

ALERTS

OCC Issues Draft Guidance and Requirements for Fintech Charter Applications

March 17, 2017

On March 15, 2017, the Office of the Comptroller of the Currency (“OCC”) issued a draft supplement (“Supplement”)[1] to its existing Licensing Manual[2] that provides additional detail on evaluating special purpose national bank (“SPNB”) charter applications from financial technology (“fintech”) companies that engage in the business of banking. In addition to the Supplement, the OCC also released a summary of comments and explanatory statement (“Summary”) that addresses key issues raised by commenters and explains the OCC’s decision to issue the Supplement for public comment.[3] The OCC is accepting comments on the Supplement through the close of business April 14, 2017. It should be noted that this date occurs after the term of Thomas J. Curry, the current Comptroller of the Currency (“Comptroller”), expires. Accordingly, we would not expect the Supplement to be finalized until his successor (“appointed by the President, by and with the advice and consent of the Senate”[4]) is seated. It is, therefore, quite possible that a new Comptroller appointed by President Trump could make substantial changes to the Supplement before it becomes operative.

Background

The Supplement was informed by comments received on the OCC’s December 2016 paper that discussed issues associated with issuing SPNB charters to fintech companies (“Whitepaper”).[5] The Whitepaper outlines the OCC’s authority to issue such charters, its approach to

supervising fintech companies, and its process for evaluating charter applications.

In his remarks at an industry conference on March 6, 2017 (“Remarks”), Comptroller Curry said the OCC “received more than 100 thoughtful comments” since publishing the Whitepaper and will continue with its plan to “issu[e] charters to fintech companies engaged in the business of banking because it is good for consumers, businesses, and the federal banking system.”[6]

In response to the Remarks, all 34 Republican members of the Financial Services Committee of the U.S. House of Representatives, in a letter dated March 10, 2017 to Comptroller Curry (the “GOP Letter”), urged the OCC not to “rush” the decision to “proceed with creating the special charter in the form of a supplement to the OCC’s licensing manual for banks, without providing the details of the charter or an opportunity for comment.”[7] The GOP Letter also reminded Comptroller Curry of his term’s expiration in April and emphasized that “[t]he OCC should provide a full and fair opportunity for stakeholders to see the details of the special charter, solicit feedback, and allow the incoming Comptroller the opportunity to assess the special purpose charter.”[8]

The Summary

In response to the comments received on the Whitepaper, the OCC emphasizes in its Summary that it will be guided by the following “threshold principles” when evaluating fintech company SPNB charter applications:

- The OCC will not allow the inappropriate commingling of banking and commerce.
- The OCC will not allow products with predatory features nor will it allow unfair or deceptive acts or practices.
- There will be no “light-touch” supervision of companies that have an SPNB charter. Any fintech companies granted such charters will be held to the same high standards that all federally chartered banks must meet.[9]

The OCC believes making such charters available would be in the public interest and support a “robust dual banking system by providing [fintech

companies] the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections.”[10] Further, the OCC believes its supervision of fintech companies that become SPNBs would “deepen the [OCC’s] expertise in emerging technologies that will be crucial to delivering banking products and services in the future.”[11]

While the OCC addresses several Whitepaper comments in its Summary, including those pertaining to consumer protection, capital and liquidity requirements, regulator coordination, and the OCC’s chartering authority, it does not discuss certain open issues specifically related to money services businesses or payment processors (which were raised in the comments). Additional clarification may be expected from the next Comptroller.

The Supplement

The Supplement “explains how the OCC will apply the licensing standards and requirements in its existing regulations and policies to fintech companies applying for an SPNB charter.”[12] Accordingly, fintech companies seeking such a charter would be required to satisfy the standards and requirements already in place for the formation of new national banks. The SPNB charter process for fintech companies would not be materially different from the national bank charter process for non-fintech companies.

In particular, the Supplement discusses: (i) permissible activities of the SPNB; (ii) the SPNB charter application process for fintech companies engaged in the business of banking; (iii) the OCC’s approach to evaluating such charter applications; and (iv) the OCC’s approach to supervising and examining those fintech companies that become SPNBs.

Permissible Activities of the SPNB

As noted in the Supplement, an SPNB “that conducts activities other than fiduciary activities must conduct at least one of the following three core banking activities: taking deposits, paying checks, or lending money.”[13] The Supplement, however, does not cover entities that accept deposits and therefore must be insured by the Federal Deposit Insurance Corporation.[14] “Accordingly, the OCC anticipates that SPNBs likely will elect to demonstrate that they are engaged in paying checks or lending money.”[15] Discounting notes, purchasing bank-permissible debt

securities, engaging in lease-financing transactions and making loans are examples provided by the OCC as forms of lending money.[16] In addition, the OCC notes that “issuing debit cards or engaging in other means of facilitating payments electronically may be considered the modern equivalent of paying checks.”[17] If the activities proposed by the fintech company have not previously been determined to be part of, or incidental to, the business of banking or to fall within an established core banking function, the OCC may ask the fintech company to prepare a legal analysis supporting its view that its proposed activities are permissible and fall within one of the core banking categories.[18]

Fintech SPNB Charter Application Process

According to the Supplement, fintech companies interested in an SPNB charter should make an initial inquiry with the OCC’s Office of Innovation, which is the primary point of contact for all fintech company inquiries. The Supplement also encourages prefling communications between the OCC and the fintech company.[19] After such exploratory communications, the OCC will be better equipped to identify certain aspects of the charter proposal that “present novel or complex issues.”[20]

The prefling stage may include one or more formal meetings with the OCC Licensing Division and other appropriate staff. Before such a meeting occurs, organizers for a fintech SPNB charter (“Organizers”) should provide the OCC with an overview of the charter proposal, including a discussion of the business plan.[21] Furthermore, “[t]he OCC will expect an SPNB applicant whose business plan includes lending or providing financial services to consumers or small business to demonstrate a commitment to financial inclusion,” and “the OCC will condition its preliminary approval of an SPNB charter on the applicant’s implementation of a Financial Inclusion Plan (‘FIP’).” The FIP must address the applicant’s “proposed goals, approach, activities and milestones for serving the relevant market or community.”[22]

After the prefling stage, the Organizers should file the charter application, including the business plan and the appropriate Interagency Biographical Report on all identified insiders.[23] These filing procedures “will be substantially the same as those applicable to any other national bank.”[24]

OCC Evaluation of Fintech SPNB Charter Applications

The Supplement walks through the chartering standards the OCC will apply and explains that the OCC is guided by certain principles when evaluating an application to establish any national bank.[25] To determine whether these standards are met, the OCC will consider, among other things, whether the applicant:

- Has organizers and management with appropriate skills and experience;
- Has adequate capital to support the projected volume and type of business and proposed risk profile;
- Has a business plan that articulates a clear path and a timeline to profitability; and
- Includes in its business plan, if applicable, a FIP that has an appropriate description of the proposed goals, approach, activities, and milestones for serving the relevant market and community.[26]

In addition, the “OCC’s evaluation may identify specific controls or requirements that are necessary for the success of the applicant’s business plan or to ensure the OCC’s chartering standards are met.”[27]

OCC Supervision and Examination of Fintech SPNBs

After the OCC issues final approval and the fintech SPNB becomes operational, the OCC will supervise the SPNB, as it does with all other national banks, under scheduled supervisory cycles, including on-site examination and periodic off-site monitoring. Because the Supplement is focused on the licensing process for SPNBs, it does not provide extensive guidance regarding the OCC’s supervisory expectations and the supervision of national banks. Key supervisory considerations, however, are highlighted in Appendix A to the Supplement. In general, the OCC indicates its supervisory framework will “incorporate core elements already in place for all national banks” and “will follow a risk-based approach commensurate with the size and complexity of the institution, focusing on any elevated risks and unique supervisory challenges presented by a given SPNB.”[28]

The OCC typically does not solicit comments on procedural manuals and supplements. However, “consistent with its guiding principles of transparency and fostering open dialogue with stakeholders” (and possibly with the GOP Letter in mind), the OCC is accepting comments

on the Supplement through the close of business April 14, 2017.

Comments should be submitted to
specialpurposecharter@occ.treas.gov.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] See Supplement, *available at* www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf.

[2] The OCC's Licensing Manual consists of a series of booklets that explain the OCC's policies and procedures on key licensing topics and is available on the OCC's website.

[3] See Summary, *available at* www.occ.gov/topics/bank-operations/innovation/summary-explanatory-statement-fintech-charters.pdf.

[4] 12 U.S.C. § 2.

[5] See Whitepaper, *available at* www.occ.treas.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf.

[6] See Remarks, *available at* www.occ.gov/news-issuances/speeches/2017/pub-speech-2017-27.pdf.

[7] See GOP Letter, *available at* www.s3.amazonaws.com/cdn.orrick.com/files/03102017LetterComptrollerCurry.pdf.

[8] *Id.*

[9] See Summary at 2.

[10] See *id.* at 3.

[11] *Id.*

[12] Supplement at 2.

[13] *Id.* at 5.

[14] *Id.* The Supplement defines “SPNB” as a national bank that engages in one of the core banking activities “but does not take deposits within the meaning of the Federal Deposit Insurance Act.” *Id.* at 2.

[15] *Id.* at 5.

[16] *See id.*

[17] *Id.*

[18] *See id.*

[19] “[T]he OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the process.” *See* Supplement at 3.

[20] *See id.*

[21] The Supplement provides more details regarding the submission of a business plan. *See id.* at 9-13.

[22] *See id.* at 13; *see also* Summary at 8-9.

[23] *See* Supplement at 5.

[24] *See id.*

[25] The principles are: “(i) maintaining a safe and sound banking system; (ii) encouraging a national bank or Federal savings association to provide fair access to financial services by helping to meet the credit needs of its entire community; (iii) ensuring compliance with laws and regulations; and (iv) promoting fair treatment of customers including efficiency and better service.” 12 CFR 5.20(f)(1).

[26] Supplement at 7.

[27] *Id.* The Supplement provides a detailed discussion of conditions associated with approvals. *See id.* at 13-15.

[28] For additional information on specific supervisory areas, applicants should refer to the booklets of the Comptroller’s Handbook, available on the OCC’s website.

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