

## CLIENT MEMORANDUM

# Office of the Comptroller of the Currency Issues Draft Licensing Manual Supplement for Evaluating Fintech Charter Applications

March 17, 2017

## AUTHORS

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On March 15, 2017, the Office of the Comptroller of the Currency (the “OCC”), the regulator of national banks, released a draft supplement to its licensing manual as the next step in its stated plan to offer a special charter for financial technology (“fintech”) companies, such as online lenders, payment processors and others engaged in bank-permissible activities (the “Licensing Supplement”). The OCC said that it will apply existing licensing standards and requirements to fintech companies applying for special purpose national bank (“SPNB”) charters. The Licensing Supplement can be accessed on the OCC’s website [here](#). Although the OCC does not typically solicit comments on its manuals and supplements, the agency is accepting written comments from respondents through close of business April 14, 2017.

The OCC also published a summary of comments and explanatory statement (the “Comment Summary”)<sup>1</sup> that explains the OCC’s decision to issue the Licensing Supplement for public comment and addresses key issues raised by commenters to its paper, *Exploring Special Purpose National Bank Charters for Fintech Companies*<sup>2</sup> (the “SPNB Paper”).<sup>3</sup>

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<sup>1</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC SUMMARY OF COMMENTS AND EXPLANATORY STATEMENT: SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINANCIAL TECHNOLOGY COMPANIES (MARCH 2017) available [here](#).

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A brief summary of the Licensing Supplement and the Comment Summary follows.

### The Licensing Supplement

For purposes of the proposed Licensing Supplement, “SPNB” means a national bank that engages in a limited range of banking activities, including one of the core banking functions described at 12 CFR 5.20(e)(1), but does not take deposits within the meaning of the Federal Deposit Insurance Act and therefore is not insured by the Federal Deposit Insurance Corporation. In reviewing and approving SPNB charter applications, the OCC will apply the licensing standards and requirements in its existing regulations and policies. Generally, the SPNB charter application process is divided into the prefiling, filing, review and evaluation, and decision stages, as is the case of a full service national bank.

To begin the prefiling stage, an SPNB charter applicant should contact the OCC’s Office of Innovation at [innovation@occ.treas.gov](mailto:innovation@occ.treas.gov). During this stage, an applicant will be assigned an OCC Licensing contact that will help to identify potential issues with its application and begin a dialogue between the OCC and the applicant.

The charter application must be filed together with the business plan and the interagency biographical report on all identified insiders to enter the filing stage. This process is substantially the same as that applicable to any other national bank.

In the review and evaluation stage, the OCC will determine if the SPNB charter application meets the standards and policy considerations of the OCC applicable to a national bank. Notably, the OCC will consider whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving its charter will foster healthy competition.<sup>4</sup> Further, the OCC will consider the same factors, including an acceptable business plan and capital support, as it does in a national bank application when evaluating if an SPNB application is in accordance with the OCC’s underlying principles.

The Licensing Supplement tailors business plan guidance to SPNB applicants because the OCC recognizes that SPNB applicants may have innovative business structures that differ significantly from national banks. The OCC’s review of an applicant’s business plan will focus on six factors: (i) risk assessment, (ii) records, systems and controls, (iii) financial management, (iv) monitoring and revising the business plan, (v) alternative business strategy, contingency plans, recovery and exit strategies and (vi) financial inclusion plan. Note that an SPNB will be subject to the same minimum leverage and risk-based capital requirements as national banks. However, the OCC may consider other metrics related to

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<sup>2</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, EVALUATING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES (MARCH 2017) available [here](#).

<sup>3</sup> For more information on the SPNB Paper see WILLKIE FARR & GALLAGHER LLP, OFFICE OF THE COMPTROLLER OF THE CURRENCY TO CONSIDER FINTECH CHARTER APPLICATIONS (DECEMBER 5, 2016) available [here](#).

<sup>4</sup> *Id.* at 6.

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activity, such as revenue, for an SPNB with limited on-balance sheet assets, or other nontraditional strategies. Additionally, the OCC expects an SPNB charter applicant whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.<sup>5</sup>

The decision stage occurs in two steps: preliminary conditional approval and final approval. In granting preliminary conditional approval for an SPNB applicant, the OCC may place additional special requirements on SPNB charters with unique business models. For example, the OCC could require an SPNB applicant to raise a higher amount of capital than proposed in the business plan before issuing final approval. Additionally, the OCC may impose conditions on the SPNB applicant that remain in place after the bank opens for business,<sup>6</sup> such as requiring the bank to have a resolution plan to sell itself or wind down, if necessary. Finally, SPNBs will be subject to the same periodic assessments as other national banks, except that the OCC will modify the assessment it charges to SPNB to account for the scope and activities of the bank and the amount and type of assets that the bank holds.

Please note that the Licensing Supplement is intended only as a guide to the OCC's approach to key aspects of the chartering process for fintech companies. A fintech company applying for an SPNB charter should carefully review all other charter materials provided by the OCC.

### The Comment Summary

The Comment Summary discusses the more than 100 comments that the OCC received in response to the SPNB Paper it published in December. The comments fall into 10 broad categories: (i) consumer protection, (ii) small business protections, (iii) financial inclusion, (iv) regulatory and supervisory standards, (v) capital and liquidity requirements, (vi) charter application process, (vii) coordination among regulators, (viii) ongoing supervision, (ix) chartering authority and (x) separation of banking and commerce. After considering the comments, the OCC identified three threshold principles that it will take into consideration when evaluating all SPNB charter applications: (i) the OCC will not allow the inappropriate commingling of banking and commerce, (ii) the OCC will not allow products with predatory features nor will it allow unfair or deceptive acts or practices and (iii) there will be no "light-touch" supervision of companies that have an SPNB charter. Moreover, the OCC directly addressed comments by incorporating specific procedures in the SPNB application process, as highlighted below.

Several commenters expressed concern that granting a national bank charter to a fintech company would allow such a company to avoid state laws designed to protect consumers. The OCC disagreed with these comments because an SPNB charter would be subject to consistent federal consumer protection standards and federal supervision and regulation. Further, OCC commenters were concerned that the SPNB charter could open the door for predatory lenders. As stated above, the OCC confirmed that it would not approve an SPNB charter application from any company that plans

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<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.* at 14.

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to offer financial products and services with predatory, unfair or deceptive features and assured commenters that it would adequately oversee SPNB chartered banks.

The OCC received comments both encouraging and discouraging it from requiring a formal commitment to financial inclusion from SPNBs engaged in lending activities or providing financial services to consumers or small businesses. The OCC elected to require SPNBs engaged in those activities to make a commitment to financial inclusion.

Many commenters felt strongly that capital and liquidity requirements should be consistent with current national bank chartering requirements, to avoid giving an SPNB a competitive advantage over national bank chartered entities. The OCC will generally hold SPNBs to the same standard but will reduce requirements for companies with simpler business models, fewer on-balance sheet assets, or other mitigating factors.

Commenters expressed concern that having the OCC make chartering decisions on a case-by-case basis could lead to inconsistent treatment across all applications. The OCC assured commenters that it strives to make the charter application process as transparent as possible, and cited the decision to open the Licensing Supplement to public comment as evidence of its commitment to transparency.

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

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