

Memorandum

OCC to Accept Applications for Federal FinTech Charters

August 1, 2018

On July 31, the Office of the Comptroller of the Currency (OCC) announced that it will begin accepting applications for limited-purpose national bank charters formed to provide nondepository financial technology, or “fintech,” bank products and services.¹ The federal charter will largely allow fintech businesses 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. This announcement follows efforts by prior Comptrollers of the Currency to develop a fintech charter,² and coincides with the publication of a report by the U.S. Department of Treasury that encourages the OCC’s consideration of applications for fintech charters.³

The special purpose charter will be available for newly formed or existing fintech businesses that would engage in one of the “core banking functions” of paying checks or lending money (including activities that the OCC has interpreted to be the modern equivalent of such activities, such as facilitating payments electronically). The fintech charter will not be available to companies seeking to take deposits or obtain FDIC deposit insurance. A company seeking a fintech charter would be required to meet the chartering requirements and standards applicable to all national banks.⁴

¹ See OCC Policy Statement on Financial Technology Companies’ Eligibility to Apply for National Bank Charters (July 31, 2018); Comptroller’s Licensing Manual Supplement: Considering Charter Applications from Financial Technology Company (June 2018).

² Keith A. Noreika, Acting Comptroller of the Currency, “Remarks Before Georgetown University’s Fintech Week” (October 19, 2017); Thomas J. Curry, Comptroller of the Currency, “Special Purpose National Bank Charters for FinTech Companies” (December 2, 2016); OCC Whitepaper, “Exploring Special Purpose National Bank Charters for Fintech Companies” (December 2016).

³ U.S. Department of the Treasury, “A Financial System that Creates Economic Opportunities: Nonbank Financials, FinTech, and Innovation” (July 2018).

⁴ The filing procedures for a fintech charter are substantially the same as those that would apply for any other national bank charter application.

In general, as a special purpose national bank, a federally chartered fintech bank 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. In addition, all federal fintech charters will be subject to the same safety and soundness standards that all federally chartered banks must meet, which are tailored by the OCC based on the institution's business model, size, complexity, and risks. Importantly, however, a company could acquire or organize a fintech company operating under this special purpose bank charter without becoming subject to the Bank Holding Company Act.⁵

By obtaining a new fintech special purpose national bank charter, a fintech bank 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 bank generally would be subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision (including the same "CAMELS" ratings system) as other national banks. Statutes that by 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 bank. 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, the provisions in the Federal Deposit Insurance Act governing the receivership of insured depository institutions would not apply to an uninsured fintech bank, although the OCC adopted a rule in 2016 that would establish a framework for the receivership of an uninsured national bank under the receivership provisions in the National Bank Act.⁶

State law would apply to a federally chartered fintech bank 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 bank if they would require the company to be licensed in order to engage in certain types of activity

⁵ See 12 U.S.C. § 1841(c)(2)(D). The acquisition of control of a fintech bank would, however, be subject to prior notice to the OCC. See 12 C.F.R. § 5.50(e)(2).

⁶ See 81 Fed. Reg. 92594 (December 20, 2016).

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, right to collect debts, 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.

- *Organizers, Management, and Directors:* The OCC expects organizers, managers and directors to be well qualified, with diverse experience in relevant areas (including at least some members with experience in banking or broader financial services). In addition, the OCC will consider whether the organizers, managers, and directors have other financial and business expertise and experience in highly regulated industries, as well as sufficient technical knowledge, skills, and experience to manage a technology-driven company.
- *Robust Business Plan:* All applicants for a fintech charter must submit a comprehensive business plan to the OCC. 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 define the market that it plans to serve and the products and services it will offer, and describe the fintech company's risk management framework and internal system of controls. Applicants should also provide a risk assessment with the business plan which, among other things, demonstrates an understanding of risks posed by third-party service providers, cybersecurity, Bank Secrecy Act and anti-money laundering requirements, Office of Foreign Assets Control economic sanctions obligations, consumer protection, and fair lending.
- *Permissibility of Activities:* If the permissibility of an applicant's proposed activities has not previously been established, OCC staff may advise the applicant to request a legal opinion from the OCC's Chief Counsel's Office.
- *Capital and Liquidity:* Federally chartered fintech banks will be subject to the minimum leverage and risk-based capital requirements that apply to all national banks. In addition, fintech charter 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.⁷ As with capital, minimum and ongoing liquidity for a federally chartered fintech bank would need to be commensurate with the risk and complexity of the proposed activities. A fintech charter applicant would need to demonstrate how it would maintain sufficient capital and liquidity under stressed conditions.

- *Financial Inclusion*: As noted above, only insured depository institutions are subject to the requirements of the Community Reinvestment Act (CRA). However, the OCC would expect any fintech charter applicant to demonstrate a commitment to “financial inclusion” that supports fair access to financial services and fair treatment of customers. To this end, a fintech charter applicant should describe its commitment to financial inclusion in its application, including its proposed goals, approaches, activities, milestones, commitment measures, and metrics for serving the anticipated market and community consistent with its activities, business model, and product and service offerings.

While the requirements for complying with the CRA are well-developed, the concept of “financial inclusion” is new and may require innovative approaches to compliance, particularly for fintech companies that do not plan to engage in traditional lending activities.

- *Contingency Planning*: The OCC expects a fintech charter applicant to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. Development of a contingency plan during the bank’s organization phase will be a condition to preliminary approval for a charter, and the OCC’s final approval for a fintech charter will require the bank to implement and adhere to the plan, which must be updated annually or more frequently as needed. Because a federally chartered fintech bank would be uninsured, the OCC will require the fintech charter applicant to include in its contingency plan options to sell itself, wind down, or merge with a nonbank affiliate, if necessary.

State banking authorities and the Conference of State Bank Supervisors (CSBS) may resume their efforts to challenge the OCC’s statutory authority to grant fintech charters. Separate lawsuits brought by the CSBS and New York State’s Department of Financial Services challenging the OCC’s authority were previously dismissed earlier in 2018 and 2017, respectively, for lack of ripeness. Following the OCC’s announcement, legal challenges may soon be forthcoming.

⁷ If the OCC grants a preliminary conditional approval for a fintech charter, that approval would include a condition specifying a minimum capital level the bank must maintain or exceed at all times, which would be established based on quantitative and qualitative factors.

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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