

Memorandum

OCC Announces New Federal Charter for FinTech Firms

December 6, 2016

On December 2, the Office of the Comptroller of the Currency announced that it will begin granting limited-purpose national bank charters to financial technology, or “fintech,” companies that offer bank products and services.¹ The announcement was made in a speech by Comptroller of the Currency Tom Curry and details were set forth in a white paper published by the OCC. The federal charter would largely allow fintech companies to operate nationwide under a single set of national standards, without needing to seek state-by-state licenses or joining with brick-and-mortar banks. The OCC is now seeking comments on its white paper proposal.

The special purpose charter would be available to fintech companies that conduct fiduciary activities or at least one of the following three core banking functions: receiving deposits, paying checks, or lending money. However, the OCC has the authority to construe these activities to include bank-permissible, technology-based innovations in financial services. For example, the OCC has stated that facilitating payments electronically is “the modern equivalent of paying checks.” In general, as a special purpose national bank, a federally chartered fintech company would be permitted to engage only in activities that are permissible for national banks, although the OCC would consider on a case-by-case basis the permissibility of a new activity that a company seeking a fintech charter wishes to conduct.

By obtaining a new fintech special purpose national bank charter, a fintech company would be 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) would govern the corporate structure of the fintech company.

Once chartered by the OCC, a fintech company generally would be subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks. Statutes that by

¹ The OCC’s fintech charter white paper is available [here](#). A copy of Comptroller Curry’s speech is available [here](#).

their terms apply to national banks, such as legal lending limits and limits on real estate holdings, apply to all special purpose national banks, including fintech firms chartered as uninsured special purpose national banks. Other laws that apply to special purpose banks include the Bank Secrecy Act and other anti-money laundering laws, the economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control, and the prohibitions against 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 Act.

Some statutes, however, apply to a national bank only if it is FDIC-insured and, therefore, would not apply to an uninsured fintech company. For example, certain provisions in the Federal Deposit Insurance Act, such as safety and soundness standards, retention of records rules, as well as the Community Reinvestment Act, only apply to insured depository institutions. In addition, if a national bank is not insured, the provisions in the Federal Deposit Insurance Act governing the receivership of insured depository institutions would not apply, although the OCC recently proposed a rule that would establish a framework for the receivership of an uninsured national bank under the receivership provisions in the National Bank Act. This proposed rule primarily focuses on uninsured national trust banks, but specifically contemplates application to other special purpose national banks (such as federally chartered fintech companies).

State law would apply to a federally chartered fintech company in the same way and to the same extent as it applies to a full-service national bank. For example, state laws would not apply to a federally chartered fintech company if they would require the company to be licensed in order to engage in certain types of activity or business. National banks also have authority to lend and offer trust services nationwide subject to a uniform set of rules and authority. 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 its announcement of the new fintech charter, the OCC identified several baseline supervisory expectations for any entity seeking a new national fintech charter, including a detailed business plan, governance, capital, liquidity, compliance risk management, financial inclusion, and recovery and resolution planning, as described in more detail below. The OCC strongly encourages prospective applicants for the fintech charter to meet with the OCC prior to filing an application to discuss these baseline expectations in detail and how the expectations (and any others arising from the particular proposal) would apply to their proposed organization.

- ***Robust Business Plan:*** A well-developed business plan is a key component of any charter proposal. The OCC would expect a fintech company seeking a federal charter to clearly articulate why it is seeking a federal charter and provide significant detail about the proposed firm's activities. The business plan should be comprehensive, cover at least three years 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.

- **Governance Structure**: The OCC would expect the governance structure for any proposed federally chartered fintech company to be commensurate with the risk and complexity of its proposed products, services, and activities, as it is for other national banks. Board members must have a prominent role in the overall governance structure and must actively oversee management, provide credible challenge, and exercise independent judgment.
- **Capital and Liquidity**: Fintech applicants would be subject to minimum regulatory capital requirements prescribed by the OCC. Although fintech firms would not be subject to the standard Basel Committee capital requirements as implemented by the OCC, a fintech company would need to satisfy tailored minimum and ongoing capital requirements commensurate with the risk and complexity of its proposed activities, taking into account both quantitative and qualitative factors. In addition, fintech applicants would be expected to propose a minimum level of capital that the proposed bank would meet or exceed at all times to account for any off-balance sheet activities. As with capital, minimum and ongoing liquidity for a federally chartered fintech company would need to be commensurate with the risk and complexity of the proposed activities. In assessing the liquidity position of a fintech applicant, the OCC would consider the company's access to funds and cost of funding, projected funding sources, projected net cash flow and liquid asset positions, projected borrowing capacity, highly liquid asset and collateral positions, and the adequacy of contingency funding plans.
- **Compliance Risk Management**: The OCC would expect all fintech applicants to manage compliance risks effectively and have a strong compliance infrastructure. An applicant seeking a special purpose fintech charter would be 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 and a commitment to maintain adequate compliance resources.
- **Financial Inclusion**: As noted above, only insured depository institutions are subject to the requirements of the Community Reinvestment Act. However, distinct from any direct CRA obligation, the OCC is guided by certain related principles in determining whether to approve a charter application, which include "encouraging" the applicant "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." The OCC would expect an applicant seeking a special purpose fintech 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, and the business plan of any fintech charter applicant would need to demonstrate how the proposed bank plans to respond to the needs of the community. In addition, the OCC indicated that it may use its ability to impose CRA or other consumer-protection requirements on

fintech applicants by way of conditions to the application's approval.

- ***Recovery and Resolution Planning***: The OCC would expect a fintech applicant's business plan to include alternative business and recovery strategies to address various best-case and worst-case scenarios and to articulate specific financial or other risk triggers that would prompt 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 OCC is expected to develop and implement a formal agency policy for evaluating applications for fintech charters, including specific criteria for approval, which will be informed by the comments received on the OCC's fintech charter white paper. Comments on the OCC's fintech charter white paper are due by January 15, 2017.

For more information regarding recent developments on the OCC's new fintech charter, please contact any member of the Firm's Financial Institutions Group.

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