

Federal Regulator Signals Willingness to Grant National Bank Charters to Fintech Companies

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On December 2, 2016, the Office of the Comptroller of the Currency (OCC) announced its willingness to entertain applications from financial technology (fintech) companies for special purpose national bank charters. In recent years, the fintech sector has attracted extraordinary interest from investors, institutions and innovators. For example, we have seen significant developments in peer-to-peer and electronic lending platforms, payments systems and digital money. Yet many nonbank providers of financial services have found it difficult or cumbersome to navigate state-by-state regulatory regimes originally designed for traditional, brick-and-mortar financial institutions. In addition, many such fintech companies must rely on third-party banks for access to payment systems or other support fundamental to their business models. A fintech company with a special purpose national bank charter could operate within a more uniform, national regulatory regime with reduced or no reliance on third-party banks.

While the OCC's recent announcement has garnered a lot of attention, a number of important questions have yet to be answered. How the regulators answer those questions, both through policy and in practice, will affect whether and how attractive the special purpose national bank charter will be for fintech companies.

The OCC's announcement followed its recent formation of an Office of Innovation, which will serve as the OCC's central point of contact and clearinghouse for requests and information related to innovation.¹ The OCC's recent announcement of a position on fintech charters is the next step in its policy review of the fintech sector. The announcement took the form of a speech delivered by Comptroller Thomas J. Curry at Georgetown University and the release of a related white paper. Neither document is particularly long or technical in nature. They are available [here](#). Below, we highlight seven key takeaways for fintech sector participants.

The announcement signals a policy-level willingness to entertain nontraditional business plans in fintech.

The OCC and other banking regulators are generally most comfortable and familiar with traditional bank business plans focused on diversified lending and core deposit-taking. Although not categorically precluded, single-purpose or niche business plans have historically faced skepticism with federal banking regulators. The OCC's recent announcement signals a greater willingness to entertain such plans in the context of fintech.

The idea of a special purpose national bank is not new. Such banks are authorized under existing laws and regulations and have been approved by the OCC in the past — although generally only for trust and credit card activities. The OCC has now expressed a willingness to grant special purpose national bank charters for fintech proposals that involve at least one of the following activities: fiduciary activities, deposit-taking, paying checks or lending. Importantly, the OCC explained that it views issuing debit cards or engaging in other means of facilitating payments electronically as the modern equivalent of paying checks for this purpose. The OCC also indicated that it would review, on a case-by-case basis, the permissibility of new activities that a fintech company may seek to conduct through a special purpose national bank.

¹ See "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective," Office of the Comptroller of the Currency (Mar. 2016). Even before its announcement last week, the OCC had signaled that it was moving toward permitting fintech companies to apply for national bank charters in its proposed rule for resolving uninsured national banks and in its revisions to the handbook on chartering national banks. See "Receiverships for Uninsured National Banks," 81 Fed. Reg. 62835 (Sep. 13, 2016); Office of the Comptroller of the Currency press release "Revised Comptroller's Licensing Manual Booklet" (Sep. 28, 2016).

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We expect that a wide range of fintech businesses will be eligible for consideration. We also expect that state-licensed nonbank lenders and lending platforms, as well as fintech businesses currently reliant on third-party bank partnerships, will be interested in exploring the potential benefits and costs of a special purpose national bank charter.

The OCC is not lowering its standards, which will remain rigorous.

The OCC's expression of flexibility at the policy level should not be misconstrued as a lowering (or even modification) of its legal and supervisory standards to approve a national bank charter. In its materials, the OCC makes clear that any fintech proposal will be held to the same rigorous standards applied to any national bank — both in the application process and through ongoing supervision.

The process to obtain a national bank charter is comprehensive, resource-intensive and often time-consuming. Applicants bear the burden of proving that they can meet a number of legal standards, including with respect to financial resources, board and management qualifications, prospects for success, compliance, anti-money laundering program, and convenience and needs of the community. We do not expect this to be different for a fintech special purpose national bank.

Going forward, a fintech special purpose national bank will be subject to all of the laws and regulations that apply to national banks generally. It will be regularly examined by the OCC for safety, soundness and compliance. It also will be expected to operate with the same corporate governance, internal controls and compliance systems expected of other national banks.

Many key parameters, such as capital requirements and operating conditions, will be determined on a case-by-case basis.

The OCC has broad discretion to impose conditions as part of the approval process and has signaled that it will do so in the case of fintech special purpose national banks. For example, we expect that the OCC will require such banks to hold capital and liquidity greater than that required under generally applicable regulations. In addition, we expect that the OCC will require fintech special purpose national banks to enter into "operating agreements" that establish ongoing parameters for the business, such as a requirement to obtain prior OCC approval for changes in the business plan. These key parameters will be established on a case-by-case basis based on the nature of the business model, the risk profile and the strength of the application materials.

The OCC will place great emphasis on consumer protection, fair treatment of customers and financial inclusion.

National banks are creatures of federal law that enjoy federal preemption of certain state and local laws. Federal preemption is not absolute: Many state laws are not preempted and will continue to apply to a national bank charter. Nevertheless, an important advantage of a special purpose national bank charter would be the ability to operate under a more uniform federal regulatory regime subject to OCC examination — rather than under varied state-based licenses subject to examination by numerous state regulators.

Some observers and state regulators believe that expanding the availability of federal preemption to fintech companies could be anti-consumer.² However, the OCC emphasizes that any special purpose national bank must have a well-developed consumer compliance program, treat customers fairly, and provide fair access to financial services. The OCC will expect any fintech applicant proposing to engage in lending activities to provide detailed information regarding its commitment to financial inclusion. In addition, although not required by statute, the OCC indicated that it may require special purpose national banks not insured by the Federal Deposit Insurance Corporation (FDIC) to meet standards similar to those applied to FDIC-insured institutions under the Community Reinvestment Act. The manner in which the OCC will evaluate and enforce financial inclusiveness in the fintech context is an area of uncertainty.

Other federal agencies will likely have a role in fintech proposals.

The OCC is just one of the federal banking agencies with a potential role in fintech proposals. For example, national banks (special purpose or otherwise) are generally required to become members of the Federal Reserve System. Business plans that involve deposit-taking will generally require that the special purpose national bank obtain federal deposit insurance from the FDIC. In addition, the Consumer Financial Protection Bureau also may have an oversight role with respect to a special purpose national bank's compliance with federal consumer financial law. Although these agencies have released speeches and materials about fintech generally, they have not publicly endorsed the OCC's approach and may have somewhat different agendas and considerations.

² New York State Department of Financial Services press release "[Statement by DFS Superintendent Maria T. Vullo Regarding the OCC Special Purpose National Bank Charters for Fintech Companies](#)" (Dec. 2, 2016).

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The OCC did not address potential requirements for significant shareholders and controlling parties.

The bank regulatory regime can impose potentially onerous requirements on significant shareholders and controlling parties of banks. The OCC's materials did not address how these requirements will apply in the context of fintech special purpose national banks. Based on our experience, we expect the OCC will require significant shareholders to provide detailed information regarding their personal, professional and financial background. In addition, depending on the ownership structure and characteristics of the national bank charter, significant institutional and corporate shareholders may need to comply with the Bank Holding Company Act administered by the Federal Reserve. This could make control positions untenable for many types of investors.

Finally, we note that the OCC has often required the controlling parties of special purpose national banks (such as trust banks and credit card banks) to enter into capital and liquidity main-

tenance agreements. As a practical matter, these maintenance agreements require the controlling party to guarantee the capital and liquidity levels of the bank. In our view, application of the Bank Holding Company Act or maintenance agreements to the controlling parties of a fintech special purpose national bank could present challenges for some fintech companies seeking to pursue this alternative.

The OCC is still working out the details.

The OCC's recent announcement was fairly high-level. The accompanying white paper requested feedback from interested parties by January 15, 2017, including in response to 13 specific questions. Comptroller Curry stated that the OCC would use that feedback to develop a formal agency policy with specific criteria, issues and considerations to govern the approval of any fintech special purpose national bank. At this early stage, interested parties have an opportunity to inform the OCC's approach through well-supported comments and feedback.

Contacts

Skadden provides integrated regulatory, technology, transactional and enforcement advice on complex matters in the financial services industry. We help clients obtain bank charters, raise capital, develop new products, structure and execute corporate transactions, implement compliance programs, conduct internal investigations and address enforcement actions.

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