

Client Alert

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OCC Announces Special Purpose National Bank Charter for FinTech Companies

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On December 2, 2016, Comptroller of the Currency Thomas Curry confirmed that the agency will begin considering applications from FinTech companies to become special purpose national banks, saying that the OCC will charter “financial technology companies that offer bank products and services and meet our high standards and chartering requirements.” The OCC simultaneously released a white paper (White Paper) on issues associated with, and conditions for, extending national bank charters to FinTech companies. The announcement is the culmination of a number of developments at the OCC over the past several months, including issuance of a March 2016 white paper setting forth a preliminary framework for “responsible innovation” and October 2016 recommendations for implementing the framework.

In his remarks, Comptroller Curry articulated three reasons why the OCC is moving forward on special purpose FinTech charters. Specifically, Comptroller Curry said the OCC believes that: “doing so is in the public interest”; companies that “offer banking products and services should have the choice to become national banks if they wish to do so,” noting that “[m]erely making a charter available, does not create a requirement to seek one”; and that “having a clear process, criteria, and standards for fintechs to become national banks ensures regulators and companies openly vet risks and that the institutions that receive charters have a reasonable chance of success, appropriate risk management, effective consumer protection, and strong capital and liquidity.”

Comptroller Curry added that the OCC will “evaluate future fintech applications in a thoughtful and transparent manner and [put] necessary guard rails in place to ensure approvals consider safety and soundness, financial inclusion, consumer protection, community reinvestment, and corporate responsibility.”

Particularly noteworthy, the White Paper notes that the OCC will grant a special purpose national bank charter to companies that either engage in fiduciary activities or engage in at least one of the three core banking functions—(1) receiving deposits, (2) paying checks, or (3) lending money. Issuing debit cards or engaging in other means of facilitating payments electronically is, according to the OCC, the “modern equivalent of paying checks” and, therefore, this should include money transmission. The OCC is also willing to consider the permissibility “on a case-by-case basis” of any new activities that FinTech companies seeking a special purpose national bank charter would want to conduct.

As part of the White Paper, the OCC requests comment on a number of issues associated with establishing a FinTech charter. Comments are due by January 15, 2017.

This alert highlights several of the White Paper’s topics of particular significance to FinTech companies.

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RULES AND STANDARDS FOR A SPECIAL PURPOSE NATIONAL BANK

Both the White Paper and Comptroller Curry in his remarks indicated that special purpose national banks would be subject to the same laws, regulations and examinations as national banks currently supervised by the OCC. In addition, while both the White Paper and Comptroller Curry make it clear that special purpose national banks would be subject to state laws in the same way, and to the same extent, as national banks (e.g., state fair lending laws and debt collection), but that a special purpose national bank charter will eliminate, for FinTech companies, the need to obtain certain state licenses. FinTech companies that obtain a special purpose national bank charter also would benefit from interest rate exportation and federal preemption even if the special purpose national bank does not take deposits (thus not triggering the requirement to be insured by the Federal Deposit Insurance Corporation). Also, the special purpose national bank might not be subject to the Bank Holding Company Act.

The White Paper also importantly notes that special purpose national banks that do not take deposits would not be insured by the Federal Deposit Insurance Corporation (FDIC), and therefore would not be subject to laws that generally apply to insured depository institutions, including the provision under the Federal Deposit Insurance Act (FDI Act) regarding the FDIC's "back-up" examination authority, the FDI Act's prohibitions on participation by persons convicted of certain crimes in the conduct of institutions, the FDI Act's requirements regarding prompt corrective actions based on capital categories, the FDI Act's standards for safety and soundness and the Community Reinvestment Act requirements.

SUPERVISORY EXPECTATIONS AND CHARTERING PROCESS

In general, entities supervised by the OCC are subject to safety and soundness requirements, obligations to provide fair access to financial services, and the requirement to comply with applicable law. The White Paper sets out the OCC's "baseline" supervisory expectations (e.g., business plans, compliance risk management, appropriate governance structures), noting that the OCC tailors these standards to the size, complexity and risks of the supervised entity. The OCC noted that the supervisory expectations for FinTech companies will be at least comparable to the supervisory expectations for traditional national banks, including requirements related to capital and liquidity, financial inclusion, recovery, and exit strategies. However, supervisory expectations may be tailored to the particular activities of FinTech companies. FinTech companies will need to explore how to structure their business models to take advantage of the special purpose national bank charter. For example, non-depository marketplace lenders that sell loans in the secondary market would likely have lower capital requirements than those that hold the loans on their own books. The White Paper also notes the possibility that the OCC will impose additional conditions on approval of a special purpose national bank charter, including restrictions on changing business models without OCC approval, higher capital and liquidity requirements, and resolution plans.

More information on the OCC's expectations for national banks and the process for applying for a national bank charter is available in the Comptroller's Licensing Manual.¹

¹ Comptroller's Licensing Manual, "Charters" (September 2016) <https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

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REQUEST FOR COMMENT

The OCC is requesting comment on a series of issues, including:

1. The public policy benefits of, and risks to, approving FinTech companies to operate under a special purpose national bank charter.
2. Elements to consider in establishing capital and liquidity requirements for an uninsured special purpose national bank that limits the type of assets such a bank would hold.
3. The information that a special purpose national bank should provide to the OCC to demonstrate its commitment to financial inclusion to individuals, businesses, and communities, including new or alternative means (e.g., products, services) to be established in furtherance of its support for financial inclusion, and how an uninsured special purpose bank that uses innovative methods to develop or deliver financial products or services in a virtual or physical community could demonstrate its commitment to financial inclusion.
4. Whether the OCC should seek a financial inclusion commitment from an uninsured special purpose national bank that would not engage in lending, and how such a bank could demonstrate a commitment to financial inclusion.
5. Ways in which special purpose national banks not engaged in providing banking services to the public could support financial inclusion.
6. Whether and how the OCC should use its chartering authority to address gaps in protections afforded individuals versus small business borrowers.
7. Potential challenges in executing or adopting a FinTech business model to meet regulatory expectations, and the specific conditions governing the activities that the OCC should consider.
8. Actions the OCC should take to ensure that special purpose national banks operate in a safe and sound manner and in the public interest.
9. The competitive advantages a FinTech special purpose national bank would have over full-service banks that the OCC needs to address, and whether FinTech companies that do not have a full banking charter pose risks to full-service banks.
10. Whether there are particular products or services offered by FinTech companies (e.g., digital currencies) that might require different approaches to supervision to mitigate risk for both the institution and the broader financial system.
11. Ways in which the OCC could enhance its coordination and communication with other regulators with jurisdiction over a proposed special purpose national bank, its parent company, or its activities.
12. Ways in which the OCC could ensure that a special purpose national bank addresses the potentially increased risks due to the bank's concentration in a limited number of business activities.
13. Additional information, materials, and technical assistance from the OCC that a FinTech company applying for a special purpose national bank charter would find useful in the application process.

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The questions for public comment demonstrate that the OCC continues to consider the potential risks that FinTech companies could create for a rapidly evolving banking industry. The questions also indicate the OCC's struggle to address the "regulatory fairness" concerns raised by traditional banks.

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