacting the BHC Act, namely to maintain a separation between banking and commerce.

1. <u>The OCC's proposal runs afoul of the principle of separation of banking and commerce.</u>

In originally establishing a wall between banking and commerce, Congress explicitly relied on the business of banking concept[33], precisely because economic neutrality ought to be required in the exercise of banking powers. If the OCC charters an institution which engages exclusively in nondepository core banking functions, the fact that the institution is characterized as, in itself, conducting the business of banking should warrant the separation of its credit granting and credit exchange functions from general commercial enterprises. However, because the novel charter type would be exempt from coverage under the BHCA, there would be no federal mechanism to ensure that its activities remain divorced from ownership or control by commercial enterprises.

Accordingly, if an institution that engages exclusively in nondepository core banking functions thereby engages in the business of banking under the NBA, then, state regulators believe, the fundamental principle mandating the separation of banking and commerce is in jeopardy. Thus, state regulators urge the Comptroller to avoid relying upon an expansive interpretation of its chartering authority to create novel, unprecedented charter types that dilute the very meaning of the business of banking and thereby undermine the wall established by Congress between banking and commerce.

2. <u>The OCC's proposal creates the opportunity for regulatory capital arbitrage.</u>

Since a special purpose nonbank would qualify as a depository institution under the generally applicable risk-based capital rules, bank holding companies would likely be able to arbitrage the capital

[32] *Compare* 12 U.S.C. § 347c (corporation, partnerships, and individuals) *with* 12 U.S.C. § 347 (member banks).
[33] *See* 12 U.S.C. § 1843(c)(8).

requirements by maintaining a special purpose nonbank as an unconsolidated subsidiary. If special purpose nonbanks are not consolidated with their parent holding company for reporting purposes, and the parent company only maintains a minority interest in the subsidiary, the parent holding company will only be required to maintain capital for its equity investment in the subsidiary despite being financially responsible for the totality of the subsidiary's liabilities. Alternatively, if the special purpose nonbank is consolidated with its parent holding company for reporting purposes, then it will be permitted to count the equity investments in its nonbank subsidiary (likely funded by debt issued and guaranteed by the parent) towards its own capital requirements, and thereby mask the double leverage inherent in the parent-subsidiary structure.

The largest bank and financial holding companies would experience the largest benefit from maintaining a special purpose nonbank as a subsidiary, since they generally employ the advanced approaches methodology for calculating risk-based capital. Specifically, since a special purpose nonbank would be a "regulated financial institution" for the purposes of the risk-based capital rule, an advanced approaches holding company would generally not be subject to the increased asset value correlation factor for wholesale exposures to unregulated financial institutions and large regulated financial institutions, and, accordingly, not be held to the same stringent capital requirements applicable absent the existence of a special purpose nonbank. Put simply, the creation of the special purpose nonbank charter will be a means for bank holding companies to reduce the quality and quantity of capital they are required to hold under the risk-based and leverage capital rules. The benefits of this arbitrage enabled through the structuring of transactions with special purpose nonbank charters will accrue to the greatest extent to the largest institutions. A similar type of arbitrage under the liquidity rules applicable to advanced approach institutions will also likely be made possible through the creation of special purpose nonbanks.

State bank regulators believe that maintaining a high quantity and quality of capital is the cornerstone of bank regulation and supervision—a belief edified through the experiences of the recent financial crisis. For this reason, we urge the OCC to refrain from creating new types of institutions which will enable the largest institutions to engage in regulatory arbitrage in a manner that would lead to a lower quality and quantity of capital.

D. *The OCC's proposal lacks clarity on the applicability of federal securities laws to special purpose nonbanks.*

1. <u>The proposed special purpose nonbanks will be exempt from the enforcement authority of the Securities and Exchange Commission.</u>

Although the OCC discusses how it intends to collaborate with various federal banking regulators in the regulation and supervision of the proposed special purpose nonbanks, the OCC does not discuss how such an institution would be governed under the federal securities regulatory framework. To a varying degree, banks enjoy exemptions from federal securities laws and the authority to enforce federal securities laws is generally the responsibility of the institution's federal banking regulator rather than the Securities Exchange Commission. As discussed in this section, the fact that Congress did not contemplate the OCC chartering a special purpose nonbank creates uncertainty not only as to whether such institutions will be exempt from various requirements under federal securities laws but also as to which agency is responsible for the enforcement of federal securities laws.

A special purpose nonbank would likely qualify for the exemption for banks under the Securities Act of 1933, Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. The exemptions for banks in federal securities laws is generally predicated upon such institutions being subject to substantially similar registration, disclosure and antifraud rules by their primary federal banking regulator and the requisite enforcement authority being delegated to these agencies to ensure compliance with these requirements.

2. The OCC lacks the authority to enforce federal securities laws against special purpose nonbanks.

Section 12(i) of the Securities Exchange Act delegates to the OCC "the powers, functions, and duties" vested in the SEC to administer and enforce various enumerated sections of the Act, including rulemaking powers, a delisting power, a trading suspension power, a power to issue orders, an investigatory power, and a litigating power.[34] However, based on the plain meaning of Section 12(i), this enforcement authority is not delegated to the OCC with respect to special purpose nonbanks. Specifically, Section 12(i) only delegates the powers, functions and duties of the SEC "[i]n respect of any securities issued by banks . . . the deposits of which are insured in accordance with the Federal Deposit Insurance Act."[35]

Accordingly, with respect to special purpose national nonbanks which refrain from receiving deposits, the Comptroller will lack the requisite authority to enforce the requirements of the Securities Exchange Act. Nevertheless, since they will qualify as "banks" under the federal securities laws, special purpose national nonbanks will be exempt from the requirements of that Act and the enforcement authority of the SEC. Thus, in addition to enjoying an exemption from the requirements of federal securities law and the jurisdiction of the SEC, special purpose national nonbanks that refrain from receiving deposits will also not be subject to the requirements of federal securities law imposed by or the enforcement authority delegated to the OCC.

State regulators believe that an exemption of this magnitude would be unprecedented and should counsel against the OCC using its chartering authority in such a manner as to create types of special purpose institutions clearly not contemplated by Congress. State regulators request that the OCC clarify how and on what legal basis the OCC will ensure compliance with the requirements of the Securities Exchange Act.

E. The OCC's proposal lacks clarity on the applicability of federal consumer financial laws to special purpose nonbanks.

1. The proposed special purpose nonbanks would not be subject to federal consumer protection laws to the same extent as full-service banks.

In outlining the extent to which the Consumer Financial Protection Bureau (CFPB) will oversee special purpose national nonbanks, the OCC discusses how federal consumer financial law will apply to such institutions. Specifically, the OCC notes that the "CFPB would supervise an uninsured special purpose national bank *engaged in certain activities* for compliance with federal consumer financial law" (emphasis added). The OCC qualifies the extent to which federal consumer financial law will apply to special purpose nonbanks because such institutions will not be subject to the entirety of federal consumer financial law, as would an insured depository institution, but rather only to the limited set of rules which apply to nondepository covered persons and only if they qualify as larger participants.[36]

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[34] *See* 15 U.S.C. § 78l(i).
[35] *See* id.
[36] *See* 12 U.S.C. § 5514.

2. The OCC is shirking its authority to apply federal consumer financial laws to special purpose nonbanks to the same extent as full-service banks.

To avoid creating an unlevel playing field in favor of special purpose nonbanks, State regulators believe it is imperative that special purpose national nonbanks be required to comply with federal consumer financial law to the same extent as full-service national banks. In transferring authority to the CFPB, the Dodd-Frank Act expressly enabled the OCC to use its enforcement authority under Section 8 of the FDIA to subject special purpose national nonbanks to the requirements of federal consumer financial law to the same extent as full-service national banks.[37]

The fact that the OCC refrains from using its enforcement authority in this respect to ensure a level playing field between banks and nonbanks fails to instill any confidence that the Comptroller will be even-handed in the use of its enforcement authority in the operating agreements entered into in chartering special purpose nonbanks. Likewise, the OCC's abdication of its authority under 12 U.S.C. 5581 does not bode well for other federal and state laws the applicability of which is left to the discretion of the Comptroller, including state laws on anti-discrimination, fair lending, and debt collection.

State regulators believe that, for the Comptroller's commitment to "high supervisory standards" to be anything more than a hollow platitude, the OCC must use its enforcement authority under the Consumer Financial Protection Act to subject special purpose nonbanks to the requirements of federal consumer financial law to the same extent as full-service national banks. Any measure short of full incorporation of federal consumer financial law (verifiable through the public availability of the operating agreements between the OCC and special purpose nonbanks) ought to cast doubt as to the commitment of the Comptroller to maintaining a level playing field while also ensuring compliance with any purportedly applicable federal and state laws.

IV. Preemption of State Law

In the wake of the financial crisis, there is a plethora of evidence that broad preemption is simply not good public policy. Understanding local markets and business practices requires a strong presence in the community. While financial technologies are deployed on a national and international basis, consumer interaction still occurs at a local level that requires local oversight. The Constitution established a federalist system to balance local and national priorities, and the emergence of financial technology does not change the fact that a balanced State-federal regulatory structure is vital to the strength of our financial system.[38]

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[37] *See* 12 U.S.C. § 5581(c)(2)(C).

[38] For more information on the traditional role of the States in licensing nondepository financial services providers and its constitutional underpinnings, see CSBS's previous comment letter on the OCC's proposed rule establishing a framework to govern receiverships for uninsured national banks, available at: CSBS Comment Letter on Proposed Rule on Receiverships for Uninsured National Banks.

A. *The proposed special purpose nonbank will entitle fintech and other nondepository companies to federal preemption to the detriment of consumers.*

Experience has shown the States not to trust the OCC when it seeks to expand its power.[39] Policymakers needn't look further than the mortgage crisis for an illustration of the disastrous results of the OCC's preemption of locally identified needs and priorities.[40]

In 1982, the OCC nullified state restrictions on adjustable rate mortgages, eliminating the ability of states to respond to lending practices that hurt consumers.[41] This laid the groundwork for predatory lending practices, culminating in state action to protect consumers where federal regulators refused to act. In 1999, North Carolina became the first State to enact a comprehensive anti-predatory law. Other states followed suit as the devastating results of predatory mortgage lending became apparent through increased foreclosures and disinvestment.

Unfortunately, rather than supporting these anti-predatory lending laws, federal regulators preempted them. In 1996, the OCC's predecessor for federal thrifts – the Office of Thrift Supervision ("OTS") – preempted all state lending laws. The OCC followed suit in 2003 with a determination that the Georgia Fair Lending Act did not apply to national banks.[42] A 2004 rule followed, exempting all national banks from state lending laws, including anti-predatory lending laws like those of Georgia and North Carolina. At a hearing on the OCC's preemption rule, Comptroller Hawke acknowledged, in response to questioning from Senator Sarbanes, that one reason Hawke issued the preemption rule was to attract additional charters, which helps to bolster the budget of the OCC.[43]

These actions removed an extra layer of regulatory protection. State officials have a unique expertise in local banking practices and local markets, which makes them uniquely situated to recognize and act upon consumer financial protection issues. Licensure is one of the key tools available to state regulators under the police powers preserved to the States by the Constitution. However, in 2006, the OCC supported an interpretation of the National Bank Act that led to the preemption of state licensing laws for operating subsidiaries of national banks.[44]

As a result of 25 years of policy that swept state responses under the rug, the mortgage crisis emerged. National bank subsidiaries offered abusive products while state regulators were powerless to enforce laws state legislators enacted to stop harm. While the OCC and supporters of the national bank system have

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[39] Past Comptrollers have gone as far as saying that national bank preemption "may operate in some cases to the disadvantage of consumers," and that losing market share [charters] "is a matter of concern to us." Jess Bravin & Paul Beckett, Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers, WALL ST. J., Jan. 28, 2002, at A1 (summarizing and quoting from an interview with Comptroller Hawke).

[40] *See* Di Maggio, Marco and Kermani, Amir and Korgaonkar, Sanket, *Partial Deregulation and Competition: Effects on Risky Mortgage Origination*, Columbia Business School Research Paper No. 15-47 (November 17, 2016) (finding "national banks' supply of loans with prepayment penalties and longer prepayment terms increased significantly" after state anti-predatory lending laws were preempted). Available at SSRN: https://ssrn.com/abstract=2591434 or http://dx.doi.org/10.2139/ssrn.2591434.

[41] *See Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983).

[42] *See* Preemption Determination and Order, 68 Fed. Reg. 46264 (August 5, 2003) (preempting "the provisions of the [Georgia Fair Lending Act] affecting national banks' real estate lending" in response to a request from National City).

[43] *See* Senate Banking Committee Hearing, *Review of the National Bank Preemption Rules* (June 7, 2004).

[44] *See Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007).

suggested the cause was unregulated nonbank mortgage companies,[45] there can be no logical support for this argument when reviewing the evidence, which even includes abuses of financial technology.

Wachovia Mortgage Loan Trust, Series 2006-AMN1 is a mortgage backed security issued in 2006.[46] The loans backing the security were originated by American Mortgage Network ("AmNet"), "an indirect wholly owned subsidiary of Wachovia Bank and Wachovia Corporation."[47] AmNet originated Alt-A mortgages through branches and "over the Internet."[48] These Alt-A loans were originated with "reduced documentation programs," including a "'No Income/No Assets/No Employment' program, where there is no verification of income, assets or employment."[49] To CSBS's knowledge, the OCC never examined this company as an operating subsidiary of Wachovia Bank, N.A.

The lending "programs" used by AmNet would have been illegal under many state laws, and examination of nonbank subsidiaries would have revealed the predatory loans. However, the OCC's preemption determinations prevented the states from examining AmNet and stopping lending practices known to local governments as predatory and counter to sound financial dealings.

B. The OCC's proposed special purpose nonbank charter will preempt the States' activities-based nondepository licensing and regulatory regimes.

Distressingly, the OCC white paper makes no reference to the state regulatory system and disingenuously suggests that entities potentially eligible for the special purpose nonbank charter are currently subject to no regulation. Equally disingenuous is the OCC's claim in the white paper that certain state laws will generally apply to national banks including laws on anti-discrimination, fair lending, and debt collection. Because the OCC is not, as a public servant, charged with the enforcement of these state laws, it is questionable whether they will "apply" as the OCC claims. In the end, these state laws will apply only at the discretion of the Comptroller which is a prerogative the OCC has tended to employ to defeat, rather than enforce, the application of state law.

In addition to supervising approximately 4,790 state-chartered banks,[50] most state banking departments also regulate a variety of nondepository financial services providers, including money transmitters, mortgage lenders, and consumer lenders. According to the OCC white paper, any of these 20,000 plus companies would qualify for a national bank charter because they send money or lend.[51] Like state banks, nondepositories licensed by state regulators are required to meet safety and soundness requirements and conform to both state and federal consumer protection laws. This is accomplished by licensing and subsequently examining nondepository companies on a regular basis. Examination of multi-state entities

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[45] *See* Jesse Stiller, *Banking Modern America: Studies in Regulatory History* (2016).
[46] *See* Prospectus Supplement, Wachovia Mortgage Loan Trust, Series 2006-AMN1 (May 23, 2006). *Available at* https://www.sec.gov/Archives/edgar/data/1326845/000128269506000309/e65745_424b5.htm.
[47] *See* id. at S-30.
[48] *See* id. AmNet was later rolled into Wachovia Securities. *See* http://www.prnewswire.com/news-releases/american-mortgage-network-and-wachovia-third-party-lending-rebranded-to-create-vertice-51630642.html.
[49] *See* id. at 31.
[50] *See* FDIC Statistics on Depository Institutions as of Year End 2015. Available at https://www.fdic.gov/bank/statistical/.
[51] As of year end 2015, there were 20,440 state licensed entities on the Nationwide Multi-State Licensing System. *See 2015 Annual Report*, State Regulatory Registry. *Available at* http://mortgage.nationwidelicensingsystem.org/about/Documents/SRR_2015AR_Web.pdf.

is performed on a collaborative basis with multi-state teams, reducing regulatory burden and improving allocation of resources among states.[52]

As proposed, and without any discussion, a special purpose national bank charter will preempt this regulatory framework for any charter recipient. The only likely charter recipients will be those financial technology firms and nondepository companies with sufficient legal resources to navigate and comply with the OCC's opaque, unarticulated chartering requirements and supervisory standards. In the end, the proposed chartering and supervisory framework will benefit large, entrenched incumbents and create a larger barrier to entry for the vast majority of financial technology firms.

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[52] *See* Multi-state Mortgage Committee Report to State Regulators (2015) *available at* https://www.csbs.org/news/presentations/annualreports/Documents/MMC%202015%20Annual%20Report_FINAL_0505.pdf; Multi-state MSB Examination Taskforce Report to State Regulators (2015) *available at* https://www.csbs.org/news/presentations/annualreports/Documents/2015%20MMET%20Annual%20Report.pdf.

Exhibit E

INDEPENDENT COMMUNITY BANKERS of AMERICA®

January 17, 2017

The Honorable Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

Re: Exploring Special Purpose National Bank Charters for Fintech Companies

Dear Comptroller Curry:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to provide comment on the White Paper *Exploring Special Purpose National Bank Charters for Fintech Companies*, which provides an overview of the Office of the Comptroller of the Currency's (OCC) intent to create a special purpose national bank charter for fintech companies. ICBA strongly supports responsible innovation and welcomes the OCC establishing a new Office of Innovation that could potentially help those community banks that are interested in partnering with financial technology or "fintech" companies. However, ICBA has strong concerns about issuing special purpose national bank charters to fintech companies without spelling out clearly the supervision and regulation that these chartered institutions and their parent companies would be subject to.

While, as a chartering authority, the OCC has always maintained a broad framework for bringing new entrants to the national banking system, in the case of fintech charters, the agency has not adequately explained who would be eligible for a charter and how it would be supervised and regulated. In fact, the White Paper raises more questions than it answers concerning such issues as chartering authority, the definition of "fintech", coordination with other federal regulatory agencies, capital requirements, among many others too numerous to mention. Without further clarification from agency officials, as

[1] The Independent Community Bankers of America®, the nation's voice for nearly 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 51,000 locations nationwide, community banks employ 700,000 Americans, hold $3.9 trillion in assets, $3.1 trillion in deposits, and $2.6 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

well as a more in depth explanation about the vital components of the special national bank charter proposed, ICBA cannot support such an initiative. Furthermore, as ICBA has stated before in its previous comment letters to the OCC, to ensure a level playing field, fintech chartered institutions should be subject to the same supervision and regulation as community banks are subject to.

OCC Lacks Explicit Statutory Authority to Issue Special Purpose Fintech Charters. **ICBA does not believe that the OCC has the necessary statutory authority for establishing a special purpose national bank charter that engages exclusively in non-depository core banking functions.** While the OCC does have explicit statutory authority to charter and supervise special purpose banks with operations limited solely to providing fiduciary services or certain other types of specialized activities such as community development banking and bankers banks, there is no explicit authority under the National Bank Act to charter a fintech company as a special purpose national bank.

In its White Paper, the OCC relies almost entirely on Section 5.20 of the OCC's chartering regulations for its authority to charter special purpose national banks with business models that are within the "business of banking." The OCC rules provide that a special purpose bank only needs to conduct at least one of the three core banking functions, namely receiving deposits, paying checks, or lending money. However, other federal laws such as the Bank Holding Company Act, federal tax laws and federal bankruptcy laws, define the business of banking more broadly than the OCC does and requires banks to engage in deposit taking before they can be defined as a "bank." In fact, the Bank Holding Company Act has been held to limit the scope of the Comptroller's chartering authority. By defining "bank" as an institution which accepts deposits and makes loans, the Bank Holding Company Act has been held to bar the Comptroller from conditioning the approval of a charter application on an institution that agrees to voluntarily refrain from engaging in either of these core banking functions, particularly deposit-taking.[2]

Since the scope of the chartering authority under the National Bank Act is very unclear and since the federal agencies are inconsistent on how they define a "bank" or what constitutes the "business of banking", ICBA believes the OCC must seek explicit statutory authority from Congress prior to issuing a special purpose fintech national bank charter. This issue is too important to the financial community for the OCC to issue these charters pursuant to statutory authority that was enacted over a hundred years ago. Congress needs to consider all the policy implications of a fintech charter including the scope of such a charter and how the business of banking should be defined under federal law.

OCC Should Issue Rules Under the Administrative Procedure Act and Consult with the Other Banking Agencies. **ICBA strongly recommends that the OCC propose rules, subject to notice and comment, concerning a special purpose national bank charter**

[2] See Independent Bankers Ass'n of America v. Conover, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (IBAA v. Conover) (holding that an institution which does not engage in both accepting deposits and making loans cannot be chartered as a national bank because it would not be engaged in the "business of banking" within the meaning of the NBA).

for fintech companies. ICBA opposes the OCC approving fintech charters on a case-by-case basis pursuant to a broadly worded policy statement that could be changed at the discretion of the agency or tailored based on the types of entities seeking national bank powers. The OCC should convene a public hearing as well as a formal rule-making process subject to the Administrative Procedure Act allowing the public to comment on any proposal by the agency. Because the OCC is attempting to establish a whole new category of bank charters and because of the potential implications of the charter for consumers, small businesses, local communities, and the financial system, outreach meetings should be included as part of the agency's due process. Proposed rules should be issued that clearly define both the scope and the policy reasons for such a charter and clearly lay out the requirements for obtaining such a charter.

ICBA also recommends that other federal banking regulators, as well as state banking agencies be consulted with regard all aspects of the proposal. In particular, we believe the OCC should coordinate directly with the Federal Reserve. Of particular concern are issues relating to access to the discount window and payments systems by such special purpose national banks. Since the White Paper does not specify any limitations on the types of companies that can charter a fintech bank, ICBA is concerned that large commercial entities such as Walmart or Google would be allowed to own, as subsidiaries, special purpose national banks, therefore mixing commerce with banking. In fact, the White Paper appears to contemplate a holding company framework for fintech charters that is comparable to industrial loan companies or diversified unitary savings and loan holding companies.

In ICBA's opinion, allowing corporate conglomerates to own banks violates the U.S. policy of maintaining the separation of banking and commerce, jeopardizes the impartial allocation of credit, creates conflicts of interest and a dangerous concentration of commercial and economic power, and unwisely extends the federal safety net to commercial interests. Since as non-depository banks, these entities may not be subject to the Bank Holding Company Act and possibly other "source of strength" requirements, such commercial entities would pose systemic risks to our banking system. These issues should be thoroughly assessed by the OCC in conjunction with the Federal Reserve and the public should be allowed to comment on that aspect of the proposal--whether allowing a commercial firm to own a special purpose national bank inappropriately mixes commerce with banking.

Since, according to the White Paper, some fintech chartered institutions would be allowed to take deposits, the FDIC should also be consulted prior to the issuance of a charter particularly since that agency must eventually approve an institution that takes deposits. ICBA believes that some online marketplace lenders could pose significant risks to the Deposit Insurance Fund if they were allowed to take deposits as a federally regulated banking entity, particularly because of their narrowly-focused lines of business and their lack of diversification. The liquidity problems that some of these firms recently experienced should raise serious concerns about whether such entities could be chartered as either special or general purpose national banks.

The OCC should also consult with the CFPB and with the state banking agencies and, in particular, the Conference of State Bank Supervisors on all aspects of consumer lending and preemption of state law. These supervisors should be asked to comment on what aspects of state consumer law, such as state usury laws, would be preempted should a special or general purpose national bank charter be issued to a fintech firm. Special purpose national banks should not be used as a way to evade important state consumer protections and usury limits.

"Fintech" Is Not Adequately Defined. The OCC has failed to properly define the scope of entities, business activities, persons, and boundaries surrounding the use of the special purpose fintech charter. As technological advances in commerce continue to evolve, the complement of financial services available to meet market demands will need innovation accordingly. But not all financial activities in a new age economy are suitable for inclusion in the national banking system. What is the definition of a fintech entity? **Will credit unions, non-bank mortgage lenders, or even payday lenders be eligible to apply for a special purpose national bank charter?** Will the OCC issue a fintech charter to a firm engaged exclusively in money transfer services? These questions need to be answered pursuant to appropriate rulemaking prior to the OCC issuing a fintech charter. Furthermore, ICBA questions whether the OCC would have the technical expertise and resources to properly supervise and regulate fintech companies that are very specialized and use very advanced technology.

Examination and Supervision of Fintech Charters Must Be Spelled Out. The OCC has also failed to explain how it will supervise and examine a special purpose national bank. Will these banks be examined every year for safety and soundness? Will examiners utilize the CAMELS Rating system to rate these banks, evaluating not only capital, but asset quality, management, earnings and liquidity? If so, what types of penalties will these banks be subject to if their ratings drop too low. All of these issues should be thoroughly vetted and spelled out as part of the rulemaking.

Regulatory Capital Requirements Are Not Defined. As the OCC is well aware, all banks in the United States are subject to a rigorous set of regulatory capital standards that focus on maintaining healthy amounts of high quality capital and are applicable to all institutions regardless of size or impact to the domestic or global financial system. Prudential bank regulators have consistently pointed to the importance of having sufficient capital available to absorb losses in uncertain economic times. Regulators have supported the use of various capital surcharges on activities that they believe might introduce a heightened level of risk. Activities that might be construed as anything other than "safe" are assessed capital penalties that require the bank to hold additional capital even when the bank is very experienced in managing the risks around the penalized activity.

However, the OCC has yet to describe the capital requirements for fintech-chartered financial institutions and how those capital requirements will change as the risk of the firm changes. Are there certain lending arrangements that will require capital surcharges? What about capital requirements for companies engaged in payments facilitation and processing? Will the OCC even consider a risk-based capital framework for these firms? Without comparable capital requirements, traditional banks will operate at a competitive disadvantage. Community banks, in particular, could be at risk of losing market share.

At a minimum, the OCC should promulgate minimum capital requirements particularly for special purpose national banks that engage primarily in small business or consumer lending, and those engaged in payments activities. While supplemental capital requirements can be tailored for more risky activities, the OCC as part of its rulemaking should establish minimum capital requirements for all special purpose national banks that are comparable to the Basel III capital requirements of commercial banks.

Financial Inclusion and Community Reinvestment Act-Type Obligations are Vague. The OCC acknowledges that fintech chartered institutions that do not accept deposits would not be subject to the Community Reinvestment Act (CRA) as they are not insured depository institutions. The OCC expects any charter application to include a discussion of the applicant's commitment to financial inclusion that supports fair access and fair treatment of customers. **However, the OCC falls short of explaining whether fintech charter applicants would be subject to financial inclusion requirements similar to CRA, and how such requirements would be met.** The only indication that an applicant would need to meet any inclusion or fair access requirement is the expectation that requirements be contained in the business plan. A discussion of fair access for a financial firm that engages consumers and small businesses over the internet cannot be held without first addressing the fact that many potential customers lack the access or sophistication required to seek credit using the tools provided by the product offering. What is the OCC's expectation for these new entities? In ICBA's opinion, these expectations should be spelled out in the chartering rules so it clear to all special purpose national bank applicants what the financial inclusion requirements are for a fintech charter.

Liquidity Requirements Must Be Developed. Fintech firms, as start-up ventures that aim to disrupt traditional financial services activities, generally are not accustomed to the extensive constraints placed on banking entities like community banks with regard to asset concentrations, fair lending, cybersecurity, risk-based capital, geographical limitations, and underwriting scrutiny. This lack of understanding could certainly lead to volatile working capital needs as firms realize the struggle of operating a dynamic business model under heavy examiner scrutiny. In some cases, the fintech charter could be subject to risks outside of the control of the entity where risk mitigation or hedging strategies would be too costly to implement to the extent required to give regulators comfort. Otherwise prudent lending solutions that a local government deems predatory could force the fintech firm to exit the business very quickly, causing the firm to expend capital at a rapid rate to provide stability to other operations. Some risks simply cannot be predicted or quantified but are ever present within many fintech businesses. For

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example, a financial technology company that clears cryptocurrency transactions would be subject to monetary policy risks of any nation, especially those nations that could make monetary policy decisions that trigger regional economic strain that drives volatility in the underlying currency.

Because the business ventures that may seek fintech charters from the OCC have not reached maturity and operate in a fluid, international marketplace, what precautions will the OCC take to ensure that these firms maintain acceptable levels of liquidity to guard against many of the unforeseen risks that appear when a financial firm ventures beyond traditional banking activities? What steps will the agency take to ensure examination personnel are properly trained to identify and understand liquidity risks that are not present today in national banks?

Reporting Requirements and BSA Requirements Must Be Comparable to Banks. Traditional banking entities, including the smallest community banks in the country, are subject to extremely robust and burdensome quarterly call reporting requirements that require extensive preparation time, reliance on multiple third party systems, and key bank resources on a quarterly basis. Regulators have repeatedly defended the need for maintaining existing reporting requirements due to the value added from the data provided by the banks. What is the OCC's vision for fintech national bank reporting requirements? Will the OCC hold these institutions to the same level of scrutiny and data gathering as they do for community banks? Will the OCC require the completion of additional schedules that traditional banking entities would not be required to complete? Will the OCC require the data to be submitted with the same frequency as data collections for community banks? Any disclosure requirements need to be clearly described in the chartering rules so applicants are aware of the requirements. Also, applicants will need to understand the agency's expectations for compliance under the Bank Secrecy Act as well as expectations concerning cybersecurity.

A Level Playing Field Must Be Maintained. **ICBA opposes the issuance of any fintech charter that is not subject to the same supervision and regulation as a community bank is subject to.** To ensure a level playing field, the OCC must not allow a special purpose national bank charter to have a competitive advantage over traditional bank charter. Otherwise regulatory arbitrage will occur and the value of the traditional bank charter will significantly decline.

Conclusion

Since the OCC is planning to establish a new category of bank charters and since its statutory authority under the National Bank Act is not explicit, ICBA strongly believes that the OCC must seek Congressional approval for such a charter. In lieu of approving these special purpose national bank charters on a case-by-case basis pursuant to a broadly worded policy statement, ICBA also strongly recommends that the OCC issue new chartering rules pursuant to the Administrative Procedure Act and in consultation with the other agencies that clearly spell out the agency's expectations for capital, liquidity, supervision and examination and addresses whether these new institutions will have direct access to the Federal Reserve's clearing and payment system and its discount window. The OCC must ensure that these new institutions are subject to the same supervision and regulation to which community banks are subject.

ICBA appreciates the opportunity to comment on the White Paper. If you have any questions or would like additional information, please do not hesitate to contact either Christopher Cole at chris.cole@icba.org or James Kendrick at james.kendrick@icba.org.

Sincerely,

/s/

Christopher Cole
Executive Vice President and Senior Regulatory Counsel

/s/

James Kendrick
First Vice President, Accounting and Capital Policy

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Exhibit F

United States Senate

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

WASHINGTON, DC 20510–6075

January 9, 2017

The Honorable Thomas J. Curry
Comptroller
Office of the Comptroller of the Currency
400 7th Street SW
Washington, D.C. 20219

Dear Comptroller Curry:

Under your leadership, the Office of the Comptroller of the Currency (OCC) has demonstrated sharpened focus on its mission and worked diligently to implement important reforms to improve financial stability. We appreciate that while being tasked with those important duties, you and your staff have also thoughtfully considered the complexities of emerging financial technologies, and led a national conversation on their risks and rewards. The research the OCC has produced and its efforts to coordinate with other agencies reflects your desire to ensure that financial innovations make the banking system work better for all Americans.

While we share your goal of ensuring that affordable banking products are more accessible, we are concerned with the OCC's proposal to expand its powers by chartering non-bank institutions. Offering a new charter to non-bank companies seems at odds with the goals of financial stability, financial inclusion, consumer protection, and separation of banking and commerce that the OCC has upheld under your tenure.

The scope of the OCC's proposal appears to have expanded beyond accommodating fintech firms. The criteria for a charter presented thus far does not specify if a firm is required to create a new technology, nor does it limit the application of the charter to a fintech firm.[1] While the charter may be used for fintech firms, it does not appear to be limited to them. Given those factors, this letter will refer to this simply as an alternative non-bank charter.

Charter Shopping

In its December 2016 white paper, the OCC declared that it has the authority to grant alternative non-bank charters to special purpose banks that "conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money."[2] It also noted that many of the companies it has researched offer a single product, such as "marketplace lenders providing loans to consumers and small businesses…payment-related services…digital currencies and distributed ledger technology, and…financial planning and wealth management products and services."[3]

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[1] https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf Pg 3
[2] https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf Pg 3
[3] https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf Pg 2

However, the report did not explain why these firms, which would necessarily be engaged in a core banking function to be eligible for an alternative charter, would not already be eligible to apply for a national bank charter under the OCC's existing authorities and procedures. Because many of these firms evidently do not intend to accept deposits, it is far from clear whether the OCC has authority to grant national bank charters to them. Congress has given the OCC a very narrowly-defined authority to charter only three specific types of special-purpose national banks (bankers' banks, credit card banks, and trust banks) that do not accept deposits.[4]

The OCC's proposal also suggests that an alternatively chartered firm might only engage in narrow lines of business with varying legal requirements. For example, the paper notes that only firms that lend to consumers would be subject to the Equal Credit Opportunity Act while firms that choose not to be insured depositories would not be subject to the Federal Deposit Insurance Act.[5] In such a scenario, the OCC would not be ensuring that "all national banks are required to meet high supervisory standards." Instead, this charter allows non-bank firms to negotiate which provisions of a national banking charter they want, including preemption of state consumer protection laws, while avoiding the rules and regulations that would apply to a full-service bank.

Establishing a new charter gives the OCC the ability to impose requirements on a case-by-case basis and risks repeating the mistakes of the financial crisis by encouraging charter shopping in order to avoid unfavorable state and federal laws.[6] A 2010 report by the University of North Carolina's Center for Community Capital demonstrates that as a result of the OCC's assertion of national bank preemption authorities over state anti-predatory mortgage laws in the run up to the financial crisis, state regulated banks were crowded out of the market by firms making riskier loans. As underwriting standards fell, default risk increased for mortgages originated by lightly-regulated OCC lenders compared to those lenders which remained subject to more stringent state laws.[7]

Hard working Americans continue to bear the burden of the last financial crisis. Allowing an alternative charter for companies that only want to provide one type of banking service may undermine full service banking and decrease access to low-cost checking and savings accounts and other key aspects of the traditional baking system, further impacting working class people.

Financial Inclusion

Providing a more favorable charter to companies engaged only in narrow lines of bank services would have a detrimental impact on the consumers who are supposed to benefit from financial innovation. A core assumption of federal efforts toward a more inclusive banking system is for the underbanked to "establish a mainstream banking relationship that provides them the opportunity to deposit funds securely, conduct basic financial transactions, accumulate savings, and access credit on fair and affordable terms."[8] It is unclear to us how the OCC's proposal, which would normalize the delivery of a la carte services by non-depository firms, aligns with

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[4] See 12 U.S.C. 27 and 1841(c)
[5] https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf Pg 6
[6] https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf Pg 2 "The OCC acknowledges, however, that to approve a fintech charter the agency may need to account for differences in business models and the applicability of certain laws."
[7] http://ccc.sites.unc.edu/files/2013/02/PreemptionImpact.pdf
[8] https://www.fdic.gov/householdsurvey/2015/2015report.pdf Pg 11

the goal of providing the underbanked with access to a full range of "safe, secure, and affordable banking services."[9]

An alternatively chartered firm that does not take deposits by offering transaction or savings accounts, and therefore does not encourage the fundamental banking act of building wealth by encouraging savings, should not be able to refer to itself as a "bank." Retail customers have an idea what this term connotes base on decades of experience – safety, stability, and a spectrum of services regulated, and in some cases insured, by the federal government.

As shown by federal statutes such as the Equal Credit Opportunity Act and the Community Reinvestment Act, the benefits provided to national banks through a charter, such as preemption of state licensing laws, were provided in consideration of a set of social benefits they return to the communities in which they operate. The OCC has not offered any examples of how an alternatively chartered firm could be required to provide all of these same social benefits to the communities in which they operate, such as access to check cashing services or a safe place to store money, when these firms are not designed to offer basic banking services like deposit taking at all.

Not only would this plan put working class Americans at risk by conflicting with national efforts toward inclusion in the banking industry, but it could also allow predatory alternative financial services providers to spread more quickly given the blessing of the federal government and elimination of state-based protections for working class Americans.

Consumer Protection

An obvious and desired benefit to the companies that might receive an alternative charter is exemption from state regulatory and consumer protection requirements that some of these companies consider to be little more than an "inefficiency."[10] Many state Attorneys General are already fighting back against online payday lenders that circumvent state licensing requirements – a preemptive alternative charter would undermine many of these state-based payday protections.[11] Even if the OCC has no current plans to allow payday lending, it is impossible to know now the breadth of potentially predatory companies that might use a federal banking charter either to avoid consumer and small business protections enforced through state licensing requirements, or whether a future OCC might allow a large national company a competitive advantage over locally-owned and operated, state chartered companies.

Prior to the financial crisis, the Office of Thrift Supervision (OTS) claimed banks could offer "low-cost credit to the public free from undue regulatory duplication and burden" if the firms it supervised were exempted from "a hodgepodge of conflicting and overlapping state requirements."[12] The OTS failed so spectacularly in its supervisory duties over the subprime lenders that emerged in competition with traditional bank lenders that it was dissolved and all of its powers were transferred to the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System by the Wall

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[9] ibid.

[10] http://www.americanbanker.com/news/law-regulation/state-regulators-balk-at-occ-fintech-charter-1090823-1.html

[11] https://ag.ny.gov/sites/default/files/nyag_comment_on_cfpb_payday_lending_rules_10_07_16_final.pdf

[12] FCIC http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf Pg 96

Street Reform and Consumer Protection Act.[13] The Act intended to eliminate and prevent these failed policies from all the federal banking agencies.

Separation of Banking and Commerce

Technology firms have specifically cited undermining the separation of banking and commerce as reason to support the OCC's charter plan.[14] There are several important reasons to preserve the separation of banking and commerce, including limitation of conflicts of interest, the risk that a special purpose entity controlled by a commercial firm would make credit decisions based on its parent firm's business strategies rather than objective evaluation of credit risk, and to limit the concentration of financial and economic power, especially via cross-selling or anti-competitive practices.[15] Under the OCC's plan, large commercial firms could acquire alternative charters and offer preferential treatment to their own financial services products to lock customers or manufacturers into uncompetitive rates and terms by relying on the market power of their commercial platforms. They would also have an anticompetitive advantage over firms that do not possess an alternative banking charter. Moreover, allowing commercial firms to acquire alternatively chartered firms could increase the scope of the federal safety net to include large parts of the commercial sector. The health of the alternatively chartered institutions would be tied to the parent companies that own them, encouraging regulators to protect commercial entities as they do critical parts of the banking system.

A Senate report on the Competitive Equality in Banking Act of 1987, an act which closed a non-bank loophole similar to the one the OCC is moving to open, noted: "At the foundation of American financial law is a longstanding tradition of separating banking and commerce."[16] In the years since, Congress has continued to strengthen that separation.[17]

As the OCC is well aware, in the aftermath of the financial crisis members of Congress instructed agencies to review growing threats to the firewall between banking and commerce. In September, the OCC issued a Dodd-Frank required report with the FDIC and Federal Reserve in which the OCC identified risks to banks involved in merchant banking and other investment activities, and in which the OCC joined other regulators in limiting the scope of such activities.[18] The alternative charter plan presented by the OCC is at odds with the findings and recommendations of this report.

As state banking supervisors have pointed out, because many companies under an alternative charter would be exempt from the Bank Holding Company Act, nothing would ensure that both bank and currently impermissible non-bank activities were intermingled in one company, and that a commercial entity could not create or acquire an alternatively chartered company.[19] This

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[13] Public Law 111-203 , Title III – Transfer of Powers to the Comptroller of the Currency, the Corporation and the Board of Governors.

[14] https://financialinnovationnow.org/wp-content/uploads/2016/07/Examining_the_Extensive_Regulation_of_Financial_Technologies.pdf Pg 4

[15] S. Report 100-19, Pp 7-9

[16] S Report 100-19, at Pg 2

[17] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984103&download=yes

[18] https://www.occ.gov/news-issuances/news-releases/2016/nr-ia-2016-107a.pdf

[19] https://www.csbs.org/regulatory/policy/Documents/2016/CSBS%20Comment%20Letter%20on%20OCC%20Receiverships%20for%20Uninsured%20National%20Banks%20NPRM.pdf Pg 7

erosion of the separation of banking and commerce would harm competitive markets and reduce market discipline, encouraging risky and abusive behavior.

Conclusion

Emerging financial technologies present challenges that Congress has failed to adequately study. While the OCC's leadership on these issues is indispensable, we believe that the OCC's plan to offer alternative charters to nonbank and fintech firms as explained could upset the current financial regulatory structure. We would urge the OCC to refrain from offering any alternative or special purpose charters. It is up to Congress to take action on these important matters, and while it does we would encourage the OCC to devote its resources to collaborating with other federal and state regulators to aid innovative financial services providers in navigating the current landscape of laws.

Sincerely,

Sherrod Brown
United States Senator

Jeffrey A. Merkley
United States Senator

Exhibit G

Illinois Department of Financial and Professional Regulation

Office of the Secretary

BRUCE RAUNER
Governor

BRYAN A. SCHNEIDER
Secretary

January 17, 2017

VIA ELECTRONIC SUBMISSION
Hon. Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219
specialpurposecharter@occ.treas.gov

RE: Exploring Special Purpose National Bank Charters for Fintech Companies

Dear Comptroller Curry:

The Illinois Department of Financial and Professional Regulation (IDFPR) appreciates the opportunity to comment on the above-referenced white paper proposing the granting of special purpose national bank charters by the Office of the Comptroller of the Currency (OCC) to certain fintech companies, including non-depository financial institutions that provide some banking products and services. IDFPR is the chartering authority for Illinois state-chartered banks and credit unions. Illinois, with 376 state-chartered commercial and savings banks having $283.7 billion assets under supervision, is the largest state-chartered banking system in the country. In addition, IDFPR charters and supervises 156 trust fiduciaries holding $9.1 trillion in trust assets. At 211 state-chartered credit unions with $35.6 billion in assets under supervision Illinois also has a leading state-chartered credit union network. Finally, IDFPR is the licensing and regulatory authority for the thousands of non-depository financial services providers operating in the State of Illinois, including money transmitters, consumer lenders, check cashers, pawn shops, mortgage brokers and lenders, and other money service businesses.

IDFPR is a proud member of the Conference of State Bank Supervisors (CSBS), and through CSBS we work to ensure nationwide that the state-chartered and state-licensed financial services marketplace operates in a safe and sound manner, consumers are protected from abusive practices, and economic prosperity expands in our states. We join CSBS's detailed comments on this topic and in their opposition to the proposed creation of a special purpose national bank charter for fintech and other non-depository companies. We write separately to emphasize certain of the most troublesome aspects of the proposed non-bank chartering regime.

First and foremost we object to the proposed non-depository charter because the OCC lacks the statutory authority to issue such a charter. The OCC's chartering authority is plainly limited to national banks engaged in deposit-taking and special purpose banks expressly authorized by Congress, namely trust banks, bankers' banks, and credit card banks. As a result, the proposed chartering of non-depository non-bank entities is unlawful and invalid.

As the financial services industry evolves and technology continues to play an increasing role in all aspects of the financial marketplace, there may indeed be a need for greater federal chartering authority. But if, when, and to what degree such increased federal involvement is appropriate is a decision that Congress alone is empowered to make. IDFPR is committed to working cooperatively with all effected constituencies, including federal and state legislators, federal and state regulators, consumers, and members of industry, to ensure a fair and efficient marketplace that is subject to appropriate – but no more than necessary – regulation. We do, however, object to the implementation of such comprehensive and far-reaching reforms through unilateral, unauthorized agency action.

However, even if the proposed chartering changes were authorized, we believe that they should not be implemented because they will actually stifle the innovation they are presumably designed to enhance. The proposed chartering regime gives the OCC the unchecked ability to decide who gets a new non-bank federal charter and thereby pick winners and losers. The effects of this preferential chartering decision making are exacerbated by the fact that the newly chartered non-banks would be the beneficiaries of an unlevel regulatory playing field in which only such federally chartered entities are exempt from certain otherwise generally applicably federal banking and consumer financial laws. Considering the structural advantage that larger, well-established firms may likely have in seeking a non-bank federal charter, the proposed new regime is likely to favor large incumbent actors to the exclusion of new and often nimble firms that are frequently the source of innovation.

Finally, we object to the broad preemptive effect of state consumer protection laws contemplated by the new federal chartering process. Recent history suggests that such aggressive federal preemption by the OCC can have significant adverse effects. For example, as Senators Brown and Merkley have also observed, research conducted by the University of North Carolina's Center for Community Capital shows that the OCC's assertion of preemption of state anti-predatory lending laws as applied to national banks contributed directly to the concentration of mortgage loans in firms engaged in riskier lending practices, crowding out state banks, and that default risk was greater for these lightly regulated OCC lenders compared to those subject to state laws. It is imprudent for a single federal agency, without clear and explicit congressional authorization, to risk similar results in the growing non-depository marketplace.

In closing, while we object to the currently proposed special purpose charter, IDFPR, together with our sister state agencies, remains committed to working with our federal counterparts to create and maintain an innovative and safe marketplace for financial services.

Very truly yours,

Bryan A. Schneider
Secretary

Exhibit H

Office of the
Comptroller of the Currency

OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies

Office of the Comptroller of the Currency
Washington, D.C.

March 2017

Introduction

The Office of the Comptroller of the Currency (OCC) has considered whether it is in the public interest to entertain applications for a special purpose national bank (SPNB) charter from financial technology (fintech) companies that engage in banking activities and meet the standards applicable to national banks. The OCC has carefully considered the issues outlined in and the comments received on the OCC's paper *Exploring Special Purpose National Bank Charters for Fintech Companies* (SPNB Paper). This summary of comments and explanatory statement addresses key issues raised by commenters and explains the OCC's decision to issue for public comment a draft supplement to the *Comptroller's Licensing Manual* (Supplement) providing guidance to any fintech company that may wish to file a charter application.

The OCC will accept comments on the Supplement through close of business April 14, 2017. Comments should be submitted to specialpurposecharter@occ.treas.gov.

OCC Support for Responsible Innovation

The OCC has long supported innovation in the national banking system. Federally chartered institutions have continually sought new approaches to meet the needs of customers and an evolving marketplace. It has been and remains the OCC's role to encourage and support institutions' efforts to engage in responsible innovation to meet the needs of consumers, businesses, and communities. The OCC's decision to issue the draft Supplement is consistent with that support. It is also one component of an initiative that began in 2015, when Comptroller of the Currency Thomas J. Curry announced[1] the agency's efforts to better understand innovation occurring in the financial services industry and to develop a framework to support responsible innovation in the federal banking system. To gain a broad perspective, the OCC conducted extensive research and held numerous discussions with fintech companies, banks, community and consumer groups, academics, and other regulators. This work led to the publication of a paper, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective,*[2] outlining principles to guide the OCC's development of a responsible innovation framework. A wide range of stakeholders provided comments on that paper, including some who suggested the OCC consider issuing federal charters to fintech companies. Charter discussions continued at the OCC's June 2016 Forum on Responsible Innovation. Since then, there has been significant and growing interest in federal bank charters for fintech companies.

Work also has continued on the development of the OCC's framework to support responsible innovation. In October 2016, the OCC established a stand-alone Office of Innovation (Office) to serve as a clearinghouse for innovation-related matters and a central point of contact for OCC staff, banks, and nonbanks. The Office conducts outreach to a variety of financial services stakeholders and provides technical assistance and other resources for banks and nonbanks on

[1] Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Federal Home Loan Bank of Chicago, August 7, 2015.

[2] OCC, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, March 2016.

the OCC's expectations and guiding principles regarding responsible innovation. The Office also promotes awareness of industry developments among OCC staff and other regulators.

SPNB Paper and SPNB Licensing Manual Draft Supplement

In December 2016, Comptroller Curry announced that the OCC would move forward with considering applications from fintech companies to become SPNBs. The OCC published and requested public comment on the SPNB Paper describing the issues associated with offering national bank charters to fintech companies.[3] The paper described the OCC's legal authority to grant a national bank charter to companies with limited purposes and articulated what the OCC considers the requirements for obtaining a charter. In particular, the paper made clear that if the OCC grants a national charter to a particular fintech company, the agency will hold that institution to the same high standards of safety and soundness, fair access, and fair treatment of customers that all federally chartered institutions must meet.

The Comptroller also asked staff to develop the draft Supplement to provide guidance for evaluating fintech charter applications and to ensure that the agency considers safety and soundness, risk management, financial inclusion, and compliance with applicable consumer protection and other laws and regulations were it to entertain applications from fintech companies. The draft Supplement, informed by the comments received on the SPNB Paper, explains how the OCC would evaluate applications from fintech companies and the conditions for approving such charters. The OCC welcomes additional comments on the draft Supplement.

While the term "special purpose national bank" is used elsewhere in the OCC's rules and policies to refer to a number of types of special purpose national banks, for purposes of the draft Supplement and this statement, "SPNB" means a national bank that engages in a limited range of banking activities, including one of the core banking functions, but does not take deposits and is not insured by the Federal Deposit Insurance Corporation (FDIC). The draft Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter an SPNB and does not apply to other types of special purpose banks described in the current *Comptroller's Licensing Manual*.[4]

OCC Responses to Comments on SPNB Paper

The OCC received more than 100 comment letters on the SPNB Paper. After considering those comments, the OCC states that in evaluating applications from fintech companies for an SPNB charter, the agency would be guided by certain threshold principles that inform the draft Supplement:

- The OCC will not allow the inappropriate commingling of banking and commerce.

[3] OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (PDF), December 2, 2016.

[4] For example, the draft Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

- The OCC will not allow products with predatory features nor will it allow unfair or deceptive acts or practices.

- There will be no "light-touch" supervision of companies that have an SPNB charter. Any fintech companies granted such charters will be held to the same high standards that all federally chartered banks must meet.

Aligned with those principles, the OCC believes that making SPNB charters available to qualified fintech companies would be in the public interest. An SPNB charter provides a framework of uniform standards and robust supervision for companies that qualify. Applying this framework to fintech companies would help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities. In addition, the OCC believes supervision by a federal regulator would promote consistency in the application of federal laws and regulations across the country.

Further, making charters available to qualifying fintech companies supports a robust dual banking system by providing these companies the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections. This is the same choice Congress has made available to companies that deliver banking products and services in traditional ways.

Moreover, providing a path for fintech companies to become national banks can make the financial system stronger by promoting growth, modernization, and competition. The OCC believes that denying fintech companies this option could make the federal banking system less capable of adapting to evolving business and consumer needs. Additionally, the OCC's supervision of fintech companies chartered as SPNBs would deepen the agency's expertise in the emerging technologies that will be crucial to delivering banking products and services in the future.

Finally, the OCC believes innovation has the potential to broaden access to financial services. Many fintech companies state that they offer products and services that reach consumers who have had limited access to banks in the past. Chartering fintech companies increases the potential to reach consumers and thereby promote financial inclusion.

General Comments

Many commenters supported the OCC's decision to consider charter applications from fintech companies and noted many of the same public benefits cited by the OCC. For example, many agreed that a national charter would provide fintech companies with uniform, clear, and consistent supervision and regulation. Numerous commenters also viewed the national bank charter as a means to empower consumers and provide greater access to credit in underserved communities. Others said the availability of a national charter would spur innovation and encourage competition. One commenter pointed out that a federal charter would give the OCC a better-informed, direct view of innovations that are reshaping the financial system. Several commenters also noted that having a national bank charter would eliminate the need for state-by-state licenses, thereby reducing regulatory burdens and costs and facilitating growth.

Other commenters warned of possible risks of permitting fintech companies to operate as national banks. Some expressed concern about the potential for consumer harm, noting that a fintech company chartered as an SPNB could avoid consumer protections granted by state laws or federal laws that only apply to deposit-taking banks. Other commenters warned that the OCC has not limited SPNB charters to fintech companies, and thus the charters could be used by payday lenders.

In addition, several commenters expressed concern that the OCC's supervision of fintech companies chartered as national banks would be less stringent than the supervision fintech companies receive from state regulators today. Others were concerned SPNBs might receive less rigorous supervision than full-service national banks.

In contrast, some commenters were concerned that a rigid regulatory framework could stifle innovation and urged the OCC to provide flexible regulation tailored to the fintech company's business model and risks. Moreover, some argued that imposing standards that only the largest fintech companies could meet could lead to industry consolidation and ultimately less innovation.

Certain commenters opposed to the charter challenged the OCC's chartering authority and suggested that a national bank charter for fintech companies could undermine the separation of banking and commerce.

Charter proponents and critics alike urged the OCC to establish clear supervisory standards in advance and to make the charter approval process transparent. Many commenters supported requiring fintech banks to demonstrate a commitment to financial inclusion.

The following sections of this statement address these and other key issues raised by commenters.

Consumer Protection

Several commenters expressed concern that granting a national bank charter to a fintech company would allow such a company to avoid state laws designed to protect consumers. Other commenters argued that federal preemption of state law could encourage charter shopping. In particular, some commenters expressed concern that SPNBs would not be subject to state laws prohibiting unfair or deceptive acts or practices. Further, some commenters stated that granting a national bank charter to fintech companies would weaken states' ability to enforce consumer protection laws by removing their visitorial oversight, thereby making it more difficult to investigate and prosecute potential violations of law.

The OCC disagrees. Consumer protection laws and enforcement activities vary from state to state. A fintech company that is approved for a national bank charter would be subject to consistent federal consumer protection standards and federal supervision and regulation.

With the passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank Act), Congress expanded federal protections for consumers through the Consumer Financial Protection Act and the establishment of the Consumer Financial Protection Bureau (CFPB).[5] Other federal laws also contain extensive protections for consumers. The Federal Trade Commission Act (FTC Act) provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful.[6] The OCC enforces the FTC Act with respect to both insured and uninsured national banks[7] and has taken a number of public enforcement actions against national banks for unfair or deceptive acts or practices.[8] Many state laws prohibiting unfair or deceptive acts or practices borrow FTC Act language and explicitly reference FTC standards and related judicial precedents. Consequently, OCC enforcement actions under the FTC Act often address the same conduct as is covered under the state "mini-FTC Acts."[9]

Congress has also carefully considered the OCC's use of federal preemption, and the Dodd-Frank Act clarified the standards and scope of the OCC's application of federal preemption for national banks and federal savings associations. The OCC acts in accordance with those provisions, which would also apply to the OCC's regulation of SPNBs. Thus, state law applies to an SPNB in the same way and to the same extent as it applies to other national banks. For example, state laws that address anti-discrimination, fair lending, debt collection, taxation, zoning, crime, and torts, generally apply to national banks and would also apply to SPNBs. In contrast to commenters' assertions, state laws that prohibit unfair or deceptive acts or practices, for example, business conduct laws that address consumer protection concerns such as material

[5] For example, in addition to prohibiting unfair or deceptive acts or practices, the Dodd–Frank Act prohibits "abusive" acts or practices as well. Dodd–Frank, section 1031, codified at 12 USC 5531. The Dodd-Frank Act also generally preserves any state law that affords consumers greater protection than Title X of the Act, including with respect to unfair, deceptive, or abusive acts or practices. The Dodd–Frank Act, section 1041(a)(2), codified at 12 USC 5551(a)(2). Title X, section 1011(a), codified at 12 USC 5491(a), created the CFPB.

[6] See 15 USC 45(a)(1) and 15 USC 45(n). See also "FTC Policy Statement on Unfairness," Federal Trade Commission (December 17, 1980); "FTC Policy Statement on Deception," Federal Trade Commission (October 14, 1983).

[7] See 12 USC 1818(b). OCC regulations regarding non-real estate and real estate lending, as well as the OCC's enforceable "Guidelines for Residential Mortgage Lending Practices," expressly reference the FTC Act standards. See 12 CFR 7.4008(c); 12 CFR 34.3(c); 12 CFR 30, appendix C. Further, OCC guidance also directly addresses unfair or deceptive acts or practices with respect to national banks. See OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002); OCC Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (February 21, 2003) (OCC Advisory Letter 2003-2); OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (February 21, 2003) (OCC Advisory Letter 2003-3); OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013) (OCC Bulletin 2013-40); OCC Bulletin 2014-37, "Risk Management Guidance: Consumer Debt Sales" (August 4, 2014) (OCC Bulletin 2014-37); and "Interagency Guidance Regarding Unfair or Deceptive Credit Practices" (August 22, 2014).

[8] For example, OCC actions have addressed national banks' failure to: provide sufficient information to allow consumers to understand the terms of the product or service being offered; adequately disclose when significant fees or similar material prerequisites are imposed in order to obtain the particular product or service being offered; and adequately disclose material limitations affecting the product or service being offered.

[9] Moreover, as explained in this statement, generally state laws prohibiting unfair or deceptive acts or practices are not preempted by either the FTC Act or the National Bank Act.

misrepresentations and omissions about products and services in billing, disclosure, and marketing materials, generally would apply to national banks, including SPNBs. The OCC understands that this would be the result even when the language of the state statute does not specifically refer to banks. Moreover, to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank and provides consumers with the right to bring a lawsuit against the bank, that remedy would be available against an SPNB. In addition, to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank and authorizes the state attorney general to enforce the law through judicial action, the state attorney general could bring an action in court against an SPNB for violation of the law.[10]

In addition to concerns regarding consumer protection laws, certain commenters expressed concerns that state laws establishing interest rate caps would be preempted for federally chartered banks. In particular, commenters warned that preemption and the availability of a fintech national bank charter could open the door for predatory lenders.

The OCC shares commenters' concerns about predatory lending and has taken significant steps to eliminate predatory, unfair, or deceptive practices in the federal banking system. For example, the OCC requires national banks engaged in lending to take into account the borrower's ability to repay the loan according to its terms.[11] Additionally, the OCC has cautioned national banks about lending activities that may be considered predatory, unfair, or deceptive, and notes that many of these lending practices already are unlawful under existing federal laws and regulations, including the FTC Act, and otherwise present significant safety and soundness and other risks. The highlighted practices include those that target prospective borrowers who cannot afford credit on the terms being offered, provide inadequate disclosures of the true costs and risks of transactions, involve loans with high fees and frequent renewals, or constitute loan "flipping" (frequent refinancings that result in little or no economic benefit to the borrower that are undertaken with the primary or sole objective of generating additional fees).[12] The OCC's policies establish that such practices conflict with the high standards expected of national banks and also present significant safety and soundness, reputation, and other risks.

The OCC does not approve charter applications from any company that plans to offer financial products and services with predatory, unfair, or deceptive features and so would not approve any such application from a fintech company. Further, the OCC takes appropriate supervisory action

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[10] See *Cuomo v. Clearing House Assn., LLC*, 557 U.S. 519 (2009).

[11] See, e.g., 12 CFR 7.4008(b) (secured consumer lending); 12 CFR 34.3(b) (secured consumer real estate lending). In addition, insured depository institutions must consider, as part of prudent credit underwriting practices, "the borrower's overall financial condition and resources . . . and the borrower's character and willingness to repay as agreed." See 12 CFR 30, appendix A, "Safety and Soundness Standards." As described in the draft Supplement, the OCC could impose special conditions on SPNBs that are similar to certain laws that apply by statute to only insured banks, to the extent appropriate given the business model and risk profile of the applicant.

[12] See OCC Advisory Letter 2000-7, "Abusive Lending Practices" (July 25, 2000); OCC Advisory Letter 2000-10, "Payday Lending" (November 27, 2000); OCC Advisory Letter 2003-2; OCC Advisory Letter 2003-3; OCC Bulletin 2013-40; OCC Bulletin 2014-37.

to ensure compliance with applicable laws, address unsafe or unsound banking practices, and prevent practices that harm consumers.[13]

Finally, it is important to remember that although a national bank can export the usury laws of the state in which it is located,[14] Congress provided this same benefit to state-chartered banks in 1980, by giving insured state banks the same ability as national banks to extend credit under their home state usury rules.

Small Business Protections

In addition to consumer protections, many commenters urged the OCC to address gaps in protection for small business customers. Some commenters suggested that the OCC look to the Small Business Borrowers' Bill of Rights, an agreement by certain online lenders to provide certain disclosures to small business borrowers. Others suggested that the OCC impose consumer protections whenever an individual may be held personally liable for the loan.

Some commenters argued against the OCC's imposition of small business borrower protections, however, noting that Congress has not extended consumer borrower protections to small businesses. They noted that Congress has repeatedly recognized important distinctions between individuals and small businesses, such as their level of sophistication. Some commenters warned that imposing any such requirements could impede the flow of capital to more sophisticated borrowers.

Other commenters argued that small business lending is regulated sufficiently by such laws as the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the FTC Act, and, thus, additional protections are not required. Some commenters urged the OCC to rely on industry developed standards and not impose standards of its own.

The OCC would take appropriate supervisory action to ensure compliance with all applicable laws,[15] including laws that address unfair or deceptive practices[16] that affect small business borrowers.[17] In addition, the OCC would expect an SPNB involved in lending to provide sufficient disclosures and clear information to ensure that all borrowers, including consumers and small businesses, can make informed credit decisions. The OCC recognizes the efforts by some companies in the online lending community to address this important issue. The OCC

[13] Federal consumer financial laws are supervised and enforced by either the OCC or CFPB as set forth in Title X of the Dodd–Frank Act.

[14] See 12 USC 85.

[15] Applicable laws include for example the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and section 5 of the FTC Act.

[16] The FTC Act, by its terms, does not limit the prohibition against unfair or deceptive acts or practices to individual consumers. 15 USC 45(a) (". . . unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful").

[17] As previously noted, federal consumer financial laws are enforced by either the OCC or CFPB, as set forth in Title X of the Dodd–Frank Act.

would look favorably on an applicant's commitment to educate small business borrowers about their rights and responsibilities.

Financial Inclusion

The OCC's statutory mission includes ensuring that national banks provide fair access to financial services and treat customers fairly.[18] To fulfill that mission, the OCC is guided by certain principles in determining whether to approve a charter application to establish a national bank. These principles include encouraging a national bank "to provide fair access to financial services by helping to meet the credit needs of its entire community" and "promoting fair treatment of customers, including efficiency and better service."[19]

The OCC requires an applicant for a traditional national bank charter to submit a business plan that demonstrates how the proposed bank plans to respond to the needs of the community, consistent with the safe and sound operation of the bank.[20] As outlined in appendix B to the draft Supplement, the OCC also would expect an applicant for an SPNB charter that intends to engage in lending or provide financial services to consumers or small businesses to include a financial inclusion plan as a component of its business plan. The nature of the commitment would depend on the entity's business model and the types of products or services it intends to provide.

The OCC received many comments on whether it should seek a financial inclusion commitment from SPNBs and how these institutions could promote financial inclusion. Many commenters argued that SPNBs can provide valuable services to underserved communities and should make a commitment to financial inclusion. They urged the OCC to require financial inclusion plans that include measurable goals and are formulated with input from the community. Without requiring a financial inclusion commitment, one commenter warned, many individuals and communities could remain underserved.

Other commenters were opposed to requiring such a commitment. Some commenters suggested that fintech companies naturally promote financial inclusion, and therefore no formal commitment is necessary.

Many commenters urged the OCC to be flexible in evaluating how different SPNBs promote financial inclusion. Some commenters proposed specific activities SPNBs could engage in to demonstrate their commitment. For example, a number of commenters suggested that SPNBs could establish financial literacy programs or provide funding for credit building and credit counseling services in low- and moderate-income communities. Other commenters viewed partnerships and investments as promising means for SPNBs to promote financial inclusion. Some commenters specifically identified Community Development Financial Institutions as potential partners or investments for SPNBs.

[18] See 12 USC 1(a).

[19] See 12 CFR 5.20(f)(1)(ii) and (iv).

[20] See 12 CFR 5.20(h)(5).

The OCC agrees that many fintech companies have significant potential to expand access to financial services. To help ensure that this potential is realized, the OCC would expect a formal commitment to, and plan for, financial inclusion from SPNBs engaged in lending activities or providing financial services to consumers or small businesses.

The OCC also agrees that there are many different activities SPNBs could engage in to promote financial inclusion. The OCC encourages the development of innovative products or services designed to address the needs of low- and moderate-income individuals and communities. SPNBs could also demonstrate their commitment to financial inclusion in more traditional ways. For example, the OCC has supported national banks' participation in programs, such as financial literacy and credit counseling services, that improve individuals' understanding of the financial products and services that meet their needs. Investments in certain funds or organizations may also be part of an effective financial inclusion plan. The OCC looks forward to working with potential SPNB applicants on both new and conventional ways to promote financial inclusion.

Regulatory and Supervisory Standards

The OCC has been clear that it would hold companies granted SPNB charters to the same high standards of safety, soundness, and fairness that all other federally chartered banks must meet. As it does for all banks, the OCC would tailor these requirements based on the bank's size, complexity, and risk, consistent with applicable law. While most commenters agreed with that standard, some commenters urged the OCC to be flexible in its regulation and supervision of fintech companies that become national banks. For example, certain commenters questioned whether start-up fintech companies would be able to meet the OCC's standards, even when tailored to the companies' size, risk, and complexity. These commenters asked whether the OCC would consider adapting its standards for fintech start-ups, with some suggesting that the OCC consider separate, more lenient standards for start-ups.

The OCC is sensitive to commenters' concerns regarding the need for appropriate standards. As the prudential regulator for approximately 1,400 national banks and federal savings associations, including nearly 1,200 community banks and savings associations, the OCC is experienced in evaluating whether a proposed bank would be able to meet the criteria to become an SPNB. Size alone is not a disqualifying factor. As explained in the draft Supplement, there are, however, certain minimum statutory and regulatory standards an institution must meet to qualify for a national bank charter. For example, an applicant must demonstrate that the bank has a reasonable chance of success, will operate in a safe and sound manner, and will foster healthy competition. In evaluating whether an institution meets those standards, the OCC considers, among other factors, whether the organizers and proposed management have the appropriate skills and experience to operate as a national bank. Further, banks must maintain sufficient liquidity and adequate capital. Additional criteria are outlined in the draft Supplement and the "Charters" booklet of the *Comptroller's Licensing Manual.*

Other commenters emphasized the need for flexibility to give SPNBs the ability to innovate rapidly. For example, some commenters expressed concern that the OCC may require SPNBs to obtain the OCC's approval before making significant deviations from their business plans and that such a requirement could make them less nimble. Specifically, these commenters referred to the condition imposed on all de novo banks to provide notice and obtain a supervisory non-objection letter from the OCC before making significant deviations from their approved business plans.

The OCC recognizes that certain deviations may be necessary and desirable to meet changes in market conditions or to introduce technological innovations that improve the customer experience. As explained in appendix F of the "Charters" booklet, however, new banks are particularly vulnerable to significant internal and external risks until they achieve a certain level of stability and profitability. The significant deviation condition provides the OCC with the opportunity to evaluate whether a proposed change could significantly increase a bank's risk profile and whether the bank can properly manage any increased risk.

It is also important to understand that the condition does not apply to all changes, just those changes that constitute significant deviations from a bank's business plan.[21] For example, a bank may decide to significantly reduce its emphasis on its targeted niche (e.g., consumer or small business lending) in favor of expanding into another area (e.g., payments processing). In that case, the bank would need to obtain the OCC's supervisory non-objection before undertaking changes to its business plan or operations. The significant deviation condition, however, would not preclude limited testing or piloting of new products or services, provided the bank has put in place appropriate internal controls and protections for targeted customers.

Capital and Liquidity Requirements

Commenters also addressed potential capital and liquidity requirements for SPNBs. Some commenters felt strongly that capital and liquidity requirements should be as consistent with current national bank chartering requirements as possible. They argued that without consistent requirements, fintech companies chartered as special purpose national banks would have a competitive advantage. Others held that capital and liquidity requirements should be commensurate with the scope of activities contemplated in the company's charter application. Some commenters recommended that a fintech company chartered as a special purpose national bank only be required to have the capital and liquidity necessary to wind down its business plan without harming customers in the event of failure. Along these lines, some suggested that companies with simpler business models or a narrower range of services, such as an online lending platform, should have lower capital requirements than full-service national banks.

Capital

Like all national banks, SPNBs would be subject to the leverage and risk-based capital requirements in 12 CFR 3. As commenters pointed out, however, for any entities that have few on-balance-sheet exposures, it will be necessary to tailor an SPNB's capital requirements to capture the different risks associated with limited balance sheets or nontraditional strategies. The

[21] See appendix F, "Significant Deviations After Opening," of the *Comptroller's Licensing Manual,* "Charters," pp. 105-06. The "Charters" booklet defines "significant deviation" as a "material variance from the bank's business plan or operations, or introduction of any new product, service, or activity or change in market that was not part of the approved business plan." Significant deviations may include, but are not limited to, significant deviations in the bank's projected growth, business strategy, lines of business, or funding sources.

OCC acknowledges that the minimum capital requirements set forth in 12 CFR 3, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, may not be sufficient for measuring capital adequacy for some SPNBs. In those cases, the OCC will use alternative approaches to determine the appropriate capital requirement. As noted in the draft Supplement, the OCC has considerable experience imposing individual capital and liquidity requirements when appropriate.

Beyond those minimum requirements, capital levels must be commensurate with the risk and complexity of the bank's proposed activities (including on- and off-balance-sheet activities). The OCC's evaluation of capital adequacy considers the risks and complexities of the proposed products, services, and operating characteristics, taking into account factors such as the scope and nature of the bank's proposed activities, quality of management, and stability or volatility of sources of funds. The OCC also considers on- and off-balance-sheet composition, credit risk, concentrations, and market risk.

Liquidity

As with capital, the OCC would consider any applicant's specific business model when evaluating its liquidity profile and liquidity risk management. For other types of special purpose national banks, the OCC has imposed tailored requirements to ensure adequate liquidity. Such requirements could include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

Some commenters urged the OCC to require SPNBs to assess their liquidity needs over various periods and scenarios, including normal and stressed conditions. They highlighted that many fintech companies emerged during a period of strong credit conditions and have not yet been tested throughout a full credit cycle. One commenter suggested that fintech companies chartered as national banks engaged in lending be required to have adequate funds to meet a specified level of future loan originations, to ensure lending continues during a liquidity crisis.

The OCC is aware that many companies and business models have not yet operated in stressed conditions. As a result, the OCC expects any charter applicant to consider and address, among other items, projected borrowing capacity under normal and adverse market conditions. For instance, a fintech bank could establish a minimum number of months of current projected operating expenses to maintain adequate liquidity. In addition, the OCC believes SPNBs should establish comprehensive contingency funding plans, just as other national banks do.

Charter Application Process

While many commenters wanted flexible and tailored regulation, they also advocated for a clear understanding of the standards that would apply during the chartering process. In particular, they urged the OCC to make the application process transparent by establishing at the outset the conditions a fintech company would be required to meet. Other commenters advised the OCC to adopt a clear definition of "fintech" and identify the types of companies the OCC views as eligible for an SPNB charter.

Commenters also expressed concern that having the OCC make chartering decisions on a case-by-case basis could lead to inconsistent treatment. Certain commenters were concerned that exercising such broad discretion could put the OCC in the position of picking winners and losers. To ensure consistent treatment, a number of commenters urged the OCC to outline the criteria for charter approval clearly, limit the use of charter conditions and operating agreements, and make chartering decisions, including applicable conditions, publicly available.

The OCC strives to make the charter application process clear, understandable, and transparent. The OCC provides detailed information about this process in its charter regulation at 12 CFR 5.20 and in the "Charters" booklet. These materials list the OCC's criteria and requirements for charter approvals of national banks, including special purpose national banks. As discussed above, the OCC is also issuing for public comment a draft Supplement to the *Comptroller's Licensing Manual* for any fintech companies seeking an SPNB charter. In addition, applicants would have an opportunity to ask questions about the process, including the conditions for approval, through multiple prefiling meetings with OCC Licensing and supervisory staff. The OCC's Office of Innovation also is available to facilitate the application process.

The decision to impose special conditions for approval of a charter application is made on the basis of many factors, including the applicant's business plan, proposed management, and relevant experience. Conditions may be imposed directly in the preliminary approval letter, or the OCC may require as a condition of approval that the applicant enter into an operating agreement. The operating agreement may impose safeguards to address certain aspects of a bank's operations, including growth, capital, or liquidity. The OCC publishes all conditional approvals, which disclose the existence of an operating agreement.

As the prudential regulator for national banks and federal savings associations, the OCC must exercise its judgment in deciding whether to approve a national bank charter to a particular company. As explained in the "Charters" booklet and the draft Supplement, the OCC's decision to approve a charter is guided by its mission to promote a vibrant and diverse banking system that benefits consumers, communities, businesses, and the U.S. economy. In general, the OCC would approve applications to charter an SPNB from any companies that have a reasonable chance of success, will provide fair access to financial services, will ensure compliance with applicable laws and regulations, and will promote fair treatment of customers and foster healthy competition.[22]

Coordination Among Regulators

Many commenters urged the OCC to coordinate with other federal and state regulators to provide consistency and clarity regarding the regulation of fintech companies. Some commenters suggested this coordination could be achieved by the creation of an interagency working group or a special subcommittee of the Federal Financial Institutions Examination Council (FFIEC).

The OCC agrees with commenters that coordination among federal and state regulators is essential to fostering responsible financial innovation. The OCC will continue to engage with

[22] The charter regulation, 12 CFR 5.20(e), *Comptroller's Licensing Manual*, "Charters," and the draft Supplement outline the factors the OCC considers in reviewing a charter application.

other regulators in a collaborative way regarding financial technology to promote a common understanding and consistent application of laws, regulations, and guidance. The OCC regularly coordinates with other state and federal banking regulators through its participation in the FFIEC. For example, the OCC participated in the FFIEC's cybersecurity initiative to raise financial institutions' awareness of cybersecurity concerns and strengthen the oversight of cybersecurity readiness.[23] The OCC also currently chairs the FFIEC Task Force on Consumer Compliance. In addition, the OCC collaborates with the CFPB on consumer-related matters, and the OCC is an active member of many of the U.S. Department of the Treasury's working groups and committees, including one for marketplace lending. The OCC also co-chairs the Basel Committee's Task Force on Financial Technology (TFFT).[24] The OCC will continue to leverage these channels of communication to collaborate and share information regarding the chartering and supervision of SPNBs.

Depending on the structure of a fintech bank and the activities it conducts, other regulators may have oversight roles as well. As a result, any fintech company considering an SPNB charter likely will need to engage with other regulators in addition to the OCC. In considering applications, the OCC would coordinate as appropriate with other federal regulators with jurisdiction over the SPNB, including to facilitate simultaneous consideration of any applications or approvals that may be required by those regulators.

Ongoing Supervision

Commenters questioned how the OCC would supervise fintech companies that become national banks. Several commenters asserted that SPNBs should be subject to the same oversight and regular examination as traditional banks. Specifically, commenters noted the importance of having regular, rigorous examinations to ensure compliance with requirements regarding safety and soundness, Bank Secrecy Act/anti-money laundering (BSA/AML) provisions, financial inclusion, fair lending, and other applicable laws. Other commenters asserted that the OCC did not have the resources or expertise necessary to properly supervise fintech companies that would become SPNBs.

As discussed in appendix A of the draft Supplement, an SPNB would be subject to the same oversight and supervision as other national banks. The OCC's supervisory process for all national banks and federal savings associations establishes minimum supervisory standards, reflects the unique characteristics of each institution, and is responsive to changes within individual institutions and the markets where they compete. Consistent with the OCC's supervision of other national banks, the OCC's supervisory strategy for SPNBs would be tailored to each bank's business model and include on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team.

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[23] FFIEC Cybersecurity Awareness Initiative, available at https://www.ffiec.gov/cybersecurity.htm.

[24] The TFFT fosters financial stability through the assessment of the risks and supervisory challenges associated with innovation and technological changes affecting banking. The TFFT's work is currently focused on the impact that fintech has on banks and banks' business models, and the implications this has for supervision.

The OCC has technical expertise in a number of areas that would likely be relevant for a newly chartered SPNB, including compliance with capital, liquidity, risk management, and consumer protection requirements. As it does with any other de novo charter, the OCC would leverage those examiners who have expertise appropriate for the bank's business model and activities. Likewise, dedicated licensing specialists, economists, other subject matter experts (e.g., those specialized in credit risk, compliance, financial inclusion, BSA/AML, operational risk, cybersecurity, or information technology), lawyers, and other staff would be assigned to individual charters, as appropriate, to support their supervision. For example, the examination team for a fintech company specializing in payment processing technology would be assisted by the OCC's Payments Systems Policy Group, whose expertise includes the latest innovations in payments systems, including distributed ledger technology. In addition, the OCC has significant experience assisting national banks in their assessment and management of risks associated with technology service providers and other third-party relationships.[25] Further, to ensure consistency in OCC supervision, a dedicated Assistant Deputy Comptroller would oversee any SPNB.

Other commenters noted the importance of ensuring that SPNBs maintain robust compliance and risk management programs. As detailed in the draft Supplement, the OCC would require any SPNB to establish and maintain well-developed, robust compliance and risk management programs that address, among other things, BSA/AML, consumer protection, third-party risk management, and data and information security requirements. The OCC expects a bank's risk management systems to be commensurate to the size, complexity, and risks of its activities. Regardless of the risk management program's design, it should address the following: risk identification, risk measurement, risk monitoring, and risk control. For example, the OCC would expect SPNBs to have a rigorous cybersecurity framework in place to assess cybersecurity risks and respond to, manage, and defend against cyber attacks.

Some commenters recommended that the OCC develop and deploy technology to modernize its approach to regulation and supervision. The OCC is committed to broadening and increasing its expertise in areas related to innovation. As part of its Responsible Innovation initiative, the OCC is open to considering ways current procedures and processes can be improved through the use of technology.

Chartering Authority

Some commenters questioned the OCC's authority to charter SPNBs that are not authorized to offer FDIC-insured deposits. They asserted that the OCC could only charter non-deposit-taking banks when expressly authorized by statute, as is the case for trust banks, bankers' banks, and credit card banks. In these commenters' view, to be chartered as a national bank under the National Bank Act, the bank must engage in the "business of banking," which they suggest requires, at a minimum, taking deposits.

Under the National Bank Act, the OCC has broad authority to grant charters for national banks to carry on the "business of banking." The OCC has interpreted the "business of banking" to include any of the three core banking functions of receiving deposits, paying checks, or lending money. The Act does not require that a bank take deposits in order to be engaged in the

[25] See OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance" (October 30, 2013).

"business of banking." Rather, under the Act, performing only one of these three activities is sufficient to be performing core banking functions. This is reflected in the OCC's regulation 12 CFR 5.20, which provides that, to be eligible for a national bank charter, a special purpose bank must either be engaged in fiduciary activities or conduct at least one of three core banking functions: receiving deposits, paying checks, or lending money.

Separation of Banking and Commerce

Some commenters expressed concern that granting a national bank charter to a non-depository fintech company could erode the traditional separation of banking and commerce. As noted in the draft Supplement and above, the OCC will not approve charter proposals that would result in the inappropriate commingling of banking and commerce. Such proposals could introduce into the banking system risks associated with nonbanking commercial activities, interfere with the efficient allocation of credit throughout the U.S. economy, and foster anti-competitive effects and undesirable concentrations of economic power.

Conclusion

The OCC appreciates the suggestions, issues, and concerns raised in the more than 100 comment letters that we received in response to the SPNB Paper. These comments informed our development of the draft Supplement, which explains how the OCC would evaluate applications from fintech companies for SPNB charters. For more information about the envisioned application process for fintech companies seeking an SPNB charter, please refer to the draft *Comptroller's Licensing Manual Supplement: Evaluating Charter Applications From Financial Technology Companies*.

The OCC will accept comments on the Supplement through close of business April 14, 2017. Comments should be submitted to specialpurposecharter@occ.treas.gov.

Exhibit I

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ller of the Currency

COMPTROLLER'S LICENSING MANUAL
DRAFT SUPPLEMENT

Evaluating Charter Applications From Financial Technology Companies

March 2017

Contents

Introduction

Purpose

The Office of the Comptroller of the Currency (OCC) has determined that it is in the public interest to consider applications for a special purpose national bank (SPNB) charter from financial technology (fintech) companies that engage in banking activities and that meet the OCC's chartering standards. The OCC has reached this decision for a number of reasons.[1]

First, in the modern economy, where technology companies already are delivering key financial services to millions of Americans, an SPNB charter provides a framework of uniform standards and supervision for companies that qualify. Applying this framework to fintech companies will help ensure that these companies, like other banks that operate under federal charters, conduct business in a safe and sound manner while effectively serving the needs of consumers, businesses, and communities.

Second, an SPNB charter supports the dual banking system by providing fintech companies the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections. This is the same choice available to companies that deliver banking products and services in traditional ways.

Third, providing a path for fintech companies to become national banks can make the financial system stronger by promoting growth, modernization, and competition. Moreover, the OCC's supervision of fintech companies will deepen the expertise the OCC already has acquired in emerging technologies for banking services—through, for example, its supervision of technology service providers. This enhanced "window" into developing technologies and financial innovations positions the OCC to better evaluate and respond to the risks that accompany the delivery of those technologies. Finally, as *this Comptroller's Licensing Manual* Supplement (Supplement) explains, the chartering process will enable the OCC to encourage fintech companies to use innovative ways to promote financial inclusion.

[1] The OCC made this determination based on its work assessing the role of innovation in banking. In March 2016, the OCC published a paper to provide its perspective on responsible innovation in the financial services industry, outline principles guiding its approach to financial innovation, and solicit feedback on nine questions and other topics presented in the paper. See Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective. On June 23, 2016, the OCC held a forum to discuss issues regarding responsible innovation. The forum included participants from the banking industry, fintech companies, academia, and community and consumer groups. On October 26, 2016, the OCC announced the decision to establish an Office of Innovation and implement a framework supporting responsible innovation. See OCC Issues Responsible Innovation Framework. Then, on December 2, 2016, the OCC announced that fintech companies may qualify for SPNB charters under certain circumstances. The OCC published a paper discussing issues related to chartering special purpose national banks and solicited public comment to help inform its path forward. See Exploring Special Purpose National Bank Charters for Fintech Companies. In developing this *Comptroller's Licensing Manual* Supplement, the OCC has carefully considered the comments it received.

Scope

The OCC has regulations and policies that govern its review and decision making with respect to chartering national banks. Consistent with administrative law terminology, these materials frequently refer to chartering as a "licensing" process. This Supplement explains how the OCC will apply the licensing standards and requirements in its existing regulations and policies to fintech companies applying for an SPNB charter.[2]

While the term "special purpose national bank" is used elsewhere in the OCC's rules and policies to refer to a number of types of special purpose national banks, for purposes of this Supplement, "SPNB" means a national bank that engages in a limited range of banking activities, including one of the core banking functions described at 12 CFR 5.20(e)(1), but does not take deposits within the meaning of the Federal Deposit Insurance Act (FDIA) and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC). This Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter an SPNB and does not apply to other types of special purpose banks described in current OCC Licensing Policy.[3]

The OCC recognizes that fintech companies that want to operate in the regulated space will choose different ways of doing so, and the SPNB charter is one option of many. Some may operate under state bank or state trust bank charters in states that offer those options. Some may apply for, or seek to acquire, full-service national bank charters; others may qualify to be another type of special purpose national bank. Still others may wish to continue, or initiate, partnerships with banks by providing technology-related services and expertise. This Supplement is not intended to discourage these other ways of conducting business but rather to clarify the OCC's expectations for a particular segment of financial service providers—that is, fintech companies seeking an SPNB charter.

The OCC anticipates that the activities of fintech companies interested in a national bank charter may vary significantly. As noted above, national bank charters are varied and include full-service charters and other special purpose national bank charters, such as trust charters. National bank charter applicants are held to the same chartering standards and procedures whether seeking to become a full-service national bank, a national trust bank, or an SPNB. Moreover, while references to "full-service bank," "trust bank," and "SPNB" are convenient ways to distinguish among national banks based on their business models, these designations do not signify a difference in the character of the national bank charter. In each of these cases, an applicant that receives OCC approval for a charter becomes a national bank subject to the laws, regulations, and federal supervision that apply to all national banks.

[2] See 12 CFR 5.20(l) (directing applicants for a special purpose charter to adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC). See also OCC *Comptroller's Licensing Manual*, "Charters."

[3] For example, this Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

Initial Steps Toward an SPNB Charter

Applicable Licensing Procedures; Initial Contact With the OCC

The OCC uses its existing chartering standards and procedures as the basis for processing applications for all national banks. This Supplement describes the OCC's approach to key aspects of the chartering process for fintech companies. It is not a comprehensive guide to all of the procedures and requirements relevant to filing an application for an SPNB charter. Fintech companies considering applying for an SPNB charter should carefully review the following materials:

- 12 CFR 5: The OCC's Rules, Policies, and Procedures for Corporate Activities are found in 12 CFR 5, and regulations on organizing a national bank are set forth in 12 CFR 5.20. These regulations are applicable to all national banks.[4]
- The *Comptroller's Licensing Manual*, including the "Charters" and "Background Investigations" booklets. The policies in the *Comptroller's Licensing Manual* are generally applicable to all national banks, and prospective applicants are strongly encouraged to read the manual.
- The "Interagency Charter and Federal Deposit Insurance Application," Business Plan Guidelines.
- The OCC's *The Director's Book*.

Fintech companies seeking an SPNB charter should make an initial inquiry concerning a charter application through the OCC's Office of Innovation, innovation@occ.treas.gov. The Office of Innovation (Office) is the primary point of contact within the OCC for all inquiries by fintech companies, including questions and preliminary inquiries related to chartering. If a fintech company is interested in further discussions regarding an SPNB charter, the Office will schedule an exploratory meeting with the appropriate OCC staff, including the OCC Licensing Division (OCC Licensing).[5] The meeting will include a discussion of the company's business model, this Supplement, and the OCC's expectations.

Prefiling Communications With the OCC

Applying for a national bank charter is an iterative process, and the OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the process. After the exploratory meeting, the OCC will begin to identify aspects of the proposed charter that present novel or complex issues.

[4] See 12 CFR 5.20(c) (describing the procedures and requirements governing the OCC's review and approval of an application to establish a national bank as applicable to a special purpose national bank).

[5] An exploratory meeting is intended to provide the opportunity for a potential applicant to ask questions, clarify concerns, and become acquainted with the regulatory environment. See *Comptroller's Licensing Manual*, "Charters."

An OCC Licensing contact will be assigned. This contact will assemble other appropriate staff—including examiners, subject matter experts, legal staff, and staff from the Office—to informally discuss with the organizers the proposal, the chartering process, and the requirements that accompany a national bank charter.

The prefiling stage may include one or more formal prefiling meetings with OCC Licensing and other appropriate staff. The number and frequency of meetings will depend on the novelty and complexity of the applicant's proposal.

Before the initial formal prefiling meeting, organizers should provide the OCC with an overview of the fintech charter proposal, including a discussion of the business plan and the relevant market, as well as any novel policy or legal issues and any unique aspects of the proposal.[6] Applicants should also include information about the qualifications of the organizers and proposed senior management. In addition, the OCC will request informational submissions for review in advance of the submission of an application, such as a draft business plan.

The OCC will expect an SPNB applicant whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion. As described below, the OCC will condition its preliminary approval of an SPNB charter on the applicant's implementation of a Financial Inclusion Plan (FIP). Accordingly, an applicant will be expected to include an FIP within its business plan and publish it for comment.

Activities of the Proposed SPNB

Bank-permissible activities: All activities of a national bank, including an SPNB, are limited to those that are permissible for national banks under a statute,[7] regulation,[8] or federal judicial precedent, or that the OCC has determined to be permissible.[9]

[6] The term "organizers" generally refers to the individuals or group applying for the new bank charter. See *Comptroller's Licensing Manual*, "Charters," for a more detailed discussion of organizers.

[7] 12 USC 24 expressly permits numerous specific activities for all national banks, including discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits; buying and selling exchange, coin, and bullion; lending money on personal security; and obtaining, issuing, and circulating notes. Section 24(Seventh) more generally authorizes national banks to engage in activities that are part of, or incidental to, the business of banking. 12 USC 92a authorizes national banks to engage in fiduciary activities.

[8] Numerous activities are expressly authorized throughout OCC regulations, including, for example: establishing and operating a messenger service (12 CFR 7.1012), acting as a finder (12 CFR 7.1002), sales of equipment convenient for a customer's use of electronic banking services (12 CFR 7.5001), providing electronic bill presentment services (12 CFR 7.5002), offering electronic stored value systems (12 CFR 7.5002), and producing and selling software that performs a service the bank could perform directly (12 CFR 7.5006).

[9] The OCC and the courts that have considered the scope of bank-permissible activities also recognize that the business of banking develops over time as the economy and business methods evolve. See, e.g., *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995); OCC Interpretive Letter No. 494 (December 20, 1989) (allowing national banks to purchase and sell financial futures for their own account). The

Core banking activities: Under 12 CFR 5.20(e)(1), a special purpose national bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking activities: taking deposits, paying checks, or lending money.[10] This Supplement covers entities other than traditional trust companies or full-service national banks that accept deposits and therefore must be insured by the FDIC. Accordingly, the OCC anticipates that SPNBs likely will elect to demonstrate that they are engaged in paying checks or lending money.

Consistent with judicial precedent, the OCC views the National Bank Act, which is the primary statutory source of national banks' authority to conduct various types of business, as sufficiently adaptable to permit national banks to engage in new activities as part of the business of banking or to engage in traditional activities in new ways.[11] For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically may be considered the modern equivalent of paying checks.

In some cases, the activities proposed for an SPNB may include activities that have not previously been determined to be part of, or incidental to, the business of banking or to fall within an established core banking function. If so, the company should discuss in prefiling meetings with the OCC the permissibility of the activities and their status as core banking activities. The OCC may ask the company to prepare a legal analysis supporting its view that its proposed activities are permissible and fall within one of the core banking categories. In connection with the chartering process, the OCC will conduct an independent legal analysis to determine whether the activities are permissible for an SPNB. As described in section V, the OCC publishes conditional approvals of charter applications; the approval typically would include the OCC's legal analysis supporting its decision. Publication will occur at the conclusion of the charter decision process.

Filing Procedures—Publication and Public Comment; Confidentiality

After the prefiling phase, the organizers for an SPNB charter should file the charter application, including the business plan and the appropriate Interagency Biographical Report on all identified insiders. For additional information on filing the application, organizers should refer to the "Charters" booklet of the *Comptroller's Licensing Manual*. The filing procedures for an SPNB will be substantially the same as those applicable to any other

OCC expressly recognizes this proposition in 12 CFR 7.5002, which states that a national bank may provide through electronic means any activity, function, product, or service that it is otherwise authorized to perform.

[10] See 12 CFR 5.20(e)(1)(i).

[11] See, e.g., 12 CFR 7.5002.

national bank.[12] An applicant for a national bank charter must publish notice of its charter in the community in which the proposed bank will be located as soon as possible before or after the filing date.[13] A public comment period runs for 30 days after the publication of the public notice.[14] The OCC maintains a public file of the application and makes it available to any person requesting it; the public file is also available on the OCC's public website.[15] Portions of the business plan of an SPNB, such as the FIP section, will be included in the public file. Applicants may request that confidential treatment be afforded to certain portions of the application, for example, portions containing proprietary information.[16]

Chartering Standards

Standards and Policy Considerations

Under the OCC's governing statutes and regulations, in evaluating an application to establish a national bank, including an SPNB, the OCC is guided by the following principles:

- Maintaining a safe and sound banking system
- Encouraging a national bank to provide fair access to financial services by helping to meet the credit needs of its entire community
- Ensuring compliance with laws and regulations
- Promoting fair treatment of customers, including efficiency and better service[17]

The OCC's regulations and policies also set forth additional considerations, including whether the proposed bank can reasonably be expected to achieve and maintain profitability[18] and whether approving its charter will foster healthy competition.[19]

Once a firm submits a proposal, the OCC determines whether it satisfies the chartering standards in the OCC's regulations and policies. The OCC will not approve proposals that are contrary to OCC policy or other established public policy. For example, proposals to provide financial products and services that have predatory, unfair, or deceptive features or

[12] For details see 12 CFR 5 and *Comptroller's Licensing Manual*, "Charters."

[13] See generally 12 CFR 5.8. Given the fact that many fintechs will operate online, the OCC will consider the operations of the SPNB in determining where publication of this notice would be appropriate.

[14] See 12 CFR 5.10.

[15] See 12 CFR 5.9(a) and (b).

[16] See 12 CFR 5.9(c).

[17] See 12 USC 1(a) and CFR 5.20(f)(1). See also *Comptroller's Licensing Manual*, "Charters."

[18] See 12 CFR 5.20(f)(2).

[19] *Comptroller's Licensing Manual*, "Charters."

that pose undue risk to consumer protection, compliance, or safety and soundness would be inconsistent with the OCC's chartering standards and will not be approved.[20]

Further, the OCC will not approve proposals that would result in an inappropriate commingling of banking and commerce. As noted earlier, under its chartering standards the OCC considers whether a given proposal is consistent with maintaining a safe and sound banking system and will foster healthy competition. Proposals that inappropriately commingle banking and commerce could introduce into the banking system risks associated with non-banking related commercial activities, interfere with the efficient allocation of credit throughout the U.S. economy and foster anti-competitive effects and undesirable concentrations of economic power, and would thus be inconsistent with the OCC's chartering standards. Proposals from companies that implicate such concerns will not be approved. The OCC also will collaborate with other regulators as necessary to avoid the inappropriate mixing of banking and commerce.

Evaluating an Application

The OCC will evaluate an application from a fintech company for an SPNB charter to determine whether it meets the standards and policy considerations noted above. In evaluating whether these are met, the OCC will consider, among other things, whether the proposed bank

- has organizers and management with appropriate skills and experience.
- has adequate capital to support the projected volume and type of business and proposed risk profile.
- has a business plan that articulates a clear path and a timeline to profitability.
- includes in its business plan, if applicable, an FIP that has an appropriate description of the proposed goals, approach, activities, and milestones for serving the relevant market and community.

The OCC's evaluation may identify specific controls or requirements that are necessary for the success of the applicant's business plan or to ensure the OCC's chartering standards are met. The OCC will impose special conditions in connection with the charter approval to achieve these goals.[21] Moreover, the OCC imposes certain standard conditions on all de novo charters, including the requirement that a bank obtain a supervisory non-objection letter from the OCC if it deviates significantly from its approved business plan. For a detailed discussion of conditions associated with approvals, see the "Chartering Decisions" section of this Supplement.

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[20] See, e.g., OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013); OCC Advisory Letter 2000-7, "Abusive Practices" (July 25, 2000).

[21] An SPNB that does not take deposits will not be subject to certain requirements that apply only to insured depository institutions; for example, the safety and soundness standards contained in 12 CFR 30 of the OCC's regulations. The OCC has the authority to impose special conditions requiring the applicant to comply with standards that generally apply only to insured banks.

Coordination With Other Regulators; Continuation of Remedies

Depending on the structure of the proposed SPNB, regulators in addition to the OCC may have oversight and supervisory roles over a particular bank. In considering applications for SPNB charters, the OCC will coordinate as appropriate with other regulators with jurisdiction over the proposed SPNB, to facilitate simultaneous consideration of any applications or approvals that may be required by those regulators.

The OCC does not permit companies that are the subject of a formal investigation or enforcement action by another regulator to avoid the consequences of that investigation or enforcement action by seeking a national bank charter. A pending investigation or enforcement action may be grounds for denial of a charter application. At a minimum, after consultation with the other regulator, the OCC will ensure that a company's obligation to remediate or pay penalties for any violations or deficiencies cited or identified by another regulator is carried forward and enforced through conditions imposed on an approval of an SPNB charter.[22]

Requirements for Organizing Group, Management, and Directors

OCC regulations and licensing policy provide guidance regarding the qualifications of organizers, management, and directors, as well as the respective roles of each.[23] These criteria and qualifications are generally applicable to SPNBs, although the OCC may tailor certain criteria as appropriate. As with all banks, organizers, managers, and directors are critical to the success of an SPNB. The OCC expects them to be well qualified, with diverse experience in relevant areas. Although the OCC would expect some members of the organizing group, the proposed board of directors, and management to have experience in regulated financial services, other relevant experience will depend on the specific products or services offered by the proposed SPNB. For example, it may be important for one or more of the organizers, managers, or directors of a proposed bank with novel technology-based products or services to have experience with those activities.

[22] See, e.g., section 612 of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203, 124 Stat.1376) which prohibits, subject to exceptions, the conversion of a state bank or thrift to a national charter, or national bank or thrift to a state charter, if the converting institution's original regulator has subjected the institution to a formal enforcement action or memorandum of understanding with respect to a significant supervisory matter.

[23] See 12 CFR 5; the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*, and the OCC's *The Director's Book*.

Business Plan

Overview

All applicants for a national bank charter must submit a business plan to the OCC.[24] Having a comprehensive proposed business plan, including the bank's financial projections, analysis of risk, and planned risk management systems and controls, is critical to the OCC's decision whether to approve a charter proposal. Proposals from companies without an established business record are subject to a higher degree of scrutiny to evaluate whether the proposed bank has a reasonable likelihood of long-term success.

Detailed information about the elements of the business plan appears in the Interagency Business Plan Guidelines.[25] The Business Plan Guidelines, which are applicable to all national banks, describe the general elements of a business plan, including: description of the business; marketing plan; management plan; records, systems, and controls; the financial management plan; monitoring and revising the plan; alternative business strategies; and financial projections. The OCC recognizes, however, that applicants for an SPNB charter may have structures and business models that differ from those of traditional, full-service national banks. Thus, in addition to the generally applicable information in the Business Plan Guidelines, applicants should consider the supplemental guidance below on specific parts of the business plan.

Applicants are also encouraged to contact the OCC with questions regarding the content of their business plans.[26]

Supplemental Guidance on Business Plan

(1) Risk Assessment

An applicant's business plan should include a risk assessment that identifies and discusses the particular risks the organizers expect the proposed bank to face given its business model. Such risks may include, for example, concentration risk, compliance risk, reputation risk, strategic risk, and operational risk, including cybersecurity risk. The risk assessment should set out the degree of risk the bank would generally assume (its "risk appetite") and how it would effectively manage the identified risks. The risk assessment factors in the target

[24] See 12 CFR 5.20(h). This regulation details specific items that should be addressed in a business plan, including earnings prospects, management, capital, community service, and safety and soundness.

[25] In addition to the Business Plan Guidelines, *Comptroller's Licensing Manual,* "Charters," provides additional information regarding the business plan. The *Comptroller's Handbook* and other resource materials should also be referenced for additional information related to specific products and services, and OCC expectations for all areas of operating a bank, including, for example, audit requirements, information technology, and corporate and risk governance.

[26] As noted in "Initial Steps Toward an SPNB Charter" in this Supplement, charter applicants may request confidential treatment of certain portions of their business plan. The FIP will be included in the public file.

markets' economic and competitive conditions, including the proposed products, services, and customers; the targeted geography (*e.g.*, regional, nationwide); and any regulatory considerations regarding serving those markets. These regulatory considerations include risks related to Bank Secrecy Act/Anti-Money Laundering (BSA/AML), consumer protection, and fair lending requirements. The risk assessment should also address the internal and system controls to monitor and mitigate risk, including management information systems, in accordance with the bank's established risk appetite.

(2) Records, Systems, and Controls

This section describes the bank's system for customer record keeping and transaction processing and the internal controls that will enable the bank to protect customer data and process transactions in an accurate and efficient manner. This section also describes the bank's compliance management programs. This section should include

- a description of the bank's information technology program, including
  - a general description of internal controls ensuring transaction and data integrity, security, and auditability;
  - overviews of the operational architecture, security framework, and resiliency structures;[27] and
  - a description of the framework that provides for effective cyber-risk governance, including continuous monitoring and management of cyber risk; strategies for cyber resilience; and processes for maintaining awareness of cybersecurity postures enterprise-wide.

- a description of the compliance management program, which should support a culture of compliance that includes a top-down, enterprise-wide commitment to understanding and adhering to applicable laws and regulations, including, but not limited to: the BSA, other AML statutes, Office of Foreign Asset Control economic sanctions obligations, statutes prohibiting discrimination or unfair or deceptive acts or practices, and other applicable consumer protection laws and regulations.

- a description of a structured plan to provide for independent testing of the business activities, systems and controls, and compliance management requirements, including but not limited to plans for independent audits.

- a description of outsourcing and third-party risk management, including a description of any functions or services that will be outsourced and risk management processes that are commensurate with the level of risk and complexity of the third-party relationships. For additional guidance, applicants should review OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance" (October 30, 2013).

[27] Applicants should review 12 CFR 30, appendix B, "Interagency Guidelines Establishing Information Security." These guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

(3) Financial Management

An SPNB will be subject to the minimum leverage and risk-based capital requirements in 12 CFR 3, which apply to all national banks. However, these requirements, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, may not be sufficient for measuring capital adequacy for some SPNBs. The risks posed by an SPNB with limited on-balance-sheet assets or nontraditional strategies may not be fully captured in its reported assets and off-balance-sheet exposures. As a result, additional approaches may be necessary to determine the minimum amount of capital needed to support the bank's activities. For example, for a proposed bank with limited on-balance-sheet assets, the OCC may consider other metrics related to activity—such as revenue—and the risks associated with the applicant's business plan when evaluating capital adequacy.

This section of the business plan should propose both minimum capital levels the bank will adhere to initially that are sufficient to support the proposed bank's business plan until the bank can achieve and sustain profitable operations and minimum capital levels the bank will adhere to after profitability that would be appropriate for its ongoing operations. This section should also discuss how the proposed bank would address adverse market conditions that could deplete capital, such as broad market volatility or volatility specific to a business line. Additional factors that applicants should consider include the following:

- On- and off-balance-sheet composition, including credit risk, concentration risk, market risk, operational risk, and compliance risk associated with nontraditional products, services, or operating characteristics.
- Proposed activities and anticipated volume (new accounts, transactions) and impact on capital.
- Plans and prospects for growth, including any material action necessary to address business activity that is either below or above expectations and management's past experience in managing growth.
- Stability or volatility of sources of funds and access to capital.
- Sufficient additional capital to implement the exit strategy laid out in the business plan.

Consistent with the process for chartering other special purpose banks,[28] preliminary conditional approval for a fintech company will include a condition specifying a minimum capital level the bank must be at or above at all times. This amount would be based on the OCC's analysis of quantitative and qualitative factors, including those described above. The OCC expects that capital in a fintech company with an SPNB charter would increase beyond

[28] The OCC tailors capital requirements for other special purpose banks. For example, the OCC typically imposes capital requirements on trust banks in addition to the minimum requirements calculated according to 12 CFR 3.

the initial minimum amount as the size, complexity, and corresponding risks of the firm evolve.

The financial management section should also address liquidity and funds management. Liquidity is a bank's capacity to readily meet its cash and collateral obligations at a reasonable cost without adversely affecting either daily operations or the bank's financial condition.[29] The OCC will consider the proposed bank's specific business model when evaluating the SPNB's liquidity profile and processes for monitoring and mitigating liquidity risk.

For other special purpose banks, the OCC has imposed requirements tailored to the bank's business model to ensure it maintains adequate liquidity. Such requirements include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

(4) Monitoring and Revising the Plan

The Business Plan Guidelines provide that this section should include a discussion of how the board of directors will monitor adherence to the business plan and adjust or amend the business plan as appropriate to accommodate significant or material changes.[30] This is an ongoing requirement, and technology-dependent businesses will need to have mechanisms in place to accommodate new or evolving technologies.

(5) Alternative Business Strategy; Contingency Plans; Recovery and Exit Strategies

Depending on the applicant's proposed business strategy and structure, the OCC may require an applicant to include an alternative business strategy detailing how the bank will manage potential scenarios when expectations—such as operating expenses, marketing costs, or growth rates—differ significantly from the original plan.[31]

While it will not always be necessary for a bank to develop an alternative business strategy, all applicants should discuss

- realistic contingency plans based on critical assumptions;
- recovery planning, including financial or other risk triggers, and a range of credible options to remain viable under stress; and

[29] For additional details regarding liquidity, applicants may refer to the "Liquidity" booklet (June 2012) of the *Comptroller's Handbook*.

[30] As discussed in the "Chartering Standards" section of this Supplement, significant deviations to the business plan may require OCC supervisory non-objection.

[31] If the bank's alternative business strategy would be considered a significant deviation from the approved business plan, the OCC would expect the applicant to obtain a supervisory non-objection before executing the strategy.

- exit strategies that provide a means for the bank to unwind in an organized manner.

(6) Financial Inclusion Plan (FIP)

As noted earlier in the "Chartering Standards" section of this Supplement, the OCC's chartering standards require consideration of whether the applicant will provide fair access to financial services and promote fair treatment of customers consistent with the safe and sound operations of the bank.[32] OCC regulations require that applicants include in their business plans an indication of the organizing group's knowledge of and plans to serve the community.[33] As discussed in detail in appendix B, "Financial Inclusion Plan Section of the Business Plan," the OCC expects an applicant for an SPNB charter whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.

Applicants engaged in such activities should include in the business plan an FIP that describes the proposed goals, approach, activities, and milestones for serving the relevant market and community. The nature and scope of an FIP developed by an applicant for an SPNB charter will vary depending on the SPNB's business model and the products or services it intends to provide to consumers or small businesses.

The OCC expects that the commitment to meet financial inclusion objectives that support fair access to financial services and fair treatment of customers will be ongoing, and accordingly, the OCC will expect the SPNB to update its FIP as appropriate.

Chartering Decision

As discussed in detail in the "Charters" booklet of the *Comptroller's Licensing Manual*, the OCC grants approval of a charter application in two steps: preliminary conditional approval and final approval. The period between the preliminary conditional approval and final approval is referred to as the organization phase.

Preliminary Conditional Approval

Following review of the application, the OCC determines whether to grant preliminary conditional approval or deny the application. A preliminary conditional approval determination indicates the OCC's permission to proceed with the organization of the bank according to the plan set forth in the application and specifies standard requirements and enforceable supervisory conditions. The OCC will include in a preliminary conditional approval of any SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses an enforceable condition that will require the SPNB to implement its FIP.

[32] See 12 USC 1(a) and 12 CFR 5.20(f)(1).

[33] See 12 CFR 5.20(h)(5).

A preliminary conditional approval decision is not an assurance that the OCC will grant final approval for a new bank charter. Granting preliminary conditional approval provides the organizers of the bank with assurances that the application has passed the first phase of OCC review before the organizers expend additional funds to raise capital, hire officers and employees, and fully develop policies and procedures, including those relating to financial inclusion. A national bank must generally open for business within 18 months of the OCC's preliminary conditional approval, unless the OCC grants an extension.[34]

Standard and Special Requirements

The OCC imposes a number of standard requirements on a bank when it grants preliminary conditional approval. Standard requirements are requirements imposed on all de novo national banks. For example, these requirements include establishing appropriate policies and procedures and adopting an internal audit system appropriate to the size, nature, and scope of the bank's activities. The OCC may also place additional special requirements on SPNB charters with certain characteristics. While standard requirements apply to all de novo charters, special requirements are tailored to a particular applicant. A requirement for a bank to raise a higher amount of capital than proposed in the business plan is an example of a special requirement. The organizing group must satisfy standard and special requirements before the OCC grants final approval.[35]

Standard and Special Conditions

In addition to the standard and special requirements discussed above, the OCC may also impose standard and special conditions that remain in place after the bank opens for business.[36]

The OCC imposes certain standard conditions on all categories of de novo charters, and those would apply to SPNBs. These standard conditions address a variety of issues, including ensuring that the bank does not significantly deviate from the business model proposed in its application without prior OCC non-objection and guaranteeing maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan.[37] It is a standard condition for an SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses that the SPNB implement its FIP.

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[34] See 12 CFR 5.20(i)(5)(iv).

[35] For additional information regarding the organization phase, please refer to *Comptroller's Licensing Manual,* "Charters."

[36] Conditions imposed in connection with the approval of a national bank charter are considered "conditions imposed in writing" and enforceable under the OCC's enforcement authority at 12 USC 1818. The OCC regularly examines for compliance with such conditions.

[37] For more information about significant deviations from business plans, see appendix F, "Significant Deviations After Opening," of *Comptroller's Licensing Manual,* "Charters."

The OCC may also impose special conditions on an individual SPNB. Examples of such conditions include requiring the bank to have a resolution plan to sell itself or wind down, if necessary, and requiring the bank to adhere to specific commitments, such as a requirement to enter into an operating agreement. In addition, in the case of an uninsured bank, the OCC can impose special conditions similar to those in laws that apply by statute to insured banks only. Where a law does not apply directly, the OCC may work with a fintech company to achieve the goals of a particular statute or regulation through the OCC's authority to impose conditions on its approval of a charter, taking into account any relevant differences between a full-service bank and special purpose bank.[38]

In addition, the OCC will impose assessments on an SPNB through special conditions established at the time of preliminary approval. The OCC is funded through assessments and fees charged to the banks it supervises.[39] SPNBs will be subject to periodic assessments, just as other national banks are.[40] The OCC has modified the assessments it charges to other special purpose national banks, however, to account for the scope and activities of the bank and the amount and type of assets that the bank holds.[41] The OCC would determine assessments for an SPNB to account for similar factors.[42]

Conditions may be imposed directly in the preliminary approval letter, or the OCC may require as a condition of approval that the applicant enter into an operating agreement with the OCC. The operating agreement may impose safeguards to address certain aspects of a bank's operations, including growth, capital, or liquidity. As noted above, for all SPNBs engaged in lending or providing financial services to consumers or small businesses, implementation of an FIP will be a condition imposed through an operating agreement. The OCC publishes all conditional approvals, which disclose the existence of an operating agreement.[43]

[38] For more information about the conditions that may be imposed, see Comptroller's Licensing Manual, "Charters."

[39] See 12 USC 16, 481.

[40] See 12 CFR 8.

[41] Additional assessments are required of certain national banks. See, e.g., 12 CFR 8.2(c) and 8.6(c) (additional assessments imposed on independent credit card banks and independent trust banks).

[42] As it gains experience with fintech companies, the OCC may amend its rules to address assessments for fintech companies.

[43] An operating agreement is enforceable under 12 USC 1818. That section of the FDIA contains the OCC's general enforcement authorities; it expressly applies to uninsured national banks. See 12 USC 1818(b)(5).

Final Approval

Receipt of final approval from the OCC means the OCC has issued a charter for the bank, and the bank can begin to conduct banking business.[44] After the OCC issues final approval and the SPNB opens for business, the OCC will supervise the SPNB, as all other national banks, under scheduled supervisory cycles, including on-site examination and periodic off-site monitoring. Any conditions imposed with the granting of a charter (e.g., operating agreement) will remain in place until removed or modified by the OCC and will be reviewed for compliance during the examination process.

Because this Supplement is focused on the licensing process for SPNBs, it does not provide extensive guidance regarding the OCC's supervisory expectations and the supervision of national banks. Key supervisory considerations, however, are highlighted in appendix A to this Supplement. For additional information on specific supervisory areas, applicants should refer to the booklets of the *Comptroller's Handbook*, available on the OCC's website.

[44] Final approval occurs once the organizers have completed all key phases of organizing the bank as determined by the OCC and received any other necessary regulatory approvals. See *Comptroller's Licensing Manual,* "Charters," for more detail.

Appendices

Appendix A: Supervisory Considerations

OCC Supervisory Framework

The supervisory framework for SPNBs will incorporate core elements already in place for all national banks. These elements include a dedicated Assistant Deputy Comptroller (ADC), an assigned portfolio manager, a supervisory strategy tailored to the bank's business model, and a blend of on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team. In addition to the statutory examination requirements[45] and consistent with longstanding OCC de novo supervision policy,[46] newly chartered SPNBs will be subject to more frequent and intensive supervision in their early years of operation. The scope of supervision activities will follow a risk-based approach commensurate with the size and complexity of the institution, focusing on any elevated risks and unique supervisory challenges presented by a given SPNB. Examples of SPNB examination and supervision activities include frequent contact with the board of directors and bank management.

Similar to the OCC's supervision framework for existing special purpose national banks, SPNBs will be housed in a common portfolio, assigned individual portfolio managers, and overseen by an ADC for SPNB Supervision, who will be based in Washington, D.C., and report to the Deputy Comptroller for Thrift Supervision and Special Supervision.[47] Centralized oversight of SPNBs will provide for a consistent approach to supervision. Each bank will have an assigned portfolio manager who will serve as the primary point of contact and examiner-in-charge for the institution. The portfolio manager and the examination team will have subject matter expertise appropriate for the bank's business model. In addition, dedicated licensing and risk specialists, legal staff, and other subject matter experts will be assigned to each bank, as appropriate.

Rating Framework

SPNBs will be subject to the same ratings framework as other national banks. As outlined in appendixes A-G of the "Bank Supervision Process" booklet of the *Comptroller's Handbook*, national banks are assessed in accordance with the Uniform Financial Institutions Rating System (UFIRS). Composite ratings are based on an evaluation of an institution's managerial, operational, financial, risk management, and compliance performance.

Under this uniform system, the OCC ensures that all national banks are evaluated in a comprehensive and uniform manner and that supervisory attention is focused appropriately

[45] SPNBs will be subject to the statutory examination cycle prescribed by 12 USC 1820(d) and 12 CFR 4.6.

[46] PPM 5400-9 (REV), "De Novo and Converted Banks."

[47] Using dedicated subject matter experts across the OCC, the supervisory office will obtain assistance to participate on examinations and advise on complex issues that SPNBs might present.

on those banks that exhibit financial and operational weaknesses or adverse trends. The UFIRS helps identify adverse trends or deteriorating financial institutions, as well as categorizing deficiencies. The rating system is commonly referred to as the CAMELS/ITCC, and it assesses components of a bank's performance as well as specialty areas that include: capital adequacy, asset quality, management, earnings, liquidity, sensitivity to market risk, information technology, trust, consumer compliance, and performance under the Community Reinvestment Act (if applicable). Each component is rated based on an evaluation of factors relevant to the specific area.

Risk Management Framework

The OCC expects every national bank to have appropriate risk management systems to address all relevant risks in the bank. The structure, sophistication, and oversight of these systems should be commensurate with the complexity and volume of risk a bank assumes. Regardless of the bank's size or complexity, sound risk management systems should do the following:

- **Identify risk:** Banks must recognize and understand existing risks and risks that may arise from new business initiatives, including risks posed by third-party relationships, by external market forces, or by regulatory or statutory changes. Risk identification should be a continuing process and occur at both the transaction and portfolio levels.

- **Measure risk:** Banks must have effective risk management systems that measure risks accurately and timely. A bank that does not have an effective risk measurement system has limited ability to control or monitor risk levels.

- **Monitor risk:** Banks must monitor risk levels to ensure timely review of risk positions and exceptions to risk limits. Monitoring reports must be timely, accurate, and relevant, and should be distributed to appropriate individuals to ensure action, when needed.

- **Control risk:** Banks must establish and communicate risk limits through policies, standards, and procedures that define responsibilities and authority. These limits serve as a means to control exposures to the various risks associated with the bank's activities.

The OCC employs a risk-based supervisory philosophy focused on evaluating risk, identifying material and emerging problems, and ensuring that individual banks take corrective action before problems compromise their safety and soundness. This supervision-by-risk approach provides a consistent definition of risk and a system for assessing risks (known as the Risk Assessment System or RAS), and it integrates risk assessment into the supervisory process. The RAS is applicable to all risks identified across a bank and can include (although it is not limited to): credit risk, information technology systems and controls, operational risk, cybersecurity risk, liquidity and funds management, consumer compliance risk, and strategic and reputation risks. Following risk evaluations, the supervisory office tailors and conducts supervisory activities based on the risks identified, and periodic testing is completed in order to validate a bank's risk assessment.

Corporate Governance Framework

The OCC expects the governance structure for any proposed SPNB to be commensurate with the risk and complexity of its proposed products, services, and activities, as it is for other national banks. The OCC sets standards for governance and for risk management systems that identify, measure, monitor, and control risk in national banks. The OCC expects national banks to have expertise, financial acumen, and a risk management framework that includes the three lines of defense. The three lines of defense model explains governance and roles among the bank's business units, support functions, and the internal audit function from a risk management perspective.

- First line of defense risk management activities take place at the frontline units where risks are created and owned.

- The second line of defense risk management activities occur in an area or function separate from the frontline unit, sometimes referred to as independent risk management (IRM). IRM oversees and assesses the frontline units' risk management activities.

- The internal audit function is often referred to as the third line of defense in this model. In its primary responsibility of providing *independent* assurance and challenge, the internal audit function assesses the effectiveness of the policies, processes, personnel, and control systems created in the first and second lines of defense. Internal audit (including co-sourcing and outsourced arrangements) must be an independent function and report directly to the Audit Committee of the board of directors.[48]

The board of directors must have a prominent role in the overall governance structure by participating on key committees and guiding the bank's risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

OCC Communication

The OCC is committed to ongoing communication with the banks it supervises and with other banking regulators. This includes formal and informal conversations, meetings, examination reports, and other written communications. At a minimum, the OCC must provide a bank's board of directors a report of examination (ROE) at least once each supervisory cycle. The ROE conveys the bank's overall condition, ratings, and risk assessment summary. It will also summarize examination activities and findings identified during the supervisory cycle.[49]

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[48] For additional information on the audit function, see the "Internal and External Audits" booklet of the *Comptroller's Handbook*.

[49] Additional information about communication guidance can be found in the the "Bank Supervision Process" booklet of the *Comptroller's Handbook*.

Appendix B: Financial Inclusion Plan Section of Business Plan

Overview and Process

The OCC expects an SPNB covered by this Supplement whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.[50]

As part of the prefiling process, the OCC expects a fintech company seeking an SPNB charter to provide information describing how it proposes to engage with its relevant market and community, including any underserved populations, and how it proposes to identify and address that community's financial needs.[51] The OCC recognizes that outreach to interested community and consumer groups may be particularly helpful in determining these community financial needs.

A fintech company's SPNB charter application should include in the FIP section of its business plan a description of its proposed goals, approaches, activities, and milestones for serving the relevant market and community.[52] The OCC recognizes that some applicants may have a business model incorporating financial inclusion as an integral aspect of the products and services they provide, and in those cases, the applicant should identify and discuss with the OCC the aspects of its business plan that address its financial inclusion goals, approach, activities, or milestones.

The OCC will include in a preliminary conditional approval of any SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses an enforceable condition that will require the SPNB to implement its FIP.

Developing the FIP

The nature and scope of an FIP will vary depending on the applicant's business model and the products or services it intends to provide to consumers or small businesses. An FIP should describe:

- The products or services the SPNB intends to offer, including any financial products or services that will foster financial inclusion, whether defined by income, geography, or other criteria such as unserved or underserved populations.

[50] See 12 CFR 5.20(f)(1) and 5.20(h)(5); see also 12 USC 1 (providing that the OCC is "charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services and fair treatment of customers" by the institutions it supervises).

[51] The prefiling process is discussed in more detail in this Supplement.

[52] As noted in this Supplement, portions of the business plan, including the FIP, will be included in the public file.

- Identification of, and method for defining, the SPNB's relevant market and community, including underserved populations or geographies, which may include, for example, low- and moderate-income individuals.

- Identification of, and method for defining, the financial services needs of the relevant market and community and how some of those needs could be met by the SPNB's products and services.

- Identification of milestones, including measurable goals, for the accomplishment of the SPNB's financial inclusion objectives and description of a reasonable approach for meeting those goals.

- Identification of terms and conditions under which the SPNB will provide lending or financial products and services to consumers or small businesses.[53]

Review of Financial Inclusion Factors

The OCC will review the adequacy of the applicant's FIP and consider whether the SPNB has addressed factors that would support fair access to financial services and fair treatment of customers, such as the following:

- The SPNB's ability, efforts, and commitment to meet various community financial needs based on the applicant's financial condition and size, economic conditions in the relevant market and community, and other factors, including any expected participation by the SPNB in governmentally insured, guaranteed, or subsidized loan programs for housing, small business, community development, or small farms.

- How the SPNB's policies, procedures, and practices, including those described in its compliance management program, are designed to ensure products and services will be offered and provided on a fair and non-discriminatory basis, with full disclosure of terms and conditions to all customers, and in compliance with applicable laws and regulations.[54]

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[53] The OCC has issued guidance cautioning national banks about lending activities that may be considered predatory, unfair, or deceptive or that may present safety and soundness and other risks. See, for example, OCC Advisory Letter 2000-7, "Abusive Lending Practices" (July 25, 2000) (identifying interest rates and fees that far exceed the true risk and cost of making loans as indicia of such lending practices); OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013) (clarifying the OCC's application of principles of safe and sound banking practices and consumer protection in connection with deposit advance products).

[54] Applicable laws vary, depending on the characteristics of the specific product or service, and may include the following laws and any implementing regulations: Truth in Lending Act, Equal Credit Opportunity Act, Credit Card Accountability Responsibility and Disclosure Act, Electronic Fund Transfer Act, and section 5 of the FTC Act.

- Investments, partnerships, ongoing outreach, and collaboration strategies, or expected participation in governmentally insured, guaranteed, or subsidized loan programs that the SPNB will use to achieve its financial inclusion objectives.

- Other factors that reasonably bear upon the extent to which the SPNB will help meet the credit and other financial services needs of the relevant market and community.

Implementation and Ongoing Communication

The SPNB's commitment to meet its financial inclusion goals, approach, activities, and milestones that support fair access to financial services and fair treatment of customers is ongoing through the life of the charter. For this reason, the OCC will require that the SPNB update its FIP in appropriate circumstances. The FIP should address how the SPNB will continue serving the needs of the relevant market and community beyond the initial years after a charter is granted, including how the SPNB will do the following:

- Communicate, and receive public input, regarding its progress in executing on its FIP.

- Update or modify its FIP in appropriate circumstances, including significant deviations to its business plan, the products or services offered, or relevant markets and communities served.

- Obtain, consider, and address public input in connection with updates to its FIP, when appropriate.

After the OCC issues final approval and the SPNB opens for business, the OCC will approach supervision of the SPNB in a manner consistent with its scheduled supervisory cycle applicable to other national banks. Conditions imposed with the approving the charter, including the condition related to implementation of the FIP, will remain in place until removed or modified by the OCC and will be reviewed for compliance during the examination process.

Exhibit J

NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

April 14, 2017

The Honorable Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Mail Stop 9W-11
Washington, DC 20219

Re: Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies

Dear Comptroller Curry,

The New York Department of Financial Services ("DFS") continues to oppose the proposal by the Office of the Comptroller of the Currency ("OCC") to create a new special purpose national bank charter for "fintech" companies. As explained in DFS's January 17, 2017 letter (attached), the regulation of non-bank financial institutions is within the jurisdiction of the states, not the OCC. DFS and other stakeholders that submitted comments in opposition to the OCC's December 2016 whitepaper "Exploring Special Purpose National Bank Charters for Fintech Companies" (the "Whitepaper") highlighted significant questions and concerns regarding the OCC's hasty and misguided effort to issue such national bank charters. Despite this strong opposition, the OCC published the "Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies" (the "Manual"), a licensing manual to charter non-bank financial institutions.[1] In publishing the Manual, the OCC apparently has ignored these serious questions and concerns and has made clear that it intends to proceed – without authority – to seek to charter nonbank financial institutions and thereby create an uneven playing field for state banking institutions in derogation of state sovereignty. The

[1] *See e.g.* Letter from John W. Ryan, President & CEO, Conference of State Bank Supervisors, to Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency (January 13, 2017) *available at* https://www.occ.treas.gov/topics/responsible-innovation/comments/comment-csbs-comment-letter-special-purpose-national-bank-charters-fintech.pdf; Letter from Robert L. Hartwig, Legal Counsel, Iowa Bankers Association, to Office of the Comptroller of the Currency (December 29, 2016) *available at* https://www.occ.treas.gov/topics/responsible-innovation/comments/comments-robert-hartwig.pdf.. Many comments submitted in support of the OCC's new charter also expressed concerns regarding the OCC's approach to issuing bank charters to non-bank fintech companies and emphasized the importance of preserving consumer protections. *See e.g.* Letter from Jessie Cheng, Deputy General Counsel, Ripple, to Office of the Comptroller of the Currency (January 13, 2017) *available at* https://www.occ.treas.gov/topics/responsible-innovation/comments/comments-ripple.pdf; Letter from Jennifer J. Finger, EVP Strategy and Development, Beneficial State Bank, to Thomas J. Curry, Comptroller of the Currency, Office of the Comptroller of the Currency (January 11, 2017) *available at* https://www.occ.treas.gov/topics/responsible-innovation/comments/comment-beneficial-state-bank.pdf

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creation of such a new federal regulatory regime over non-bank financial institutions extends beyond the OCC's jurisdictional authority under the National Bank Act ("NBA") to charter national banks.

The National Bank Act authorizes the formation of associations to conduct the "business of banking."[2] It does not broadly authorize the OCC to regulate the entire financial system in this country. During the 160 years since the passage of the NBA, it has been well understood that there is a dual banking system for banking entities, but that non-bank institutions operate throughout the country under the supervision of the states as discussed in DFS's previous comment letter to the OCC dated January 17, 2017 and the comments submitted by other state regulators, as well as members of Congress.

In the Manual, the OCC purports to redefine the "business of banking," and without authority seeks to expand the OCC's regulation of financial institutions beyond historical and legal limits. In doing so, the OCC references its own prior regulation rather than congressional authority to extend its jurisdictional reach.[3] Clearly, regulation cannot expand the jurisdiction of the OCC, whose ability to regulate or attempt to preempt state regulation can only be authorized by a clear Congressional grant of authority.[4] Indeed, regulation by the OCC of non-depository financial institutions requires clear authority under the NBA, which it distinctly lacks.

The business of banking is, and has traditionally been recognized by the courts to be, inexorably linked to receiving deposits, while non-depository financial institutions have traditionally been classified as non-banks. In *Independent Bankers Ass'n of America v. Conover*,[5] the Court held, on facts remarkably similar to the OCC's fintech chartering proposal, that an institution that does not engage in accepting deposits cannot be chartered as a national bank because it would not be engaged in the "business of banking" within the meaning of the NBA. The Court further noted that the historical use of the term "business of banking" in the industry and in case law strongly suggests that accepting deposits is an essential element of the "business of banking," and that a financial institution that is legally unable to take deposits "cannot engage in the 'business of banking' within the meaning of the NBA."[6]

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[2] 12 U.S.C. § 21. While the OCC has some flexibility in determining what activities national banks may engage in as "incidental powers … necessary to carry on the business of banking," the OCC incorrectly asserts that this flexibility additionally imbues it with the power to redefine what is a bank in the first place. *See* 12 USC §24 (Seventh); *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995).

[3] *See* Manual at p. 2-5.

[4] *See Stark v. Wickward,* 321 U.S. 288, at 309 (1944) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'" (quoting *Brown & Williamson,* 529 U.S. at 159)). *See also Medtronic, Inc. v. Lohr,* 518 U.S. 470, at 485-86 (1996) ("In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the Court] starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

[5] 1985 U.S. Dist. LEXIS 22529 (M.D. Fla. Feb. 15, 1985).

[6] *IBAA v. Conover,* at *34 -*36 (M.D. Fla. Feb. 15, 1985).

The OCC's jurisdictional expansionism results in the creation of a new regulatory regime with neither the regulatory infrastructure nor clear standards to protect consumers. The NBA was designed to create regulation for depository institutions and existing federal regulatory structures and oversight of national banks demonstrate that they are specifically tailored to the regulation of depository institutions. Throughout the Manual, the OCC acknowledges that critical features of its existing federal regulatory requirements for depository institutions will not be sensible for non-depository institutions and the OCC declares that these standards will not apply to the new "special purpose charter" it has created.[7]

Tellingly, the OCC's Manual, if allowed to proceed, would exempt its new fintech chartered entities from existing federal standards of safety and soundness, liquidity and capitalization. By contrast, New York and other existing state regulators, who for years have regulated non-depository institutions including those using financial technology, have clear laws addressing safety and soundness for non-depository institutions. As appropriate for different types of non-bank entities, New York has bonding requirements,[8] liquidity and capitalization standards,[9] and in the case of money transmitters a State Transmission of Money Insurance Fund[10] that protects the purchasers and holders of New York instruments in the event of a failure of a money transmitter. DFS has demonstrated its leadership as an innovative regulator by the actions it has taken in the virtual currency industry. Moreover, DFS has dedicated staff and regulation designed to address the challenges of regulating non-depository institutions including the Bank Secrecy Act and Anti-Money Laundering ("BSA-AML") challenges that these institutions present. In implementing regulations for the licensing and supervision of virtual currency entities,[11] DFS enhanced trust and legitimacy of a promising emerging financial services technology, while also providing for both minimum capital standards and surety bond or deposit requirements based in each case on the specific risk factors of the entity.[12] In this way, New York both supported and enabled innovation while also protecting consumers and requiring that all companies operate in a safe and sound manner within the financial services marketplace.

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[7] Inexplicably, fintech companies licensed under the new charter will be exempt from safety and soundness standards applicable to all other national banks. *See* Manual Footnote 21 ("A SPNB that does not take deposits will not be subject to certain requirements that apply only to ensure depository institutions: for example the safety and soundness standards contained and 12 CFR 30"). The Manual also states that capitalization and liquidity will be tailored for "special purpose national banks," but fails to establish clear standards for these important requirements. *See* Manual p.11.

[8] For example, licensed money transmitters in New York are subject to bonding or deposit requirements pursuant to Section 643 of the Banking Law and Parts 406.13 and 406.14 of the Superintendent's Regulations. In addition, Section 651 of New York's Banking Law mandates that licensed money transmitters must maintain liquid assets approximating the value of their money transmission obligations. Further, pursuant to Article XIII-C of the Banking Law, New York maintains a State Transmitter of Money Insurance Fund to protect certain users of licensed money transmitters. The OCC's proposed charter includes none of these important protections.

[9] For example, licensed lenders in New York are subject to minimum liquid asset requirements pursuant to Sections 341.5 and 342 of the Banking Law and minimum net worth requirements pursuant to Parts 401.1(b) and 401.2(b) of the Superintendent's Regulations.

[10] As noted in footnote 8 above, Article XIII-C of the Banking Law created a State Transmitter of Money Insurance Fund to protect users.

[11] 23 NYCRR Part 200.

[12] *See* 23 NYCRR § 200.8 and 200.9.

As evidenced by its Manual, the OCC has not created critical standards for safety and soundness, liquidity or capitalization, nor does the OCC have the jurisdiction, expertise or authority to set them for non-banks. The OCC provides none of the protections that DFS provides for New York consumers – including usury protections -- and has no answer to concerns that New York consumers would have no recourse if a chartered money transmitter or other non-depository institution fails. New York vigorously opposes back-door attempts to prey on consumers with payday loans. Likewise the OCC has not addressed the unique challenges of, or standards that will be applied to, these entities with respect to critical BSA-AML regulation and supervision. This is unacceptable to DFS.

Quite simply, the OCC was not granted the authority to set the boundaries of its own power, or to unilaterally stretch and twist the contours of banking beyond recognition in order to cover traditionally non-bank activities and non-bank companies. Such a sweeping remake of the financial system and the financial regulatory structure of the entire country would require an act of Congress, and would come at the expense of the valuable role and experience of state regulators. The OCC has no authority to create non-depository, low-regulation, no-reserves, capital-markets-dependent non-banks with little regard for the safety and soundness of the existing banking system.

Rather than unilaterally seeking to empower so-called "fintech" companies at the expense of existing banks and consumer protection, the OCC should work together with other federal and state banking regulators to improve the capacity of banks to innovate while maintaining appropriate standards. Responsible innovation in financial services and banking can come from the deeply experienced state regulators and existing federal regulators of national banks. Indeed, the OCC irrationally seeks to create an unauthorized and hasty loophole for fintech companies, without legislative approval and at the expense of state sovereignty and consumers. [13]

For these, as well as all previously stated reasons submitted in comments, DFS continues to oppose the OCC's national non-bank bank charters applicable to any financial services company making use of technology. DFS seeks to preserve a safe and sound banking system, and to protect consumers.

Respectfully,

Maria T. Vullo

Maria T. Vullo
Superintendent
New York State Department of Financial Services

[13] Comments received by the OCC requested that the OCC preempt state regulatory authority – calling for it to "supersede" or "harmonize" state laws. The OCC should not be catering to requests to create regulatory arbitrage and avoid consumer protections. Indeed, the OCC simply does not have the legal authority to preempt state regulation without a constitutional and clear congressional mandate.

Exhibit K

Office of the
Comptroller of the Currency
U.S. Department of the Treasury [https://occ.gov/index.html]

NR 2018-74

FOR IMMEDIATE RELEASE
July 31, 2018

Contact: Bryan Hubbard
(202) 649-6870

OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies

WASHINGTON — The Office of the Comptroller of the Currency (OCC) today announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking.

“Over the past 150 years banks and the federal banking system have been the source of tremendous innovation that has improved banking services and made them more accessible to millions. The federal banking system must continue to evolve and embrace innovation to meet the changing customer needs and serve as a source of strength for the nation’s economy,” said Comptroller of the Currency Joseph M. Otting. “The decision to consider applications for special purpose national bank charters from innovative companies helps provide more choices to consumers and businesses, and creates greater opportunity for companies that want to provide banking services in America. Companies that provide banking services in innovative ways deserve the opportunity to pursue that business on a national scale as a federally chartered, regulated bank.”

The OCC’s decision is consistent with bi-partisan government efforts at federal and state levels to promote economic opportunity and support innovation that can improve financial services to consumers, businesses, and communities. The decision was documented in a policy statement and supplement to the OCC’s *Comptroller's Licensing Manual*, both published today. The OCC’s decision follows extensive outreach with many stakeholders over a two-year period, and after reviewing public comments solicited following the publication of *Exploring Special Purpose National Bank Charters for Fintech Companies* in December 2016, and *Comptroller’s Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies* in March 2017.

In announcing the decision, the policy statement and *Comptroller's Licensing Manual Supplement* stress:

- Every application will be evaluated on its unique facts and circumstances.
- Fintech companies that apply and qualify for, and receive, special purpose national bank charters will be supervised like similarly situated national banks, to include capital, liquidity, and financial inclusion commitments as appropriate. Fintech companies will be expected to submit an acceptable contingency plan to address significant financial stress that could threaten the viability of the bank. The plan would outline strategies for restoring the bank’s financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective.
- The expectations for promoting financial inclusion will depend on the company’s business model and the types of planned products, services, and activities.
- New fintech companies that become special purpose national banks will be subject to heightened supervision initially, similar to other de novo banks.
- The OCC has the authority, expertise, processes, procedures, and resources necessary to supervise fintech companies that become national banks and to unwind a fintech company that becomes a national bank in the event that it fails.

The OCC has statutory authority, regulations, and policies that govern its review and decision making with respect to chartering national banks, including special purpose national banks. That authority includes companies that engage in one of the core banking functions (paying checks, lending money, or taking deposits) and is described at 12 CFR 5.20(e)(1). That authority does not require the bank to take deposits within the meaning of the Federal Deposit Insurance Act and therefore would not require insurance from the Federal Deposit Insurance Corporation.

Qualifying fintech companies also may apply for federal charters under the OCC’s authority to charter full-service national banks and other special purpose banks, such as trust banks, banker’s banks, and credit card banks.

A national bank charter is only one option among many for companies engaged in the business of banking. Other options include pursuing state banking charters, appropriate business licenses, and partnerships with other federal or state financial institutions. The option to apply for a national bank charter allows these companies to choose the best business model and regulatory structure for their business and strategic goals, which will help them meet the needs of their customers throughout the nation.

“Providing a path for fintech companies to become national banks can make the federal banking system stronger by promoting economic growth and opportunity, modernization and innovation, and competition,” Comptroller Otting said. “It also provides consumers greater choice, can promote financial inclusion, and creates a more level playing field for financial services competition.”

Related Links

- OCC Policy Statement (PDF)
- *Comptroller’s Licensing Manual Supplement: Considering Charter Applications From Financial Technology Companies* (PDF)

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Exhibit L

Office of the Comptroller of the Currency

Washington, DC 20219

Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters

July 31, 2018

It is the policy of the Office of the Comptroller of the Currency (OCC) to consider applications for national bank charters from companies conducting the business of banking, provided they meet the requirements and standards for obtaining a charter. This policy includes considering applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits.

This policy statement is based on broad authority granted to the OCC by the National Bank Act,[1] as implemented in existing regulation[2] and established OCC procedures.[3]

The OCC is issuing this policy statement to clarify its intent to exercise its existing chartering authority. The OCC also recognizes the importance of supporting responsible innovation in the federal banking system to better enable the system to

- evolve to meet the needs of the consumers, businesses, and communities it serves;
- operate in a safe and sound manner;
- provide fair access to financial services;
- treat customers fairly; and
- promote economic opportunity and job creation.

The OCC recognizes that the business of banking evolves over time, as do the institutions that provide banking services. As the banking industry changes, companies that engage in the business of banking in new and innovative ways should have the same opportunity to obtain a national bank charter as companies that provide banking services through more traditional means. The OCC will require these new entrants to the national banking system to adhere to the same high standards that apply to all national banks.

The OCC adopts this policy after careful consideration of the extensive stakeholder feedback and public comment received over the past two years.

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[1] See 12 USC 21, 26, and 27.

[2] See 12 CFR 5.20.

[3] See *Comptroller's Licensing Manual*, specifically the "Charters" booklet (September 2016) and the *Comptroller's Licensing Manual* Supplement, "Considering Charter Applications From Financial Technology Companies" (July 2018).

OCC Chartering Authority

The National Bank Act gives the OCC broad authority to grant charters for national banks to carry on the "business of banking." This authority extends to special purpose national banks. As defined in the OCC's regulations, the "business of banking" includes any of the three core banking functions of receiving deposits, paying checks, or lending money. Section 5.20 of the OCC's regulations provides that, to be eligible for a national bank charter, a special purpose national bank must conduct at least one of these three core banking functions. Thus, the OCC has authority to grant a national bank charter to a fintech company that engages in one or more of those core banking activities.

OCC Support for Responsible Innovation

The federal banking system must adapt to the rapid technological changes taking place in the financial services industry to remain relevant and vibrant and to meet the evolving needs of the consumers, businesses, and communities it serves. The OCC encourages all national banks and federal savings associations to develop strategies that incorporate responsible innovation to address the changing operating environment and evolving needs and preferences of their customers. The OCC has developed an agency-wide framework to support responsible innovation throughout the federal banking system and established the Office of Innovation to serve as a clearinghouse for innovation-related matters and a point of contact for OCC staff, banks, and nonbanks to facilitate innovation-related activities.

Considering applications from fintech companies for national bank charters is one important way that the OCC supports responsible innovation in the federal banking system. Companies engaged in the business of banking should have a path to become a national bank, provided they meet the rigorous standards necessary to become and succeed as a national bank.

Chartering a qualified fintech company as a national bank would also have important public policy benefits. The national bank charter provides a framework of uniform standards and robust supervision. Applying this framework to fintech companies that qualify can level the playing field with regulated institutions and help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities. In addition, applying the OCC's uniform supervision over national banks, including fintech companies, will help promote consistency in the application of laws and regulations across the country and ensure that consumers are treated fairly. More broadly, providing a path for fintech companies to become national banks promotes consumer choice, economic growth, modernization, and competition—all of which strengthen the federal banking system and support the nation's economy.

Office of the Comptroller of the Currency

Washington, DC 20219

Chartering Standards and Supervisory Expectations

The decision to consider national bank charter applications from qualifying fintech companies is consistent with the OCC's longstanding chartering standards and supervisory expectations. The OCC will use its existing chartering standards and procedures for processing applications from fintech companies as outlined in the *Comptroller's Licensing Manual*. As with all national banks, the OCC will consider whether a proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will treat customers fairly, and will comply with applicable laws and regulations. The OCC will also consider whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving the charter will foster healthy competition.

A fintech company that receives a national bank charter will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC would tailor these standards based on the bank's size, complexity, and risk profile, consistent with applicable law. In addition, a fintech company with a national bank charter will be supervised like similarly situated national banks, including with respect to capital, liquidity, and risk management.

The OCC also expects a fintech company that receives a national bank charter to demonstrate a commitment to financial inclusion. The nature of that commitment will depend on the company's business model and the types of products, services, and activities it plans to provide. By providing a high standard similar to the Community Reinvestment Act's expectations for national banks that take insured deposits, the financial inclusion commitment will help ensure that all national banks provide fair access to financial services and treat customers fairly.

In addition, a fintech company approved for a national bank charter will be required to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. The plan would outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective. The specific considerations related to supervision, capital, liquidity, financial inclusion, and contingency planning are described in the agency's supplement to the *Comptroller's Licensing Manual*, "Considering Charter Applications From Financial Technology Companies."

While the OCC is open and receptive to charter applications from qualified fintech companies, the OCC will not approve proposals that are contrary to applicable law, regulation, policy, or safety and soundness. Exercising the OCC's existing authority to grant special purpose charters does not alter existing barriers separating banking and commerce. Further, proposals that include financial products and services that have predatory, unfair, or deceptive features or that pose undue risk to consumer protection, would be inconsistent with law and policy and would not be approved.

//signed//	July 31, 2018
Joseph M. Otting Comptroller of the Currency	Date

Exhibit M

Of i
ller of the Currency

COMPTROLLER'S LICENSING MANUAL SUPPLEMENT

Considering Charter Applications From Financial Technology Companies

July 2018

Contents

Introduction

Technological innovations have revolutionized the way financial products and services are delivered and have enabled the development of new products and services. Today, many financial products and services are more accessible, easier to use, and more tailored to the needs of customers than ever before. The Office of the Comptroller of the Currency (OCC) has determined that companies that offer innovative technology-driven products and services may be eligible for a national bank charter, provided they meet the chartering requirements and standards applicable to all national banks.[1] Those requirements and standards are established by statute at 12 USC 21, 26, and 27, and by the OCC's regulations at 12 CFR 5. Comprehensive, publicly available OCC guidance explains how the OCC applies these requirements and standards.

The requirements and standards that govern applications for a national bank charter do not change if the applicant's business model incorporates new delivery channels or mechanisms using new technology to meet evolving customer needs. Financial technology —or fintech— companies may seek to comply with those requirements and standards in ways tailored to their business models, their delivery channels, and the products and services they offer. This document describes the key factors the OCC will consider in evaluating charter applications from fintech companies that have nontraditional or limited business models, do not take deposits, and rely on funding sources different from those relied on by insured banks.

This Supplement to the *Comptroller's Licensing Manual* provides detail on how the OCC would evaluate applications for a special purpose national bank charter from fintech companies and clarifies the OCC's expectations that companies with a fintech business model demonstrate a commitment to financial inclusion. It also explains the contingency planning each bank will be expected to undertake. Finally, the document describes the OCC's approach to supervising newly chartered special purpose national banks.

This Supplement augments, and does not replace, the OCC's existing chartering guidance. *The Comptroller's Licensing Manual* comprises a series of booklets that set out the OCC's policies on bank charters and step-by-step procedures for potential applicants for all charter types, including special purpose national banks.[2] The *Comptroller's Licensing Manual* includes the "Charters" booklet, which is a key resource for those seeking a national bank charter. The "Charters" booklet

- describes OCC policies and procedures used in the charter application process and provides detailed guidance and instructions.
- discusses the factors that the OCC considers in deciding whether to grant a charter.

[1] The requirements and standards discussed in this supplement would also apply to a group of individuals (organizing group) or an unincorporated entity. The reference to "companies" reflects the interest in and inquiries made to the OCC from established fintech companies for a special purpose national bank charter.

[2] See the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*.

- describes the application process, including the prefiling process, filing, OCC review of the application, the decision, and the organization phase of the new bank.
- provides information about the ongoing supervision of a federally chartered bank.
- discusses issues specific to special purpose national banks.

All potential applicants for a special purpose charter should carefully read this Supplement in conjunction with the OCC chartering regulation (12 CFR 5) and the "Charters" booklet.[3]

As with all potential charter applicants, OCC staff stands ready to answer questions, explain the application process, and provide guidance to potential applicants. The OCC invites those contemplating a special purpose national bank charter to contact the OCC's Office of Innovation to begin a dialogue about what it takes to become a special purpose national bank.

What Is a Special Purpose National Bank?

A special purpose national bank is a national bank that engages in a limited range of banking or fiduciary activities, targets a limited customer base, incorporates nontraditional elements, or has a narrowly targeted business plan. Special purpose national banks include those banks whose operations are limited to certain activities, such as credit card operations, fiduciary activities, community development, or cash management activities. Special purpose national banks also include national banks that engage in limited banking activities, including one or more of the core banking functions of taking deposits, paying checks, or lending money.[4]

This Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter a special purpose national bank that would engage in one or more of the core banking activities of paying checks or lending money, but would not take deposits and would not be insured by the Federal Deposit Insurance Corporation (FDIC).[5] We refer to these banks in this Supplement as SPNBs.[6] Fintech companies that seek a national bank

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[3] The OCC's regulation, 12 CFR 5, sets forth the OCC's rules, policies, and procedures for the corporate activities of a national bank and a federal savings association. The specific rules that apply to organizing a national bank are set forth in 12 CFR 5.20.

[4] Under 12 CFR 5.20(e)(1), a special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking activities: taking deposits, paying checks, or lending money. Beyond those core activities, the activities of an SPNB are limited to those that are permissible for national banks under a statute, regulation, or federal judicial precedent, or that the OCC has determined to be permissible. See e.g. 12 USC 24(Seventh); 12 CFR 7.5002; *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995).

[5] The OCC views the National Bank Act as sufficiently adaptable to permit national banks to engage in traditional activities like paying checks and lending money in new ways. For example, facilitating payments electronically may be considered the modern equivalent of paying checks. Applicants proposing to engage in activities not already addressed in statute, regulation, or OCC precedent should consult the OCC with respect to the permissibility of those activities.

[6] This Supplement does not apply to other types of special purpose banks. For example, this Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

charter and plan to take insured deposits would be required to obtain FDIC insurance and should apply for a full-service national bank charter.

As a national bank, an SPNB will be subject to the laws, rules, regulations, and federal supervision that apply to all national banks. In addition, all SPNBs will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC will tailor these standards based on the bank's business model, size, complexity, and risks, consistent with applicable law. For example, to approve a charter as an SPNB, the OCC may need to account for differences in business models and activities, risks, and the inapplicability of certain laws resulting from the uninsured status of the bank.

To address some of these differences, companies seeking a charter as an SPNB will be expected to make a commitment to financial inclusion and develop and adhere to a contingency plan that includes options to sell, wind down, or merge with a nonbank affiliate, if necessary.

Application Process: Overview

The OCC charters national banks under the authority of the National Bank Act of 1864, as amended.[7] In evaluating whether to approve an application to establish a national bank, the OCC must determine whether the proposed bank has complied with all statutory and regulatory requirements and has met the OCC's chartering standards.[8] The OCC uses its established chartering standards and procedures as the basis for processing applications for all national banks, including SPNBs.[9]

The OCC's application process for a national bank consists of four phases:

1. A prefiling phase, in which potential applicants engage with the OCC in formal and informal meetings to discuss the proposal, the chartering process, and application requirements.
2. The filing phase, in which the organizers submit a complete application.
3. The review phase, in which the OCC reviews and analyzes the application to assess whether the proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair

[7] See 12 USC 21, 26, and 27.

[8] See 12 CFR 5.20 (describing the OCC's statutory chartering authority and the procedures and requirements governing the OCC's review and approval of an application to establish a national bank, including a bank with a special purpose). Special purpose bank charter applicants generally must provide the information required by the OCC's standard review process. Applicants, however, should tailor the contents of the application to be consistent with the business model of the proposed special purpose bank.

[9] See 12 CFR 5.20(l)(1) (directing applicants for a special purpose charter to adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC). See also the "Charters" booklet of the *Comptroller's Licensing Manual*.

treatment of customers, will ensure compliance with laws and regulations, and will foster healthy competition.[10]

4. The decision phase, in which the OCC decides whether to approve a charter application. The decision phase includes the preliminary conditional approval stage, in which the OCC imposes requirements and conditions for receiving a charter; the organization stage, in which the bank raises capital and prepares for opening; and the final approval stage.

The Supplement highlights key aspects of each phase of the application process. The "Charters" booklet of the *Comptroller's Licensing Manual* includes an in-depth discussion of each of these phases. Potential applicants are encouraged to familiarize themselves with the "Charters" booklet and the requirements for a national bank charter before initiating the application process.

Prefiling Communications

The OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the application process. The OCC strongly encourages potential applicants to engage with the OCC well in advance of filing a charter application to better understand the application process and the OCC's requirements and expectations.

A fintech company interested in an SPNB charter should contact the Office of Innovation, innovation@occ.treas.gov. After the initial dialogue, the Office of Innovation may arrange further discussions with appropriate OCC staff, including the Licensing Department (Licensing), to give the company an opportunity to understand the application process, explain its proposal and reasons for seeking a charter, and become acquainted with the bank regulatory environment.

If the company decides to pursue a charter, one or more additional meetings will be scheduled, as determined by Licensing. For these additional meetings, organizers should be prepared to discuss the proposed bank's business plan, including a description of the proposed activities, the underlying marketing analysis supporting the business plan, the capital and liquidity needed to support the business plan, as well as a contingency plan to remain viable under significant financial stress. The company also should be prepared to address how it proposes to demonstrate a commitment to financial inclusion. These meetings will enable early identification of issues related to the proposed business plan, management, capital, and other requirements for a charter. The meetings will also give the OCC an opportunity to provide feedback on the proposal and discuss any legal, policy, or supervisory issues that may be relevant to the proposal and that would need to be resolved in connection with the final application. Licensing also will determine whether the organizers should submit a draft application before filing a formal application.[11]

[10] See 12 CFR 5.20(f).

[11] The OCC employs the draft application process to better understand the potential challenges inherent in unusual or complex filings and the major obstacles from a policy or risk perspective. Filing a draft application does not guarantee that the OCC will approve a formal application.

Filing a Charter Application

After the prefiling phase, organizers would file a charter application. The filing procedures for an SPNB will be substantially the same as those that would apply to any other national bank. For example, the application must be published[12] and made available to the public for comment.[13] For details on filing and publishing notice of an application, see 12 CFR 5 and the "Charters" booklet of the *Comptroller's Licensing Manual*.

OCC Review of the Application

Key Considerations

The OCC begins the process of reviewing the application as soon as it is filed.[14] In its review, the OCC will consider whether the proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair treatment of customers, and will ensure compliance with laws and regulations.[15] The OCC's regulations set forth additional considerations, including whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving its charter will foster healthy competition.[16]

In evaluating whether the applicant has met these standards, the OCC will consider an applicant's business model and proposed risk profile. It will also consider, among other factors, whether the proposed bank has a business plan that articulates a clear path and timeline to profitability, has adequate capital and liquidity to support the projected volume, and has organizers and management with appropriate skills and experience.[17]

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[12] The applicant must publish notice of its charter application in the community in which the proposed bank will be located as soon as practicable before or after the date of the filing. See 12 CFR 5.8. Because many SPNBs will operate online and nationally, the OCC will consider and discuss with the applicant alternative locations or methods where publication of this notice would be appropriate.

[13] The public comment period runs for 30 days after publication of the public notice. See 12 CFR 5.10. The OCC maintains a public file of the application and makes it available to any person requesting it; the public file is also available on the OCC's website, and the OCC publishes notice of the application in its Weekly Bulletin. Applicants may request that confidential treatment be afforded to certain parts of the application, for example, those containing proprietary information. See 12 CFR 5.9.

[14] See *Comptroller's Licensing Manual*, "Charters" booklet. The OCC seeks to make a decision on a complete and accurate application within 120 days after receipt or as soon as possible thereafter. The OCC's review of a special purpose charter application, however, may require additional time and scrutiny.

[15] See 12 USC 1(a) and 12 CFR 5.20(f)(1). See also *Comptroller's Licensing Manual*, "Charters" booklet.

[16] See 12 CFR 5.20(f)(2) and *Comptroller's Licensing Manual*, "Charters" booklet.

[17] The "Charters" booklet provides detailed information on each of these factors.

The charter review process is comprehensive and takes into account all aspects of the applicant's individual business model, governance structure, and risk profile. Highlighted below are some of the key considerations the OCC will assess in determining whether to grant an SPNB charter to a fintech company.[18]

Organizers, Management, and Directors

The organizers, managers, and directors are critical to the success of an SPNB, as they are for all banks. The OCC expects them to be well qualified, with diverse experience in relevant areas.[19] Although the OCC would expect some members of the organizing group, the proposed board of directors, and management to have experience in banking or broader financial services, other relevant experience will depend on the specific products or services offered by the proposed bank. In addition, the OCC will consider whether the organizers, managers, and directors have other financial and business expertise and experience in highly regulated industries, including relevant experience needed to implement the proposed bank's business plan. Since fintech companies are technology-driven, having sufficient technical knowledge, skills, and experience will be as necessary as having sufficient banking and financial experience.

OCC regulations and licensing policies, including those outlined in the "Charters" booklet of the *Comptroller's Licensing Manual*, provide additional guidance regarding the qualifications of organizers, managers, and directors, as well as the respective roles of each. These criteria and qualifications are generally applicable to SPNBs, although the OCC may tailor certain criteria as appropriate.

Business Plan

All applicants for a national bank charter must submit a comprehensive business plan to the OCC.[20] Having a comprehensive plan is critical to the OCC's decision on whether to approve a national bank charter. The OCC expects a company seeking any type of national bank charter to articulate why it is seeking a national bank charter and to provide significant detail about the proposed bank's activities. Proposals from companies without an established business record will be subject to a higher degree of scrutiny to evaluate whether the proposed bank has a reasonable likelihood of long-term success.

The business plan is an integral part of the management and oversight of a newly chartered or de novo bank and should establish the bank's written goals and objectives. The plan also

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[18] The key considerations contained in this Supplement are based on the OCC's extensive internal review and analysis of whether to entertain SPNB applications, as well as the comments it has received from the public and stakeholders including fintech companies, banks, community and consumer groups, and trade associations.

[19] OCC regulations and licensing policy provide guidance regarding the qualifications of organizers, managers, and directors, as well as the respective roles of each. See 12 CFR 5; the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*; and *The Director's Book*.

[20] See 12 CFR 5.20(h). This regulation details specific items that should be addressed in a business plan, including earnings prospects, management, capital, community service, and safety and soundness.

summarizes and explains how the bank will organize its resources to meet its goals and measure its progress.

The business plan also should describe the bank's proposed activities. Questions about the permissibility of the applicant's proposed activities should be raised by the applicant (and may also be raised by the OCC) early in the discussion of the applicant's proposal. In a case in which the permissibility of an activity has not previously been established, OCC staff may advise the applicant to request a legal opinion from the OCC's Chief Counsel's Office.

In addition, the business plan should clearly define the market that the proposed bank plans to serve and the products and services it will offer. It should identify the proposed bank's customer base and contain realistic forecasts regarding market demand, economic conditions, competition, and financial projections, under normal and stressed conditions. The basis for the applicant's forecasts should also be included.

A key element of the applicant's business plan is a description of the proposed bank's risk management framework to identify, measure, monitor, and control risks. This description should include a discussion of how the board will monitor adherence to the business plan and adjust or amend the plan as appropriate to accommodate significant or material changes.

The business plan should also describe the bank's proposed internal system of controls to monitor and mitigate risk, including management information systems. The discussion of internal controls should include a general description of the controls for ensuring customer transaction and data integrity, security, and auditability, as well as overviews of the operational architecture, security framework, and resiliency structures.[21] Independent testing of the business activities, systems and controls, and compliance management systems should also be addressed.[22] Further, the business plan should address any functions or services that will be outsourced to a third party and the third-party risk management processes that are commensurate with the level of risk and complexity of those third-party relationships.

The applicant should also provide a risk assessment with the business plan. The risk assessment should demonstrate a realistic understanding of risk and describe management's assessment of all risks inherent in the proposed business model and products and services, including risks relating to third-party service providers, cybersecurity, Bank Secrecy Act (BSA) and anti-money laundering (AML) requirements, Office of Foreign Assets Control economic sanctions obligations, consumer protection, and fair lending. The risk assessment should set out the degree of risk the bank intends to assume (its risk appetite) and how it would manage the identified risks. The risk assessment should factor in the target markets'

[21] Applicants should review 12 CFR 30, appendix B, "Interagency Guidelines Establishing Information Security Standards." These guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information and for disposing of consumer information.

[22] Such independent testing may be performed internally or may be outsourced but should be performed by someone independent of the day-to-day functions of the business activities, systems, and controls and who has the requisite skills to identify program or control weaknesses.

economic and competitive conditions, including the proposed products, services, and customers; the targeted geography (e.g., regional, nationwide); and any regulatory considerations regarding serving those markets.[23]

Detailed guidance regarding the business plan is available in the "Charters" booklet of the *Comptroller's Licensing Manual*.[24] Additional information on the OCC's expectations regarding a bank's risk management and corporate governance framework may be found in appendix A to this Supplement, "Supervisory Considerations."

Capital and Liquidity

The OCC's evaluation of a bank's capital is important not only to assess the strength of an individual bank but also to maintain the safety and soundness of the entire banking system. Bank capital also helps to ensure public confidence in the stability of individual banks and the banking system; supports the volume, type, and character of the business conducted; and provides for the possibilities of loss.

For an SPNB, minimum and ongoing capital levels should be commensurate with the risk and complexity of the proposed activities. An SPNB will be subject to the minimum leverage and risk-based capital requirements in 12 CFR 3 that apply to all national banks. These requirements, however, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, set a floor and may not be sufficient for measuring capital adequacy for some SPNBs.

For example, the risks posed by an SPNB with limited on-balance-sheet assets or nontraditional strategies may not be fully captured in its reported assets and off-balance-sheet exposures. To account for this gap, organizers will be expected to propose a minimum level of capital that the bank will meet or exceed at all times. Organizers will determine this minimum level of capital through a capital adequacy assessment that considers quantitative and qualitative factors, such as the volume of off-balance-sheet activity conducted and the risks associated with the applicant's business plan. The OCC will evaluate the applicant's capital adequacy assessment.

Capital adequacy should be addressed in the business plan. Organizers should analyze and support the minimum capital levels the bank will adhere to until it can achieve and sustain

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[23] For any SPNB that provides retail bank services, the applicant should describe a BSA/AML compliance program (12 CFR 21.21) reasonably designed to assure and monitor compliance with BSA recordkeeping and reporting requirements, and a consumer compliance program designed to ensure fair treatment of customers and to promote fair access to financial services as well as compliance with section 5 of the Federal Trade Commission Act, the Unfair, Deceptive, and Abusive Acts or Practices prohibitions of the Dodd–Frank Consumer Protection and Wall Street Reform Act of 2010, and all other applicable consumer financial protection laws and regulations.

[24] The "Charters" booklet of the *Comptroller's Licensing Manual* includes a link to the OCC's Business Plan Guidelines. The Business Plan Guidelines provide information on the general elements of a business plan, including a description of the business; marketing plan; management plan; compliance management; the financial management plan; records, systems, and controls; and financial projections.

profitable operations. In addition, organizers should propose minimum capital levels the bank will adhere to after profitability that would be appropriate for its ongoing operations. Organizers also should discuss how the bank would address adverse market conditions that could deplete capital, such as broad market volatility or volatility specific to a business line. Additional factors that organizers should consider include the following:

- On- and off-balance-sheet composition, including credit risk, concentration risk, and market risk.
- Operational risk, including third-party relationships, and compliance risk associated with nontraditional products, services, or operating characteristics.
- Proposed activities and anticipated volume (new accounts, transactions) and impact on capital.
- Plans and prospects for growth, including any material action necessary to address business activity that is either below or above expectations and management's past experience in managing growth.
- Stability or volatility of sources of funds and access to capital.[25]

If the OCC grants preliminary conditional approval for an SPNB charter, that approval will include a condition specifying a minimum capital level the bank must maintain or exceed at all times.[26] This amount would be based on the analysis of quantitative and qualitative factors, including those described above. The OCC expects that capital in an SPNB would increase beyond the initial minimum amount as the size, complexity, and corresponding risks of the bank evolve.

In addition to capital, the organizers should address liquidity and funds management. Liquidity is a bank's capacity to readily meet its cash and collateral obligations at a reasonable cost without adversely affecting either daily operations or the bank's financial condition.[27] Since SPNBs are uninsured and likely to rely on funding that is potentially more volatile in certain environments, organizers should describe how the SPNB can be funded and maintain sufficient liquidity under stressed conditions. The OCC will consider the proposed bank's specific business model when evaluating the bank's liquidity profile and

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[25] For additional guidance on capital considerations, please see the "Capital and Dividends" booklet of the *Comptroller's Licensing Manual*.

[26] The OCC tailors capital requirements for other special purpose banks. For example, the OCC typically imposes capital requirements on trust banks in addition to the minimum requirements calculated according to 12 CFR 3. Because trust banks do not make loans or rely on deposit funding, the OCC typically requires them to hold a specific minimum amount of capital, which often exceeds the capital requirements for other types of banks.

[27] For additional details regarding liquidity, applicants may refer to the "Liquidity" booklet of the *Comptroller's Handbook*.

processes for monitoring and mitigating liquidity risk.[28] Based on an analysis of the proposed SPNB's business model, the OCC may impose requirements tailored to the bank's funding model, structure, and risks to ensure it maintains adequate liquidity at all times and in all economic environments. Such requirements could include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

Financial Inclusion

Consistent with the agency's mission to ensure fair treatment of customers and fair access to financial services, the OCC expects any entity seeking an SPNB charter to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers.[29] The nature of that commitment will depend on the proposed bank's business model, and the types of products, services, or activities it intends to provide.

An SPNB applicant should describe the proposed bank's commitment to financial inclusion in its application. The description should include the proposed goals, approaches, activities, milestones, commitment measures, and metrics for serving the anticipated market and community consistent with the bank's activities, business model, and product and service offerings. For more information on the OCC's expectations regarding financial inclusion, see appendix B to this Supplement, "Financial Inclusion Commitment Guidance."

Contingency Planning

Before receiving final approval for a charter, an SPNB will be required to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. The contingency plan should outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective.[30] The format and content of the plan are flexible and should be tailored to the bank's specific business and reviewed and updated as the bank's business evolves.

As a condition for preliminary approval of a charter, an SPNB will be required to develop the contingency plan during the bank's organization phase. The OCC's final approval will require the bank to implement and adhere to the plan. The bank will be expected to review the contingency plan annually and update it as needed. Any significant changes to the contingency plan will require the non-objection of the appropriate supervisory office.

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[28] National banks, including SPNBs, that meet certain asset thresholds are automatically subject to additional liquidity requirements under 12 CFR 50, including banks with total consolidated assets equal to $250 billion or more, and banks with total consolidated on-balance-sheet foreign exposure equal to $10 billion or more.

[29] See 12 USC 1(a).

[30] "OCC's Guidelines Establishing Standards for Recovery Planning for Certain Large Insured National Banks, Insured Federal Savings Associations and Insured Federal Branches," in 12 CFR 30, appendix E may be a useful resource for SPNBs developing strategies to restore the bank to financial viability.

Other Important Considerations

Coordination With Other Regulators

Depending on the structure of the proposed SPNB, regulators in addition to the OCC may have oversight and supervisory roles over the bank. In considering applications for SPNB charters, the OCC will coordinate as appropriate with other regulators to facilitate consideration of any applications or approvals that may be required by those regulators.

Continuation of Remedies

The OCC does not permit companies that are the subject of a corrective program or enforcement action by another regulator to avoid the consequences of that corrective program or enforcement action. A pending enforcement action with respect to a significant supervisory matter may be grounds for denial of a charter application. Otherwise, after consultation with the other regulator, the OCC will ensure that a company's obligation to remediate or pay penalties for any violations or deficiencies cited or identified by another regulator is carried forward and enforced through conditions imposed on an approval of an SPNB charter.

The Chartering Decision

The OCC grants approval of a charter application in two steps: preliminary conditional approval and final approval.[31] The period between the preliminary conditional approval and final approval is referred to as the organization phase.[32] The OCC will issue a final approval once it determines that all key phases of organizing the bank have been completed, all requirements and conditions for final approval have been met, and the organizers have received any other necessary regulatory approvals.

The OCC imposes certain conditions in connection with the approval of all new national bank charters, including special purpose national banks.[33] The conditions may address a variety of issues, such as guaranteeing maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan. Other conditions include ensuring that the bank does not significantly deviate from the business model proposed in its application without obtaining the OCC's prior non-objection.[34]

The OCC also will impose conditions that are specific to SPNBs or unique to an individual SPNB. For example, because SPNBs are uninsured, the OCC will require the bank to develop a contingency plan that includes options to sell itself, wind down, or merge with a nonbank affiliate, if necessary. In addition, the OCC may impose conditions similar to requirements in statutes that apply by their terms only to insured banks, for instance a condition requiring the bank to demonstrate a commitment to financial inclusion.[35]

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[31] Following review of the application, the OCC determines whether to grant preliminary conditional approval or deny the application. A preliminary conditional approval determination indicates the OCC's permission to proceed with the organization of the bank according to the business plan set forth in the application and specifies the conditions for approval. Granting preliminary conditional approval provides the organizers of the bank with assurances that the application has passed the first phase of OCC review before the organizers expend additional funds to raise capital, hire officers and employees, and fully develop policies and procedures. It is not an assurance that the OCC will grant final approval for a new bank charter.

[32] For additional information on the organization phase, see the "Charters" booklet of the *Comptroller's Licensing Manual*.

[33] The OCC also imposes a number of requirements on a bank when it grants preliminary conditional approval. Examples of such requirements include establishing appropriate policies and procedures and adopting an internal audit system appropriate to the size, nature, and scope of the bank's activities. The organizers must satisfy these requirements before the OCC grants final approval. These requirements are discussed in the "Charters" booklet of the *Comptroller's Licensing Manual*.

[34] See the "Charters" booklet of the *Comptroller's Licensing Manual* for a discussion of conditions that may be imposed in connection with a charter application. The condition regarding a significant deviation from the business plan is discussed in appendix F, "Significant Deviations After Opening."

[35] Certain provisions in the Federal Deposit Insurance Act, such as section 1831p-1 (safety and soundness standards) and section 1829b (retention of records), only apply to insured depository institutions. When a law does not apply directly, the OCC may, through a charter condition, work with the bank to achieve the goals of a particular statute or regulation, taking into account relevant differences between a full-service bank and a special purpose bank.

In addition, the OCC will impose assessments on an SPNB as a condition of approval. The OCC is funded through assessments and fees charged to the banks it supervises, and SPNBs will be subject to periodic assessments, just as other national banks are.[36] The OCC has modified the assessments it charges to other special purpose national banks to account for the banks' activities and the assets they hold.[37] The OCC would determine assessments for an SPNB based on similar factors tailored to the business model of the SPNB.

These charter conditions are enforceable and generally will remain in place until removed or modified by the OCC.[38] Compliance with these conditions will be reviewed by the OCC during the examination process.[39]

Supervision of Approved SPNBs

After the OCC issues final approval and the bank opens for business, the OCC will supervise the SPNB, as it does all other national banks, under a scheduled supervisory cycle, including on-site examination and periodic off-site monitoring. The OCC sets high expectations for the entities it supervises. Like all de novo institutions, newly chartered SPNBs will be subject to rigorous ongoing oversight to ensure that the bank's management and the board of directors are properly executing their business strategy and the bank is meeting its performance goals.

Key supervisory considerations for SPNBs are highlighted in appendix A to this Supplement. For additional information on specific areas of bank supervision such as internal controls and corporate and risk governance, applicants should refer to the booklets of the *Comptroller's Handbook*.

[36] See 12 USC 16 and 481; and 12 CFR 8.

[37] Additional assessments are required of certain national banks. See, e.g., 12 CFR 8.2(c) and 8.6(c) (additional assessments imposed on independent credit card banks and independent trust banks). As it gains experience, the OCC may amend its rules to address assessments for SPNBs.

[38] Conditions imposed in connection with a charter are considered "conditions imposed in writing" and are enforceable under 12 USC 1818.

[39] These conditions may be imposed in the preliminary approval letter and the final approval letter (together, conditional approval letters). The OCC also may require that the applicant enter into an operating agreement with the OCC. The OCC publishes all conditional approval letters on its website on a monthly basis. The OCC does not generally publish operating agreements. A conditional approval letter, however, will disclose the existence of an operating agreement. The special purpose charters section of the "Charters" booklet of the *Comptroller's Licensing Manual* has additional information on operating agreements and other documents used for some special purpose national trust banks.

Appendixes

Appendix A: Supervisory Considerations

OCC Supervisory Framework

The supervisory framework for SPNBs will incorporate core elements already in place for all national banks. These elements include an assigned supervisory office, an assigned portfolio manager, a supervisory strategy tailored to the bank's business model, and a blend of on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team. In addition to the statutory examination requirements[40] and consistent with longstanding OCC de novo supervision policy, newly chartered SPNBs will be subject to more frequent and intensive supervision in their early years of operation. The scope of supervision activities will follow a risk-based approach commensurate with the size and complexity of the institution, focusing on any elevated risks and unique supervisory challenges presented by a given SPNB. SPNB examination and supervision activities will also include frequent contact with the board of directors and bank management.

OCC executive management will assess the OCC's ability and willingness to supervise an eligible SPNB based on the OCC's risk appetite, resources, and skill sets needed. The executives will collaborate with the Office of Innovation, Legal, and Licensing staff in making their decisions on proposed SPNB charters. Similar to the OCC's supervision framework for existing special purpose banks, the OCC will identify the appropriate supervisory office for ongoing supervision. In addition, each bank will have an assigned portfolio manager who will serve as the primary point of contact and examiner-in-charge for the institution. The portfolio manager and the examination team will have subject matter expertise appropriate for the bank's business model. In addition, licensing and risk specialists, legal staff, and other subject matter experts will be assigned to each bank, as appropriate.

Rating Framework

SPNBs will be subject to the same ratings framework, including applicable specialty ratings, as other national banks. As outlined in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*, national banks are assessed in accordance with the Uniform Financial Institutions Rating System. Composite ratings are based on an evaluation of an institution's managerial, operational, financial, risk management, and compliance performance.

Under this uniform rating system, the OCC ensures that all national banks are evaluated in a comprehensive and uniform manner and that supervisory attention is focused appropriately on those banks that exhibit financial and operational weaknesses or adverse trends. The rating system, commonly referred to as CAMELS, assesses components of a bank's

[40] As national banks, SPNBs will be subject to the statutory examination cycle prescribed by 12 USC 1820(d).

performance including capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk, as well as specialty areas such as information technology, trust (if applicable), and consumer compliance.

Risk Management Framework

The OCC expects every national bank to have an appropriate risk management framework to address all relevant risks to the bank.[41] The structure, sophistication, and oversight of these systems should be commensurate with the complexity and amount of risk a bank assumes. Regardless of the bank's size or complexity, a sound risk management framework should do the following:

- **Identify risk:** Banks must recognize and understand existing risks and risks that may arise from new business initiatives, including risks posed by third-party relationships, by external market forces, or by regulatory or statutory changes. Risk identification should be a continuing process and occur at both the transaction and portfolio levels.
- **Measure risk:** Banks must have effective risk management systems that measure risks accurately and in a timely manner. A bank that does not have an effective risk measurement system has limited ability to control or monitor risk levels.
- **Monitor risk:** Banks must monitor risk levels to ensure timely review of risk positions and exceptions to risk limits. Monitoring reports must be timely, accurate, and relevant, and should be distributed to appropriate individuals to ensure action, when needed.
- **Control risk:** Banks must establish and communicate risk limits through policies, standards, and procedures that define responsibilities and authority. These limits serve as a means to control exposures to the various risks associated with the bank's activities.

The OCC employs a risk-based supervisory philosophy focused on evaluating risk, identifying material and emerging problems, and ensuring that individual banks take corrective action before problems compromise their safety and soundness or result in the unfair treatment of customers. This supervision-by-risk approach provides a consistent definition of risk and a system for assessing risks (known as the Risk Assessment System or RAS), and it integrates risk assessment into the supervisory process. The RAS is applicable to all risks identified across a bank and can include (although it is not limited to) credit risk, information technology systems and controls, operational risk, cybersecurity risk, liquidity and funds management, compliance risk, and strategic and reputation risks. Following risk evaluations, the supervisory office tailors and conducts supervisory activities based on the risks identified, and periodic testing is completed in order to validate a bank's risk assessment.

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[41] For additional information on the risk management framework, see the "Corporate and Risk Governance" booklet of the *Comptroller's Handbook*.

Corporate Governance Framework

As with all national banks, the OCC expects the governance structure for any proposed SPNB to be commensurate with the risk and complexity of its proposed products, services, and activities. The OCC expects national banks to have expertise, financial acumen, and a risk management framework that includes governance and well-defined roles among the bank's business units, support functions, and the internal audit function.[42]

The board of directors must have a prominent role in the overall governance structure by participating on key committees and guiding the bank's overall strategy and risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

Ongoing Communication

The OCC is committed to ongoing communication with the banks it supervises and with other banking regulators. This includes formal and informal conversations, meetings, examination reports, and other written communications. At a minimum, the OCC must provide a bank's board of directors a report of examination (ROE) at least once each supervisory cycle. The ROE conveys the bank's overall condition, ratings, and risk assessment summary. It also summarizes examination activities and findings identified during the supervisory cycle.[43]

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[42] Internal audit (including co-sourcing and outsourced arrangements) must be an independent function and report directly to the audit committee of the board of directors. For additional information on the audit function, see the "Internal and External Audits" booklet of the *Comptroller's Handbook*.

[43] Additional information about communications can be found in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*.

Appendix B: Financial Inclusion Commitment Guidance

Financial Inclusion Commitment

Consistent with the agency's mission to ensure fair treatment of customers and fair access to financial services, the OCC expects any entity seeking an SPNB charter to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers. The nature of that commitment will depend on the proposed bank's business model, and the types of products, services, or activities it intends to provide.

Considerations

Initial Description

In completing the charter application, each SPNB applicant should identify the financial services needs of underserved markets that could be met by the SPNB's products, services, and activities. An applicant should include a description of its financial inclusion commitment that addresses the proposed bank's

- products, services, and activities.
- anticipated markets and communities, including underserved populations or communities, including low- and moderate-income customers.
- goals, milestones, commitment measures (e.g., the applicant's loan origination volumes for lenders, average pooled account balances and transaction volumes for payment entities), and metrics (e.g., the measure as a percentage of activity in anticipated markets and communities, such as the share of lending to low- and moderate-income borrowers).

Policies and Procedures

During the organization phase, following preliminary conditional approval, the SPNB will develop policies and procedures that address the SPNB's implementation of its financial inclusion commitment.

Before final approval, the OCC will review and evaluate the SPNB's policies and procedures related to the financial inclusion commitment and will consider the following:

- The SPNB's ability, efforts, and commitment to meet various community credit and other financial service needs, including those of underserved populations or communities, based on the applicant's projected financial condition and size, economic conditions in the anticipated markets and communities, and other factors.
- Investments, partnerships, ongoing outreach, and collaboration strategies, or expected participation in governmentally insured, guaranteed, or subsidized loan programs that the SPNB will use to achieve its financial inclusion objectives.

- Other factors that reasonably bear upon the extent to which the SPNB will help meet the credit and other financial services needs of the anticipated market and community, including underserved populations or communities.
- The SPNB’s process to meet the needs of the anticipated market and community on a continual basis, including its process to update or modify its financial inclusion commitment in appropriate circumstances, and material changes to the products or services offered or the markets and communities served.

The SPNB’s commitment to financial inclusion is ongoing through the life of the charter. Financial inclusion commitment-related conditions imposed as part of any final approval will remain in place and will be reviewed for compliance during the examination process.

Exhibit N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARIA T. VULLO,

Plaintiff,

v. 17 Cv. 3574 (NRB)

OFFICE OF THE COMPTROLLER
OF THE CURRENCY, et al.,

Defendants.

------------------------------x

November 21, 2017
11:00 a.m.

Before:

HON. NAOMI REICE BUCHWALD,

District Judge

APPEARANCES

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
BY: NATHANIEL J. DORFMAN
MATTHEW L. LEVINE
JAMES CAPUTO

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
CHRISTOPHER CONNOLLY
Assistant United States Attorney

(Case called)

THE DEPUTY CLERK: Is the plaintiff present and ready to proceed?

MR. LEVINE: Yes, we are, your Honor.

THE COURT: State your name for the record, please.

MR. LEVINE: Matthew Levine for the New York State Department of Financial Services.

MR. DORFMAN: Nathaniel Dorfman for the Department of Financial Services as well.

MR. LEVINE: And with us in court is James Caputo, who is also an attorney at the Department of Financial Services.

THE DEPUTY CLERK: Is the defendant present and ready to proceed?

MR. CONNOLLY: Yes. Good morning, your Honor. Christopher Connolly, from the U.S. Attorney's Office, on behalf of the government.

THE COURT: Let me start with an apology. I should have advised you earlier that I would like today's argument to focus only on the standing, ripeness and finality issues. If we get over those, I will call you back and deal with the merits.

So let me start with some questions.

First, Mr. Connolly, the acting comptroller -- and I know there has been a new one confirmed.

MR. CONNOLLY: Yes.

THE COURT: I don't know if he is there yet.

MR. CONNOLLY: He is not. He will be there at the beginning of next week, your Honor. So Mr. Noreika is still right now the acting comptroller for a brief period.

THE COURT: That's fine.

The acting comptroller in July, at the so-called Exchequer's speech, said that the Office of the Comptroller had not received any applications for special purpose charters from fintech companies. Is that still true?

MR. CONNOLLY: That remains true, your Honor.

THE COURT: Mr. Levine, if the OCC never issues a 5.20(e)(1) charter to a fintech company, is it correct that none of the injuries which DFS alleges will ever occur?

MR. LEVINE: I believe that's correct, your Honor.

THE COURT: If that is correct, then is this case not premature?

MR. LEVINE: I would respectfully say it is not, your Honor. And there is evidence in the record already before you, which I believe establishes that.

Where I would start is not in the statements after we filed suit, but in the documents and statements before we filed suit.

So the first document that I would ask you to focus on is referenced on page 2 of their memorandum, and it's called the charters document. It's their general manual for licensing. It's like a 60-page document. I have a copy here if you'd like me to hand it up.

THE COURT: If I have trouble sleeping.

MR. LEVINE: What I would focus on is the process that they describe in there. There is a four-stage process for licensing under the OCC.

One is the pre-application meetings. They basically require you to come in and meet with them, and discuss with them your proposed application, so that they can get a sense of your business plan and make sure the application is not a waste of time. Secondly, after they do that, then the applicant files the application. The third step is consideration of the application by the OCC. And the fourth step is the determination.

The second document, which is relevant here, is Exhibit B to our complaint, which is the December 2016 document which refers to charters for fintech companies. And in that document the OCC says, We are going to follow the same process that's in our standard licensing manual for these proposed fintechs -- the prefiling meeting, the filing, the evaluation, and the decision.

And in that document the OCC says, We recommend potential applicants carefully review the OCC chartering regulation and the charters booklet -- the one I just referred to -- for a full description of the chartering application process and requirements. The OCC strongly urges groups of individuals interested in an SPNB -- special purpose national bank -- charter to engage with the OCC well in advance of filing an application.

So they are in this document in December inviting people to come in and talk, the pre-meeting.

In March, they issue the two documents, which essentially say the same thing. This is the supplement, so it's essentially a supplement to the large licensing manual that I referenced.

THE COURT: Isn't the word "draft" on every page?

MR. LEVINE: That would be elevating form over substance, your Honor. If every agency just put draft on a document, they could try to avoid a challenge until the last possible moment. I think that's what is happening here.

THE COURT: Well, we will discuss what might be the possible moment. Isn't part of -- let me let you finish.

MR. LEVINE: I was just going to say, the other thing is the law establishes when the process gets far enough such that there is really nothing left to do from the agency's point. They have said we have the authority. That's the issue here. They have said that over and over and over again in the documents and the speeches.

THE COURT: Maybe your objections will persuade them that they shouldn't exercise their authority. Why do you give up on your objections, objections that others have raised? Maybe it will have an impact.

MR. LEVINE: Well, we have written to them twice. We wrote to them in January --

THE COURT: And you wrote to them after the March documents as well, because you didn't take them as absolutely final. You put in additional comments, which they invited.

MR. LEVINE: By simply inviting comments doesn't mean the process isn't sufficiently ripe to get a decision of this court. Because they have said they have the legal authority. They have said it over and over. And there is really nothing left for them to do except grant an application, and at that point --

THE COURT: They haven't even received an application.

MR. LEVINE: They have had discussions. And that's in Acting Noreika's statement on July 7 or July 15.

THE COURT: July 19?

MR. LEVINE: Yes. He says two things:

"Does the OCC have the authority to grant national bank charters to financial technology companies that don't take deposits? The answer to that question is a rather simple yes."

Then, here is the other relevant piece, or one of the other relevant pieces. "The OCC will continue to hold discussions with interested companies while we evaluate our options."

They are having those initial discussions. Step one, stage one, which is in the December 16 paper, the March paper, and in their charters licensing manual, 60 pages long. They are taking the first step. It is not just a matter of hypothetical, they are actually acting on it. They need to do that stage one before they accept the application. So it's actually already happening, your Honor.

Again, later, in Acting Comptroller Noreika's speech, he says, "Companies interested in exploring chartering options should review the comptroller's licensing manual, charters booklet" -- the big one -- "and contact the OCC's office of innovation for initial discussion."

Initial discussion is stage one. It's their standard process. So they are acting on their standard process to go ahead and license.

So it's more than theoretical, your Honor; it is likely.

THE COURT: Your argument is, any statement made by the comptroller after you filed your case is a statement that I should ignore because it's simply a litigation-based statement. Is that correct?

MR. LEVINE: No, that's not correct. I would ask you to apply maybe some extra scrutiny.

THE COURT: Or you like some parts of what they said because they help your argument.

MR. LEVINE: I would add additional scrutiny to them.

For example, it is consistent with their prior statements, in the July post-litigation --

THE COURT: What Comptroller Curry said doesn't by law bind anybody, does it? In other words, the new comptroller is free to take a totally different position. I am not saying he's going to, but he is free to do so. Nothing that has happened binds the comptroller going forward, correct?

MR. LEVINE: The current comptroller, he was just confirmed.

THE COURT: Nothing that has happened up to now prevents the new comptroller, when he comes on Monday, from totally changing the policy leanings of, first, the prior administration, presidentially speaking, and the prior acting head of the office.

MR. LEVINE: That is correct, your Honor. And I would argue that's the case of any new agency head, to come in and undo or start to undo something that's been in place before. I think we are far enough along, because of the definitive nature of their statement about their authority and because they have started taking first steps towards licensing, I believe we are far enough along for you to make that decision. They could moot the case now. The new comptroller could just simply say, we are not going to do this, in which case we will withdraw our complaint. They haven't done it.

Yes, he has only been there a little while, but the alternative, your Honor, is we are going to end up running into court for a TRO before your Honor once they issue a license. And I would suggest that, because we are far enough along, because the statement of authority is definitive, and because they have actually said, we are already starting this process, come in and talk to us, we are meeting with people, that you can make the decision now.

Another thing I would suggest is, if your Honor has some doubts about it, we could have limited jurisdictional discovery. Yes, you have the representation from Mr. Connolly they haven't actually received an application yet, but they may be very close; they may be inviting applications; they may be days away. We don't know that.

THE COURT: Mr. Connolly, assume that I agree with you that this case is not ready for decision. At what point or what action do you acknowledge would be sufficient to moot the threshold arguments? What next step?

MR. CONNOLLY: There are at least two, and perhaps three steps that would need to be taken before we would have an injury, in fact, sufficient to confer standing or, in addition, to get over that threshold of a final agency action for purposes of APA review.

First, and most fundamentally, OCC needs to make a final determination that it's going to issue 5.20(e)(1) charters to fintech companies. They have not made that final decision. It's certainly something they are considering; it's something they have been considering for a very long time. But they have also persisted in saying that it's not their only option for supporting fintech innovation, and so you may ultimately have a different course than the one that DFS is premising its complaint upon.

So first you need a final agency decision, yes, we are going to be issuing these types of charters to fintech companies.

Then you need the consideration of applications, in other words, you have a framework in place and you have people who are applying for them. There I think you reach the point where DFS might credibly be able to say, there are going to be harms that flow from this because they have applications that are under consideration and the next step is going to be, presumably, the granting of the charter that we believe is going to lead to all of these harms.

So, at the outer limit, at least those two things need to happen. The most fundamental thing, of course, your Honor, would be the actual issuance of a charter; in other words, you put flesh on the bones of who is going to be getting these charters, under what circumstances, and then you have clearly the ability of the agency, of the state to argue there are actual or imminent harms. But we are, again, at least two or three steps removed from that at this point.

THE COURT: But as a matter of sensible policy as well as law, a policy from all perspectives -- the comptroller, DFS, potential applicants -- does it not moot the threshold argument if and when the OCC says that it has decided to proceed to accept applications from fintech companies for special purpose charters under 5.20?

In other words, once you make that final decision and you announce it, isn't that the point at which these standing and ripeness issues and final agency action issues come to an end, and come to an end sensibly? In other words, there is no benefit to having companies spend all sorts of money applying for these charters if, in fact, it turns out that a court says you don't have any right under the law to issue them. In a sense, what else do we need to know and aren't we sort of considering all of the relevant interests?

MR. CONNOLLY: Your Honor, you may well be right.

THE COURT: I am asking you to take a position, in the context of this case, as to at what point do these arguments that you have been making, which I think do have some currency, come to an end by virtue of what the comptroller decides to do?

MR. CONNOLLY: When OCC says -- and I suspect that it would be a two-part statement -- we have decided to issue 5.20(e)(1) charters to fintech companies and are accepting applications for them, in other words, the decision is made and the process is commencing, at that point, the standing arguments that the government has made and the final agency action arguments that the government has made would likely -- we would likely be in a very different posture then, your Honor. Then DFS would be able to make better arguments with respect to the harms.

THE COURT: I don't see any point in going through this a second round. At some point we ought to get clarity. Maybe your arguments are good now, but at some point they are going to evaporate. I mean, they have to evaporate at some point, if you decide to go ahead. If you never go ahead, they are happy, I'm happy; I don't know how you feel, but in any event, we are done. But if the comptroller says, we have decided to go ahead and we will accept applications, would that not be the perfect time to decide the merits before the fintech companies spend all of the money, time and effort to put in applications? They may decide to go ahead, but at least at that moment they are on notice that it's possible that a court is going to say you have just wasted your time.

MR. CONNOLLY: Correct.

THE COURT: So as a matter of sensible policy, there is nothing else -- you have taken a position. You're consistent in your position even now that you have the right to do this. But as of now, you are still saying we may be persuaded by the eloquence of New York state and others.

MR. CONNOLLY: That OCC has indicated that it believes it has this authority does not mean that it will actually exercise that authority. And that is a consistent theme that comes throughout any of the documents before the Court, including the acting comptroller's statements from July 2017.

THE COURT: Mr. Levine.

MR. LEVINE: Just two short responses to Mr. Connolly's statement.

First, the OCC could announce that determination when they issue a license to a fintech company. Nothing requires them to make an announcement beyond what they have done so far. So we could find out because an institution that we currently license sends us the letter from the OCC and says, we are licensed by the OCC, we no longer are subject to your jurisdiction. There is nothing requiring them to do anything before that.

Secondly, I believe it has already evaporated, the term you used. Their statements have evaporated. And here's where they are. They have already said they are going to consider applications. This is in Exhibit H to our complaint, the explanatory statement at page 2. "In December 2016, Comptroller Curry announced that the OCC would move forward with considering applications from fintech companies to become special purpose national banks." It's right there, and this is prior to our litigation, and this is Exhibit H, page 2.

Then, in Comptroller Curry's statement, March 6, 2017, Exhibit J to our complaint, "We will be issuing charters to fintech companies engaged in the business of banking because it is good for consumers, business, and the federal banking system."

Your Honor, they have already said we are moving forward to consider applications and we will be issuing these charters. I believe that indicates this matter is ripe for decision.

THE COURT: In Acting Comptroller Noreika's statement before the Exchequer Club in July, he said, and I quote, "That said, at this point, the OCC has not determined whether it will actually accept or act upon applications from non-depository fintech companies for special purpose national bank charters that rely on this regulation. And to be clear, we have not received, nor are we evaluating, any such applications from non-depository fintech companies."

It goes on, "While OCC has no imminent or concrete plans to use Section 5.20 to charter an uninsured special purpose fintech national bank, clearly, other statutory chartering options exist for the OCC and many fintech business models to achieve the same result."

So it seems to me that, to accept your argument, I have to basically find the acting comptroller to be lying; and, regardless of my general skepticism in the world, to ask me, to ask any court to find that a head of an agency who makes a statement that's clear on its face is lying, simply because the statement is post-litigation, I think is a very aggressive argument.

MR. LEVINE: Your Honor, we are asking to look at the totality of the allegations in our complaint. And in those totality, I believe there is sufficient evidence for you to move forward. If there isn't sufficient evidence, you can certainly order limited jurisdictional discovery.

THE COURT: The jurisdictional discovery isn't going to tell me ultimately whether the comptroller is actually going to proceed or not.

MR. LEVINE: We have no position that I took away from Mr. Connolly's statement as to when we are actually going to know.

THE COURT: I agree. Really, he is the assistant U.S. attorney in the courtroom. He is in no position to be speaking as to a future policy of the comptroller. I wouldn't ask him to do that. But I will press him on some of the standing issues.

MR. LEVINE: Sure. I would just say that today, after this argument, the new comptroller could issue a memo internally saying, accept applications, move on them, etc., and we still may not know about that.

THE COURT: What would be so awful if that happened and you came back to court and we address the merits? Let's assume on the merits you win. And, honestly, that's an assumption, not because I have a view, it's because I have really not spent the time studying the merits. So it is an honest statement that it's an assumption.

Let's assume you then win and that a fintech company loses its national charter at the end. If there is no temporary restraint, and there might not be, they exist for a few months. Or the other possibility is you lose the argument, in which case they continue. Why is that such a bad result, because it adds the other factor, which really is part of the ripeness argument. Any court would be in a better position to decide whether this special purpose charter is consistent with the law or not if we knew what the fintech entity was, what they were doing. Maybe the comptroller will require certain consumer protections that are similar to New York's. Again, you're asking that I should assume, without their taking action, that they don't view themselves as a protective agency.

MR. LEVINE: We do view them as not a protective agency, and I want to give an example of that in a moment.

Respectfully, I don't believe any further factual development is necessary here. I think the legal issue is completely teed up for your Honor's consideration. The entity that will be licensed, the fintech entity, will either lend money or pay checks, because it won't have to accept deposits.

So we know it's going to do one of those two things. Knowing that, I respectfully submit, your Honor, won't inform the legal decision at all. So I don't think there is any additional factual development that needs to be made there.

Secondly, what I would say is, in those several months, and I know your Honor would move this matter along quickly, as you do all your matters, but even in those several months, then the potential harms, if the OCC were to take over, could come into place. They will not ensure the kind of fair lending that we require, and that our enforcement actions have required. They will not ensure that payday lending doesn't occur. Here, there is no payday lending in New York. The civil usury rate is 16 percent. When those restrictions come off, they can do payday lending. They are only limited by the interest rate of the state in which they are located. That will come off in those months. Those consumers will be affected in New York. Also affected in New York, certain institutions are subject to being used to commit human trafficking, small money transmitters for example. Those protections will come off. The OCC in Washington, in the Treasury Department, doesn't care about enforcing those kind of things. We do, and even in those several months, those harms will happen.

So I submit, your Honor, it does make a difference.

THE COURT: If a special purpose charter were given to a fintech company that's currently regulated by another state, how does New York suffer an injury in fact?

MR. LEVINE: I guess it depends on the entity. If it's somebody like Western Union, obviously, all 50 states regulate Western Union to some extent or another. So if it's given to Western Union, it's certainly going to impact us. If it's a small money transmitter in Delaware, I don't know off the top of my head where we would immediately receive injury, but I certainly think it would encourage other entities --

THE COURT: Doesn't that question actually point out that there could be charters given that might not have the same impact on New York state?

I understand the situation where the company is currently regulated by New York, and I gather if they get the national charter, they no longer need to follow New York's rules. And I can see, based on the arguments you have made, why that is a direct consequence to New York and to its citizens. But what if it is, as I said, a company that's currently chartered in Hawaii, make it very far away, how is New York affected in reality if the Hawaii state chartered entity now has a federal charter?

MR. LEVINE: They can certainly try to come to New York. I guess, if they are far away, that's unlikely. They can certainly come and try to exercise their national charter here.

THE COURT: But one that's a little more hypothetical, and certainly one of your arguments, that New York state loses revenue would not be applicable at all.

MR. LEVINE: That's correct. Look, I just want to say one thing about fintechs. It's really a misnomer. To use Western Union as an example, when they got the telegraph back 100-plus years ago, it became a fintech. When Citibank started using ATMs in the 70s, it was a fintech.

THE COURT: So it's not a dirty word.

MR. LEVINE: It's not a dirty word. These are just traditional financial services, not some new class of financial services.

THE COURT: Haven't we always had national banks? Wasn't that one of those early constitutional cases that we all learned about?

MR. LEVINE: We had both national banks and state banks. They are certainly entitled -- banks are certainly entitled to go either way. We have had this wonderful system of dual regulation. We have 200-plus banks that we regulate in this state. It works well. But for these non-depository institutions that would be subject to this charter, those have been almost exclusively regulated by states for 150 years or more.

THE COURT: We tried to find, through a little Internet research, on whether the new comptroller has taken a position on special purpose national bank charters to fintech companies. Are you aware whether he has ever spoken on this topic at all?

MR. CONNOLLY: Your Honor, I am not aware of whether he has ever spoken on the topic.

MR. LEVINE: There is one thing I wanted to add, which is this. The entities likely to seek these fintech charters are not going to be a small, nice service business; they are going to be the large entities.

THE COURT: Like who?

MR. LEVINE: Western Union, like Apple Pay, entities like PayPal. PayPal has a license in every state. We regulate PayPal. PayPal does not receive deposits; it's a non-depository institution. They transmit money, they pay checks, or they make payments between parties. We license them through all the other 50 states. They would be withdrawn from our jurisdiction. Those are the entities likely to seek these charters, not a small entity in another state.

THE COURT: And they would prefer to be nationally chartered because they would rather be governed by one set of rules instead of 50 sets of rules?

MR. LEVINE: That's certainly an argument. But, also, maybe they don't want to have to comply with the strong protections for consumers and businesses that we have in New York.

THE COURT: Isn't it automatically obvious that if PayPal receives a national charter, that the charter would have fewer restrictions and controls to protect consumers?

MR. LEVINE: Yes, your Honor. Here's the example I would point to. In a slightly different procedural context, a couple of weeks ago a bank we regulated BTMU, a Japanese bank, was under our charter. They flipped to an OCC charter. They did it through a different process; not a new charter, but a conversion from a state branch to a federal branch. And I can tell you the reason they did it was to get out from under us because they had a number of problems. This has been in the press recently. They have had a number of problems, and they wanted to get out because they didn't want to solve those problems. The OCC didn't care about those problems. They put some stuff in their conversion papers to recognize they had problems but, in actuality, they really don't care; they are not known for their vigorous enforcement. So there is an argument, a strong argument, that they are seeking to avoid the protections that are in New York.

THE COURT: I am out of questions. Let me give each of you a chance to say anything that you haven't had a chance to say up to now.

Mr. Connolly.

MR. CONNOLLY: Your Honor, if the Court has no further questions for the government, I would just again reiterate, we are talking about a challenge to a decision that OCC has not made and, indeed, might not ever make. And that's really at the crux of this case, and that's why the government's motion to dismiss should be granted.

Thank you.

THE COURT: Do you have any quibble with me that at the moment, if they ever decide to proceed, that that would be a ripe and appropriate time to get to the merits?

MR. CONNOLLY: I don't want to foreclose any arguments that the government might have, depending on what posture we are in, but certainly if a decision is made to issue 5.20(e)(1) charters to non-depository fintech companies, and that decision is presumably going to come hand and glove with, the doors are open now to the acceptance of these applications, certainly then we are talking about a final decision being made and a process being in motion that DFS is certainly more plausibly going to be able to argue leads to imminent harm.

THE COURT: Mr. Levine.

MR. LEVINE: I would just say, your Honor, the key word there is presumably. Again, we have no idea how that announcement would come, whether it would be a declaration or a speech, or simply the issuance of a license, which is our greatest concern.

If your Honor is considering dismissing this case on ripeness, I would query whether your Honor would want to do it on some condition about the statement or the position of the comptroller about whether they are going to proceed or not. We believe they have already said they have, but assuming Mr. Connolly's position. Otherwise we are out of this court and we are going to have to, I think very likely, come back to you on a rush basis.

THE COURT: OK. Thank you very much. We will give you a decision as soon as we can.

MR. LEVINE: Thank you, your Honor.

MR. CONNOLLY: Thank you, your Honor.

(Adjourned)