

CLIENT MEMORANDUM

Office of the Comptroller of the Currency to Consider Fintech Charter Applications

December 5, 2016

AUTHORS

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On December 2, 2016, the Comptroller of the Currency, Thomas J. Curry, announced that the Office of the Comptroller of the Currency (the “OCC”) will begin to consider applications from financial technology (“Fintech”) companies to become special purpose national banks (“SPN Banks”). Concurrent with the announcement, the OCC published a paper that discusses the issues that the agency will consider in granting SPN Bank charters.¹ The paper can be accessed on the OCC’s website, at <https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>, and the agency is accepting written comments from respondents until January 15, 2017. A brief summary of the paper follows.

The OCC has authority to grant charters for SPN Banks pursuant to the National Bank Act and the Home Owners’ Loan Act.² National banks are authorized to conduct business on a nationwide basis and must adhere to uniform standards

¹ Also on December 2, 2016, at a Conference on Financial Innovation at the Board of Governors of the Federal Reserve System, Governor Lael Brainard spoke on the importance of Fintech and the Federal Reserve’s engagement with Fintech market participants. A transcript of her speech is available at <https://www.federalreserve.gov/newsevents/speech/brainard20161202a.htm>.

² OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016) available at <https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>.

Office of the Comptroller of the Currency to Consider Fintech Charter Applications

Continued

and federal oversight.³ All national banks, including SPN Banks, are organized under, and governed by, the National Bank Act.⁴ An SPN Bank may limit its activities to fiduciary activities or to banking activities but if it does conduct banking activities, it must conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money.⁵ According to the OCC, the National Bank Act provides sufficient flexibility to allow full-service national banks or SPN Banks to engage in new banking activities or to employ new methods to engage in traditional activities.⁶

Generally, the same statutes, regulations, examination, reporting and supervision applicable to other national banks will apply to SPN Banks. This includes, for example, statutes that by their terms apply to national banks or that apply to an entity based on its activities, such as the Bank Secrecy Act, anti-money laundering laws, economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control, section 5 of the Federal Trade Commission Act, and the consumer protection provisions of section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁷ Additionally, the OCC's chartering regulations and licensing policies and procedures and state law apply to an SPN Bank in the same way and to the same extent as they apply to a full-service national bank.⁸ Notably, statutes that apply to a national bank only if it is FDIC-insured do not apply to an uninsured SPN Bank, but the OCC may impose requirements on an uninsured SPN Bank as a condition for granting a charter if it deems the conditions appropriate based on the risk and business model of the institution.⁹ An SPN Bank may also be regulated by the Federal Reserve, Federal Deposit Insurance Corporation or the Consumer Financial Protection Bureau depending on the structure of the bank and the activities it conducts.

The OCC has identified the following seven baseline standards for an SPN Bank applicant to consider:¹⁰ (1) the SPN Bank must have a robust business plan, (2) the SPN Bank must have a governance structure commensurate with the risk and complexity of its proposed products, services and activities, (3) the SPN Bank must have minimum and ongoing capital levels commensurate with the risk and complexity of its on- and off-balance sheet activities, (4) the SPN Bank must have minimum and ongoing liquidity commensurate with the risk and complexity of the proposed activities, (5) the SPN Bank must demonstrate a top-down, enterprise-wide commitment to compliance and maintain appropriate systems

³ The OCC has focused on national bank charters, rather than federal savings association charters, for Fintech companies because national bank charters are not subject to the asset and investment limitations and deposit insurance requirements applicable to federal savings associations.

⁴ *Id.*

⁵ *Id.* at 3

⁶ *Id.* at 4

⁷ *Id.* at 5

⁸ *Id.*

⁹ *Id.* at 6

¹⁰ *Id.* at 8

Office of the Comptroller of the Currency to Consider Fintech Charter Applications

Continued

to identify, assess, manage and monitor the compliance process, (6) the SPN Bank must demonstrate a commitment to financial inclusions that supports fair access to financial services and fair treatment of customers and if the SPN Bank is engaged in lending it must explain its commitment to financial inclusion in its business plan, and (7) the SPN Bank must identify specific risk triggers that may harm its business and develop strategies to survive the risk.

A Fintech company must apply to become an SPN Bank through the OCC's standard charter review process. The process is conducted by the OCC's Licensing Department and divided into the pre-filing, filing, review and evaluation, and decision stages as in the case of a full service national bank. The OCC notes that it may adapt requirements for a Fintech SPN Bank applicant, to the extent consistent with applicable law.¹¹

The OCC is accepting written comments to any aspect of its paper until January 15, 2017 and it is soliciting responses to the following 13 questions:¹²

1. What are the public policy benefits of approving Fintech companies to operate under a national bank charter? What are the risks?
2. What elements should the OCC consider in establishing the capital and liquidity requirements for an uninsured special purpose national bank that limits the type of assets it holds?
3. What information should a special purpose national bank provide to the OCC to demonstrate its commitment to financial inclusion to individuals, businesses and communities? For instance, what new or alternative means (e.g., products, services) might a special purpose national bank establish in furtherance of its support for financial inclusion? How could an uninsured special purpose bank that uses innovative methods to develop or deliver financial products or services in a virtual or physical community demonstrate its commitment to financial inclusion?
4. Should the OCC seek a financial inclusion commitment from an uninsured special purpose national bank that would not engage in lending, and if so, how could such a bank demonstrate a commitment to financial inclusion?
5. How could a special purpose national bank that is not engaged in providing banking services to the public support financial inclusion?
6. Should the OCC use its chartering authority as an opportunity to address the gaps in protections afforded individuals versus small business borrowers, and if so, how?

¹¹ *Id.*

¹² *Id.* at 15-16

Office of the Comptroller of the Currency to Consider Fintech Charter Applications

Continued

7. What are potential challenges in executing or adapting a Fintech business model to meet regulatory expectations, and what specific conditions governing the activities of special purpose national banks should the OCC consider?
8. What actions should the OCC take to ensure special purpose national banks operate in a safe and sound manner and in the public interest?
9. Would a Fintech special purpose national bank have any competitive advantages over full service banks the OCC should address? Are there risks to full-service banks from Fintech companies that do not have bank charters?
10. Are there particular products or services offered by Fintech companies, such as digital currencies, that may require different approaches to supervision to mitigate risk for both the institution and the broader financial system?
11. How can the OCC enhance its coordination and communication with other regulators that have jurisdiction over a proposed special purpose national bank, its parent company, or its activities?
12. Certain risks may be increased in a special purpose national bank because of its concentration in a limited number of business activities. How can the OCC ensure that a special purpose national bank sufficiently mitigates these risks?
13. What additional information, materials, and technical assistance from the OCC would a prospective Fintech applicant find useful in the application process?

If you have any questions regarding this memorandum, please contact David S. Katz (202-303-1149, dkatz@willkie.com), William R. Halaby III (212-728-8658, whalaby@willkie.com) or the Willkie attorney with whom you regularly work.

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