

# Alert

## OCC Begins Accepting Fintech Charter Applications

August 1, 2018

On July 31, 2018, the Office of the Comptroller of the Currency (“OCC”) issued a [news release](#) announcing that it will begin accepting special purpose national bank (“SPNB”) charter applications from financial technology (“fintech”) companies that do not take deposits but are engaged in the business of lending money or paying checks (including the modern equivalent thereof, which the OCC suggests includes issuing debit cards or otherwise facilitating payments electronically).<sup>1</sup>

The OCC’s decision was announced shortly after the U.S. Department of the Treasury (“Treasury”) released an extensive [report](#) endorsing SPNB charters for fintech companies.<sup>2</sup> In its report, the Treasury “recommend[ed] that the OCC move forward with prudent and carefully considered applications for [SPNB] charters” and noted that fintech companies receiving such a charter “. . . should not be permitted to accept FDIC-insured deposits, to reduce risks to taxpayers.”<sup>3</sup> The Treasury also emphasized the importance that the “. . . [SPNB] charter not provide an undue advantage to newly chartered firms relative to the banks that have operated within the existing regulatory system for years.”<sup>4</sup>

As part of its announcement, the OCC also published a [Policy Statement on Financial Technology Companies’ Eligibility to Apply for National Bank Charters](#) (“Policy Statement”)<sup>5</sup> as well as a supplement to the [Comptroller’s Licensing Manual](#) (“Supplement”).<sup>6</sup> In the Policy Statement, which the OCC notes is intended to clarify its “intent to exercise its existing chartering authority,”<sup>7</sup> the OCC explains that, under the National Bank Act, it has broad authority to grant charters for national banks to carry on the “business of banking,” including the authority to grant charters for SPNBs. Because the OCC’s regulations define the “business of banking” to include any of the three core banking functions of taking deposits,<sup>8</sup> paying checks or lending money, the OCC concludes that it “has authority to grant a national bank charter to a fintech company that engages in one or more of those core banking activities.”<sup>9</sup> The Policy Statement also provides an overview of the OCC’s support for responsible innovation in the

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<sup>1</sup> See News Release, available [here](#).

<sup>2</sup> See Report, available [here](#).

<sup>3</sup> See *Id.* at p. 73.

<sup>4</sup> See *Id.*

<sup>5</sup> See Policy Statement, available [here](#).

<sup>6</sup> See Supplement, available [here](#).

<sup>7</sup> Policy Statement at 2, *supra* n.5.

<sup>8</sup> The Supplement, however, clarifies that the definition “SPNB” as used in the Supplement means a fintech company applying for an SPNB charter “. . . that would engage in one of the core banking activities of paying checks or lending money, but would not take deposits and would not be insured by the Federal Deposit Insurance Corporation (FDIC).” Supplement at 2, *supra* n.6. This is consistent with the March 2017 version of the Supplement.

<sup>9</sup> Policy Statement at 2, *supra* n.5.; see also 12 C.F.R. § 5.20.

financial services industry as well as a summary of the chartering standards for applicants and supervisory expectations applicable to fintech company SPNBs.

The Supplement is a revised version of a draft supplement published in March 2017, and is intended to (i) provide detail on how the OCC would evaluate applications from a fintech company for an SPNB charter; (ii) clarify the OCC's expectations that fintech SPNBs demonstrate a commitment to financial inclusion; (iii) explain the contingency planning each fintech SPNB will be expected to undertake and (iv) describe the OCC's approach to supervising newly chartered fintech company SPNBs.<sup>10</sup> The Supplement further provides that fintech SPNBs will be supervised like similarly situated national banks — including with respect to capital, liquidity, financial inclusion commitments and risk management, as appropriate<sup>11</sup> — and that new fintech SPNBs will be subject to heightened supervision at the outset, consistent with longstanding OCC de novo supervision policy.<sup>12</sup>

The Supplement notes the OCC's application process for an SPNB consists of four phases:

1. A prefiling phase, in which potential applicants engage with the OCC in formal and informal meetings to discuss the proposal, the chartering process and application requirements.
2. The filing phase, in which the organizers submit a complete application.
3. The review phase, in which the OCC reviews and analyzes the application to assess whether the proposed bank has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will promote fair treatment of customers, will ensure compliance with laws and regulations, and will foster healthy competition.
4. The decision phase, in which the OCC decides whether to approve a charter application. The decision phase includes the preliminary conditional approval stage, in which the OCC imposes requirements and conditions for receiving a charter; the organization stage, in which the bank raises capital and prepares for opening; and the final approval stage.<sup>13</sup>

A fintech company interested in an SPNB charter should contact the Office of Innovation at [innovation@occ.treas.gov](mailto:innovation@occ.treas.gov). While it appears the OCC is prepared to accept applications immediately, there exists the possibility that soon-to-be-filed lawsuits could jeopardize the chartering process in the near term.

For example, the Conference of State Bank Supervisors (“CSBS”) and the New York State Department of Financial Services (“NYDFS”) each filed lawsuits in 2017 challenging the OCC's original fintech SPNB charter proposal. In those lawsuits, state regulators argued that the proposal exceeded the OCC's statutory authority, and that its actions to create a new charter violated both the National Bank Act and the 10th Amendment to the Constitution, which provide that each state retains those sovereign powers not expressly delegated under the Constitution to the federal government. These lawsuits were eventually dismissed due to a lack of ripeness; that is, the cases could not proceed because the OCC had not reached a final fintech SPNB charter decision. However, it is likely that such lawsuits will be refiled in

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<sup>10</sup> Supplement at 1, *supra* n.6.

<sup>11</sup> *See Id.* at 8-10, 15.

<sup>12</sup> *See Id.* at 14.

<sup>13</sup> *See Id.* at 3-4.

the near future. Immediately following the publication of the Policy Statement and the Supplement, the NYDFS issued a statement re-emphasizing its fierce opposition to a fintech SPNB charter.<sup>14</sup>

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If you have any questions concerning this *Alert* or would like assistance in engaging with the OCC regarding an SPNB charter, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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<sup>14</sup> See Statement, available [here](#) (“[NYDFS] also strongly opposes today’s decision by the [OCC] to begin accepting applications for national bank charters from nondepository [fintech] companies. [NYDFS] believes that this endeavor, which is also wrongly supported by the Treasury Department, is clearly not authorized under the National Bank Act. As [NYDFS] has noted since the OCC’s proposal, a national fintech charter will impose an entirely unjustified federal regulatory scheme on an already fully functional and deeply rooted state regulatory landscape”).