

Client Update

OCC Greenlights Special FinTech Bank Charter

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In a speech on December 2, 2016, Comptroller of the Currency Thomas J. Curry announced that the OCC would move forward with its long-awaited plan to grant charters to FinTech companies. The speech coincided with the release of a paper, *Exploring Special Purpose National Bank Charters for FinTech Companies*, detailing the OCC's authority to grant charters for FinTech companies, as well as requesting a response from the public on related policy issues.¹ Comments are due by January 15, 2017.

In this client update, the sixth in our series on regulation of the FinTech industry,² we outline this major policy initiative and what it means for the FinTech industry.

KEY FEATURES OF A FINTECH CHARTER

Attributes Needed to Receive a Charter

The OCC's paper discusses the necessary prerequisites for a firm to obtain a charter, which include: (i) an appropriate corporate structure; (ii) engaging solely in bank-permissible activities, such as payment or lending activities; and (iii) adhering to regulatory requirements, including various consumer financial

¹ OCC, "Exploring Special Purpose National Bank Charters for FinTech Companies" (Dec. 2, 2016), available at <https://www.occ.treas.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-FinTech.pdf>; see also Thomas J. Curry, Comptroller of the Currency, Remarks Regarding Special Purpose National Bank Charters for FinTech Companies (Dec. 2, 2016), available at <https://www.occ.treas.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.

² See [Regulators Set Sights on Online Marketplace Lenders](#), Debevoise & Plimpton LLP (May 5, 2016); [Regulators Probe Marketplace Lending Business Model](#), Debevoise & Plimpton LLP (June 30, 2016); [Regulatory Developments in the FinTech Space](#), Debevoise & Plimpton LLP (Oct. 7, 2016); [Regulatory Focus on Innovation Grows: The OCC and CFPB's Differing Approaches](#), Debevoise & Plimpton LLP (Nov. 8, 2016); [Optimism and Innovation at the SEC's FinTech Forum](#), Debevoise & Plimpton LLP (Nov. 17, 2016).

protection regulations and Bank Secrecy Act and anti-money laundering requirements. Nevertheless, a key benefit granted by the charter would be the benefit of preemption under the National Bank Act (“NBA”), including “exportation” of interest rates from a bank’s home state to other states, regardless of the individual state’s usury restrictions.

Supervisory Expectations

Comptroller Curry noted that supervision is a key part of responsible innovation and that the OCC’s authority should provide sufficient flexibility to supervise the ever-evolving nature of FinTech. At minimum, firms receiving a charter will be required to meet the following supervisory requirements:

- A well-defined and developed business plan documenting a firm’s activities and activities to support financial inclusion (this business plan can be particularly important going forward as a firm considers expansionary activities);
- A governance structure that reflects the expertise, financial acumen and risk management necessary in light of the proposed business;
- Capital and liquidity that is commensurate with the risk and complexity of the proposed business, including off-balance sheet activities;
- A plan to effectively manage compliance risks (including consumer protection and anti-money laundering compliance); and
- Addressing potential recovery and resolution in the event of severe stress.

Resolution and Capital Requirements

One of the OCC’s initial concerns regarding FinTech firms with an uninsured limited purpose charter related to resolution in the event of insolvency. The OCC addressed this concern through its proposed rule detailing a receivership framework for uninsured national banks under the NBA. Comptroller Curry’s speech reinforced this point, noting that having a process in place by which to resolve FinTech firms was critical.³

In line with mitigating the risk of potential insolvency, the OCC will impose capital and liquidity requirements on FinTech firms that obtain a limited purpose national bank charter, as is the case with other national banks. These capital requirements will be tailored to the risk and complexity of each entity,

³ Office of the Comptroller of the Currency, Notice of Proposed Rulemaking: Receiverships for Uninsured National Banks (Sept. 13, 2016) available at <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-110a.pdf>.

and Comptroller Curry emphasized that capital should be looked at in the context of a firm's business model, similar to what has been done for other special purpose banks.⁴ To that end, the OCC requests comment on which elements of the FinTech business model it should consider when developing capital and liquidity requirements (Question 2).

A FLEXIBLE CHARTERING PROCESS

A key consideration of the OCC's proposal appears to be the need to maintain a flexible framework for innovation. As noted by the Comptroller, such a charter is one of several means by which FinTech firms may operate. FinTech firms may also avail themselves of a state bank charter or choose not to seek a banking charter at all. The contemplated OCC charter likely would benefit those FinTech firms that engage in national bank-type activities, which would include extending loans, facilitating payments or taking deposits. The Comptroller also expressed his view that such a charter would not require additional regulations on the part of the OCC, as it would fall under its existing chartering authority.

The paper and Comptroller Curry both stressed that the OCC would engage in a "tailored" application process for firms that decide to engage in the chartering process. Given the diverse nature of FinTech firms, Comptroller Curry remarked that the hardest aspect of this process may be to accommodate the variety of activities in which these entities engage. Nevertheless, the OCC signaled that FinTech firms would not be forced to fit into a one-size-fits-all, traditional banking model, and that the law provides the OCC with sufficient flexibility to accommodate innovative and diverse models.

To that end, the paper strongly suggests that firms review the OCC's existing chartering process and be prepared to engage actively with the OCC. The paper requests comment on the ways in which the chartering and supervision process can adapt to accommodate the diversity of FinTech firms, while also ensuring consistent application of the relevant regulatory requirements to these companies. For example, the OCC requests comment as to (i) whether there are specific challenges to adapting the FinTech business model to regulatory expectations (Question 7); (ii) whether there are specific products and services that may require a different approach to supervision (Question 10); and (iii) what actions the OCC should take to ensure such firms operate in a safe and sound manner (Question 8).

⁴ The OCC has taken a similar tailored approach to capital requirements for trust banks. See e.g., OCC, Revised Guidance: Capital and Liquidity (June 26, 2007), available at <https://www.occ.gov/news-issuances/bulletins/2007/bulletin-2007-21.html>.

Comptroller Curry expressed his view that the existing federal and state regulatory regimes would continue to work hand-in-hand, even for those FinTech firms granted a charter. Although certain state law requirements would be preempted, FinTech firms granted such a charter would still be required to comply with requirements, such as fair lending and prohibitions against unfair or deceptive acts or practices. The New York Department of Financial Services (“NYDFS”) Superintendent, Maria T. Vullo, emphasized this point in a speech shortly after the OCC’s announcement, indicating both the NYDFS’s opposition to the charter and that “New York will not allow consumer protections to fall into the void” despite the OCC’s intention to build a federal FinTech regulatory framework.⁵

AREAS FOR POTENTIAL INFLUENCE BY THE INDUSTRY

Comptroller Curry specifically called on industry participants to work with the OCC in finalizing the design of the charter. In his prepared remarks, he noted that OCC has yet to finalize a specific policy for accepting FinTech national bank charters, and that industry can take steps to inform the staff on how to design the chartering process, including with respect to capital and liquidity requirements and addressing the variance among business models.

One particular area where the OCC requests such comment is for purposes of the Community Reinvestment Act (“CRA”). Since the CRA only applies to institutions insured by the Federal Deposit Insurance Corporation (“FDIC”), FinTech firms with business models that do not require deposit insurance (*i.e.*, do not take deposits) will not be subject to CRA requirements. Nevertheless, the OCC suggests that it likely would impose CRA-like principles, such as “fair access,” “fair treatment” and “meeting the credit needs of its community,” as conditions to granting a charter to FinTech firms. Specifically, the Paper requests comment on “what types of activities and expectations the OCC should require for entities seeking a special purpose national bank charter that demonstrates their commitment to financial inclusion that supports fair access to financial services and fair treatment of customers” (Questions 4 and 5).

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Please do not hesitate to contact us with any questions.

⁵ Maria T. Vullo, Superintendent, N.Y. Dep’t of Fin. Servs., Statement Regarding the OCC Special Purpose National Bank Charters for FinTech Companies (Dec. 2, 2016), *available at* <http://www.dfs.ny.gov/about/press/pr1612021.htm>.