

Client Update

OCC Proposes Chartering Process for FinTech Firms

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On March 15, 2017, the Office of the Comptroller of the Currency (the “OCC”) issued a draft supplement to its licensing manual (the “Supplement”) setting forth proposed key components of the application and approval process for a special purpose national bank (“SPNB”) charter aimed at financial technology (“FinTech”) companies.¹ This followed the publication by the OCC of a white paper proposing the creation of the new type of charter in December 2016.² The Supplement explains the goals of the OCC in establishing the SPNB charter, including promoting growth, modernization, competition and innovation as a means towards a more efficient and inclusive financial services sector in the United States. In a separate release on the same day, the OCC also addressed comment letters it has received on the proposed SPNB charter (the “Summary of Comments”), some of which were highly critical of the proposal on both policy and practical grounds.³ The OCC seems nevertheless intent on finalizing the SPNB charter this year. We expect divided views to persist and will be closely following developments.

STEPS IN THE CHARTERING PROCESS

The proposed process of applying for an SPNB charter seems to be simply a variation on the standard national bank chartering process. Although this fact provides some certainty as to what to expect during the process, the application

¹ OFFICE OF THE COMPTROLLER OF THE CURRENCY, EVALUATING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (2017), available [here](#).

² OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016), available [here](#).

³ OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC SUMMARY OF COMMENTS AND EXPLANATORY STATEMENT: SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINANCIAL TECHNOLOGY COMPANIES (2017), available [here](#).

to FinTech companies of the stringent requirements associated with chartering a national bank has raised concerns.

According to the Supplement, a FinTech company considering the possibility of applying for an SPNB charter should contact the OCC's Office of Innovation at innovation@occ.treas.gov. At the beginning of the application process, the OCC expects to assign a licensing contact to assemble appropriate staff to discuss the process with the applicant's team: "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."⁴

Prior to the initial pre-filing meeting, the applicant is expected to provide the OCC with a detailed submission that includes, among other things, a discussion of: (a) the business plan, (b) relevant market, (c) any novel policy or legal issues, and (d) any unique aspects of the proposal. The activities of an SPNB will be limited to those permissible for national banks under a statute, regulation or federal judicial precedent, or those that the OCC has determined to be permissible. The applicant may conduct one of the following core banking activities: taking deposits, making payments on checks or lending money. However, most applicants likely would engage in activities related to paying checks or lending money, as deposit-taking would require a full-service charter.⁵ Any activity that is not part of or incidental to the business of banking should be discussed with the OCC in pre-filing conversations, after which the OCC will determine whether such activities are permissible for an SPNB. The OCC makes clear in the Summary of Comments its intention to not approve a charter for any organization engaged in general commercial activities outside the business of banking.

After the pre-filing phase, the charter applicant will follow substantially the same procedures as any national bank charter applicant, including filing the charter application, a business plan and the appropriate Interagency Biographical Report on all identified insiders. The application process includes public elements: the applicant must publish notice of its charter in the community where it will be located, there is a public comment period and a public file of the application is available on the OCC's website and to anyone who requests it, though proprietary information may be kept confidential on request.

⁴ OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 1, at 3.

⁵ Such applicants already are covered by the existing OCC licensing manual.

CHARTERING STANDARDS

In evaluating an SPNB application, the OCC is guided by certain principles: (a) maintaining a safe and sound banking system; (b) encouraging fair access to financial services by helping to meet the credit needs of the entire community; (c) ensuring compliance with laws and regulations; and (d) promoting fair treatment of customers, including efficiency and better service. The OCC will not approve proposals that are contrary to OCC or public policy, or that result in the inappropriate commingling of banking and commerce. Among other things, the OCC will consider whether the proposed SPNB: (a) has organizers and management with appropriate skills and experience; (b) has adequate capital to support the projected volume and type of business and proposed risk profile; (c) has a business plan that articulates a clear path and timeline to profitability; and, (d) if the proposed SPNB will lend or provide financial services to consumers or small businesses, includes in its business plan a financial inclusion component that appropriately describes the proposed goals, approach, activities and milestones for serving the relevant market and community. Although OCC regulations and licensing policy provide guidance regarding the qualifications and experience of organizers, management and directors, the specific products or services offered by the proposed SPNB will help determine what credentials are appropriate.⁶

The business plan is a key element of the application and must include a description of the business, a marketing plan, a management plan and financial projections. The OCC presents supplemental guidance for the FinTech SPNB, including the importance of risk management (including management of cyber-risk), the necessity of a description of the information technology and compliance management systems, and details on financial management information. The OCC may impose special conditions on a proposed SPNB, such as requiring the creation of a resolution plan, imposing capital requirements higher than proposed in the business plan, or other measures imposed through an operating agreement.

The FinTech sector's potential for providing low-cost, scalable financial services to underserved communities is a key interest of the OCC at this time, so financial inclusion likely will be an area of focus in the application process. Specifically, the OCC and the industry have focused on the possibility that applicants will be required to demonstrate financial inclusiveness as a substitute for the

⁶ E.g., 12 C.F.R. §5.1 et seq. (2015); OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL (the "Charters" and "Background Investigations" booklets are of particular relevance).

requirements of the Community Reinvestment Act. In prior statements, the Comptroller emphasized that determining financial inclusiveness will be an individualized process, and noted that FinTech companies that receive such a charter must nevertheless demonstrate “real responsibility” to serving their communities.⁷

Under the proposed regime, approval of the SPNB’s charter application will take place in two steps: preliminary conditional approval and final approval. Preliminary conditional approval, though not an assurance of final approval, allows organizers to proceed with raising capital, hiring officers and employees, developing policies and procedures and undertaking other tasks required for the establishment of the SPNB.

SUMMARY OF COMMENTS

The OCC notes in the Summary of Comments release that it received over 100 comment letters on the SPNB rule proposal, which fall into the following broad categories: general comments, consumer protection, small business protections, financial inclusion, regulatory and supervisory standards, capital and liquidity requirements, charter application process, coordination among regulators, ongoing supervision, chartering authority, and the separation of banking and commerce. Summarizing the principles that inform the Supplement, the OCC stresses the following three points:

- SPNB charter recipients will not receive “light touch” supervision or regulation.
- Predatory products and unfair or deceptive acts or practices will not be tolerated.
- SPNB charters are not a means for inappropriate commingling of banking and commerce.

Although the OCC listed these principles in the reverse order, we expect that most readers are focused on whether the SPNB charter will be some form of “regulatory sandbox.” The Summary of Comments make clear that it will not be.

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Although many commenters welcomed the SPNB charter as beneficial to the nascent FinTech industry, adoption may not occur as rapidly as the OCC intends due to the time and expense associated with the application process outlined by

⁷ Thomas J. Curry, Comptroller of the Currency, Remarks at Lendit USA (Mar. 6, 2017).

the Supplement and the lack of relaxed ongoing supervision. On the other hand, the SPNB may usher in an era of more tailored regulation and supervision that FinTech companies will find attractive as they seek to serve a national customer base.

The OCC will be accepting comments on the Supplement through the close of business on April 14, 2017. Please do not hesitate to contact us with any questions.

For additional information on developments in the FinTech world, listen to Lee Schneider's podcast, "Appetite for Disruption," with cohost Troy Paredes.⁸

⁸ "Appetite for Disruption" is available on [Stitcher](#), [iTunes](#) and other similar sources of fine audio commentary.