UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, 1129 20th Street, N.W. Washington, D.C. 20036 Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, 400 7th Street SW, Washington, D.C. 20219 and JOSEPH OTTING, COMPTROLLER OF THE CURRENCY, 400 7th Street SW, Washington, D.C. 20219 Defendants.	Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff CONFERENCE OF STATE BANK SUPERVISORS ("CSBS") brings this Complaint for declaratory and injunctive relief against the OFFICE OF THE COMPTROLLER OF THE CURRENCY and JOSEPH OTTING, COMPTROLLER OF THE CURRENCY ("Comptroller Otting") (collectively, the "OCC"), alleging as follows:

INTRODUCTION

1. CSBS, the nationwide organization of state banking regulators in the United States, brings this action challenging the OCC's creation of a new special-purpose national bank charter for nonbank companies, including financial technology companies ("fintech") (the "Nonbank Charter Program").

2. State authorities (including CSBS's members) have been successfully overseeing and regulating nonbank institutions—including those viewed as fintech in nature—for more than a century. In addition to supervising state-chartered banks, most state banking departments regulate a variety of nonbank financial services providers, including money transmitters, mortgage lenders, consumer lenders, and debt collectors.

3. Long before the OCC's interest in these companies manifested itself in the Nonbank Charter Program, nonbanks have unquestionably been subject to state regulatory authority and state law for many decades—including but not limited to licensing, examination and reporting requirements, usury laws, and a variety of other consumer protections, such as restrictions on product terms and unfair and deceptive practices, and requirements pertaining to disclosure, investments, and net worth. Among other prudential requirements, states also impose upon these nonbank companies certain business-conduct requirements and ensure that these institutions conform to both state and federal consumer-protection and anti-money-laundering laws.

4. More recently, however, the explosive growth of the nonbank financial services industry has drawn the OCC's attention, leading to the creation of its Nonbank Charter Program. The Nonbank Charter Program pulls nonbank fintech companies that receive the charter into the national banking regulatory system, thereby preempting and displacing the licensing, regulation, and supervision responsibilities of state authorities over these institutions.

5. The OCC contends that the number of fintech companies in the United States and United Kingdom has reached more than 4,000, with investment in the sector growing from $1.8 billion to $24 billion worldwide in just the last five years. It is therefore without question that the OCC's actions to remove these nonbank companies from state oversight will have significant

economic consequences—for example, the largest 10 money transmitters alone transferred more than $685 billion in 2017.

6. The OCC formally announced its interest in nonbanks and the creation of a new national bank charter for nonbank companies in December 2016, under the leadership of then-Comptroller Thomas J. Curry ("Comptroller Curry"). In the ensuing months, the OCC went through several leadership changes and faced a previous lawsuit filed by CSBS challenging its authority under the National Bank Act ("NBA") to offer the nonbank charter. In response, the OCC (at least ostensibly) reconsidered the creation of the new charter.

7. But on July 31, 2018, the OCC clearly and unambiguously announced that it would pursue its originally announced intention to exercise its alleged power to charter nonbanks, stating that it has now begun accepting applications for nonbank charters. OCC Press Release, *OCC Begins Accepting National Charter Applications for Financial Technology Companies*, OCC (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html (attached hereto as Exhibit A).

8. On the same day, the OCC published a Policy Statement to "clarify its intent to exercise its existing chartering authority," as well as a supplement to its Licensing Manual explaining the policies and procedures governing its Nonbank Charter Program. *See* OCC Policy Statement dated July 31, 2018 and *Comptroller's Licensing Manual Supplement: Considering Charter Applications from Financial Technology Companies* (attached hereto as Exhibits B and C).

9. In announcing the commencement of the Nonbank Charter Program, the OCC made clear that the program is intended only for companies that do not take deposits and are not insured by the Federal Deposit Insurance Corporation ("FDIC"). *See* Licensing Manual

Supplement, Exhibit C at p. 2. The OCC also made its official position regarding its authority to regulate these companies clear: the OCC's chartering authority does not require that the company take deposits. *See* Press Release, Exhibit A.

10. By creating a national bank charter for nonbank companies like fintech firms, the OCC has gone far beyond the limited authority granted to it by Congress under the NBA and other federal banking laws. Those laws cabin the OCC's authority to charter only those institutions that carry on either the "business of banking" or certain special purposes expressly authorized by Congress. It is well settled by court precedent, federal banking laws, and historical chartering practice that carrying on the "business of banking" under the NBA requires, at a minimum, engaging in receiving deposits. Yet the OCC has, through its latest effort, created without express statutory authorization a new type of charter for nonbank companies that would neither carry on the business of banking (because chartered companies would not be engaged in deposit-taking), nor any expressly authorized special purpose.

11. Because creating a national bank charter for nondepository institutions, and the regulation upon which the OCC relies in doing so, are contrary to the NBA and inconsistent with other federal banking laws, the OCC has acted beyond its statutory authority and not in accordance with law.

12. Further, because the OCC established the Nonbank Charter Program without adequately considering and addressing the myriad policy implications and concerns raised by the public or conducting an adequate cost-benefit analysis, and because the OCC has not offered a reasoned explanation for its decision, its actions should be deemed not only contrary to law, but also arbitrary, capricious, and an abuse of discretion.

13. The OCC has also acted without observance of procedure required by law. The OCC has created this sweeping new nonbank charter without following the notice and comment procedures applicable to preemption interpretations under the NBA, instead opting merely to publish a high-level white paper, policy statement, and a supplement to the Comptroller's Licensing Manual and seeking public "feedback" regarding the mechanics of its new charter. Notwithstanding the significance of the nondepository financial services industry to consumers and the consequences of this new charter, the OCC has declined to pursue publicly vetted interpretations.

14. Finally, the OCC's Nonbank Charter Program allows chartered entities to operate outside the bounds of existing state regulation and preempts state law. But the OCC through its Nonbank Charter Program cannot preempt state law without clear evidence of Congressional intent to authorize the OCC to do so. Because Congress has not granted the OCC the requisite authority to charter these nonbank entities, much less expressed the intent that the OCC's nonbank charter program should preempt state law, the OCC's program violates the Supremacy Clause and the Tenth Amendment of the U.S. Constitution.

15. Moreover, this challenge to the OCC's chartering authority is now ripe for review. On April 30, 2018, the Honorable Dabney L. Friedrich found that the issuance of a Nonbank Charter was too speculative to support standing or ripeness and dismissed CSBS's prior lawsuit without prejudice. At that time, the OCC was in the midst of a leadership change and had publicly expressed uncertainty regarding whether it would move forward with the Nonbank Charter Program at all. In fact, in seeking the dismissal of CSBS's lawsuit as premature, the OCC argued it was "incontrovertible that the OCC ha[d] not decided whether to accept applications" for the Nonbank Charter Program. *See* Reply in Support of Defendant's Motion to

Dismiss, filed in *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, 1:17-cv-00763 at p. 14 (Doc. 15). The Court relied on the OCC's statements that, for example, "even if a Fintech attempted to apply, the OCC may not accept the application" (*Id.*), and ultimately determined that there were not sufficient allegations that the "OCC will issue a charter *imminently*." Memorandum Opinion at p. 5 (Doc. 19) (emphasis added).

16. Things have changed substantially since the Court's decision, however. The issuance of a Nonbank Charter is now clearly imminent. In fact, a mere three months after the Court's dismissal, the OCC publicly announced that it would move forward with the Nonbank Charter Program. As recently as October 17, 2018, Comptroller Otting has publicly stated that the OCC has had in-depth discussions with, and is vetting, several companies and expects to receive applications by the end of 2018, with charter decisions made by mid-2019. Thus, upon information and belief, multiple pre-qualified candidates have already decided to apply (and may have already applied).

17. For all of these reasons, the Nonbank Charter Program is subject to review under the Administrative Procedure Act ("APA") and cannot stand. CSBS brings this action seeking declaratory and injunctive relief declaring the OCC's Nonbank Charter Program unlawful and enjoining the OCC from continuing it.

PARTIES

18. Plaintiff CSBS is the nationwide organization of state banking and financial services regulators from all 50 U.S. states, the District of Columbia, Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa. CSBS is a 501(c)(3) corporation incorporated and headquartered in Washington, DC.

19. For more than a century, CSBS has given state bank and financial services regulators a national forum to coordinate bank and nondepository supervision and to develop regulatory policy. As the chartering and supervisory authorities for more than 75% of the banks in the United States, and the licensing and regulatory authorities for more than 20,000 nondepository financial services providers, CSBS's state regulator members are charged with protecting consumers, ensuring safety and soundness of the institutions under their authority, and encouraging economic prosperity in their states.

20. Plaintiff CSBS has standing to bring this action because (1) its members would otherwise have standing to sue in their own right; (2) the interests CSBS seeks to protect are germane to its purpose; and (3) neither the claims asserted nor the relief sought requires the participation of individual members in this lawsuit. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Indeed, courts have previously recognized CSBS's associational standing to challenge actions of the OCC. *See Conference of State Bank Supervisors v. Lord*, 532 F.Supp. 694, 695 (D. D.C. 1982); *aff'd sub nom. Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983).

21. Defendant Office of the Comptroller of the Currency is a bureau of the United States Department of the Treasury and functions as the primary supervisor of federally chartered national banks. Its offices are located at 400 7th Street S.W., Washington, DC 20219.

22. Defendant Joseph Otting is the current Comptroller of the Currency and is named in his official capacity.

JURISDICTION AND VENUE

23. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 500-596, 701 *et seq*., the National Bank Act, 12 U.S.C. § 1, *et seq.* and 12 U.S.C. § 21, *et seq.*, and the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

24. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1).

BACKGROUND

I. Depository Institutions and Nondepository Institutions ("Nonbanks") are Distinct Types of Institutions Subject to Distinct Systems of Regulation.

25. In the United States, depository institutions and nondepository institutions are different types of institutions and are subject to distinct systems of financial regulation administered by different regulatory authorities.

26. Depository institutions are entities chartered under special federal or state incorporation laws for the formation of commercial banks and savings associations that, pursuant to their corporate powers, engage in receiving deposits in addition to engaging in nondepository financial activities, including lending money and paying checks.

27. Nondepository institutions, on the other hand, are not banks. These nonbank entities are natural persons or entities organized under general incorporation laws that engage in nondepository financial activities, such as lending and transmitting money, but they do not engage in receiving deposits and are prohibited from doing so by federal and state laws.

28. In fact, the laws of every state prohibit the use of the term "bank" in naming a nondepository institution, prohibit nondepository institutions from creating the impression that they are banks, and prohibit the formation of general business corporations for the purpose of carrying on the business of banking.

29. Nondepository institutions are not subject to federal and state banking laws because they are not required to obtain a bank or other depository institution charter to simply lend or transmit money. Since the creation of the system of federal deposit insurance in 1933, federal law has prohibited institutions from taking deposits unless they obtain a depository institution charter and thereby become subject to depository institution regulation. 12 U.S.C. § 378(a)(2). Unauthorized banking laws in every state likewise treat deposit-taking as the exclusive privilege of banks and other depository institutions (like savings associations and credit unions). By restricting the activity of deposit taking to depository institutions, federal and state laws ensure that banking is subject to bank regulation, while still preserving the rights of individuals and entities to engage in nondepository financial activities.

30. Thus, the only reason that an institution seeking to engage financial activities is required to obtain a bank charter is to engage in receiving deposits, and, conversely, it is unnecessary for nonbanks to obtain a national or state bank charter simply to conduct financial activities other than deposit-taking. For this reason, a separate and distinct system of regulation has been established to regulate the financial activities of nonbanks.

31. And because depository institutions are subject to a distinct and comprehensive regulatory scheme, they are generally not bound by state licensing and regulatory requirements applicable to nonbank financial institutions. This includes the crucial state system of licensure and regulation of nonbank financial institutions providing consumer financial services.

A. Both the OCC and the States Charter and Regulate Depository Institutions Concurrently, as Part of the U.S. Dual-Banking System.

32. The federal government and state governments exercise concurrent authority over depository institutions under their respective special incorporation laws, which enable them to charter and regulate commercial banks and savings associations.

33. This allocation of chartering and regulatory authority is referred to as a "dual banking system" because depository institutions can choose to apply for a state charter issued by one of CSBS's members, or for a federal charter issued by the OCC.

34. National banks are commercial banks chartered and regulated primarily by the OCC, while state banks are commercial banks chartered and regulated primarily by their state chartering authority in conjunction with either the Federal Deposit Insurance Corporation ("FDIC") or the Federal Reserve System ("FRS").

35. National banks are required to become members of the FRS, while, for state banks, Federal Reserve membership is optional. 12 U.S.C. §§ 222 (national banks) and 321 (state banks). State banks that become members of the FRS are regulated by the FRS, while state banks that do not become members are regulated by the FDIC.

36. As a condition of Federal Reserve membership, national banks are required to apply for, obtain, and maintain deposit insurance from the FDIC. 12 U.S.C. § 222. Thus, full-service national banks chartered by the OCC must be FDIC-insured banks. Accordingly, all of the 842 full-service national banks active as of September 30, 2018 are FDIC-insured.

37. The Federal Reserve Act ("FRA"), Federal Deposit Insurance Act ("FDIA"), and other federal banking laws impose uniform prudential and safety and soundness requirements on national and state-chartered banks, including, but not limited to, generally applicable capital requirements, community reinvestment requirements, regular examination, uniform supervisory ratings, lending limits, and restrictions on unsafe and unsound banking practices. These prudential rules and requirements generally apply to "insured depository institutions" and thus become applicable upon obtaining deposit insurance from the FDIC.

38. Federal banking laws also impose restrictions on the organizational structure, control, affiliation, merger and acquisition, and conversion of national and state banks. For instance, any parent company that controls a bank is deemed a "bank holding company" pursuant to the Bank Holding Company Act ("BHCA"), and is subject to regulation and supervision by the FRS and restricted to conducting only those activities that are deemed by the FRS to be "closely related to banking." 12 U.S.C. § 1843(c)(8).

39. Lastly, in the event of insolvency, depository institutions are subject to a special resolution regime outside of bankruptcy that involves seizure of insolvent or unsound banks and resolution through an FDIC receivership. Unlike other commercial enterprises and nondepository financial institutions licensed by the states, banks are ineligible for bankruptcy. *See* 11 U.S.C. § 109(b), (d).

40. These extensive regulations applicable to depository institutions—including the prudential regulations, structural restrictions, and special resolution mechanisms mentioned above—have developed over time and in recognition that the special deposit-taking power of banks poses a special hazard to the public that necessitates the application of "cradle-to-grave" regulation to the entirety of bank operations, in order to reduce the likelihood and severity of bank failure.

41. Moreover, as recompense for the unparalleled stringency and intrusiveness of depository institution regulation, depository institutions are given certain regulatory privileges not afforded other institutions. One of the most significant privileges afforded depository institutions is federal preemption of state law and regulation.

B. CSBS's Member States (Not the OCC) Have Always Had Primary Responsibility For Licensing and Regulating Nondepository Financial Institutions ("Nonbanks").

42. For more than a century, states have regulated nonbank financial activities by requiring all persons and corporations to obtain a state license to engage in such activities in a business capacity.

43. These state laws impose licensing and other regulatory requirements on nondepository financial institutions providing certain consumer financial services and delegate the authority to regulate and supervise such institutions to the state banking and financial agencies that are CSBS's members. Generally, nondepository institutions must obtain a license in every state in which they seek to engage in activities subject to licensure.

44. The nondepository financial activities subject to licensing and regulation by the states generally include mortgage lending and servicing, consumer lending and servicing, money-services businesses and money transmission, debt collection, credit-service businesses, credit bureaus, payday lending, title lending, auto lending and auto loan servicing, and student lending and student-loan servicing.

45. State laws impose product restrictions on these nondepository institutions, such as restrictions on interest rates and finance charges. State laws also impose business conduct requirements—such as prohibitions on unfair, abusive, or deceptive acts and practices; restrictions on predatory lending; customer communication restrictions; disclosure requirements; permissible investment requirements; and net worth requirements.

46. Every state regulates certain nondepository financial activities, such as mortgage lending. And 49 of the 50 states regulate other nondepository financial activities, such as consumer lending and money transmission.

47. For instance, the 49 states that heavily regulate consumer lending require the licensure and regulation of institutions engaging in the business of lending money to persons on an unsecured basis below a certain amount and/or above a certain percentage rate. Some, but not all, of these laws apply to commercial lending in addition to lending for household, family, and personal purposes. *See* Survey of State Licensing and Regulatory Laws for Nonbank Mortgage Lending, Consumer Lending, and Money Transmission ("State Licensing/Regulatory Law Survey") (attached hereto as Exhibit D).

48. Additionally, 49 states license and regulate institutions performing money transmission and other money-transfer services. *See* State Licensing/Regulatory Law Survey, Exhibit D. Such laws generally apply to businesses that provide check cashing, currency exchange, or money transmitting or remittance services, or issue or redeem money orders, traveler's checks, and other similar instruments.

49. All 50 states require any person or company that negotiates, makes, or offers to make mortgage loans to obtain a mortgage lending license. *See* State Licensing/Regulatory Law Survey, Exhibit D. Under these licensing laws, nonbank mortgage lenders are subject to restrictions on product terms and business conduct, as well as pre-licensure and continuing education standards and character and fitness requirements. These requirements conform to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act"), which set minimum standards for state licensure of nonbank mortgage lenders and called for the states to establish the Nationwide Mortgage Licensing System ("NMLS"), administered by CSBS. Today, NMLS serves as the system of record for state licensure of nonbank money transmitters, consumer lenders, and other licensed nonbank financial institutions.

50. Thus, CSBS's members license and regulate the activities of lending money and transmitting money (the functional equivalent of paying checks, per the OCC's interpretation) when performed by nondepository institutions. These are merely some of the state laws that have long governed nonbanks, as part of the states' century-old oversight of these companies.

II. The National Bank Act Allows National Banks to Escape the Application of State Law Under Certain Circumstances.

51. The NBA and the OCC's implementing regulations preempt a number of state laws, including but not limited to state laws authorizing state regulation of national banks, state laws that conflict with a national bank's exercise of its powers, and state usury laws.

52. Under the NBA, national banks are subject exclusively to the regulatory authority of the OCC and, thus, state laws authorizing state bank regulators to apply state regulation to national banks and otherwise supervise and examine national banks are expressly preempted. 12 U.S.C. § 484; 12 C.F.R. § 7.4000 (2018).

53. Furthermore, under the NBA, "state consumer financial laws" that "prevent or significantly interfere" with a national bank's exercise of its powers are preempted. *See* 12 U.S.C. § 25b. In its regulations, the OCC has listed certain categories of state laws that are said to be preempted under this standard—such as state laws governing loan terms, interest rates, advertising, and disclosure. 12 C.F.R. §§ 7.4007, 7.4008; 34.4 (2018).

54. These regulations also provide that any state licensing laws that require national banks to obtain a license or to register with the state before exercising a federally-granted authority—including the activities of lending and transmitting money—are preempted because they interfere with a national bank's exercise of its powers and conflict with the OCC's exclusive visitorial authority over national banks. 12 C.F.R. §§, 7.4008(d)(1); 7.5002(c); 34.4(a)(1) (2018).

55. Moreover, Section 85 of the NBA expressly preempts state usury laws in certain circumstances. For example, under the "most favored lender" reading of Section 85, the maximum rate permitted to be charged on loans extended by national banks is the rate of interest allowed by the laws of the state where the bank is located, even if that rate is higher than the rate permitted by state law for state banks. 12 U.S.C. § 85; 12 C.F.R. §§ 7.4001(b).

56. Additionally, Section 85 permits the interstate "exportation" of interest rates—allowing the bank to apply the maximum permissible rate in the state in which the bank is located to loans to customers residing in a different state, even if the rate exceeds the highest permissible rate in that state. 12 USC § 85. Further, "interest" under Section 85 has been interpreted to include a wide variety of finance charges and fees and preempts conflicting state law definitions of interest. 12 U.S.C. § 85; 12 C.F.R. § 7.4001(c).

57. As the OCC has stated, this extensive preemption is the primary reason nonbank financial institutions, including "fintech" companies, are interested in applying for the Nonbank Charter.

A. Allowing Nondepository Institutions (Nonbanks) to Escape the Application of State Law is Not Good Policy and is the Type of Preemption Congress Has Acted to Restrict.

58. As recent history has shown, given the broad nature of NBA preemption, its extension to nondepository institutions is not good public policy. Indeed, it is widely accepted that by extending NBA preemption to nondepository mortgage company subsidiaries of national banks, and by asserting preemption of state anti-predatory lending laws from the mid-1990s to the early 2000s, the OCC played a pivotal role in laying the legal foundation for the subprime lending abuses that bore out during the financial crisis in the years that followed. *See* Arthur E.

Wilmarth Jr., *The Dodd Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893, 897-918 (2011).

59. To correct the OCC's regulatory overreach, Congress enacted the Dodd-Frank Act in 2010, amending the NBA to rescind the OCC's extension of NBA preemption to nondepository subsidiaries of national banks, making those subsidiaries subject to state consumer financial laws. *See* 12 U.S.C. § 25b(b)(2), (e), (h). Congress also took significant steps to limit the OCC's authority to preempt state consumer financial laws, including through the imposition of new procedural and evidentiary requirements and heightened standards of review. *See* 12 U.S.C. § 25b(b), (c), (d), (g).

60. State government officials have unique expertise in the banking practices and market conditions in their communities, which makes them uniquely situated to recognize and act upon consumer financial protection issues. Due to their proximity to the consumers and communities they are charged with protecting, and their accountability to state legislatures that promulgate state consumer financial law, state regulators are best positioned to apply, interpret, and enforce state consumer financial laws, as compared to centralized federal agencies.

61. Additionally, for more than a century, state banking regulators have led the way in promoting and enabling financial innovation, being the first to allow such new ideas as interest-bearing checking accounts, home equity loans, and automated teller machines—innovations that were subsequently adopted in the national banking system.

62. Importantly, regulators in the dual-banking system have enabled the emergence of these innovations by embracing and building upon the essential attributes that make a bank what it is, not by denying those attributes and deconstructing banking simply to enable the circumvention of existing regulatory systems.

63. Ultimately, the dual-banking system thrives as intended—not when bank regulators enable arbitrage by seeking to exploit purported ambiguity in foundational statutory terms with well-settled meanings (as OCC has done here)—rather, when bank regulators embrace the dynamic of competitive federalism to encourage banks to deliver innovative solutions that further the purpose for which they are chartered; namely, to carry on the business of banking.

III. The OCC's Statutory Power is Limited to Chartering National Banking Associations for "Carrying on the Business of Banking."

64. The NBA, enacted in 1863 and substantially revised in 1864, created the national banking system and established the OCC as a bureau within the Treasury Department with responsibility for supervising these federally chartered banks. *See* 12 U.S.C. § 1, *et seq.*; 12 U.S.C. § 21, *et seq.* (Title LXII of the Revised Statutes).

65. The OCC is responsible for ensuring federally chartered banks' safety and soundness, compliance with federal banking laws, and compliance with federal laws regarding fair access to financial services and fair treatment of customers. 12 U.S.C. § 1(a). The OCC is authorized to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

66. The NBA is a bank incorporation law enabling the chartering of national banks. Under the NBA, national banks are formed for "carrying on the business of banking," 12 U.S.C. § 21, and are granted the powers necessary to pursue this purpose. 12 U.S.C. § 24. To organize a national bank, the NBA requires incorporators to file articles of association and an organization certificate with the OCC. 12 U.S.C. § 21-22. For the OCC to be authorized to grant the charter, the association must be "lawfully entitled to commence the business of banking" and formed for the "legitimate objects" contemplated by the NBA. 12 U.S.C. § 26-27.

A. The Essential, Unambiguous Meaning of the "Business of Banking" Necessarily Includes the Receiving of Deposits.

67. The NBA, both on its own and when read together with other federal banking laws, specifies the minimum, essential meaning of the "business of banking." Indeed, the text of the Act, judicial interpretations of the Act, and subsequently enacted federal banking laws interrelated with the Act—including the FRA, Banking Act of 1933, FDIA, and BHCA—all indicate that engaging in receiving deposits is a necessary condition of carrying on the banking business under the NBA.

68. First, the plain language of the NBA chartering provisions require incorporators to identify in the organization certificate the place where the national bank's "operations of discount and deposit are to be carried on" and refers to such operations elsewhere as "the general business of each national bank association." 12 U.S.C. §§ 22, 81. This provision of the NBA, unmodified since the Act's passage in the 1860s, gives a clear indication that, in enacting the NBA, Congress identified deposit taking as an indispensable function necessary to carry on the business of banking.

69. Additionally, in interpreting the meaning of the business of banking under the NBA, the OCC has stated that "the National Bank Act essentially reduces the business of banking, in perhaps its simplest form, to accepting deposits, making loans, *and* paying checks." *See* 1985 OCC QJ LEXIS 812, *21-22 (emphasis added), *cited with approval in Dep't of Banking & Consumer Fin. v. Clarke*, 809 F.2d 266, 270 (5th Cir. 1987) ("Congress has defined the business of banking, stripped to its essentials, as accepting deposits, paying checks, *and* making loans"), *cert denied* 483 U.S. 1010 (1987) (emphasis added). Thus, the OCC and the courts have previously interpreted and defined the business of banking as requiring engaging in all three core banking functions, including the function of receiving deposits.

70. More generally, courts that have interpreted the term "business of banking" as used in the NBA have taken note of the essential nature of deposit taking. *See*, *e.g.*, *United States v. Philadelphia National Bank*, 374 U.S. 321, 326 (1963)("[c]ommercial banks are unique among financial institutions in that they alone are permitted by law *to accept demand deposits*.") (emphasis added). Indeed, as put by the Ninth Circuit, "the deposit and withdrawal of funds 'are services provided by banks since the days of their creation. Indeed, such activities define the business of banking.'" *See Gutierrez v. Wells Fargo Bank*, 704 F.3d 712, 723 (9th Cir. 2012) (quoting *Bank of Am. v. City & Cty. of S.F.*, 309 F.3d 551, 563 (9th Cir. 2002)).

71. Additionally, other federal banking laws that have a practical interrelation with the NBA confirm that receiving deposits is required to carry on the business of banking.

72. For example, in order to comply with the NBA requirement that the applicant be "lawfully entitled to commence" the business of banking (12 U.S.C. §§ 26-27), the FRA requires that an applicant be capable of becoming a member of the FRS and an insured bank under the FDIA upon "commencing business." 12 U.S.C. § 222. A national bank that fails to become (or cannot become) an FRS member and obtain deposit insurance from the FDIC forfeits "all of the rights, privileges, and franchises" granted to it under the NBA. 12 U.S.C. § 501a.

73. However, a national bank cannot obtain deposit insurance unless it takes deposits, because the FDIA expressly requires that a national bank be "engaged in the business of receiving deposits, other than trust funds" to be eligible to be an "insured bank." 12 U.S.C. § 1815(a)(1). Therefore, absent specific congressional authorization, a national bank must, *at a minimum*, be "engaged in the business of receiving deposits" in order to comply with obligations imposed under the FRA and FDIA and thereby be "lawfully entitled to commence the business of banking" under the NBA.

74. Additionally, through the definition of "bank" in the BHCA, 12 U.S.C. § 1841, *et seq.,* Congress likewise has recognized that receiving deposits is a required function in order to be engaged in the "business of banking." The BHCA definition of "bank" and the NBA term "business of banking" should be interpreted together in a coherent fashion because they serve a similar purpose of restricting entry into the banking system. *See Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 417-26 (1965).

75. Section 2(c)(1) of the BHCA defines a "bank" to include an institution that, at a minimum, engages in the business of receiving deposits. *See* 12 U.S.C. §§ 1841(c)((1)(A) and (B). Congress purposely crafted this definition to ensure that it covers all institutions chartered to carry on the business of banking, and thus its focus on deposit-taking represents a recognition by Congress that receiving deposits is necessary to carry on the banking business. Accordingly, any definition of the "business of banking" in the NBA that does not require receiving deposits is plainly in conflict with the BHCA and undermines the intent of Congress in restricting entry into the banking system.

76. Lastly, in prohibiting receiving deposits without obtaining a bank charter, the federal and state unauthorized banking laws and the extensive body of precedent interpreting these laws indicate that deposit-taking is a function indispensable to engaging in the business of banking. *See*, *e.g.*, 12 U.S.C. § 378(a)(2); *Davis v. W.J. West & Co.*, 127 Ga. 407 (1907).

77. The fundamental proposition underlying these laws is that institutions may conduct all manner of financial activities (some of which, such as lending and transmitting money, may even be core to the banking business), but it is only when financial activities are conducted in concert with the function of receiving deposits that those activities take on the character of banking activities.

78. In sum, read together and in a manner consistent with other banking laws, the NBA must be interpreted to reflect the consistent, settled understanding of Congress and the courts that engaging in receiving deposits is indispensable to "carrying on the business of banking."

IV. The OCC's Authorization to Issue Special-Purpose Charters Is Limited to Specific Categories of Special Purpose National Banks.

79. The Nonbank Charter Program is not the first time OCC has exceeded the limits of its chartering authority. Each time the OCC has created charters for entities that would not be engaged in the business of banking, the courts struck down those efforts, concluding that OCC is not empowered by the NBA to charter such institutions unless specifically authorized by Congress.

80. For example, in 1977 a federal district court rejected the OCC's efforts to charter a national bank whose activities would be limited to the fiduciary services provided by a trust company—holding that the OCC lacked authority to charter an institution that would not engage in the business of banking, including receiving deposits. *National State Bank v. Smith*, No. 76-1479 (D. N.J. Sept. 16, 1977), *rev'd on other grounds*, 591 F.2d 223 (3d Cir. 1979).

81. In response to this defeat, the OCC asked Congress to expand its authority. It requested from Congress an amendment to the NBA that would specifically authorize the Comptroller to charter national trust banks. Congress adopted the requested amendment in 1978 as part of the Financial Institutions Regulatory and Interest Rate Control Act ("FIRIRCA"), 12 U.S.C. § 27(a). Congress thereby gave the OCC specific authorization to create national trust banks, the first type of special-purpose chartering authority conferred upon the OCC.

82. In the following decade, a federal district court once again blocked the OCC's efforts to issue special-purpose charters beyond its authority, granting an injunction prohibiting

the OCC from issuing special-purpose charters to "nonbank banks" —that is, institutions chartered by the OCC that escaped regulation under the BHCA because they either did not accept demand deposits or make commercial loans and thus did not qualify as "banks." *Independent Bankers Assn. of America v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529, Fed. Banking L. Rep. (CCH) P86, 178 (M.D. Fla. Feb. 15, 1985). The court held that the activities included in the definition of "bank" under the BHCA constitute the minimum, essential elements of the "business of banking" under the NBA and, accordingly, "a financial institution that is legally unable to engage in both activities cannot engage in the 'business of banking' within the meaning of the NBA." *Id*.

83. Following the OCC's defeat in *Conover*, Congress declined to adopt legislation extending to the OCC the special-purpose chartering authority it had attempted to assert with respect to "nonbank banks." To the contrary, Congress took steps to codify the *Conover* ruling by amending the BHCA, through the Competitive Equality Banking Act ("CEBA"), to make it clear that financial institutions that do not accept deposits are not "banks." *See* 12 U.S.C. § 1841(c); s*ee also* S. Rep. No. 100-19, at 7 (1987).

84. Ultimately, the OCC is permitted to charter a national bank only: (1) where the institution is organized to carry on "the business of banking," which, under current law, includes (at a minimum) taking deposits—and thus is a "full-service national bank"—or (2) where Congress has taken specific legislative action to allow the OCC to charter an entity to carry on a special purpose other than the business of banking—and thus is a "special purpose national bank."

85. Currently, Congressional authorization exists to charter only two categories of special purpose national banks: trust banks and banker's banks. 12 U.S.C. § 27(a)(last sentence) and (b). Specific legislative authorization was required for trust banks and banker's banks

because solely providing fiduciary services or correspondent banking services did not, under existing law, qualify as carrying on the business of banking. This would not have been necessary if OCC already possessed the broad authority it now claims.

THE OCC'S NONBANK CHARTER PROGRAM

I. The OCC's Announcement of the Nonbank Charter Program in 2016 Meets with Objections and Concern.

86. In March 2016, the OCC issued a "white paper" announcing that it had begun an initiative to study innovation in the federal banking system, to include, among other things, evaluation of the opportunities and risks presented by rapid advances in financial technology. *See* "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective," dated March 2016 (available at https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf).

87. In September 2016, the OCC communicated to the public that it was considering as part of its innovation initiative the creation of a special-purpose bank charter for nonbanks. *See* Proposed Rulemaking, *Receiverships for Uninsured National Banks*, 81 Fed. Reg. 62,835 (Sept. 13, 2016) (to be codified at 12 C.F.R. pt. 51). The proposed rulemaking noted that the OCC was "considering how best to implement a regulatory framework that is receptive to responsible innovation, such as advances in financial technology," as well as "considering whether a special-purpose charter could be an appropriate entity for the delivery of banking services in new ways." *Id*. at p. 62,837.

88. Although this proposed rulemaking did not itself authorize a special-purpose charter for nonbanks, the connection to a potential special-purpose charter was clear, and it triggered significant public concern. This included a letter from CSBS noting that state banking regulators were opposed to a potential national charter for nonbank companies for a variety of

reasons. CSBS made clear its view that the OCC lacked statutory authority to issue these nonbank charters and that such charters "would distort the marketplace for financial services and undermine State laws and regulations governing financial services." *See* Letter from CSBS to Comptroller Curry dated November 14, 2016 (attached hereto as Exhibit E).

89. Also in September 2016, the OCC issued substantial revisions to its existing "Charter" booklet of the Comptroller's Licensing Manual, which further paved the way for the issuance of future nonbank charters. *See* OCC Bulletin 2016-29 regarding Revised Comptroller's Licensing Manual Booklet (available at https://www.occ.treas.gov/news-issuances/bulletins/2016/bulletin-2016-29.html).

90. Notwithstanding public concern raised in response to the September 2016 proposed rulemaking, the OCC finalized the *Receivership for Uninsured National Banks* rule without change and with no meaningful response to the public feedback it received.

91. The OCC's consideration of the issue led to then-Comptroller Curry's announcement on December 2, 2016, that the OCC had decided to create a new special-purpose charter for nonbank companies, stating that "the OCC *will* move forward with chartering financial technology companies that offer bank products and services . . . .". *See* "Remarks by Thomas J. Curry, Comptroller of the Currency, Regarding Special-purpose National Bank Charters for Fintech Companies," at Georgetown Law Center dated Dec. 2, 2016 at p. 3 (emphasis in original) (available at https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf).

92. When addressing the basis for the OCC's newfound chartering authority, Comptroller Curry asserted that the OCC "has the authority to grant special-purpose national

bank charters to fintech firms that conduct *at least one* of three core banking activities—receiving deposits, paying checks *or* lending money." *Id*. at p. 5 (emphasis added).

93. It was clear that in his statement of authority Comptroller Curry was not referencing any provision of the NBA or other statute but, instead, a regulation promulgated by the OCC itself in 2003, 12 C.F.R. § 5.20(e)(1) (stating that the OCC may charter a special-purpose bank that limits its activities to "any other activities within the business of banking," provided that the special-purpose bank conducts "*at least one of* the following three core banking functions: Receiving deposits; paying checks; *or* lending money.") (emphasis added).

94. The Comptroller stated that the OCC would be developing a "formal agency policy" for evaluating applications for nonbank charters and that the OCC had published on the same day a white paper discussing the issue and seeking stakeholder feedback to help inform the development of the forthcoming policy. *See* Comptroller Remarks at pp. 3, 5.

95. The OCC's Nonbank Charter Decision and white paper met with significant public concern and criticism.

96. Notably, U.S. Senators Sherrod Brown (Ranking Member, Senate Committee on Banking, Housing, and Urban Affairs) and Jeffrey A. Merkley issued a letter to Comptroller Curry expressing concern that "[o]ffering a new charter to non-bank companies seems at odds with the goals of financial stability, financial inclusion, consumer protection, and separation of banking and commerce that the OCC has upheld under your tenure."

97. The Senators also questioned whether the OCC had the ability to issue charters to nondepository institutions, noting that that Congress has given the OCC "a very narrowly-defined authority" to charter entities that are not engaged in the business of banking, limited to bankers' banks, credit card banks, and trust banks. The Senators urged the OCC to refrain from

issuing special-purpose charters because "[i]t is up to Congress to take action on these important matters."

98. A diverse group of more than 25 entities expressed opposition to the nonbank charter—including consumer groups, banking and financial industry trade associations, state government officials and others. Several questioned the OCC's statutory authority to issue national bank charters to nonbank companies. Many urged the OCC to seek Congressional approval for the charter and, if the charter were to be pursued, to develop generally applicable regulations pursuant to the APA that would clarify such important questions as the OCC's expectations for capital, liquidity, financial inclusion, supervision and examination, and whether the new charter holders would have direct access to the Federal Reserve's payment system and its discount window.

99. Still others expressed concern about potential consumer harm, preemption of state laws, and competitive advantage available to nonbank charter holders if they are not held to the same supervision and regulation as other banks. Concerns were also raised that the nonbank charter could jeopardize the longstanding U.S. policy of limiting affiliations or combinations between banks and commercial enterprises.

100. Many critics noted that the OCC had not adequately explained which nonbank companies would be eligible for a charter, how "fintech" is defined, and how those companies would be supervised and regulated.

101. CSBS itself submitted a 27-page explanation of its opposition to the Nonbank Charter Decision, expressing its views that the OCC lacked statutory authority to issue the charters; such charters would distort the marketplace for financial services and create tremendous uncertainty and risks pertaining to access to critical government resources, including the

payments system and the federal safety net; and the preemptive effect of the charter nullifies the states' ability to protect customers. *See* Letter from CSBS to Comptroller Curry dated January 13, 2017 (attached hereto as Exhibit F).

102. On March 10, 2017, members of the U.S. House of Representatives Committee on Financial Services sent a letter to Comptroller Curry likewise expressing concern regarding a rushed decision, urging the Comptroller not to take further action, and vowing to examine any further action taken by the OCC and, if appropriate, to overturn that action.

II. Despite Public Concern, the OCC Begins Implementing the Nonbank Charter Program in 2017.

103. Notwithstanding these numerous and significant concerns and the questions raised about its statutory authority, the OCC continued to move forward with the implementation of the Nonbank Charter Program. On March 15, 2017, the OCC published a "draft" supplement to the Comptroller's Licensing Manual (entitled "Evaluating Charter Applications From Financial Technology Companies"). The draft supplement made explicit that the new nonbank charter was intended for companies that do not take deposits.

104. As in the prior white paper and other public pronouncements by the OCC, the agency reiterated its reliance upon its own regulation (12 C.F.R. § 5.20(e)(1)) as authority for its ability to charter companies that do not take deposits, so long as they either pay checks or lend money.

105. Separately on March 15, 2017, the OCC published a "Summary of Comments and Explanatory Statement," apparently in an attempt to respond to the significant volume of concerns expressed in response to its December 2016 white paper. *See* "OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies" dated March 2017 (available at https://www.occ.treas.gov/topics/bank-

operations/innovation/summary-explanatory-statement-fintech-charters.pdf) (attached hereto as Exhibit G).

106. This "Summary of Comments and Explanatory Statement" fell far short of addressing the numerous criticisms of the Nonbank Charter Decision, however. In particular, the OCC's response to questions about its chartering authority is limited to two short paragraphs that, once again, rely solely upon the OCC's own regulation (12 C.F.R. § 5.20(e)(1)) in support of its ability to issue national bank charters to nondepository companies. *See* Summary of Comments and Explanatory Statement at pp. 14-15.

107. The OCC invited feedback on its Manual Supplement. As with its prior white paper, the Manual Supplement drew sharp criticism and elicited significant concerns. Many commenters, recognizing that the OCC had not adequately addressed the concerns previously raised in response to the OCC white paper, re-submitted their prior letters.

108. Similarly, CSBS reiterated its previously articulated concerns in response to the Manual Supplement, as well as a number of new concerns. Among other things, CSBS criticized the *ad hoc* regulatory treatment of charter holders which, contrary to the OCC's contentions, would not be subject to most federal banking laws, which cover only insured banks. CSBS also emphasized the unfair advantages to the nonbank charter holders, as compared to traditional, full service banks; the threatened erosion of the separation of banking and commerce; and the potential for significant consumer harm. *See* Letter from CSBS to Comptroller Curry dated April 13, 2017 (attached hereto as Exhibit H).

III. <u>The OCC Has Begun Taking Nonbank Charter Applications.</u>

109. Recognizing that the OCC had not responded to the numerous concerns raised regarding the Nonbank Charter Program and intended to move forward with its plan to issue

nonbank charters, CSBS initiated a legal action against the OCC and Comptroller Curry in this Court in April 2017, seeking declaratory and injunctive relief.

110. Subsequently, and while the lawsuit was pending, Comptroller Curry was succeeded by Acting Comptroller Keith Norieka, who was then succeeded by the current Senate-confirmed Comptroller Otting.

111. In August 2017 the OCC moved to dismiss CSBS's lawsuit, arguing that the suit was premature because the agency was still deciding whether it would actually exercise its newly claimed power. Relying upon OCC's representations that it had not yet decided to move forward with the Nonbank Chartering Program, the Court dismissed CSBS's complaint without prejudice on April 30, 2018. *See generally Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, 17-cv-763-DLF, Doc. No. 19 (D.D.C., Apr. 30, 2018).

112. Within a mere three months of the dismissal of CSBS's suit, however, the OCC on July 31, 2018 announced it had begun accepting applications for nonbank charters. *See* Press Release, *OCC Begins Accepting National Charter Applications from Financial Technology Companies* (July 31, 2018) (available at https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html (Exhibit A)

113. As before, the OCC stated that its authority to grant nonbank charters was derived from 12 CFR 5.20(e), and that its authority "does not require the bank to take deposits within the meaning of the Federal Deposit Insurance Act and therefore would not require insurance from the Federal Deposit Insurance Corporation." *Id*.

114. On the same day, the Comptroller also issued a Policy Statement, which echoed the OCC's position that Section 5.20 permits it to issue a special purpose national bank charter to an entity that performs any one of the OCC-described "core banking functions"—receiving

deposits, paying checks *or* lending money. *See* Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters dated July 31, 2018 at p. 3 (available at https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf) (attached hereto as Exhibit B). The Policy Statement also made it clear that the OCC "is open and receptive to charter applications from qualified fintech companies." *Id*.

115. That day the OCC also published a final Comptroller's Licensing Manual Supplement. *See* Comptroller's Licensing Manual Supplement, *Considering Charter Applications from Financial Technology Companies* dated July 2018 (available at https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-considering-charter-applications-fintech.pdf) (attached hereto as Exhibit C)

116. The Manual Supplement outlines the process for applying for a nonbank charter, the OCC's considerations when evaluating applicants, the requirements for the charter holder, and the OCC's approach to supervising chartered entities.

117. Based upon public statements by Comptroller Otting himself, applications for nonbank charters are imminent, if not already received. In an article he authored for the *American Banker* in September 2018, Comptroller Otting explained that "interest in the charter remains robust, and we expect multiple applications by the end of the year." *See American Banker,* "Why do state regulators want to limit consumer choice?" by Joseph Otting, dated September 18, 2018 (available at https://www.americanbanker.com/opinion/occs-otting-why-do-state-regulators-want-to-limit-consumer-choice) (attached hereto as Exhibit I).

118. Comptroller Otting made even more clear that a nonbank charter is imminent in another article he authored, published on October 17, 2018. *See Politico*, "Otting Sees OCC

Ready for Fintech Decisions by Mid-2019" by Joseph Otting dated October 18, 2018 (available at https://subscriber.politicopro.com/financial-services/whiteboard/2018/10/otting-sees-occ-ready-for-fintech-decisions-by-mid-2019-2088074) (attached hereto as Exhibit J). He reiterated that the OCC is in active discussions with "a number of highly interested institutions" and that OCC will receive applications by the end of the year, with charter decisions expected shortly thereafter (no later than mid-year 2019). *Id*.

119. Thus, upon information and belief, the OCC has already met with several companies who have decided to pursue a nonbank charter. But it is not known to CSBS whether any company has yet applied for a nonbank charter, and CSBS does not have an effective means of receiving prompt notice of any such applications.

120. There is no statutory requirement under the NBA that charter applicants publish a notice of the submission or approval of their charter application. Although the OCC's regulations and Licensing Manual do impose such a requirement, these guidelines only require that the applicant publish a notice of its charter application in a general circulation newspaper in the community in which the bank will be located. 12 C.F.R. 5.8(a). Although the OCC's Licensing Manual indicates that the OCC will publish notice of charter applications in its Weekly Bulletin, publication in this report is purely at the discretion of the OCC and is frequently delayed. Applications are routinely omitted from the Weekly Bulletin, and these notices often contain insufficient information to determine whether the application at issue involves a nonbank charter.

121. Thus, to determine whether a charter application has simply been filed, let alone approved, CSBS members must monitor local newspapers across the country or simply hope that the OCC has not omitted the charter application from its weekly report and has provided

sufficient detail to make the application identifiable. In such a scenario, it is very likely that the first notice of a charter application or approval that state regulators receive will be in the form of a consumer complaint or while monitoring for unlicensed activity in their state.

THE NONBANK CHARTER PROGRAM CANNOT STAND

I. The OCC Lacks Statutory Authority to Charter Nondepository Companies and, Thus, to Implement the Nonbank Charter Program.

122. The OCC's Nonbank Charter Program exceeds the OCC's authority under the NBA. Congress has never conferred upon the OCC the broad power to redefine the business of banking to exclude deposit taking, so as to enable the OCC to create new categories of charters for companies that do not engage in the business of banking. In fact, each time the OCC has attempted to issue such charters, the federal courts have struck down its efforts.

123. As previously noted, it is only upon specific authorization by Congress that the OCC has been allowed to issue special-purpose bank charters to institutions that do not, under existing law, engage in the business of banking. Applying fundamental principles of statutory construction, the existence of these specific grants of Congressional authority necessarily demonstrates that the OCC does not have any authority to charter special-purpose national banks other than those expressly authorized by statute. These specific statutory grants of special-purpose chartering authority would never have been necessary if the OCC possessed general authority to issue special-purpose charters. In addition, to adopt a broad view of the OCC's chartering authority would render the specific grants of statutory chartering authority for bankers' banks and trust banks redundant and mere surplusage, contrary to established canons of statutory construction.

124. In asserting that it has the power to issue nonbank charters, the OCC relies solely upon one of its own regulations, 12 C.F.R. § 5.20(e)(1), which states that the OCC may charter a

special-purpose bank that engages in any activity within the business of banking, provided that it conducts "*one of* the following three core banking functions: Receiving deposits; paying checks; *or* lending money" (emphasis added). But an agency cannot expand the nature or scope of its own authority—only Congress can do that.

125. Because Section 5.20(e)(1)—never before used by the OCC to support a chartering decision—would allow a bank charter to be issued to an organization that does not take deposits and is therefore not engaged in the business of banking, it is patently inconsistent with the NBA, BHCA, FDIA and FRA, as well as established court precedent and long-standing OCC interpretations. Indeed, the OCC has crafted Section 5.20(e)(1) so expansively that the agency could create an immeasurable variety of special-purpose nonbank charters under the purported reach of the regulation. There is no Congressional authority for this far-reaching power, and Section 5.20(e)(1) cannot serve as a valid basis for the OCC's Nonbank Charter Program.

126. The OCC interprets Section 5.20(e)(1) in a manner unsupported by any statutory language or Congressional instruction. Through this interpretation, the OCC purports to have the power to define the scope of its own regulatory authority. As such, this interpretation is not entitled to any deference. Nor is the OCC entitled to deference where its decision making relates in part to the interpretation of banking statutes it is not charged with implementing and purports to reconcile conflicting statutory regimes.

II. <u>The OCC Engaged in Improper Rulemaking by Failing to Undertake a Preemption Determination Submitted for Public Notice and Comment.</u>

127. Despite the unprecedented nature of the Nonbank Charter Program, the OCC did not follow the required notice and comment procedures imposed by the NBA with respect to

preemption interpretations. *See* 12 U.S.C. §§ 25b, 43. Instead, the OCC relied solely upon its white paper and Manual Supplement and invitations for informal feedback.

128. When the OCC concludes that the NBA preempts state consumer protection laws, the NBA requires the OCC to publish in the Federal Register a notice of the preemption interpretation the OCC is considering and provide interested parties an opportunity to comment. 12 U.S.C. § 43. Additionally, the OCC is required to periodically publish a notice containing a list of its preemption determinations with respect to state consumer financial laws. 12 U.S.C. §§ 25b(d), (g). Although the OCC has repeatedly asserted in establishing the Nonbank Charter Program that state consumer protection laws are preempted and would not apply to fintech companies that receive a nonbank charter, the OCC has not complied with any of the notice and comment requirements imposed by the NBA on these preemption interpretations.

129. It is improper and unlawful for the OCC to handle this matter of fundamental importance to the U.S. banking and financial systems outside the notice and comment process mandated by the NBA. The OCC has opted instead to approve nonbank charters pursuant to broadly worded policy statements and sparse legal analysis, which is contrary to the transparency requirements imposed on OCC preemption interpretations by Congress.

130. The process the OCC has pursued is no substitute for, and in fact violates, the notice and comment procedures required by the NBA.

III. <u>The OCC's Actions in Implementing the Nonbank Charter Program are Arbitrary and Capricious.</u>

131. The OCC's Nonbank Charter Program also is arbitrary, capricious, and an abuse of discretion because it has failed to consider the many significant implications of the Nonbank Charter Program, nor has it offered a reasoned explanation for its actions.

132. Among other things, the OCC wholly failed to respond adequately to the many relevant and significant public comments received in response to its Nonbank Charter Program. This includes the many significant policy considerations that weigh strongly against the creation of this new special charter.

133. As articulated in CSBS's letters in response to the white paper and Manual Supplement, as well in the public feedback of many others, the Nonbank Charter Program has raised numerous concerns that remain unaddressed:

- Many significant federal banking laws do not apply to Nonbank Charter Program charter holders;
- The use of individualized, *ad hoc*, private agreements between the OCC and charter holders creates an uneven playing field among regulated entities;
- The lack of transparency regarding specific regulatory requirements nullifies any promise of a level playing field among regulated banks;
- The uncertain scope of the incidental powers conferred through the special-purpose charter raises significant safety and soundness concerns;
- The OCC has not explained how special-purpose charter holders comply with the requirement that national banks become members of the Federal Reserve System, how they will be regulated by the Federal Reserve, and whether they will have access to the federal safety net and critical public resources;
- The nonbank charter is structured to evade the coverage of the BHCA and enables the commingling of banking and commerce;

- Nonbank charter holders likely will be exempt from the enforcement authority of the Securities and Exchange Commission, and the OCC itself lacks the authority to enforce the federal securities laws with respect to nondepository institutions;
- Special-purpose charter holders are not subject to federal consumer protection laws to the same extent as full-service banks; and
- The special-purpose charter undermines and preempts existing state regulation of financial services providers; charter holders are entitled to preemption of some state laws, to the detriment of consumers.

134. The OCC failed to acknowledge, much less analyze and address, most of these myriad concerns before implementing the final Nonbank Charter Program.

IV. The Nonbank Charter Program is Unconstitutional.

135. Under the Supremacy Clause and Tenth Amendment of the U.S. Constitution, an invasion of state sovereign interests is permitted only if it is the clear and manifest purpose of Congress to supplant state law.

136. Here, as noted above, Congress has not authorized the OCC to issue national bank charters to institutions engaged in lending money and paying checks, but not engaged in receiving deposits. Absent a clear expression of Congressional authority and intent to preempt state law, the states retain the power to regulate and supervise nondepository institutions, and the Nonbank Charter Program represents an unlawful and unconstitutional assertion of preemptive authority by the OCC.

V. The Nonbank Charter Program Harms CSBS's Member Regulators.

137. The Nonbank Charter Program has created regulatory interference with traditional areas of state concern; namely, the enforcement of state laws, including consumer protections

such as state usury laws and state licensing laws applicable to nondepository financial institutions providing consumer financial services. These state laws are of vital importance to the states and their economies, communities, and citizens, and reflect the unique policy priorities and commitments of the residents of each state.

138. As outlined above, the NBA and the OCC's implementing regulations assert preemption of state consumer financial laws, including, among others, state licensing laws and state usury laws. The OCC's Policy Statement, Licensing Manual Supplement and related public issuances repeatedly state that recipients of a Nonbank Charter are subject to the same laws and regulations that apply to national banks, including the federal laws affording preemption and rendering state consumer financial laws inapplicable.

139. In announcing its final decision to establish the Nonbank Charter Program, the OCC made clear that the Nonbank Charter is an option that would vitiate the necessity of pursuing state licensure. Further, as indicated in the OCC's subsequent statements as well as the Treasury Department's July 31, 2018 recommendation to finalize the Nonbank Charter Program, the primary motivation for a nondepository financial institution to seek the Charter is to avoid compliance with existing state law. The preemptive effect of the Nonbank Charter Program occurs regardless of the nature, size or location of the charter holder's business.

140. Thus, the scope of the harm to CSBS's members is significant. Although the OCC has not formally defined "fintech," or what constitutes a "fintech" company, the term is generally understood to encompass any of a very broad array of technology-driven financial services providers. Fintech companies range from start-up ventures to well-established conglomerates. The term covers a wide variety of services, from the traditional (*e.g.*, payment processing) to the more cutting edge (*e.g.*, crowd funding and digital currencies, such as bitcoin).

And although the Nonbank Charter Program primarily focuses on fintech companies, it extends to any nonbank financial services providers, regardless of the extent to which they are technology-driven. Regardless of the label applied, interference with state regulatory authority is inevitable because an institution must engage in lending or transmitting money to be eligible for the Nonbank Charter, all states license and regulate the activities of lending and transmitting money, and the OCC has asserted that the application of state regulatory authority to Nonbank Charter holders is preempted.

141. The states' enforcement of their own laws has been undermined by the Nonbank Charter Program and the purported applicability of federal preemption to charter holders. This injury to state enforcement creates a judicially cognizable interest because it impedes the states' exercise of their sovereign power to create and enforce a legal code and diminishes that sovereignty.

142. The OCC's actions impede the states' ability to continue their existing regulation of financial services companies within their borders and to enforce state laws designed to protect the consuming public and ensure the safety and soundness of nondepository companies. This also creates difficulties for the states in detecting unlicensed activity within their borders. Similarly, companies facing or at risk of state enforcement actions escape state enforcement authority by obtaining a national charter.

143. Indeed, even without accepting an application, interference with the regulatory operations of CSBS's members has already begun to materialize in several forms. For instance, since the OCC has begun its campaign to redefine what it means to be a bank under federal law, confusion has arisen as to the meaning of banking under state regulatory and criminal laws prohibiting persons from referring to themselves as or implying that they are "banks" without a

bank charter. Additionally, the establishment of the Nonbank Charter Program poses challenges for CSBS's members in allocating resources for examination and enforcement as state regulators worry that significant resources may be devoted to such efforts, only to have the relevant institution seek to escape their jurisdiction by obtaining a Nonbank Charter from the OCC.

144. The states have a legitimate, sovereign interest in the continued enforceability of their state consumer financial laws. Examples of the state licensing laws that are directly affected by the Nonbank Charter Program are identified in the accompanying State Licensing/Regulatory Law Survey, Exhibit D.

145. Requirements imposed under these affected state laws include, but are certainly not limited to, restrictions on mortgage lending, such as restrictions on loan flipping, negative amortization, abnormal prepayment penalties, and loan packing practices, *e.g.*, N.M. Stat. Ann. §§ 58-21A-1 *et seq*.

146. Affected laws also include restrictions on consumer lending, such as mandating consideration of a borrower's ability to repay, *e.g.*, Mo. Rev. Stat. § 367.185(4); and the imposition of requirements on money transmitters to preserve customer funds from misappropriation, data breaches and insolvency, *e.g.*, Cal. Fin. Code §§ 2037, 2081. Compliance with these requirements is ensured through regular examination by the appropriate state regulatory agency, and violation of these prohibitions and restrictions triggers several possible government actions, from investigation and inspection to enforcement actions and criminal referral. *See, e.g.*, Wash. Rev. Code Ann. §§ 19.146.100, 110, 220.

147. By way of another example, many states effectively ban high-cost, short-term small-dollar lending, often referred to as "payday lending," by setting interest rate caps or usury limits at levels at which this type of lending would not be profitable. *See, e.g.*, Ark. Const.

amend. 89, § 3. However, the OCC has asserted that recipients of the nonbank charter are permitted under the NBA to "export" the interest rates permitted in one state into another state, as explained above. Thus, according to the OCC, a nonbank is, for the first time, permitted to override these state laws and engage in what would otherwise be usurious lending.

CLAIMS FOR RELIEF

COUNT I

The OCC's Nonbank Charter Program Exceeds its Statutory Authority

148. CSBS incorporates by reference the allegations of the preceding paragraphs.

149. The NBA only allows the OCC to charter entities to (1) carry on the "business of banking," which requires, at a minimum, receiving deposits, or (2) carry on a special purpose expressly authorized by Congress.

150. As a result, the OCC lacks the authority to charter nondepository entities without the express authorization of Congress. The OCC's own regulations (specifically, 12 C.F.R. 5.20(e)(1)) are insufficient to expand the scope of the OCC's chartering authority beyond that delegated to the OCC by statute.

151. Moreover, the OCC's interpretation of the scope of its own authority is not entitled to deference, particularly where the OCC is attempting to interpret conflicting federal statutes, including statutes the OCC is not charged with implementing.

152. CSBS is entitled to relief pursuant to 5 U.S.C. §§ 702 and 706(2)(A) and (C). The OCC's Nonbank Charter Program exceeds the OCC's statutory authority and is otherwise not in accordance with law, and this Court should declare the Nonbank Charter Program unlawful and set it aside, as well as enjoin the OCC from taking further action toward the creation or issuance of any of these nonbank special-purpose charters.

COUNT II

The OCC's Promulgation of 12 C.F.R. § 5.20(e)(1) Exceeds its Statutory Authority

153. CSBS incorporates by reference the allegations of the preceding paragraphs.

154. As previously noted, the NBA only allows the OCC to charter entities (1) to carry on the "business of banking," which requires, at a minimum, engaging in receiving deposits, or (2) to carry on a special purpose expressly authorized by Congress.

155. In promulgating 12 C.F.R. § 5.20(e)(1), the OCC endeavored to unilaterally extend its authority to charter entities that do not carry on the "business of banking," such as nondepository entities, without the requisite Congressional authorization. The OCC cannot through the promulgation of regulations expand the scope of its own chartering authority beyond that delegated to the OCC by statute.

156. Moreover, the OCC's interpretation of the scope of its own authority is not entitled to deference, particularly where the OCC is attempting to interpret conflicting federal statutes, including statutes the OCC is not charged with implementing.

157. CSBS is entitled to relief pursuant to 5 U.S.C. §§ 702 and 706(2)(A) and (C). Because Section 5.20(e)(1) improperly exceeds the OCC's statutory authority and is otherwise not in accordance with law, this Court should declare that regulation unlawful and set it aside, as well as enjoin the OCC from taking further action toward the creation or issuance of any charter pursuant to this invalid regulation.

COUNT III

Failure to Follow Rulemaking Procedures Required by Law

158. CSBS incorporates by reference the allegations of the preceding paragraphs.

159. The OCC's Nonbank Charter Program is a "preemption determination" and an "opinion letter or interpretive rule" within the meaning of 12 U.S.C. §§ 25b and 43, respectively.

160. The OCC did not comply with the requirements of the NBA in issuing this rule and making this determination. 12 U.S.C. §§ 25b(g), 43(a).

161. CSBS is entitled to relief pursuant to 5 U.S.C. §§ 702 and 706(2)(D). Because OCC's Nonbank Charter Program was reached without observance of the procedure required by law, this Court must declare the Nonbank Charter Program unlawful and set it aside.

COUNT IV

Arbitrary and Capricious Action

162. CSBS incorporates by reference the allegations of the preceding paragraphs.

163. In making and implementing the Nonbank Charter Program, the OCC not only acted beyond its statutory authority but also failed to consider the effect of its actions on the states' authority to regulate traditional areas of state concern. The OCC likewise failed to consider the many significant concerns arising from the Nonbank Charter Program, or to conduct an adequate cost-benefit analysis, and it did not offer a reasoned explanation for its decision.

164. Under the APA, an agency cannot act in a manner that is arbitrary or capricious and is required to engage in "reasoned decision making" when adopting new rules. 5 U.S.C. § 706(2)(A).

165. Moreover, the OCC's actions are not entitled to deference, particularly where the OCC is attempting to define the scope of its own authority and interpret conflicting federal statutes, including statutes the OCC is not charged with implementing.

166. The OCC's Nonbank Charter Program is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and this Court must declare the Nonbank Charter Program unlawful and set it aside.

COUNT V

Preemption—Article VI, clause 2 (Supremacy Clause) and the Tenth Amendment of the U.S. Constitution

167. CSBS incorporates by reference the allegations of the preceding paragraphs.

168. Pursuant to the Tenth Amendment of the U.S. Constitution, the states retain the powers not delegated to the federal government—which include the police powers necessary to regulate financial services and protect consumers and the public interest from unsound and abusive financial practices. Among other things, the states possess the power to regulate nonbank companies, like those that are purportedly eligible for the OCC's new nonbank charter.

169. The OCC's nonbank charter program creates conflicts with state laws to the extent it purports to enable nonbank charter holders to disregard state laws previously applicable to them.

170. Under the Supremacy Clause of the U.S. Constitution, federal law represents the supreme law of the land when it conflicts with state law, but only to the extent that Congress has clearly manifested its intent to preempt state law.

171. Because Congress did not intend to extend the OCC's national bank chartering authority to include the nondepository entities described in the OCC's Nonbank Charter Program, Congress has not clearly and manifestly expressed an intent that the OCC's new nonbank charter program should preempt state law.

172. Indeed, there is nothing in the NBA authorizing the OCC to create a charter for these nonbank entities, much less clearly and manifestly reflecting Congressional intent that the charter preempt state laws.

173. For this reason, Plaintiff is entitled to relief pursuant to 28 U.S.C. § 2201, 2202 and 5 U.S.C. §§ 702, 706(2)(A) and (B), and this Court should declare the Nonbank Charter Program unlawful and unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff CSBS prays for a judgment and order:

1. Declaring that the Office of Comptroller of the Currency lacks statutory authority under the National Bank Act to create and issue special-purpose national bank charters to nonbank companies that do not carry on the "business of banking," which includes, at a minimum, receiving deposits;

2. Declaring that the Office of Comptroller of the Currency lacked statutory authority under the National Bank Act to promulgate 12 C.F.R. § 5.20(e)(1);

3. Declaring that the OCC's Nonbank Charter Program was improperly reached without following proper notice and comment procedures required by the Administrative Procedure Act and the NBA;

4. Declaring that the OCC's Nonbank Charter Program is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

5. Declaring that the Nonbank Charter Program is an unconstitutional attempt to preempt otherwise applicable state law, in violation of the Supremacy Clause and Tenth Amendment to the U.S. Constitution;

6. Declaring the Nonbank Charter Program unlawful and setting it aside;

7. Declaring the OCC's promulgation of 12 C.F.R. § 5.20(e)(1) unlawful and setting that regulation aside;

8. Awarding injunctive relief prohibiting the OCC from continuing the Nonbank Charter Program or creating or issuing any nonbank charter pursuant to 12 C.F.R. § 5.20(e)(1);

9. Awarding Plaintiff its reasonable costs, including attorneys' fees, incurred in bringing this action; and

10. Awarding any such other relief as the Court deems just and equitable.

Date: October 25, 2018

Respectfully submitted,

/s/ Jennifer Ancona Semko

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EXHIBIT A

Office of the Comptroller of the Currency
U.S. Department of the Treasury [https://occ.gov/index.html]

NR 2018-74

FOR IMMEDIATE RELEASE
July 31, 2018

Contact: Bryan Hubbard
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OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies

WASHINGTON — The Office of the Comptroller of the Currency (OCC) today announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking.

"Over the past 150 years banks and the federal banking system have been the source of tremendous innovation that has improved banking services and made them more accessible to millions. The federal banking system must continue to evolve and embrace innovation to meet the changing customer needs and serve as a source of strength for the nation's economy," said Comptroller of the Currency Joseph M. Otting. "The decision to consider applications for special purpose national bank charters from innovative companies helps provide more choices to consumers and businesses, and creates greater opportunity for companies that want to provide banking services in America. Companies that provide banking services in innovative ways deserve the opportunity to pursue that business on a national scale as a federally chartered, regulated bank."

The OCC's decision is consistent with bi-partisan government efforts at federal and state levels to promote economic opportunity and support innovation that can improve financial services to consumers, businesses, and communities. The decision was documented in a policy statement and supplement to the OCC's *Comptroller's Licensing Manual*, both published today. The OCC's decision follows extensive outreach with many stakeholders over a two-year period, and after reviewing public comments solicited following the publication of *Exploring Special Purpose National Bank Charters for Fintech Companies* in December 2016, and *Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies* in March 2017.

In announcing the decision, the policy statement and *Comptroller's Licensing Manual Supplement* stress:

- Every application will be evaluated on its unique facts and circumstances.
- Fintech companies that apply and qualify for, and receive, special purpose national bank charters will be supervised like similarly situated national banks, to include capital, liquidity, and financial inclusion commitments as appropriate. Fintech companies will be expected to submit an acceptable contingency plan to address significant financial stress that could threaten the viability of the bank. The plan would outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective.
- The expectations for promoting financial inclusion will depend on the company's business model and the types of planned products, services, and activities.
- New fintech companies that become special purpose national banks will be subject to heightened supervision initially, similar to other de novo banks.
- The OCC has the authority, expertise, processes, procedures, and resources necessary to supervise fintech companies that become national banks and to unwind a fintech company that becomes a national bank in the event that it fails.

The OCC has statutory authority, regulations, and policies that govern its review and decision making with respect to chartering national banks, including special purpose national banks. That authority includes companies that engage in one of the core banking functions (paying checks, lending money, or taking deposits) and is described at 12 CFR 5.20(e)(1). That authority does not require the bank to take deposits within the meaning of the Federal Deposit Insurance Act and therefore would not require insurance from the Federal Deposit Insurance Corporation.

Qualifying fintech companies also may apply for federal charters under the OCC's authority to charter full-service national banks and other special purpose banks, such as trust banks, banker's banks, and credit card banks.

A national bank charter is only one option among many for companies engaged in the business of banking. Other options include pursuing state banking charters, appropriate business licenses, and partnerships with other federal or state financial institutions. The option to apply for a national bank charter allows these companies to choose the best business model and regulatory structure for their business and strategic goals, which will help them meet the needs of their customers throughout the nation.

"Providing a path for fintech companies to become national banks can make the federal banking system stronger by promoting economic growth and opportunity, modernization and innovation, and competition," Comptroller Otting said. "It also provides consumers greater choice, can promote financial inclusion, and creates a more level playing field for financial services competition."

Related Links

- OCC Policy Statement (PDF)
- *Comptroller's Licensing Manual Supplement: Considering Charter Applications From Financial Technology Companies* (PDF)

# # #

EXHIBIT B

Office of the Comptroller of the Currency

Washington, DC 20219

Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters

July 31, 2018

It is the policy of the Office of the Comptroller of the Currency (OCC) to consider applications for national bank charters from companies conducting the business of banking, provided they meet the requirements and standards for obtaining a charter. This policy includes considering applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits.

This policy statement is based on broad authority granted to the OCC by the National Bank Act,[1] as implemented in existing regulation[2] and established OCC procedures.[3]

The OCC is issuing this policy statement to clarify its intent to exercise its existing chartering authority. The OCC also recognizes the importance of supporting responsible innovation in the federal banking system to better enable the system to

- evolve to meet the needs of the consumers, businesses, and communities it serves;
- operate in a safe and sound manner;
- provide fair access to financial services;
- treat customers fairly; and
- promote economic opportunity and job creation.

The OCC recognizes that the business of banking evolves over time, as do the institutions that provide banking services. As the banking industry changes, companies that engage in the business of banking in new and innovative ways should have the same opportunity to obtain a national bank charter as companies that provide banking services through more traditional means. The OCC will require these new entrants to the national banking system to adhere to the same high standards that apply to all national banks.

The OCC adopts this policy after careful consideration of the extensive stakeholder feedback and public comment received over the past two years.

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[1] See 12 USC 21, 26, and 27.

[2] See 12 CFR 5.20.

[3] See *Comptroller's Licensing Manual*, specifically the "Charters" booklet (September 2016) and the *Comptroller's Licensing Manual* Supplement, "Considering Charter Applications From Financial Technology Companies" (July 2018).

Office of the Comptroller of the Currency

Washington, DC 20219

OCC Chartering Authority

The National Bank Act gives the OCC broad authority to grant charters for national banks to carry on the "business of banking." This authority extends to special purpose national banks. As defined in the OCC's regulations, the "business of banking" includes any of the three core banking functions of receiving deposits, paying checks, or lending money. Section 5.20 of the OCC's regulations provides that, to be eligible for a national bank charter, a special purpose national bank must conduct at least one of these three core banking functions. Thus, the OCC has authority to grant a national bank charter to a fintech company that engages in one or more of those core banking activities.

OCC Support for Responsible Innovation

The federal banking system must adapt to the rapid technological changes taking place in the financial services industry to remain relevant and vibrant and to meet the evolving needs of the consumers, businesses, and communities it serves. The OCC encourages all national banks and federal savings associations to develop strategies that incorporate responsible innovation to address the changing operating environment and evolving needs and preferences of their customers. The OCC has developed an agency-wide framework to support responsible innovation throughout the federal banking system and established the Office of Innovation to serve as a clearinghouse for innovation-related matters and a point of contact for OCC staff, banks, and nonbanks to facilitate innovation-related activities.

Considering applications from fintech companies for national bank charters is one important way that the OCC supports responsible innovation in the federal banking system. Companies engaged in the business of banking should have a path to become a national bank, provided they meet the rigorous standards necessary to become and succeed as a national bank.

Chartering a qualified fintech company as a national bank would also have important public policy benefits. The national bank charter provides a framework of uniform standards and robust supervision. Applying this framework to fintech companies that qualify can level the playing field with regulated institutions and help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities. In addition, applying the OCC's uniform supervision over national banks, including fintech companies, will help promote consistency in the application of laws and regulations across the country and ensure that consumers are treated fairly. More broadly, providing a path for fintech companies to become national banks promotes consumer choice, economic growth, modernization, and competition—all of which strengthen the federal banking system and support the nation's economy.

Chartering Standards and Supervisory Expectations

The decision to consider national bank charter applications from qualifying fintech companies is consistent with the OCC's longstanding chartering standards and supervisory expectations. The OCC will use its existing chartering standards and procedures for processing applications from fintech companies as outlined in the *Comptroller's Licensing Manual*. As with all national banks, the OCC will consider whether a 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 treat customers fairly, and will comply with applicable laws and regulations. The OCC will also consider whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving the charter will foster healthy competition.

A fintech company that receives a national bank charter will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC would tailor these standards based on the bank's size, complexity, and risk profile, consistent with applicable law. In addition, a fintech company with a national bank charter will be supervised like similarly situated national banks, including with respect to capital, liquidity, and risk management.

The OCC also expects a fintech company that receives a national bank charter to demonstrate a commitment to financial inclusion. The nature of that commitment will depend on the company's business model and the types of products, services, and activities it plans to provide. By providing a high standard similar to the Community Reinvestment Act's expectations for national banks that take insured deposits, the financial inclusion commitment will help ensure that all national banks provide fair access to financial services and treat customers fairly.

In addition, a fintech company approved for a national bank charter will be required to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. The plan would outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective. The specific considerations related to supervision, capital, liquidity, financial inclusion, and contingency planning are described in the agency's supplement to the *Comptroller's Licensing Manual*, "Considering Charter Applications From Financial Technology Companies."

While the OCC is open and receptive to charter applications from qualified fintech companies, the OCC will not approve proposals that are contrary to applicable law, regulation, policy, or safety and soundness. Exercising the OCC's existing authority to grant special purpose charters does not alter existing barriers separating banking and commerce. Further, proposals that include financial products and services that have

Office of the Comptroller of the Currency

Washington, DC 20219

predatory, unfair, or deceptive features or that pose undue risk to consumer protection, would be inconsistent with law and policy and would not be approved.

//signed//

Joseph M. Otting
Comptroller of the Currency

July 31, 2018

Date

EXHIBIT C

Office of the
Comptroller of the Currency

COMPTROLLER'S LICENSING MANUAL SUPPLEMENT

Considering Charter Applications From Financial Technology Companies

July 2018

Contents

Introduction

Technological innovations have revolutionized the way financial products and services are delivered and have enabled the development of new products and services. Today, many financial products and services are more accessible, easier to use, and more tailored to the needs of customers than ever before. The Office of the Comptroller of the Currency (OCC) has determined that companies that offer innovative technology-driven products and services may be eligible for a national bank charter, provided they meet the chartering requirements and standards applicable to all national banks.[1] Those requirements and standards are established by statute at 12 USC 21, 26, and 27, and by the OCC's regulations at 12 CFR 5. Comprehensive, publicly available OCC guidance explains how the OCC applies these requirements and standards.

The requirements and standards that govern applications for a national bank charter do not change if the applicant's business model incorporates new delivery channels or mechanisms using new technology to meet evolving customer needs. Financial technology —or fintech— companies may seek to comply with those requirements and standards in ways tailored to their business models, their delivery channels, and the products and services they offer. This document describes the key factors the OCC will consider in evaluating charter applications from fintech companies that have nontraditional or limited business models, do not take deposits, and rely on funding sources different from those relied on by insured banks.

This Supplement to the *Comptroller's Licensing Manual* provides detail on how the OCC would evaluate applications for a special purpose national bank charter from fintech companies and clarifies the OCC's expectations that companies with a fintech business model demonstrate a commitment to financial inclusion. It also explains the contingency planning each bank will be expected to undertake. Finally, the document describes the OCC's approach to supervising newly chartered special purpose national banks.

This Supplement augments, and does not replace, the OCC's existing chartering guidance. *The Comptroller's Licensing Manual* comprises a series of booklets that set out the OCC's policies on bank charters and step-by-step procedures for potential applicants for all charter types, including special purpose national banks.[2] The *Comptroller's Licensing Manual* includes the "Charters" booklet, which is a key resource for those seeking a national bank charter. The "Charters" booklet

- describes OCC policies and procedures used in the charter application process and provides detailed guidance and instructions.
- discusses the factors that the OCC considers in deciding whether to grant a charter.

[1] The requirements and standards discussed in this supplement would also apply to a group of individuals (organizing group) or an unincorporated entity. The reference to "companies" reflects the interest in and inquiries made to the OCC from established fintech companies for a special purpose national bank charter.

[2] See the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*.

- describes the application process, including the prefiling process, filing, OCC review of the application, the decision, and the organization phase of the new bank.
- provides information about the ongoing supervision of a federally chartered bank.
- discusses issues specific to special purpose national banks.

All potential applicants for a special purpose charter should carefully read this Supplement in conjunction with the OCC chartering regulation (12 CFR 5) and the "Charters" booklet.[3]

As with all potential charter applicants, OCC staff stands ready to answer questions, explain the application process, and provide guidance to potential applicants. The OCC invites those contemplating a special purpose national bank charter to contact the OCC's Office of Innovation to begin a dialogue about what it takes to become a special purpose national bank.

What Is a Special Purpose National Bank?

A special purpose national bank is a national bank that engages in a limited range of banking or fiduciary activities, targets a limited customer base, incorporates nontraditional elements, or has a narrowly targeted business plan. Special purpose national banks include those banks whose operations are limited to certain activities, such as credit card operations, fiduciary activities, community development, or cash management activities. Special purpose national banks also include national banks that engage in limited banking activities, including one or more of the core banking functions of taking deposits, paying checks, or lending money.[4]

This Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter a special purpose national bank that would engage in one or more 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).[5] We refer to these banks in this Supplement as SPNBs.[6] Fintech companies that seek a national bank

[3] The OCC's regulation, 12 CFR 5, sets forth the OCC's rules, policies, and procedures for the corporate activities of a national bank and a federal savings association. The specific rules that apply to organizing a national bank are set forth in 12 CFR 5.20.

[4] Under 12 CFR 5.20(e)(1), a special purpose bank 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. Beyond those core activities, the activities of an SPNB are limited to those that are permissible for national banks under a statute, regulation, or federal judicial precedent, or that the OCC has determined to be permissible. See e.g. 12 USC 24(Seventh); 12 CFR 7.5002; *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995).

[5] The OCC views the National Bank Act as sufficiently adaptable to permit national banks to engage in traditional activities like paying checks and lending money in new ways. For example, facilitating payments electronically may be considered the modern equivalent of paying checks. Applicants proposing to engage in activities not already addressed in statute, regulation, or OCC precedent should consult the OCC with respect to the permissibility of those activities.

[6] This Supplement does not apply to other types of special purpose banks. For example, this Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

charter and plan to take insured deposits would be required to obtain FDIC insurance and should apply for a full-service national bank charter.

As a national bank, an SPNB will be subject to the laws, rules, regulations, and federal supervision that apply to all national banks. In addition, all SPNBs will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC will tailor these standards based on the bank's business model, size, complexity, and risks, consistent with applicable law. For example, to approve a charter as an SPNB, the OCC may need to account for differences in business models and activities, risks, and the inapplicability of certain laws resulting from the uninsured status of the bank.

To address some of these differences, companies seeking a charter as an SPNB will be expected to make a commitment to financial inclusion and develop and adhere to a contingency plan that includes options to sell, wind down, or merge with a nonbank affiliate, if necessary.

Application Process: Overview

The OCC charters national banks under the authority of the National Bank Act of 1864, as amended.[7] In evaluating whether to approve an application to establish a national bank, the OCC must determine whether the proposed bank has complied with all statutory and regulatory requirements and has met the OCC's chartering standards.[8] The OCC uses its established chartering standards and procedures as the basis for processing applications for all national banks, including SPNBs.[9]

The OCC's application process for a national bank 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

[7] See 12 USC 21, 26, and 27.

[8] See 12 CFR 5.20 (describing the OCC's statutory chartering authority and the procedures and requirements governing the OCC's review and approval of an application to establish a national bank, including a bank with a special purpose). Special purpose bank charter applicants generally must provide the information required by the OCC's standard review process. Applicants, however, should tailor the contents of the application to be consistent with the business model of the proposed special purpose bank.

[9] See 12 CFR 5.20(l)(1) (directing applicants for a special purpose charter to adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC). See also the "Charters" booklet of the *Comptroller's Licensing Manual*.

treatment of customers, will ensure compliance with laws and regulations, and will foster healthy competition.[10]

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.

The Supplement highlights key aspects of each phase of the application process. The "Charters" booklet of the *Comptroller's Licensing Manual* includes an in-depth discussion of each of these phases. Potential applicants are encouraged to familiarize themselves with the "Charters" booklet and the requirements for a national bank charter before initiating the application process.

Prefiling Communications

The OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the application process. The OCC strongly encourages potential applicants to engage with the OCC well in advance of filing a charter application to better understand the application process and the OCC's requirements and expectations.

A fintech company interested in an SPNB charter should contact the Office of Innovation, innovation@occ.treas.gov. After the initial dialogue, the Office of Innovation may arrange further discussions with appropriate OCC staff, including the Licensing Department (Licensing), to give the company an opportunity to understand the application process, explain its proposal and reasons for seeking a charter, and become acquainted with the bank regulatory environment.

If the company decides to pursue a charter, one or more additional meetings will be scheduled, as determined by Licensing. For these additional meetings, organizers should be prepared to discuss the proposed bank's business plan, including a description of the proposed activities, the underlying marketing analysis supporting the business plan, the capital and liquidity needed to support the business plan, as well as a contingency plan to remain viable under significant financial stress. The company also should be prepared to address how it proposes to demonstrate a commitment to financial inclusion. These meetings will enable early identification of issues related to the proposed business plan, management, capital, and other requirements for a charter. The meetings will also give the OCC an opportunity to provide feedback on the proposal and discuss any legal, policy, or supervisory issues that may be relevant to the proposal and that would need to be resolved in connection with the final application. Licensing also will determine whether the organizers should submit a draft application before filing a formal application.[11]

[10] See 12 CFR 5.20(f).

[11] The OCC employs the draft application process to better understand the potential challenges inherent in unusual or complex filings and the major obstacles from a policy or risk perspective. Filing a draft application does not guarantee that the OCC will approve a formal application.

Filing a Charter Application

After the prefiling phase, organizers would file a charter application. The filing procedures for an SPNB will be substantially the same as those that would apply to any other national bank. For example, the application must be published[12] and made available to the public for comment.[13] For details on filing and publishing notice of an application, see 12 CFR 5 and the "Charters" booklet of the *Comptroller's Licensing Manual*.

OCC Review of the Application

Key Considerations

The OCC begins the process of reviewing the application as soon as it is filed.[14] In its review, the OCC will consider 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, and will ensure compliance with laws and regulations.[15] The OCC's regulations set forth additional considerations, including whether the proposed bank can reasonably be expected to achieve and maintain profitability and whether approving its charter will foster healthy competition.[16]

In evaluating whether the applicant has met these standards, the OCC will consider an applicant's business model and proposed risk profile. It will also consider, among other factors, whether the proposed bank has a business plan that articulates a clear path and timeline to profitability, has adequate capital and liquidity to support the projected volume, and has organizers and management with appropriate skills and experience.[17]

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[12] The applicant must publish notice of its charter application in the community in which the proposed bank will be located as soon as practicable before or after the date of the filing. See 12 CFR 5.8. Because many SPNBs will operate online and nationally, the OCC will consider and discuss with the applicant alternative locations or methods where publication of this notice would be appropriate.

[13] The public comment period runs for 30 days after publication of the public notice. See 12 CFR 5.10. The OCC maintains a public file of the application and makes it available to any person requesting it; the public file is also available on the OCC's website, and the OCC publishes notice of the application in its Weekly Bulletin. Applicants may request that confidential treatment be afforded to certain parts of the application, for example, those containing proprietary information. See 12 CFR 5.9.

[14] See *Comptroller's Licensing Manual*, "Charters" booklet. The OCC seeks to make a decision on a complete and accurate application within 120 days after receipt or as soon as possible thereafter. The OCC's review of a special purpose charter application, however, may require additional time and scrutiny.

[15] See 12 USC 1(a) and 12 CFR 5.20(f)(1). See also *Comptroller's Licensing Manual*, "Charters" booklet.

[16] See 12 CFR 5.20(f)(2) and *Comptroller's Licensing Manual*, "Charters" booklet.

[17] The "Charters" booklet provides detailed information on each of these factors.

The charter review process is comprehensive and takes into account all aspects of the applicant's individual business model, governance structure, and risk profile. Highlighted below are some of the key considerations the OCC will assess in determining whether to grant an SPNB charter to a fintech company.[18]

Organizers, Management, and Directors

The organizers, managers, and directors are critical to the success of an SPNB, as they are for all banks. The OCC expects them to be well qualified, with diverse experience in relevant areas.[19] Although the OCC would expect some members of the organizing group, the proposed board of directors, and management to have experience in banking or broader financial services, other relevant experience will depend on the specific products or services offered by the proposed bank. In addition, the OCC will consider whether the organizers, managers, and directors have other financial and business expertise and experience in highly regulated industries, including relevant experience needed to implement the proposed bank's business plan. Since fintech companies are technology-driven, having sufficient technical knowledge, skills, and experience will be as necessary as having sufficient banking and financial experience.

OCC regulations and licensing policies, including those outlined in the "Charters" booklet of the *Comptroller's Licensing Manual*, provide additional guidance regarding the qualifications of organizers, managers, and directors, as well as the respective roles of each. These criteria and qualifications are generally applicable to SPNBs, although the OCC may tailor certain criteria as appropriate.

Business Plan

All applicants for a national bank charter must submit a comprehensive business plan to the OCC.[20] Having a comprehensive plan is critical to the OCC's decision on whether to approve a national bank charter. The OCC expects a company seeking any type of national bank charter to articulate why it is seeking a national bank charter and to provide significant detail about the proposed bank's activities. Proposals from companies without an established business record will be subject to a higher degree of scrutiny to evaluate whether the proposed bank has a reasonable likelihood of long-term success.

The business plan is an integral part of the management and oversight of a newly chartered or de novo bank and should establish the bank's written goals and objectives. The plan also

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[18] The key considerations contained in this Supplement are based on the OCC's extensive internal review and analysis of whether to entertain SPNB applications, as well as the comments it has received from the public and stakeholders including fintech companies, banks, community and consumer groups, and trade associations.

[19] OCC regulations and licensing policy provide guidance regarding the qualifications of organizers, managers, and directors, as well as the respective roles of each. See 12 CFR 5; the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*; and *The Director's Book*.

[20] See 12 CFR 5.20(h). This regulation details specific items that should be addressed in a business plan, including earnings prospects, management, capital, community service, and safety and soundness.

summarizes and explains how the bank will organize its resources to meet its goals and measure its progress.

The business plan also should describe the bank's proposed activities. Questions about the permissibility of the applicant's proposed activities should be raised by the applicant (and may also be raised by the OCC) early in the discussion of the applicant's proposal. In a case in which the permissibility of an activity has not previously been established, OCC staff may advise the applicant to request a legal opinion from the OCC's Chief Counsel's Office.

In addition, the business plan should clearly define the market that the proposed bank plans to serve and the products and services it will offer. It should identify the proposed bank's customer base and contain realistic forecasts regarding market demand, economic conditions, competition, and financial projections, under normal and stressed conditions. The basis for the applicant's forecasts should also be included.

A key element of the applicant's business plan is a description of the proposed bank's risk management framework to identify, measure, monitor, and control risks. This description should include a discussion of how the board will monitor adherence to the business plan and adjust or amend the plan as appropriate to accommodate significant or material changes.

The business plan should also describe the bank's proposed internal system of controls to monitor and mitigate risk, including management information systems. The discussion of internal controls should include a general description of the controls for ensuring customer transaction and data integrity, security, and auditability, as well as overviews of the operational architecture, security framework, and resiliency structures.[21] Independent testing of the business activities, systems and controls, and compliance management systems should also be addressed.[22] Further, the business plan should address any functions or services that will be outsourced to a third party and the third-party risk management processes that are commensurate with the level of risk and complexity of those third-party relationships.

The applicant should also provide a risk assessment with the business plan. The risk assessment should demonstrate a realistic understanding of risk and describe management's assessment of all risks inherent in the proposed business model and products and services, including risks relating to third-party service providers, cybersecurity, Bank Secrecy Act (BSA) and anti-money laundering (AML) requirements, Office of Foreign Assets Control economic sanctions obligations, consumer protection, and fair lending. The risk assessment should set out the degree of risk the bank intends to assume (its risk appetite) and how it would manage the identified risks. The risk assessment should factor in the target markets'

[21] Applicants should review 12 CFR 30, appendix B, "Interagency Guidelines Establishing Information Security Standards." These guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information and for disposing of consumer information.

[22] Such independent testing may be performed internally or may be outsourced but should be performed by someone independent of the day-to-day functions of the business activities, systems, and controls and who has the requisite skills to identify program or control weaknesses.

economic and competitive conditions, including the proposed products, services, and customers; the targeted geography (e.g., regional, nationwide); and any regulatory considerations regarding serving those markets.[23]

Detailed guidance regarding the business plan is available in the "Charters" booklet of the *Comptroller's Licensing Manual*.[24] Additional information on the OCC's expectations regarding a bank's risk management and corporate governance framework may be found in appendix A to this Supplement, "Supervisory Considerations."

Capital and Liquidity

The OCC's evaluation of a bank's capital is important not only to assess the strength of an individual bank but also to maintain the safety and soundness of the entire banking system. Bank capital also helps to ensure public confidence in the stability of individual banks and the banking system; supports the volume, type, and character of the business conducted; and provides for the possibilities of loss.

For an SPNB, minimum and ongoing capital levels should be commensurate with the risk and complexity of the proposed activities. An SPNB will be subject to the minimum leverage and risk-based capital requirements in 12 CFR 3 that apply to all national banks. These requirements, however, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, set a floor and may not be sufficient for measuring capital adequacy for some SPNBs.

For example, the risks posed by an SPNB with limited on-balance-sheet assets or nontraditional strategies may not be fully captured in its reported assets and off-balance-sheet exposures. To account for this gap, organizers will be expected to propose a minimum level of capital that the bank will meet or exceed at all times. Organizers will determine this minimum level of capital through a capital adequacy assessment that considers quantitative and qualitative factors, such as the volume of off-balance-sheet activity conducted and the risks associated with the applicant's business plan. The OCC will evaluate the applicant's capital adequacy assessment.

Capital adequacy should be addressed in the business plan. Organizers should analyze and support the minimum capital levels the bank will adhere to until it can achieve and sustain

[23] For any SPNB that provides retail bank services, the applicant should describe a BSA/AML compliance program (12 CFR 21.21) reasonably designed to assure and monitor compliance with BSA recordkeeping and reporting requirements, and a consumer compliance program designed to ensure fair treatment of customers and to promote fair access to financial services as well as compliance with section 5 of the Federal Trade Commission Act, the Unfair, Deceptive, and Abusive Acts or Practices prohibitions of the Dodd–Frank Consumer Protection and Wall Street Reform Act of 2010, and all other applicable consumer financial protection laws and regulations.

[24] The "Charters" booklet of the *Comptroller's Licensing Manual* includes a link to the OCC's Business Plan Guidelines. The Business Plan Guidelines provide information on the general elements of a business plan, including a description of the business; marketing plan; management plan; compliance management; the financial management plan; records, systems, and controls; and financial projections.

profitable operations. In addition, organizers should propose minimum capital levels the bank will adhere to after profitability that would be appropriate for its ongoing operations. Organizers also should discuss how the bank would address adverse market conditions that could deplete capital, such as broad market volatility or volatility specific to a business line. Additional factors that organizers should consider include the following:

- On- and off-balance-sheet composition, including credit risk, concentration risk, and market risk.
- Operational risk, including third-party relationships, and compliance risk associated with nontraditional products, services, or operating characteristics.
- Proposed activities and anticipated volume (new accounts, transactions) and impact on capital.
- Plans and prospects for growth, including any material action necessary to address business activity that is either below or above expectations and management's past experience in managing growth.
- Stability or volatility of sources of funds and access to capital.[25]

If the OCC grants preliminary conditional approval for an SPNB charter, that approval will include a condition specifying a minimum capital level the bank must maintain or exceed at all times.[26] This amount would be based on the analysis of quantitative and qualitative factors, including those described above. The OCC expects that capital in an SPNB would increase beyond the initial minimum amount as the size, complexity, and corresponding risks of the bank evolve.

In addition to capital, the organizers should address liquidity and funds management. Liquidity is a bank's capacity to readily meet its cash and collateral obligations at a reasonable cost without adversely affecting either daily operations or the bank's financial condition.[27] Since SPNBs are uninsured and likely to rely on funding that is potentially more volatile in certain environments, organizers should describe how the SPNB can be funded and maintain sufficient liquidity under stressed conditions. The OCC will consider the proposed bank's specific business model when evaluating the bank's liquidity profile and

[25] For additional guidance on capital considerations, please see the "Capital and Dividends" booklet of the *Comptroller's Licensing Manual*.

[26] The OCC tailors capital requirements for other special purpose banks. For example, the OCC typically imposes capital requirements on trust banks in addition to the minimum requirements calculated according to 12 CFR 3. Because trust banks do not make loans or rely on deposit funding, the OCC typically requires them to hold a specific minimum amount of capital, which often exceeds the capital requirements for other types of banks.

[27] For additional details regarding liquidity, applicants may refer to the "Liquidity" booklet of the *Comptroller's Handbook*.

processes for monitoring and mitigating liquidity risk.[28] Based on an analysis of the proposed SPNB's business model, the OCC may impose requirements tailored to the bank's funding model, structure, and risks to ensure it maintains adequate liquidity at all times and in all economic environments. Such requirements could include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

Financial Inclusion

Consistent with the agency's mission to ensure fair treatment of customers and fair access to financial services, the OCC expects any entity seeking an SPNB charter to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers.[29] The nature of that commitment will depend on the proposed bank's business model, and the types of products, services, or activities it intends to provide.

An SPNB applicant should describe the proposed bank's commitment to financial inclusion in its application. The description should include the proposed goals, approaches, activities, milestones, commitment measures, and metrics for serving the anticipated market and community consistent with the bank's activities, business model, and product and service offerings. For more information on the OCC's expectations regarding financial inclusion, see appendix B to this Supplement, "Financial Inclusion Commitment Guidance."

Contingency Planning

Before receiving final approval for a charter, an SPNB will be required to develop a contingency plan to address significant financial stress that could threaten the viability of the bank. The contingency plan should outline strategies for restoring the bank's financial strength and options for selling, merging, or liquidating the bank in the event the recovery strategies are not effective.[30] The format and content of the plan are flexible and should be tailored to the bank's specific business and reviewed and updated as the bank's business evolves.

As a condition for preliminary approval of a charter, an SPNB will be required to develop the contingency plan during the bank's organization phase. The OCC's final approval will require the bank to implement and adhere to the plan. The bank will be expected to review the contingency plan annually and update it as needed. Any significant changes to the contingency plan will require the non-objection of the appropriate supervisory office.

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[28] National banks, including SPNBs, that meet certain asset thresholds are automatically subject to additional liquidity requirements under 12 CFR 50, including banks with total consolidated assets equal to $250 billion or more, and banks with total consolidated on-balance-sheet foreign exposure equal to $10 billion or more.

[29] See 12 USC 1(a).

[30] "OCC's Guidelines Establishing Standards for Recovery Planning for Certain Large Insured National Banks, Insured Federal Savings Associations and Insured Federal Branches," in 12 CFR 30, appendix E may be a useful resource for SPNBs developing strategies to restore the bank to financial viability.

Other Important Considerations

Coordination With Other Regulators

Depending on the structure of the proposed SPNB, regulators in addition to the OCC may have oversight and supervisory roles over the bank. In considering applications for SPNB charters, the OCC will coordinate as appropriate with other regulators to facilitate consideration of any applications or approvals that may be required by those regulators.

Continuation of Remedies

The OCC does not permit companies that are the subject of a corrective program or enforcement action by another regulator to avoid the consequences of that corrective program or enforcement action. A pending enforcement action with respect to a significant supervisory matter may be grounds for denial of a charter application. Otherwise, after consultation with the other regulator, the OCC will ensure that a company's obligation to remediate or pay penalties for any violations or deficiencies cited or identified by another regulator is carried forward and enforced through conditions imposed on an approval of an SPNB charter.

The Chartering Decision

The OCC grants approval of a charter application in two steps: preliminary conditional approval and final approval.[31] The period between the preliminary conditional approval and final approval is referred to as the organization phase.[32] The OCC will issue a final approval once it determines that all key phases of organizing the bank have been completed, all requirements and conditions for final approval have been met, and the organizers have received any other necessary regulatory approvals.

The OCC imposes certain conditions in connection with the approval of all new national bank charters, including special purpose national banks.[33] The conditions may address a variety of issues, such as guaranteeing maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan. Other conditions include ensuring that the bank does not significantly deviate from the business model proposed in its application without obtaining the OCC's prior non-objection.[34]

The OCC also will impose conditions that are specific to SPNBs or unique to an individual SPNB. For example, because SPNBs are uninsured, the OCC will require the bank to develop a contingency plan that includes options to sell itself, wind down, or merge with a nonbank affiliate, if necessary. In addition, the OCC may impose conditions similar to requirements in statutes that apply by their terms only to insured banks, for instance a condition requiring the bank to demonstrate a commitment to financial inclusion.[35]

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[31] Following review of the application, the OCC determines whether to grant preliminary conditional approval or deny the application. A preliminary conditional approval determination indicates the OCC's permission to proceed with the organization of the bank according to the business plan set forth in the application and specifies the conditions for approval. Granting preliminary conditional approval provides the organizers of the bank with assurances that the application has passed the first phase of OCC review before the organizers expend additional funds to raise capital, hire officers and employees, and fully develop policies and procedures. It is not an assurance that the OCC will grant final approval for a new bank charter.

[32] For additional information on the organization phase, see the "Charters" booklet of the *Comptroller's Licensing Manual*.

[33] The OCC also imposes a number of requirements on a bank when it grants preliminary conditional approval. Examples of such requirements include establishing appropriate policies and procedures and adopting an internal audit system appropriate to the size, nature, and scope of the bank's activities. The organizers must satisfy these requirements before the OCC grants final approval. These requirements are discussed in the "Charters" booklet of the *Comptroller's Licensing Manual*.

[34] See the "Charters" booklet of the *Comptroller's Licensing Manual* for a discussion of conditions that may be imposed in connection with a charter application. The condition regarding a significant deviation from the business plan is discussed in appendix F, "Significant Deviations After Opening."

[35] Certain provisions in the Federal Deposit Insurance Act, such as section 1831p-1 (safety and soundness standards) and section 1829b (retention of records), only apply to insured depository institutions. When a law does not apply directly, the OCC may, through a charter condition, work with the bank to achieve the goals of a particular statute or regulation, taking into account relevant differences between a full-service bank and a special purpose bank.

In addition, the OCC will impose assessments on an SPNB as a condition of approval. The OCC is funded through assessments and fees charged to the banks it supervises, and SPNBs will be subject to periodic assessments, just as other national banks are.[36] The OCC has modified the assessments it charges to other special purpose national banks to account for the banks' activities and the assets they hold.[37] The OCC would determine assessments for an SPNB based on similar factors tailored to the business model of the SPNB.

These charter conditions are enforceable and generally will remain in place until removed or modified by the OCC.[38] Compliance with these conditions will be reviewed by the OCC during the examination process.[39]

Supervision of Approved SPNBs

After the OCC issues final approval and the bank opens for business, the OCC will supervise the SPNB, as it does all other national banks, under a scheduled supervisory cycle, including on-site examination and periodic off-site monitoring. The OCC sets high expectations for the entities it supervises. Like all de novo institutions, newly chartered SPNBs will be subject to rigorous ongoing oversight to ensure that the bank's management and the board of directors are properly executing their business strategy and the bank is meeting its performance goals.

Key supervisory considerations for SPNBs are highlighted in appendix A to this Supplement. For additional information on specific areas of bank supervision such as internal controls and corporate and risk governance, applicants should refer to the booklets of the *Comptroller's Handbook*.

[36] See 12 USC 16 and 481; and 12 CFR 8.

[37] Additional assessments are required of certain national banks. See, e.g., 12 CFR 8.2(c) and 8.6(c) (additional assessments imposed on independent credit card banks and independent trust banks). As it gains experience, the OCC may amend its rules to address assessments for SPNBs.

[38] Conditions imposed in connection with a charter are considered "conditions imposed in writing" and are enforceable under 12 USC 1818.

[39] These conditions may be imposed in the preliminary approval letter and the final approval letter (together, conditional approval letters). The OCC also may require that the applicant enter into an operating agreement with the OCC. The OCC publishes all conditional approval letters on its website on a monthly basis. The OCC does not generally publish operating agreements. A conditional approval letter, however, will disclose the existence of an operating agreement. The special purpose charters section of the "Charters" booklet of the *Comptroller's Licensing Manual* has additional information on operating agreements and other documents used for some special purpose national trust banks.

Appendixes

Appendix A: Supervisory Considerations

OCC Supervisory Framework

The supervisory framework for SPNBs will incorporate core elements already in place for all national banks. These elements include an assigned supervisory office, an assigned portfolio manager, a supervisory strategy tailored to the bank's business model, and a blend of on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team. In addition to the statutory examination requirements[40] and consistent with longstanding OCC de novo supervision policy, newly chartered SPNBs will be subject to more frequent and intensive supervision in their early years of operation. The scope of supervision activities 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. SPNB examination and supervision activities will also include frequent contact with the board of directors and bank management.

OCC executive management will assess the OCC's ability and willingness to supervise an eligible SPNB based on the OCC's risk appetite, resources, and skill sets needed. The executives will collaborate with the Office of Innovation, Legal, and Licensing staff in making their decisions on proposed SPNB charters. Similar to the OCC's supervision framework for existing special purpose banks, the OCC will identify the appropriate supervisory office for ongoing supervision. In addition, each bank will have an assigned portfolio manager who will serve as the primary point of contact and examiner-in-charge for the institution. The portfolio manager and the examination team will have subject matter expertise appropriate for the bank's business model. In addition, licensing and risk specialists, legal staff, and other subject matter experts will be assigned to each bank, as appropriate.

Rating Framework

SPNBs will be subject to the same ratings framework, including applicable specialty ratings, as other national banks. As outlined in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*, national banks are assessed in accordance with the Uniform Financial Institutions Rating System. Composite ratings are based on an evaluation of an institution's managerial, operational, financial, risk management, and compliance performance.

Under this uniform rating system, the OCC ensures that all national banks are evaluated in a comprehensive and uniform manner and that supervisory attention is focused appropriately on those banks that exhibit financial and operational weaknesses or adverse trends. The rating system, commonly referred to as CAMELS, assesses components of a bank's

[40] As national banks, SPNBs will be subject to the statutory examination cycle prescribed by 12 USC 1820(d).

performance including capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk, as well as specialty areas such as information technology, trust (if applicable), and consumer compliance.

Risk Management Framework

The OCC expects every national bank to have an appropriate risk management framework to address all relevant risks to the bank.[41] The structure, sophistication, and oversight of these systems should be commensurate with the complexity and amount of risk a bank assumes. Regardless of the bank's size or complexity, a sound risk management framework should do the following:

- **Identify risk:** Banks must recognize and understand existing risks and risks that may arise from new business initiatives, including risks posed by third-party relationships, by external market forces, or by regulatory or statutory changes. Risk identification should be a continuing process and occur at both the transaction and portfolio levels.
- **Measure risk:** Banks must have effective risk management systems that measure risks accurately and in a timely manner. A bank that does not have an effective risk measurement system has limited ability to control or monitor risk levels.
- **Monitor risk:** Banks must monitor risk levels to ensure timely review of risk positions and exceptions to risk limits. Monitoring reports must be timely, accurate, and relevant, and should be distributed to appropriate individuals to ensure action, when needed.
- **Control risk:** Banks must establish and communicate risk limits through policies, standards, and procedures that define responsibilities and authority. These limits serve as a means to control exposures to the various risks associated with the bank's activities.

The OCC employs a risk-based supervisory philosophy focused on evaluating risk, identifying material and emerging problems, and ensuring that individual banks take corrective action before problems compromise their safety and soundness or result in the unfair treatment of customers. This supervision-by-risk approach provides a consistent definition of risk and a system for assessing risks (known as the Risk Assessment System or RAS), and it integrates risk assessment into the supervisory process. The RAS is applicable to all risks identified across a bank and can include (although it is not limited to) credit risk, information technology systems and controls, operational risk, cybersecurity risk, liquidity and funds management, compliance risk, and strategic and reputation risks. Following risk evaluations, the supervisory office tailors and conducts supervisory activities based on the risks identified, and periodic testing is completed in order to validate a bank's risk assessment.

[41] For additional information on the risk management framework, see the "Corporate and Risk Governance" booklet of the *Comptroller's Handbook*.

Corporate Governance Framework

As with all national banks, the OCC expects the governance structure for any proposed SPNB to be commensurate with the risk and complexity of its proposed products, services, and activities. The OCC expects national banks to have expertise, financial acumen, and a risk management framework that includes governance and well-defined roles among the bank's business units, support functions, and the internal audit function.[42]

The board of directors must have a prominent role in the overall governance structure by participating on key committees and guiding the bank's overall strategy and risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

Ongoing Communication

The OCC is committed to ongoing communication with the banks it supervises and with other banking regulators. This includes formal and informal conversations, meetings, examination reports, and other written communications. At a minimum, the OCC must provide a bank's board of directors a report of examination (ROE) at least once each supervisory cycle. The ROE conveys the bank's overall condition, ratings, and risk assessment summary. It also summarizes examination activities and findings identified during the supervisory cycle.[43]

[42] Internal audit (including co-sourcing and outsourced arrangements) must be an independent function and report directly to the audit committee of the board of directors. For additional information on the audit function, see the "Internal and External Audits" booklet of the *Comptroller's Handbook*.

[43] Additional information about communications can be found in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*.

Appendix B: Financial Inclusion Commitment Guidance

Financial Inclusion Commitment

Consistent with the agency's mission to ensure fair treatment of customers and fair access to financial services, the OCC expects any entity seeking an SPNB charter to demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers. The nature of that commitment will depend on the proposed bank's business model, and the types of products, services, or activities it intends to provide.

Considerations

Initial Description

In completing the charter application, each SPNB applicant should identify the financial services needs of underserved markets that could be met by the SPNB's products, services, and activities. An applicant should include a description of its financial inclusion commitment that addresses the proposed bank's

- products, services, and activities.
- anticipated markets and communities, including underserved populations or communities, including low- and moderate-income customers.
- goals, milestones, commitment measures (e.g., the applicant's loan origination volumes for lenders, average pooled account balances and transaction volumes for payment entities), and metrics (e.g., the measure as a percentage of activity in anticipated markets and communities, such as the share of lending to low- and moderate-income borrowers).

Policies and Procedures

During the organization phase, following preliminary conditional approval, the SPNB will develop policies and procedures that address the SPNB's implementation of its financial inclusion commitment.

Before final approval, the OCC will review and evaluate the SPNB's policies and procedures related to the financial inclusion commitment and will consider the following:

- The SPNB's ability, efforts, and commitment to meet various community credit and other financial service needs, including those of underserved populations or communities, based on the applicant's projected financial condition and size, economic conditions in the anticipated markets and communities, and other factors.
- Investments, partnerships, ongoing outreach, and collaboration strategies, or expected participation in governmentally insured, guaranteed, or subsidized loan programs that the SPNB will use to achieve its financial inclusion objectives.

- Other factors that reasonably bear upon the extent to which the SPNB will help meet the credit and other financial services needs of the anticipated market and community, including underserved populations or communities.
- The SPNB's process to meet the needs of the anticipated market and community on a continual basis, including its process to update or modify its financial inclusion commitment in appropriate circumstances, and material changes to the products or services offered or the markets and communities served.

The SPNB's commitment to financial inclusion is ongoing through the life of the charter. Financial inclusion commitment-related conditions imposed as part of any final approval will remain in place and will be reviewed for compliance during the examination process.

EXHIBIT D

CSBS SINCE 1902
CONFERENCE OF STATE BANK SUPERVISORS

State Licensing Laws for Mortgage Lending, Consumer Lending, and Money Transmission (as of September 2018)

State	Mortgage Lending	Consumer Lending	Money Transmission
Alabama	Ala. Code §§ 5-26-1 et seq. (LexisNexis 2018)	Ala. Code §§ 5-19-1 et seq. (LexisNexis 2018)	Ala. Code §§ 8-7A-1 et seq. (LexisNexis 2018)
Alaska	Alaska Stat. §§ 06.60.010 et. seq. (2018)	Alaska Stat. §§ 06.20.010 et. seq. (2018)	Alaska Stat. §§ 06.55.101 et. seq. (2018)
Arizona	Ariz. Rev. Stat. §§ 6-941 et. seq., 6-991 et. seq. (LexisNexis 2018)	Ariz. Rev. Stat. §§ 6-601 et. seq. (LexisNexis 2018)	Ariz. Rev. Stat. §§ 6-1201 et. seq. (LexisNexis 2018)
Arkansas	Ark. Code Ann. §§ 23-39-501 et seq. (2018)	Not Applicable	Ark. Code Ann. §§ 23-55-101 et seq. (2018)
California	Cal. Fin. Code §§ 50001 et. seq. (Deering 2018)	Cal. Fin. Code §§ 22100 et. seq. (Deering 2018)	Cal. Fin. Code §§ 2000 et. seq. (Deering 2018)
Colorado	Colo. Rev. Stat. §§ 12-61-901 et. seq. (2018)	Colo. Rev. Stat. §§ 5-2-301 et. seq. (2018)	Colo. Rev. Stat. §§ 11-110-101 et. seq. (2018)
Connecticut	Conn. Gen. Stat. §§ 36a-485 et. seq. (2018)	Conn. Gen. Stat. §§ 36a-555 et. seq. (2018)	Conn. Gen. Stat. §§ 36a-595 et. seq. (2018)
Delaware	Del. Code Ann. tit. 5, §§ 2201 et. seq., 2401 et. seq. (2018)	Del. Code Ann. tit. 5, §§ 2201 et. seq. (2018)	Del. Code Ann. tit. 5, §§ 2301 et. seq. (2018)
Florida	Fla. Stat. Ann. §§ 494.001 et. seq. (LexisNexis 2018)	Fla. Stat. Ann. §§ 516.001 et. seq. (LexisNexis 2018)	Fla. Stat. Ann. §§ 560.001 et. seq. (LexisNexis 2018)
Georgia	Ga. Code Ann. §§ 7-1-1000 et. seq. (2018)	Ga. Code Ann. §§ 7-3-1 et. seq. (2018)	Ga. Code Ann. §§ 7-1-680 et. seq. (2018)
Hawaii	Haw. Rev. Stat. §§ 454F-1 et. seq. (LexisNexis 2018)	Haw. Rev. Stat. §§ 412:9-100 et. seq. (LexisNexis 2018)	Haw. Rev. Stat. §§ 489D--1 et. seq. (LexisNexis 2018)
Idaho	Idaho Code Ann. §§ 26-31-101 et. seq. (2018)	Idaho Code Ann. §§ 28-46-301 et. seq. (2018)	Idaho Code Ann. §§ 26-2901 et. seq. (2018)
Illinois	205 Ill. Comp. Stat. Ann. 635/1-1 et. seq. (LexisNexis 2018)	205 Ill. Comp. Stat. Ann. 670/1 et. seq. (LexisNexis 2018)	205 Ill. Comp. Stat. Ann. 657/1 et. seq. (LexisNexis 2018)
Indiana	Ind. Code Ann. §§ 24-4.4-1-101 et. seq. (LexisNexis 2018)	Ind. Code Ann. §§ 24-4.5-3-501 et. seq. (LexisNexis 2018)	Ind. Code Ann. §§ 28-8-4-1 et. seq. (LexisNexis 2018)
Iowa	Iowa Code §§ 535B.1 et. seq., 535D.1 et. seq. (2018)	Iowa Code §§ 537.2301 et. seq. (2018)	Iowa Code §§ 533C.101 et. seq. (2018)
Kansas	Kan. Stat. Ann. §§ 9-2201 et. seq. (2018)	Kan. Stat. Ann. §§ 16a-2-301 et. seq. (2018)	Kan. Stat. Ann. §§ 9-508 et. seq. (2018)
Kentucky	Ky. Rev. Stat. Ann. §§ 286.8-010 et. seq. (LexisNexis 2018)	Ky. Rev. Stat. Ann. §§ 286.4-410 et. seq. (LexisNexis 2018)	Ky. Rev. Stat. Ann. §§ 286.11-001 et. seq. (LexisNexis 2018)
Louisiana	La. Rev. Stat. Ann. §§ 6:1081 et. seq. (2018)	La. Rev. Stat. Ann. §§ 9:3557 et. seq. (2018)	La. Rev. Stat. Ann. §§ 6:1031 et. seq. (2018)
Maine	Me. Rev. Stat. tit. 9-A, §§ 1-301 et. seq., 13-101 et. seq. (2018)	Me. Rev. Stat. tit. 9-A, §§ 2-301 et. seq. (2018)	Me. Rev. Stat. tit. 32, §§ 6101 et. seq. (2018)

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State	Mortgage Lending	Consumer Lending	Money Transmission
Maryland	Md. Code Ann., Fin. Inst. §§ 11-501 et. seq., 11-601 et. seq. (LexisNexis 2018)	Md. Code Ann., Fin. Inst. §§ 11-201 et. seq. (LexisNexis 2018)	Md. Code Ann., Fin. Inst. §§ 12-401 et. seq. (LexisNexis 2018)
Massachusetts	Mass. Ann. Laws ch. 255E, §§ 1 et. seq., ch. 255F, §§ 1 et. seq. (LexisNexis 2018)	Mass. Ann. Laws ch. 140, §§ 96 et. seq. (LexisNexis 2018)	Mass. Ann. Laws ch. 167F, § 4, ch. 169, §§ 1 et. seq. (LexisNexis 2018)
Michigan	Mich. Comp. Laws Serv. §§ 445.1651 et. seq., 493.131 et. seq. (LexisNexis 2018)	Mich. Comp. Laws Serv. §§ 493.1 et. seq. (LexisNexis 2018)	Mich. Comp. Laws Serv. §§ 487.1001 et. seq. (LexisNexis 2018)
Minnesota	Minn. Stat. §§ 58.01 et. seq., 58A.01 et. seq. (2018)	Minn. Stat. §§ 56.0001 et. seq. (2018)	Minn. Stat. §§ 53B.01 et. seq. (2018)
Mississippi	Miss. Code Ann. §§ 81-18-1 et. seq. (2018)	Miss. Code Ann. §§ 75-67-101 et. seq. (2018)	Miss. Code Ann. §§ 75-15-1 et. seq. (2018)
Missouri	Mo. Rev. Stat. §§ 443.701 et. seq. (2018)	Mo. Rev. Stat. §§ 367.100 et. seq. (2018)	Mo. Rev. Stat. §§ 361.700 et. seq. (2018)
Montana	Mont. Code Ann. §§ 32-9-101 et. seq. (2018)	Mont. Code Ann. §§ 32-5-101 et. seq. (2018)	Not Applicable
Nebraska	Neb. Rev. Stat. Ann. §§ 45-701 et. seq. (LexisNexis 2018)	Neb. Rev. Stat. Ann. §§ 45-1001 et. seq. (LexisNexis 2018)	Neb. Rev. Stat. Ann. §§ 8-2701 et. seq. (LexisNexis 2018)
Nevada	Nev. Rev. Stat. Ann. §§ 645E.010 et. seq. (Lexis-Nexis 2018)	Nev. Rev. Stat. Ann. §§ 675.010 et. seq. (Lexis-Nexis 2018)	Nev. Rev. Stat. Ann. §§ 671.010 et. seq. (Lexis-Nexis 2018)
New Hampshire	N.H. Rev. Stat. Ann. §§ 397-A:1 et. seq. (LexisNexis 2018)	N.H. Rev. Stat. Ann. §§ 399-A:1 et. seq. (LexisNexis 2018)	N.H. Rev. Stat. Ann. §§ 399-G:1 et. seq. (LexisNexis 2018)
New Jersey	N.J. Rev. Stat. §§ 17:11C-51 et. seq. (2018)	N.J. Rev. Stat. §§ 17:11C-1 et. seq. (2018)	N.J. Rev. Stat. §§ 17:15C-1 et. seq. (2018)
New Mexico	N.M. Stat. Ann. §§ 58-21-1 et. seq., 58-21B-1 et. seq. (LexisNexis 2018)	N.M. Stat. Ann. §§ 58-15-1 et. seq. (LexisNexis 2018)	N.M. Stat. Ann. §§ 58-32-101 et. seq. (LexisNexis 2018)
New York	N.Y. Banking Law §§ 589 et. seq., 599-a et. seq. (Consol. 2018)	N.Y. Banking Law §§ 340 et. seq. (Consol. 2018)	N.Y. Banking Law §§ 640 et. seq. (Consol. 2018)
North Carolina	N.C. Gen. Stat. §§ 53-244.010 et. seq. (2018)	N.C. Gen. Stat. §§ 53-164 et. seq. (2018)	N.C. Gen. Stat. §§ 53-208.41 et. seq. (2018)
North Dakota	N.D. Cent. Code §§ 13-04.1-01 et. seq., 13-10-01 et. seq. (2018)	N.D. Cent. Code §§ 13-04.1-01 et. seq. (2018)	N.D. Cent. Code §§ 13-09-01 et. seq. (2018)
Ohio	Ohio Rev. Code Ann. §§ 1322.01 et. seq. (LexisNexis 2018)	Ohio Rev. Code Ann. §§ 1321.01 et. seq. (LexisNexis 2018)	Ohio Rev. Code Ann. §§ 1315.01 et. seq. (LexisNexis 2018)
Oklahoma	Okla. Stat. Ann., tit. 59, §§ 2095.1 et. seq. (LexisNexis 2018)	Okla. Stat. Ann., tit. 14A, §§ 3-501 et. seq. (LexisNexis 2018)	Okla. Stat. Ann., tit. 6, §§ 2101 et. seq. (LexisNexis 2018)
Oregon	Or. Rev. Stat. §§ 86A.095 et. seq. (2018)	Or. Rev. Stat. §§ 725.045 et. seq. (2018)	Or. Rev. Stat. §§ 717.200 et. seq. (2018)
Pennsylvania	7 Pa. Cons. Stat. §§ 6101 et. seq. (2018)	7 Pa. Stat. Ann. §§ 6201 et. seq. (2018)	7 Pa. Stat. Ann. §§ 6101 et. seq. (2018)

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State	Mortgage Lending	Consumer Lending	Money Transmission
Rhode Island	R.I. Gen. Laws §§ 19-14-1 et. seq., 19-14.10-1 et. seq. (2018)	R.I. Gen. Laws §§ 19-14-1 et. seq. (2018)	R.I. Gen. Laws §§ 19-14-1 et. seq., 19-14.3-1 et. seq. (2018)
South Carolina	S.C. Code Ann. §§ 37-22-110 et. seq. (2018)	S.C. Code Ann. §§ 34-29-10 et. seq. (2018)	S.C. Code Ann. §§ 35-11-100 et. seq. (2018)
South Dakota	S.D. Codified Laws §§ 54-4-1 et. seq. (2018)	S.D. Codified Laws §§ 54-4-1 et. seq. (2018)	S.D. Codified Laws §§ 51A-17-1 et. seq. (2018)
Tennessee	Tenn. Code Ann. §§ 45-13-101 et. seq. (2018)	Tenn. Code Ann. §§ 45-12-101 et. seq. (2018)	Tenn. Code Ann. §§ 45-7-201 et. seq. (2018)
Texas	Tex. Fin. Code Ann. §§ 157.001 et. seq. (2018)	Tex. Fin. Code Ann. §§ 342.051 et. seq. (2018)	Tex. Fin. Code Ann. §§ 151.001 et. seq. (2018)
Utah	Utah Code Ann. §§ 70D-2-101 et. seq., 70D-3-101 et. seq. (LexisNexis 2018)	Utah Code Ann. §§ 70C-8-201 et. seq. (LexisNexis 2018)	Utah Code Ann. §§ 7-25-101 et. seq. (LexisNexis 2018)
Vermont	Vt. Stat. Ann., tit. 8, §§ 2200 et. seq. (2018)	Vt. Stat. Ann., tit. 8, §§ 2200 et. seq. (2018)	Vt. Stat. Ann., tit. 8, §§ 2500 et. seq. (2018)
Virginia	Va. Code Ann. §§ 6.2-1600 et. seq., 6.2-1700 et. seq. (2018)	Va. Code Ann. §§ 6.2-1500 et. seq. (2018)	Va. Code Ann. §§ 6.2-1900 et. seq. (2018)
Washington	Wash. Rev. Code Ann. §§ 31.04.015 et. seq. (LexisNexis 2018)	Wash. Rev. Code Ann. §§ 31.04.015 et. seq. (LexisNexis 2018)	Wash. Rev. Code Ann. §§ 19.230.005 et. seq. (LexisNexis 2018)
West Virginia	W. Va. Code Ann. §§ 31-17-1 et. seq., 31-17A-1 et. seq. (LexisNexis 2018)	W. Va. Code Ann. §§ 46A-4-101 et. seq. (LexisNexis 2018)	W. Va. Code Ann. §§ 32A-2-1 et. seq. (LexisNexis 2018)
Wisconsin	Wis. Stat. §§ 224.71 et. seq. (2018)	Wis. Stat. §§ 138.01 et. seq. (2018)	Wis. Stat. §§ 217.01 et. seq. (2018)
Wyoming	Wyo. Stat. Ann. §§ 40-23-101 et. seq. (2018)	Wyo. Stat. Ann. §§ 40-14-341 et. seq. (2018)	Wyo. Stat. Ann. §§ 40-22-101 et. seq. (2018)

EXHIBIT E

CSBS SINCE 1902

CONFERENCE OF STATE BANK SUPERVISORS

November 14, 2016

Office of the Comptroller of the Currency (OCC)
Legislative and Regulatory Activities Division
400 7th Street SW, Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

Re: Receiverships for Uninsured National Banks, Proposed Rule; Docket ID OCC-2016-0017

Dear Comptroller Curry,

The Conference of State Bank Supervisors (CSBS) appreciates the opportunity to comment on the notice of proposed rulemaking, entitled *Receiverships for Uninsured National Banks*, addressing how the Office of the Comptroller of the Currency (OCC) would conduct the receivership of an uninsured national bank and placing the receivership proposal within the OCC's responsible innovation initiative. State bank supervisors appreciate the OCC's desire to clarify the receivership framework applicable to uninsured national banks for the benefit of the broader regulatory community and financial market participants. We also appreciate the efforts of the OCC and other financial regulatory agencies to focus on the benefits and risks that technological innovation has and will continue to bring to financial services. However, as set out in this comment letter, State banking regulators oppose a potential national charter for certain financial technology companies because it would distort the marketplace for financial services and undermine State laws and regulations governing financial services.

CSBS and its members recognize the value flowing from the intersection of innovation and financial services—value that enables existing and new companies to potentially better serve their customers. This convergence also presents risks—risks for customers and for the larger marketplace. State regulators have and continue to charter, license, and supervise a variety of entities involved in developing innovative financial services solutions and products. As supervisors of over three-quarters of this nation's banks and a very broad range of non-depository financial services companies, State regulators are committed to fostering innovation that promotes economic development and improves the ability of regulated financial services companies to serve their customers and operate in a safe and sound manner.

I. SPECIAL PURPOSE CHARTERS

The rulemaking indicates that the proposed receivership framework falls within the OCC's initiative on responsible innovation and that the OCC is considering whether "a special purpose charter could be an appropriate entity for the delivery of banking services in new ways" by financial technology (fintech) companies.

In this section, State regulators share our perspective on the Comptroller's chartering authority as well as the supervisory and regulatory issues that would be created by an unprecedented, overreaching use of such authority.

A. Statutory Limits of the OCC's Chartering Authority

The proposed rule begins with a discussion of the OCC's authority to issue special purpose charters. The proposal cites Section 5.20(e)(1)(i) of the OCC's chartering regulations in stating that "[t]he OCC has the authority to charter and supervise special purpose banks with operations limited solely to providing fiduciary services. . . . In addition to national trust banks, the OCC also may charter other special purpose banks with business models that are within the business of banking. The OCC's rules provide that a special purpose bank must conduct *at least one of the three core banking functions*, namely receiving deposits, paying checks, or lending money" (emphasis added).[1]

As CSBS indicated when the OCC's chartering regulations were revised in 2003,[2] State regulators are firmly opposed to any expansion of the Comptroller's chartering authority that would enable wholesale preemption of State oversight and consumer protection laws for a group of entities conducting activities that are only loosely related to banking. State regulators believe that Section 5.20(e)(1)(i) of the OCC's chartering regulations exceeds the statutory limits of the OCC's chartering authority by authorizing the OCC to charter an institution that engages exclusively in non-depository core banking functions—whether lending money and/or paying checks.

The Comptroller's Licensing Manual indicates that new national banks may be organized for "full-service operations" under a general purpose charter or that new national banks may be organized for "special purpose operations" under a special purpose charter. As discussed below, the National Bank Act (NBA) and other federal banking laws do not support the assertion that an institution that engages exclusively in non-depository core banking functions may be chartered by the Comptroller as a national bank under either a general or special purpose charter.

As courts have held,[3] and as the OCC itself has acknowledged,[4] the NBA does not authorize the Comptroller to issue a general purpose charter to an institution that engages exclusively in non-depository core banking functions, because such an institution would not be engaged in the "business of banking". While an institution operating under a general purpose charter need not exercise all of the powers inherent in the

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[1] *See* 81 Fed. Reg. 62835, 62837 (citing 12 C.F.R. § 5.20(e)(1)(i)).

[2] In our 2003 comment letter we stated: "the OCC's proposal to allow limited purpose national banks to conduct fiduciary activities or 'any other activities within the business of banking' raises important questions. . . . CSBS is concerned that expansion of the limited purpose national bank charter creates a safe harbor - enabling wholesale preemption of State oversight and consumer protection laws for a group of entities conducting activities only loosely related to banking . . . additional clarification on the OCC's plans for expanding limited purpose national bank powers is needed to avoid a perception that the OCC is availing the national bank charter to a group of entities not conducting core banking activities. CSBS questions what authority the OCC has to undertake such a sweeping measure."

[3] *See Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (*IBAA v. Conover*) (holding that an institution which does not engage in both accepting deposits and making loans cannot be chartered as a national bank because it would not be engaged in the "business of banking" within the meaning of the NBA). *See also National State Bank of Elizabeth v. Smith*, No. 76-1479 (D.N.J. September 16, 1977) (holding that the Comptroller lacked the authority to charter a trust company which did not also engage in the "business of banking") *rev'd on other grounds*, 591 F.2d 223 (3d Cir. 1979).

[4] *See* Office of the Comptroller of the Currency Interpretations - Corporate Decision #96-41. Although the OCC dealt with the issue in a perfunctory manner in this interpretive letter, by conditioning the approval of the charter application on the applicant's commitment that it would eventually perform a deposit-taking function, the OCC implicitly acknowledged that a general purpose charter cannot be granted to an institution which does not perform the core banking function of deposit-taking.

business of banking, applicable legal precedent,[5] the OCC's chartering history,[6] federal banking law,[7] and other federal laws[8] plainly indicate that engaging exclusively in non-depository core banking functions does not, in itself, constitute engaging in the "business of banking" under the NBA. As several provisions of the NBA (12 U.S.C. §§ 21, 24(Seventh), 26 & 27) make clear, the OCC may not issue a general purpose national bank charter to an institution unless that institution intends to engage in the "business of banking," including deposit-taking.

With respect to special purpose charters, although Congress has given the Comptroller specific grants of authority to charter special purpose institutions engaged in fiduciary activities[9] or a narrowly drawn set of specialized activities,[10] those narrowly drawn grants of authority clearly do not allow the Comptroller to issue other types of special purpose charters to institutions that are engaged exclusively in non-depository core banking functions. Based on the foregoing, the chartering regulation upon which the OCC appears to rely (Section 5.20(e)(1)(i)) clearly exceeds the statutory limits of the Comptroller's chartering authority.

In addition to the NBA, the Bank Holding Company Act (BHCA) has been held to limit the scope of the Comptroller's chartering authority. Specifically, by defining "bank" as an institution which accepts deposits and makes loans,[11] the BHCA has been held to bar the Comptroller from conditioning the approval of a charter application on the institution agreeing to voluntarily refrain from engaging in either of these core banking functions, particularly deposit-taking.[12] The subsequent revision of the BHCA with the passage of the Competitive Equality in Banking Act of 1987 (CEBA) would not have altered the governing rationale of court's ruling in *IBAA v. Conover*. To the contrary, CEBA's classification of an "insured bank" as a "bank" under the BHCA represents a congressional acknowledgment that performing the function of deposit-taking is a necessary condition to be engaged in the business of banking, as the court held in *IBAA v. Conover*.

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[5] *See IBAA v. Conover*, supra note 2; *National State Bank of Elizabeth v. Smith*, supra note 2.

[6] It is noteworthy that, since the adoption of Section 5.20(e)(1)(i) of the OCC's chartering regulations in 2003, the Comptroller has not, to our knowledge, granted a general purpose charter to an institution engaged exclusively in non-depository core banking functions.

[7] Other provisions of the NBA also support the conclusion that an institution engaged exclusively in non-depository core banking functions cannot be engaged in the business of banking without also engaging in deposit-taking. *See e.g.*, 12 U.S.C. § 22 (requiring that the organization certificate (i.e. charter) specify the place where the institutions operations of discount and deposit are to be carried on). Other federal banking laws likewise recognize that deposit-taking is the essential function of and necessary condition to engage in the business of banking. *See* 12 U.S.C. § 378 (prohibiting deposit-taking without a bank charter); 12 U.S.C. § 1841(c)(1) (definition of "bank" under the Bank Holding Company Act).

[8] Numerous federal laws treat the function of deposit-taking as a necessary condition for qualifying as a bank. See *In re Republic Trust & Sav. Co.*, 59 B.R. 606 (Bankr. N.D. Okla. 1986) (interpreting bankruptcy code definition of "banking institution" in 11 U.S.C. § 109(b) as inapplicable to an institution which does not have the power to or actually engage in deposit-taking). See also 26 U.S.C. § 581 (defining a "bank" under federal tax law as an institution "a substantial part of the business of which consists of receiving deposits and making loans and discounts").

[9] *See* 12 U.S.C. § 27(a) (national trust companies).

[10] *See* 12 U.S.C. § 24(Eleventh) (community development banks); 12 U.S.C. § 27(a) (cash management banks); 12 U.S.C. § 27(b) (bankers' banks). For certain special purpose charters, the OCC's chartering authority stems from other federal banking laws, *see* 12 U.S.C. § 1841(c)(2)(F) (credit card banks).

[11] *See* 12 U.S.C. § 1841(c)(1).

[12] *See IBAA v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *36-*38 (holding that "nonbank banks" did not act "voluntarily" when they chose to refrain either from accepting demand deposits or from making commercial loans in order to avoid being treated as "banks" under the BHC Act). In the court's view, "the Comptroller will issue . . . charters [for nonbank banks] with the knowledge that they cannot exercise one of the powers that is essential to the business of banking. The substantive effect is the same as if the charters contained terms limiting them." *Id.* at *38.

Given the OCC's chartering history, the applicable case law, and the lack of any statutory authority for the expansive interpretation underlying Section 5.20(e)(1)(i), State regulators request that the OCC identify the statutory source for their purported authority to charter a national bank that engages exclusively in non-depository core banking functions.[13] Additionally, State regulators request that the OCC clarify the source and limits of the Comptroller's authority to grant a general purpose charter to an institution that voluntarily limits its activities to the exercise of non-depository core banking functions. Stakeholders, whether prospective charter applicants or fellow chartering and supervisory authorities, deserve clarity as to the legal foundations for a charter to engage exclusively in non-depository core banking functions—a type of charter without precedent in the national banking system.

B. Supervisory and Regulatory Issues

Aside from the legal issues pertaining to the limits of the Comptroller's chartering authority, State supervisors believe significant policy considerations counsel against the reshaping of the national charter for an institution which engages exclusively in non-depository core banking functions. Such policy considerations include concerns regarding the traditional state-federal balance of authority in licensing and regulation, the preemption of State consumer protection laws, the separation of banking and commerce, and potential risks posed to payments systems.

i. Traditional Role of the States in Chartering and Licensing

With the exception of the dual banking system, the acts of chartering and licensing—although a routine function of the States—is a power that the federal government has exercised sparingly. In contrast to banking, where the exercise of regulation begins with the charter grant, the federal government has almost always regulated nonbanking activities by imposing rules on firms that have already acquired the right to engage in a nonbanking business under a State charter or license. The licensing of financial services activities takes place primarily at the State level, because, as a function of the inherent police power of the States, the protection of the public welfare is primarily a matter of local concern.[14] Indeed, as Justice Brandeis explained over 70 years ago: "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[15]

State regulators believe that Congress has deliberately preserved this cooperative federal-state regulatory framework for the vast majority of nonbanking financial services activities for the benefit of consumers and providers of financial services alike. Consumers benefit because the proximity of the State regulatory framework has proven to be more accountable to local concerns and enables the public to conduct their own assessment as to whether the degree of consumer protections afforded by a particular State accords with their personal preferences. Additionally, a State-based licensing structure benefits financial services

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[13] In the 2003 final rule revising Section 5.20(e)(1)(i) the OCC stated the core banking functions requirement is based on 12 U.S.C. § 36(j), the statutory provision identifying the activities which cause a facility to be considered a bank branch. Given the clear distinction between the definition of a bank "branch" in Section 36(j), which does not refer to the "business of banking" and the statutes governing the OCC's chartering authority (12 U.S.C. §§ 21, 24(Seventh), 26 & 27), which expressly describe a national bank as an institution that is authorized to engage in and shall commence the "business of banking", State regulators reject the assertion that the statutory definition of "branch" can provide any support for a legitimate expansion of the OCC's special-purpose chartering authority.

[14] *Lewis v. BT Inv. Managers*, 447 U.S. 27, 38 (1980) ("both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities.")

[15] *See e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

providers by precluding large, entrenched incumbents from capturing the licensing process so as to exclude new, innovative entrants.

Where Congress has seen fit to provide for the concurrent licensing or regulation of financial services activities at the federal and State level—for instance, in banking, securities, or certain, limited specialized financial services activities—it has done so expressly and clearly through specific legislation. To date, Congress has not authorized the creation of a federal charter or license for the vast majority of nonbank financial service providers, deferring to State authority and the actions of duly elected State legislatures.[16]

By offering a degree of preemption historically unavailable to non-depository institutions, an unprecedented national bank charter for fintech companies would potentially result in the total centralization of non-depository licensing in a single federal agency and thereby nullify the greater competition and innovation enabled through reliance upon multiple State chartering and licensing authorities. State regulators believe that this effective nullification of State authority would result in multiple negative consequences for financial services providers and consumers.

In such a scenario, the OCC could easily become a means for entrenched institutions to exclude new, innovative entrants in order to preserve market structure and competitive dynamics under the status quo. Similarly, incumbent chartered institutions could pressure the OCC to raise the barriers to entry for other fintech companies in order to prevent innovative institutions from obtaining federal charters, either because they lack the significant resources required or because their business models differ slightly from the fintech business models already sanctioned by the OCC. Put simply, the creation of a federal charter for fintech or other nonbanking companies would put the OCC in the position of picking winners and losers among providers of fintech services, to the general detriment of customers and innovative financial services providers. State regulators believe that preserving the preeminent role of the States in the chartering and licensing of non-depository providers of financial services provides the best national strategy for encouraging fintech companies to develop and offer innovative products and solutions, while promoting consumer protection and a diverse and stable financial services market.

In addition to hindering innovation in the financial services industry, the creation of a new special purpose bank charter for fintech and other non-depository institutions would threaten significant harm to consumers both by preempting State consumer protection laws as well as by triggering a "race to the bottom". State regulators believe that, by selectively displacing State consumer protection laws, the issuance of a federal charter would make it increasingly difficult for State legislatures to expand or revise consumer protection laws in response to local concerns. State regulators urge the Comptroller to avoid triggering such a competition in laxity as it would undermine the overriding national public interest in maintaining a safe and sound financial system that protects the interests of consumers while encouraging innovation, growth and vibrancy in the U.S. financial services industry.

In sum, State regulators are opposed to the unprecedented expansion of the Comptroller's chartering authority because, in acting without express authority from Congress, the OCC would drastically alter the traditional state-federal balance of authority in the licensing and regulation of non-depository financial services. We urge the OCC to refrain from upsetting the current equilibrium that has been deliberately

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[16] On several occasions, legislation has been proposed which would provide the OCC with the authority to charter special purpose non-depository institutions, but such legislation has never been enacted by Congress. See FFSCC Charter Act of 2011, H.R. 1909, 112th Cong. (2011); Consumer Credit Access, Innovation, and Modernization Act, H.R. 6139, 112th Cong. (2012). Nevertheless, the fact that proposed legislation was introduced in order to authorize the OCC to charter a non-depository institution underscores the need for Congressional authorization with respect to the non-depository charter currently under consideration.

preserved by Congress, for such a unilateral maneuver would seriously undermine the protections afforded to consumers under State law and would potentially trigger unilateral action by other chartering authorities seeking to grant benefits similar to those afforded under a federal charter.

ii. Preemption of State Consumer Protection and Licensing Laws

In addition to altering the traditional state-federal balance of authority in the regulation of financial services, the creation of a new charter type for an institution engaged exclusively in lending money or paying checks would massively preempt otherwise applicable State licensing and consumer protection laws. Unfortunately, the preemption of State consumer protection laws by the OCC is not an experience with which State regulators are unfamiliar.

For instance, leading up to the 2008 financial crisis, many States adopted laws and brought enforcement actions to stop predatory lending. Such anti-predatory lending laws were enacted because the unique insight of State regulators into local conditions allowed them to identify abusive practices within their jurisdictions. Nevertheless, the OCC promptly preempted the application of State anti-predatory lending laws to national banks and their affiliates, thereby permitting unsafe and abusive lending practices to flourish in the lead up to the financial crisis.[17] With respect to the possible creation of new types of special purpose national bank charters currently being contemplated by the Comptroller, State regulators believe that a similar pattern of overriding State consumer protection laws—and the invaluable, local perspective of State officials underlying such laws—would be highly likely to recur.

At least one consumer-oriented interest group has indicated that they may support the creation of a new special purpose national bank charter for fintech companies provided the charter were to serve as a floor, and not a ceiling, for State fair lending and consumer protection laws. It should be abundantly clear that, even if the OCC were willing to declare that a fintech charter would be subject to stricter State consumer protection laws than those applicable at the federal level, such an arrangement would still depend on the OCC's willingness to rigorously supervise federally chartered institutions for compliance with State laws. To rely on the OCC to exercise its visitorial authority to ensure compliance with State consumer protection laws is to reassign the enforcement of State consumer protection laws from those State officials who are sworn, and legally bound, to enforce them, to federal officials for whom compliance with State law has proven to be, at best, a secondary concern.

In sum, State regulators firmly oppose the creation of new special purpose national bank charters for fintech companies and other non-depository providers of financial services, because such charters will either (1) preempt stricter State consumer protection laws than applicable at the federal level, or (2) reduce State regulators to mere bystanders who are reliant on the discretion of the OCC to enforce State consumer protection laws that apply to federally-chartered fintech companies.

iii. The Separation of Banking and Commerce

The OCC seems to interpret its authority to issue a general purpose charter to engage in the business of banking as implicitly providing the OCC with authority to issue a special purpose charter to engage exclusively in any core banking function within the business of banking. If this interpretation were sound, State regulators believe that such an implicit authority would irreconcilably conflict with a fundamental principle of federal banking law, namely, the separation of banking and commerce.

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[17] *See, e.g.,* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 Iowa J. Corp. L. 893, 909-919 (2011).

In originally establishing a wall between banking and commerce, Congress explicitly relied on the business of banking concept,[18] precisely because economic neutrality ought to be required in the exercise of banking powers. If the OCC charters an institution which engages exclusively in non-depository core banking functions, the fact that the institution is characterized as, in itself, conducting the business of banking, warrants the separation of its credit granting operations from general commercial enterprises. However, because the novel charter type would be exempt from coverage under the BHCA, there would be no federal mechanism to ensure that its activities remain divorced from ownership or control by commercial enterprises.

Accordingly, if an institution that engages exclusively in non-depository core banking functions thereby engages in the business of banking under the NBA, then, State regulators believe, the fundamental principle mandating the separation of banking and commerce is in jeopardy. Thus, State regulators urge the Comptroller to avoid relying upon an expansive interpretation of its chartering authority to create novel, unprecedented charter types that dilute the very meaning of the business of banking and thereby undermine the wall established by Congress between banking and commerce.

iv. Payments System Risk

Despite their membership in the Federal Reserve System, special purpose national banks have limited access to the Federal Reserve payment systems. Pursuant to the Competitive Equality in Banking Act (CEBA) of 1987, special purpose national banks are prohibited from incurring daylight overdrafts in their Federal Reserve Accounts on behalf of affiliates.[19] State regulators have significant concerns and request clarity regarding the OCC's understanding as to whether and on what terms a special purpose national bank would be granted access to Federal Reserve payment systems. Under 12 U.S.C. § 222, any new special purpose national bank must become a member of the Federal Reserve System. However, the Federal Reserve Board has not yet issued any regulations or policy statements governing the future membership of fintech national banks, including fintech payments processors.

Providing nonbank payment processors with direct access to the Federal Reserve payments system would create significant new challenges in measuring and controlling settlement risk. Special purpose national banks typically have been involved only indirectly in making settlement arrangements through Fedwire and ACH.[20] This indirect approach is consistent with the intent of Congress reflected in CEBA, which exempted a number of special purpose institutions from treatment as a bank provided they do not obtain payment related services from any Federal Reserve Bank.[21]

Beyond settlement risk, the provisions of CEBA also point to significant legal and operational risks which would stem from creating a special purpose national bank charter for an institution whose functions are limited to payment processing activities. Those hazards would include the risk that a poorly articulated legal and regulatory framework would result in significant financial exposures or losses to payments system participants. Finally, given the virtual business models pursued by many nonbank fintech companies, those companies generally face greater inherent cyber-related risks that could easily flow through to the Fed's payment systems if such companies are allowed direct access.[22]

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[18] *See* 12 U.S.C. § 1843(c)(8).
[19] *See* 12 C.F.R. § 225.52.
[20] *See Nonbanks in the Payment System*, Payments System Research, Federal Reserve Bank of Kansas City (2003), available here: https://www.kansascityfed.org/~/media/files/publicat/psr/bksjournarticles/nonbankpaper.pdf.
[21] *See* 12 U.S.C. § 1841(c)(2). *See also* 12 CFR 225.145.
[22] Kristin Broughton, *Apple Pay A Systemic Risk? Banker Warns About Nonbank Players*, American Banker (Nov. 21, 2014).

In light of the many risks that such a novel federal charter would pose to the payment systems, State regulators request that the OCC provide greater clarity as to whether and on what terms a fintech company with a special purpose national bank charter would be granted direct access to Federal Reserve payments systems. We urge the OCC to refrain from authorizing or issuing any new type of special purpose national bank charter until the Federal Reserve Board has clearly explained how it intends to regulate the membership of such institutions in the Federal Reserve System.

II. PROPOSED RECEIVERSHIP FRAMEWORK

As the main purpose of the proposed rule is to articulate a framework to govern the receivership of uninsured national banks, this section discusses issues prompted by the proposed receivership framework. State regulators are concerned about several aspects of the proposed framework, including issues related to the conflicts between the proposal and OCC policy, federal law, and other State laws, as well as the costs stemming from administering the receivership of an uninsured institution.

A. Conflict with OCC Policy

Since Congress authorized the chartering of national trust companies in 1978, the OCC generally has not required a national trust bank to obtain deposit insurance as a prerequisite to granting it a charter. However, in 2013, the OCC established a new chartering policy that required that national trust banks obtain deposit insurance in order to be chartered by the OCC, unless an adequate resolution mechanism were in place to resolve the uninsured institution.[23] The OCC's stated rationale for the policy change in 2013 was that the agency is not structured to act as a receiver and that it is ill-equipped to resolve a failed non-depository institution that lacks deposit insurance.

State regulators believe that the OCC's policy conclusion in 2013 is supported by a strong rationale, as receiverships for uninsured institutions can be devastating to creditors of the institution and for that reason must rest on a sound resolution mechanism that is administered by an agency with extensive institutional experience in serving as a receiver. In sharp contrast to its policy position set forth only three years ago, the OCC's proposed rule seems to indicate (without any supporting evidence) that the OCC's ability to administer receiverships has significantly improved. State regulators request that the OCC explain in detail how the structure and experience of the OCC has changed over the past three years in such a manner as would enable it to overcome its previously-stated concerns regarding its limited capacity to function as a receiver.

B. Conflict with Federal Law

Just as the OCC is responsible for appointing the FDIC as receiver for insured national banks, State regulators are responsible for appointment with respect to insured state banks. Furthermore, State banking regulators charter and license a number of uninsured institutions and are charged with appointing receivers and overseeing receiverships for such institutions. Based on this experience overseeing receiverships for uninsured institutions, State regulators wish to emphasize that conflicts with certain generally applicable federal laws, particularly bankruptcy law, can be pervasive.

For instance, the U.S. Bankruptcy Code excludes "banking institutions" from being a debtor in liquidation proceedings under Chapter 7 and reorganization proceedings under Chapter 11.[24] The definition of banking institution is such that an institution will not qualify as a bank if it lacks the power to receive deposits, since

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[23] *See* Joe Adler, *OCC Quietly Ends Exemptions for Trust Banks*, American Banker (Apr. 19, 2013). *See also* Michael H. Krimminger, *Moving Towards a Fintech National Banking Charter?*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Oct. 22, 2016).

[24] *See* 11 U.S.C. § 109(b), (d).

this is the essential function and distinguishing attribute of banks.[25] On this basis, it has been held that a mortgage and trust company[26] and a currency exchange[27] were not banking institutions under bankruptcy law and were therefore eligible to file for bankruptcy. To determine whether an institution is precluded from being a debtor by the banking institution exception, bankruptcy courts predominantly rely upon the state classification test, which involves an examination of the person's status under the law of the State of incorporation.[28]

Under these provisions of the bankruptcy code, uninsured trust banks covered by the proposal as well as prospective special purpose charters contemplated by the proposal would remain eligible to file for bankruptcy in a liquidation or reorganization proceeding. Given the relative novelty of the proposed receivership structure, State regulators request clarity as to how the proposed framework would interact with conflicting bankruptcy law and the rights accorded debtors and creditors under such law.

C. Conflict with State Law

State regulators are concerned that the OCC's legal authority to serve as a receiver is untested and undeveloped in many areas critical to the operation of a receivership. For instance, the authorities cited in the proposed rule for many of the proposed powers, duties, and responsibilities of receivers for uninsured national banks rely on either precedents involving challenges to the authority of the FDIC or on the notion of a common law of receivers.

State regulators caution the OCC that the common law of receivers to which it makes frequent reference, was not and cannot be developed overnight. For example, the common law of receiverships governing the marshalling of assets, set-off, priorities, and the segregation of fiduciary accounts have been developed by State courts and agencies over the past two centuries as rules have been crafted and revised through experience in an untold number of receiverships. Furthermore, any available case law pertaining to the receivership of an uninsured national bank was developed prior to the creation of the deposit insurance system in 1933, when the legal system functioned quite differently given the then prevalent distinction between suits at law and equity,[29] the fact that shareholders of national banks were subject to double liability,[30] and the fact that most modern federal banking laws had yet to be promulgated.

State regulators believe that the absence of recent, historically relevant case law governing the conduct of a receivership administered by the OCC underscores the need for the OCC to avoid hastily creating new resolution frameworks for and new types of special purpose charters for untested financial service business models.

D. Costs of Receivership

As the OCC acknowledges, the proposed receivership framework raises numerous cost implications. The major cost implication, according to the OCC, stems from the possibility that the receiver may not be able to recoup its expenses in performing liquidation functions if they exceed the liquidation value of the failed institution's assets. State regulators urge the OCC to also consider the tremendous costs to the creditors of

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[25] *See In re Republic Trust & Sav. Co.*, 59 B.R. 606 (Bankr. N.D. Okla. 1986); *In re Republic Financial Corp*., 77 B.R. 282 (N.D. Okla. 1987).
[26] *See In re Central Mortg. & Trust, Inc.*, 50 B.R. 1010 (S.D. Tex. 1985).
[27] *See Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542, (7th Cir. 1985)
[28] *See In re Southern Indus. Banking Corp.*, 59 B.R. 978 (E.D. Tenn. 1986).
[29] *See generally* Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C.L.Rev. 283 (1928).
[30] James Fraser Gluck & August Baker, THE LAW OF RECEIVERS OF CORPORATIONS INCLUDING NATIONAL BANKS, 434 (Banks & Brothers 1891).

a failed institution in the event that administrative expenses exceed the resources available after liquidation. The total losses to creditors from the resolution of an uninsured non-depository institution are likely to be significantly greater than losses associated with the failure of an insured bank.

The unique funding structure of insured banks, with their access to core deposits, bolsters their franchise value, increases the likelihood of a sale of their assets and a transfer of their liabilities to an acquiring bank, and thereby reduces the magnitude of losses to creditors in resolution. In contrast, non-depository institutions have much less resilient liability structures heavily dependent on higher cost, volatile, short-term funding provided by sophisticated, institutional investors, who are likely to withdraw their funds at the earliest indication of potential problems.

State regulators believe that it is highly unlikely that the funding structures of non-depository institutions could mitigate the losses to their creditors in resolution to the same degree that the core deposit base of a bank reduces the losses suffered by creditors as a result of its failure. As the OCC considers the possible creation of a new special purpose national bank charter for fintech firms, State regulators urge the Comptroller to consider the cost implications of placing such firms in receivership, given the relatively low franchise value of and the lack of resiliency in their funding structures.

III. CONCLUSION

State bank regulators appreciate the opportunity to comment on the OCC's proposed rule to establish a framework to govern the receiverships of uninsured national banks. As discussed above, State regulators have several significant concerns with and request clarity as to how the OCC's existing statutory chartering authority could provide any valid basis for the OCC to approve new types of special purpose national bank charters for institutions engaged exclusively in non-depository core banking functions. Additionally, State bank supervisors believe significant risks and costs are likely to result from an expansive, unprecedented use of the OCC's chartering authority. With respect to the proposed receivership framework, we have further concerns as to how such a receivership would interact with conflicting State and federal laws. We look forward to receiving a detailed analysis and discussion by the OCC of all of the issues that we have raised in this comment letter.

As fellow chartering and regulatory authorities, the members of CSBS take great pride in our long-history of promoting the strength and vitality of the dual banking system. As State regulators continue to work to foster a regulatory and supervisory environment which promotes innovative practices in the delivery of financial services, we encourage the Comptroller to respect the balance of federal and State authority in the regulation of financial services so as not to undermine the effectiveness and impair the vitality of the dual banking system itself—a hallmark of cooperative federalism.

Sincerely,

John W. Ryan
President & CEO

EXHIBIT F

CSBS SINCE 1902
CONFERENCE OF STATE BANK SUPERVISORS

January 13, 2017

Office of the Comptroller of the Currency (OCC)
Legislative and Regulatory Activities Division
400 7th Street SW, Suite 3E-218
Mail Stop 9W-11 Washington, DC 20219

Re: Exploring Special Purpose National Bank Charters for Fintech Companies

Dear Comptroller Curry,

The Conference of State Bank Supervisors appreciates the opportunity to comment on the white paper, titled *Exploring Special Purpose National Bank Charters for Fintech Companies*, announcing the Office of the Comptroller of the Currency's (hereinafter "OCC" or "Comptroller") intention to "move forward with chartering financial technology companies that offer bank products and services."

CSBS is the nationwide organization of state banking and financial services regulators from all 50 U.S. states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. For more than a century, CSBS has given state bank and financial services regulators a national forum to coordinate bank and nondepository supervision and to develop regulatory policy. As the chartering, licensing and supervisory authorities for over 75% of the banks in the United States and over 20,000 nondepository financial services providers, State regulators are charged with protecting consumers, ensuring safety and soundness, and encouraging economic prosperity in their states.

As stated in our November 2016 comment letter to the OCC[1], state bank regulators oppose the creation of a special purpose national bank charter for financial technology (fintech) and other nondepository companies because:

1. The OCC lacks statutory authority to issue such a charter;
2. Such a charter will distort the marketplace for financial services, with a federal agency arbitrarily picking winners and losers;
3. The issuance of such a charter creates tremendous uncertainty and risks pertaining to access to critical government resources, including the payments system and the federal safety net; and
4. The preemptive effect of this charter nullifies the states' ability to protect consumers.

This comment letter will provide an overview of the reasons underlying our opposition to the OCC creating a special purpose national bank charter for fintech and other nondepository companies (hereinafter "special purpose national nonbank charter" or "special purpose national nonbank"). Additionally, we have attached a Legal and Policy Assessment that provides a more in-depth discussion of the unlawful and invalid nature of a special purpose national nonbank charter, the many unsettling policy implications resulting from the Comptroller acting outside the confines of its statutory chartering authority, the many legal uncertainties and policy issues stemming from the unlawful nature of a special

[1] CSBS's previous comment letter on the OCC's proposed rule establishing a framework to govern receiverships for uninsured national banks is available at: CSBS Comment Letter on Proposed Rule on Receiverships for Uninsured National Banks.

purpose nonbank charter, and the dangerous consequences stemming from the preemption of state laws through such a charter.

I. The OCC's proposed special purpose "fintech" charter is inconsistent with the letter and intent of the National Bank Act.

The OCC claims, citing its chartering regulations, that it has the authority to charter a special purpose bank to conduct any activity within the business of banking so long as it engages in receiving deposits, lending money, or paying checks. Consequently, the OCC claims to have the statutory authority to charter a special purpose national nonbank—that is, a special purpose bank that does not engage in deposit-taking and only engages in lending money or paying checks. However, as CSBS has set out in previous comments to the OCC and reiterates with this letter, the OCC lacks any statutory authority to charter a special purpose national nonbank.

A. Special purpose national nonbanks cannot lawfully be formed under any type of special purpose bank charter.

Courts have held and Congress has made clear that the Comptroller is prohibited from chartering a national bank that does not engage in deposit-taking, unless the charter is for a special purpose bank expressly authorized in statute.[2] The special purpose banks expressly authorized by Congress are trust banks, bankers' banks, and credit card banks. Since Congress has not expressly authorized the Comptroller to issue a special purpose nonbank charter, any attempt to grant a special purpose national bank charter to such an institution would be unlawful and invalid.

B. Special purpose national nonbanks cannot lawfully be formed under a full-service bank charter.

According to the white paper, the Comptroller proposes that these newly chartered entities would have "the same charter as a full-service national bank." However, since a special purpose national nonbank would not be engaged in deposit-taking, the Comptroller is prohibited from granting it a full-service national bank charter.[3] Full-service national banks are chartered to engage in the "business of banking". Engaging in the "business of banking" under the National Bank Act, as a matter of law[4] and as a matter of common sense, requires engaging in deposit-taking. Thus, any attempt to grant a full-service national bank charter to a special purpose national nonbank would be unlawful and invalid.

C. Special purpose national nonbank charters would be unlawful and invalid.

Therefore, since (1) the granting of a special purpose nonbank charter has not been expressly authorized by Congress, and since (2) a special purpose nonbank would not engage in deposit-taking, the

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[2] For a more in-depth analysis of the applicable precedent and applicable federal statutes, see Part I.B.2. of the Assessment.

[3] While the Comptroller may claim that a special purpose nonbank would receive a full-service charter and voluntarily refrain from receiving deposits, such a legal machination does not escape the rule that a charter recipient must exercise the power to receive deposits for the Comptroller to have the authority to grant a full-service national bank charter. Additionally, such a chartering structure places an improper reliance on the OCC's enforcement authority to bolster its chartering authority, as discussed in Part I.B.2. of the Assessment, and will have numerous unsettling policy implications, as discussed in Part II of the Assessment.

[4] *See Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (*IBAA v. Conover*).

Comptroller lacks the authority to charter a special purpose nonbank. Accordingly, regardless of what the Comptroller's regulations provide, any attempt by the Comptroller to charter a special purpose nonbank would be unlawful and invalid.[5] State regulators urge the Comptroller to avoid taking the unlawful action contemplated in the white paper, for the creation of a national nonbank charter would be an unauthorized and unprecedented expansion of the Comptroller's chartering authority, distorting the purpose for which the national banking system was established.

II. The OCC's proposed "fintech" charter destabilizes banking's legal and regulatory structure.

A. Most federal banking laws will not apply to the OCC's proposed special purpose nonbanks.

The special purpose national nonbank that the OCC proposes to charter would not be subject to the clear majority of federal banking laws. For instance, these special purpose nonbanks would be exempt from many of the statutes and regulations that apply to insured depository institutions, including prompt corrective action requirements, source of strength requirements, restrictions on management interlocks, generally applicable prudential safeguards, community reinvestment act requirements, and uniform accounting standards. This notable absence of generally applicable federal banking laws covering special purpose nonbanks clearly evidences that Congress has not contemplated the creation of a special purpose national nonbank charter.

The OCC has intentionally structured the special purpose nonbank charter to evade the application of certain federal banking laws. For instance, a special purpose nonbank is specifically designed to avoid being classified as a "bank" for purposes of the Bank Holding Company Act. Evading this Act means that special purpose nonbanks would not be subject to consolidated supervision by the Federal Reserve and the parent companies of special purpose nonbanks would not be subject to the anti-tying rules, restrictions on proprietary trading, and restrictions on affiliations with commercial companies.

Even under the National Bank Act—the enabling statute that purportedly authorizes the grant of nonbank charters—the treatment of special purpose nonbanks is uncertain. For instance, the scope of the incidental powers granted to a special purpose nonbank cannot be clearly delineated, given that the currently authorized incidental powers were permitted on the basis that they would be exercised by institutions that exercise all the express powers granted under the National Bank Act. There is similar uncertainty surrounding how branching requirements will apply.

Furthermore, whether a special purpose nonbank would be required to be a Federal Reserve member and the consequences of membership for a special purpose nonbank are also unclear. Moreover, it is uncertain whether a special purpose nonbank would be eligible for access to Federal Reserve services, including gaining access to the payments systems and the discount window. As discussed more fully in Part II.B. of the Assessment, state regulators believe it would be unwise to provide unfettered access to Federal Reserve services, particularly the payments systems, to special purpose national nonbanks because they refrain from engaging in the business of receiving deposits.

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[5] The chartering of a special purpose nonbank would not be the first time that the OCC has attempted to charter a special purpose institution which it lacks the authority to charter. For a discussion of the history of the OCC's special purpose chartering authority and Congressional reactions to the OCC's unlawful chartering attempts, see Part I.B.1. of the Assessment.

B. The OCC proposes an ad-hoc, confidential regulatory framework that will create an unlevel playing field.

Even more unsettling is the regulatory and supervisory framework proposed by the OCC to compensate for the legal chasm in which special purpose nonbanks will operate. In the white paper, the OCC states that it will incorporate otherwise inapplicable rules or impose equivalent requirements by entering into operating agreements with charter recipients which are enforceable under the OCC's enforcement authority. In the absence of generally applicable federal banking laws to govern the operations of special purpose nonbanks, the OCC will have absolute discretion as to whether and to what extent otherwise inapplicable rules will be made applicable through operating agreements.

The white paper makes clear that the operating agreements will be completely individualized to the business model of the charter recipient. This lack of transparency and certainty leaves the general public and potential applicants completely in the dark as to the rules and requirements in key areas such as the Community Reinvestment Act, capital, liquidity, and other "baseline supervisory expectations." Furthermore, charter recipients and the industry generally will have no assurance that rules will be applied and enforced in a uniform, impartial manner, and, because the operating agreements will not be made publicly available, no means of verifying any assurances given.

As fully discussed in Part II.A of the Assessment, the inevitable result of the OCC's proposed supervisory framework will be an unlevel playing field to the disadvantage of traditional, full-service banks. Equally important, due to the ad-hoc, opaque nature of the operating agreements, the OCC will have the unchecked power to favor certain applicants over others, thereby picking winners and losers. Most startups do not have profitable business plans, and only a limited number of established financial technology firms have annual profits. These are not the companies who will enjoy the benefits of the proposed charter. Additionally, the lack of transparency and absence of objective requirements in the proposed supervisory framework for special purpose nonbanks will have a deleterious effect on the ability of new financial innovation to emerge going forward. In short, the special purpose nonbank charter proposed by the OCC will benefit large incumbent firms with established business model and create a barrier to entry for the vast majority of emerging fintech firms.

C. Special purpose nonbanks may be exempt from the OCC's enforcement authority under federal securities laws.

The treatment of special purpose national nonbanks under federal securities laws, although not discussed in the white paper, is an issue of major importance. As discussed in more detail in Part III.D. of the Assessment, while special purpose nonbanks will enjoy exemptions under several federal securities laws, there are serious questions as to whether the enforcement authority delegated to the Comptroller under such laws is sufficient to enable the Comptroller to apply and enforce these laws to institutions that refrain from engaging in the business of receiving deposits.

D. Special purpose national nonbanks will not be subject to federal consumer financial laws to the same extent as full-service banks.

Lastly, the applicability of federal consumer financial law to special purpose nonbanks chartered by the Comptroller while relatively less uncertain is telling in that it demonstrates how the Comptroller will generally apply and enforce otherwise inapplicable laws through the proposed operating agreements. The white paper discusses how only a handful of federal consumer financial laws will apply to special purpose nonbanks, namely, those that apply to nondepository covered persons. However, as discussed more fully in Part III.E. of the Assessment, the Comptroller fails to acknowledge and apparently refuses to utilize the broader authority granted to the OCC under the Dodd-Frank Act to apply and enforce the totality of

federal consumer financial law under its general enforcement authority. State regulators believe that the OCC's failure to use its enforcement authority to its fullest extent in the consumer protection context does not bode well for the uniform application and robust enforcement of otherwise inapplicable federal banking, securities, and consumer protection laws.

III. The OCC's proposed "fintech" charter eliminates states' consumer protection authority.

State regulators have witnessed OCC preemption determinations hurt consumers through the preemption of anti-predatory lending laws, adjustable rate mortgage restrictions, and state oversight of national bank operating subsidiaries. This consistent effort by the OCC to preempt state consumer protection laws created the legal foundation for the mortgage crisis and prevented states from having the opportunity to respond to lending practices that hurt consumers. Congress recognized this in the Dodd-Frank Act, repealing the OCC's preemption of state supervision of national bank operating subsidiaries, requiring the CFPB to determine whether OCC preemption determinations are tenable, and lowering the agency deference available to the OCC on preemption challenges. Unilateral chartering decisions by the OCC defies the requirements imposed on the OCC by Congress.

In addition to supervising approximately 4,790 state-chartered banks, most state banking departments also regulate a variety of nondepository financial services providers, including money transmitters, mortgage lenders, and consumer lenders. Based on the OCC's description of the "fintech" charter, any of these 20,000 plus companies would qualify for a national bank charter because they pay checks or lend money. Time and again, Congress has made the conscious decision to reserve the licensure and supervision of institutions engaged in these nondepository activities to the states, choosing to pass activity-based laws like the Electronic Funds Transaction Act, not federal chartering laws.

States require nondepositories to meet safety and soundness requirements and conform to both state and federal consumer protection laws through a state licensing process. Multi-state nondepository companies are examined on a collaborative basis with multi-state teams, reducing regulatory burden and improving allocation of resources among states. As proposed, and without any discussion, a special purpose national bank charter will preempt this regulatory framework for any charter recipient.

IV. Conclusion

State bank regulators appreciate the opportunity to comment on the OCC's white paper announcing their intention to charter a special purpose nonbank through an unprecedented expansion of their chartering authority. As discussed above and in the attached Legal and Policy assessment, state regulators have several significant concerns with how the OCC's existing statutory chartering authority could provide any valid basis for the OCC to charter a special purpose nonbank engaged exclusively in nondepository core banking functions. Additionally, state bank supervisors believe significant risks and costs are likely to result from an expansive, unprecedented use of the OCC's chartering authority. Contrary to the OCC's assertions, a level-playing field between the proposed charter type and the financial services industry is not feasible given the lack of both transparency and impartiality inherent in the proposed chartering framework.

As fellow chartering and regulatory authorities, the members of CSBS take great pride in our long history of promoting the strength and vitality of the dual-banking system. As state regulators continue to work with each other and our federal regulatory counterparts to foster a regulatory and supervisory environment that promotes innovative practices in the delivery of financial services, we encourage the Comptroller to

respect the balance of federal and state authority in the regulation of financial services and to avoid undermining the effectiveness and impairing the vitality of the dual-banking system.

Sincerely,

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John W. Ryan
President & CEO

Attachment: CSBS Legal and Policy Assessment

CSBS SINCE 1902
CONFERENCE OF STATE BANK SUPERVISORS

CSBS Legal and Policy Assessment

CSBS has attached this legal and policy assessment to our comment letter to discuss, in greater detail, our perspective as to how the Comptroller's unauthorized expansion of its chartering authority will create a multitude of hazards for consumers, the financial services industry, and the broader regulatory community.

In Part I, CSBS discusses the unprecedented and unauthorized nature of the special purpose charter proposed in the white paper in the context of the history and limits of the Comptroller's chartering authority. Part II discusses the unsettling policy implications that State regulators believe are prompted by the Comptroller's proposed expansion of its chartering authority, including the inevitability of an unlevel playing field in favor of the proposed special purpose charter. In Part III, CSBS discusses the tremendous legal uncertainty surrounding the treatment of the proposed type of special purpose charter under federal banking law, federal securities law, and federal consumer protection law. Lastly, in Part IV, State bank regulators share our perspective on the dangers of preempting state laws, including state consumer protection law.

I. Statutory Limits of the OCC's Chartering Authority

In the OCC's white paper, the Comptroller has asserted the authority to charter a new type of special purpose institution, which would not carry on the business of banking and which has not been specifically authorized by Congress. This Part will demonstrate that the Comptroller has no statutory authority under the NBA or other federal banking laws to approve any new type of special purpose charter, and the Comptroller has no authority to issue any regulation that would expand the limits of the chartering authority established by Congress. In the sections that follow, we set out that (1) the Comptroller lacks the requisite statutory authority to charter institutions whose activities are limited to lending money and/or paying checks or functionally similar activities (hereinafter "special purpose nonbank charters" or "special purpose nonbanks"), and (2) due to this insufficient statutory authority, the Comptroller has no power to bootstrap his chartering authority through an unauthorized, unprecedented, and arbitrary reliance on the agency's enforcement authority.

A. National banks must be chartered either to carry on the business of banking, or to engage exclusively in a special purpose activity expressly authorized by Congress.

1. <u>Full-service national banks may be formed only to engage in the business of banking which includes, at minimum, engaging in deposit-taking.</u>

Since the enactment of the National Bank Act (NBA) in 1863, the Comptroller has been authorized to charter "associations for carrying on the business of banking" (hereinafter "full-service national banks"). In the NBA, the phrase "business of banking" not only refers to the enumerated and incidental powers of national banks, but also serves to limit what constitutes a valid exercise of the Comptroller's chartering authority.[1] While the business of national banks has evolved and fluctuated over time, it remains as true

[1] *See* 12 U.S.C. §§ 21, 26-27.

today as it did in 1863 that an institution cannot carry on the "business of banking" under the NBA unless it is endowed with and actually exercises the power to receive deposits.

Unlike the many other enumerated powers of national banks, the receiving of deposits has always been recognized as the minimum essential element of, and the necessary condition to carry on, the "business of banking" under the NBA. A private company could conceivably carry on every other activity within the business of banking without obtaining a bank charter. However, when such a company supplements any of those activities by engaging in the business of receiving deposits, the entire character of the institution's business is transformed, for its business thereby becomes intimately connected with the public interest and, accordingly, it is required to obtain a bank charter.[2]

Most importantly, as a necessary condition for "carrying on the business of banking", granting the power to receive deposits to a national bank is a necessary condition for the valid exercise of the Comptroller's chartering authority, in the absence of a specific grant of congressional authority for chartering a special purpose national bank.

2. Special purpose national banks may be formed only to engage in special purpose activities expressly authorized by Congress.

When, as today, the Comptroller has attempted to charter institutions that intend to refrain from receiving deposits, it has been held that specific statutory authorization is required to charter such institutions. Courts have declared that the Comptroller is not empowered by the NBA to charter nondepository institutions that do not carry on the business of banking, unless specifically authorized by Congress. As detailed in this Part, Congress, through narrowly-drawn amendments to the NBA and the Bank Holding Company Act (BHC Act), has specifically authorized the Comptroller to charter certain special purpose institutions that could not otherwise be chartered by the Comptroller because they do not carry on the "business of banking", including trust banks, bankers' banks, and credit card banks.

3. A new type of special purpose charter not expressly authorized by Congress may not be created through the grant of a full-service charter.

In the white paper, the OCC asserts the authority to grant charters to special purpose national banks that limit their activities to any activity within the business of banking as long as they conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money. According to the OCC, it has statutory authority to charter special purpose nonbanks, that is, institutions which refrain from accepting deposits and exclusively engage in the nondepository core banking functions of paying checks or lending money (or functionally similar activities). Presumably, the OCC bases this asserted authority on the false premise that the authority to charter full-service national banks to carry on the business of banking implies the authority to charter special purpose national banks, including special purpose nonbanks. Put differently, the Comptroller incorrectly asserts that an implicit grant of special purpose chartering authority can be derived from its traditional, full-service chartering authority.

B. OCC's special purpose chartering authority is limited in scope and distinct from its full-service chartering authority.

The OCC's framing of its chartering authority fundamentally misconstrues the relationship between its full-service chartering authority and its special purpose chartering authority. This rationale neglects the very essence of the agency's full-service chartering authority and the historical development of its special purpose chartering authority. Since the OCC has repeatedly neglected to outline the nature and limits of

[2] *See* 12 U.S.C. 378.

its special purpose chartering authority, an overview of the history of the Comptroller's special purpose chartering authority follows.

The historical overview below demonstrates that (1) the OCC's special purpose chartering authority is a separate and distinct grant of explicit chartering authority and cannot be implied from the OCC's full-service chartering authority, and (2) the Comptroller lacks the special purpose chartering authority to charter special purpose nonbanks except for trust banks, bankers' banks, and credit card banks. After outlining the historical development of the OCC's authority to charter special purpose national banks, we will discuss how the Comptroller lacks the authority to use its full-service chartering authority to create a new type of special purpose charter for institutions which do not accept deposits, unless specifically authorized by Congress.

1. <u>The historical development of the OCC's special purpose chartering authority demonstrates its distinct legislative origin and limited nature.</u>

For over a century, the Comptroller's chartering authority was limited to the authority to charter full-service national banks organized for the purpose of "carrying on the business of banking", including the acceptance of deposits. At various points since the mid-1970s, the OCC has attempted to charter institutions that would not carry on the business of banking. Instead, such institutions were chartered to engage in activities that either were not within the business of banking as originally defined in the National Bank Act of 1864 (such as the fiduciary activities of national trust banks) or activities that did not include receiving of deposits from the general public (such as the activities of bankers' banks and credit card banks). The Comptroller's attempts to charter such institutions gave rise to several legal controversies regarding the minimum essential characteristics of the "business of banking" under the NBA. Those earlier controversies have reemerged today as the Comptroller unlawfully asserts in the white paper the authority to charter special purpose nonbanks.

Two federal courts struck down the OCC's attempts to charter institutions that were not engaged in the business of banking, holding that the OCC's chartering of special purpose institutions exceeded the limits of its chartering authority.[3] As a consequence of these legal defeats, the OCC persuaded Congress to authorize or ratify the chartering of special purpose national banks through targeted, narrowly drawn amendments to the NBA or BHC Act.[4] These carefully-targeted legislative grants of authority empowered the Comptroller to charter narrowly defined categories of special purpose national banks that do not carry on the business of banking. Congress' carefully limited grants of chartering authority for special purpose national banks make clear that the OCC's authority to charter special purpose institutions is completely separate and distinct from the Comptroller's traditional authority to charter full-service national banks that accept deposits and engage in "the business of banking."

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[3] *See Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529, at *34 -*36 (M.D. Fla. Feb. 15, 1985) (*IBAA v. Conover*) (special purpose "nonbank banks" were held unlawful). See also *National State Bank of Elizabeth v. Smith*, No. 76-1479 (D.N.J. September 16, 1977) (special purpose trust banks were held unlawful prior to Congress' specific grant of statutory authorization for such institutions), rev'd on other grounds, 591 F.2d 223 (3d Cir. 1979)

[4] *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRIRCA), Pub. L. No. 95-630, § 1504, 92 Stat. 3641 (1978) (codified at 12 U.S.C. § 27(a) (national trust banks); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404, 96 Stat. 1511 (1982) (codified at 12 U.S.C. § 27(b)(1)) (bankers' banks); Competitive Equality in Banking Act of 1987 (CEBA), Pub. L. No. 100-86, § 101, 101 Stat. 552, 554 (1987), codified at 12 U.S.C. § 1841(c) (credit card banks).

a. National trust banks and credit card banks were originally unlawfully chartered and subsequently ratified by Congress.

The creation of the OCC's special purpose chartering authority for national trust banks is illustrative of this pattern. In 1977, the Comptroller issued to City Trust Services a certificate of authority (i.e. charter) to carry on the business of banking as a national bank despite the fact that City Trust's articles of association declared that its activities would be limited to the fiduciary services provided by a trust company.[5] When the proposed charter was challenged, a federal district court held that the charter was invalid because the Comptroller lacked authority to charter an institution that would engage only in fiduciary activities and would not engage in the business of banking, including the acceptance of deposits.[6]

Following this defeat, the Comptroller requested an amendment to the NBA that would specifically authorize the Comptroller to charter national trust banks.[7] Congress adopted the requested amendment in 1978 and thereby gave specific authority for the creation of national trust banks, the first type of special purpose chartering authority conferred upon the OCC.[8] Similar events, in which the OCC exceeded its statutory chartering authority and persuaded Congress to ratify new types of special purpose charters, took place with respect to credit card banks. In each case, Congress gave the OCC a carefully-limited authority to charter a narrowly-defined category of limited-purpose financial institutions, as shown by 12 U.S.C. 27(a), 27(b), 1841(c)(2)(D), and 1841(c)(2)(F).

Today, the Comptroller is once again attempting to usurp the legislative prerogatives of Congress by asserting an unfounded authority to charter a new, broadly-defined class of special purpose national nonbanks for fintech and other nondepository institutions. The OCC has taken this unlawful action in spite of the fact that Congress has not only not authorized, but actually intended to prohibit the chartering of special purpose national nonbanks, whether for fintech companies or any other nondepository.[9]

b. Nonbank banks were unlawfully chartered and subsequently prohibited by Congress.

In the 1980s, the Comptroller was rebuffed by a federal court and by Congress when the Comptroller made a similar attempt to issue national bank charters to special purpose institutions that only engaged in lending and did not accept deposits. A federal district court struck down the Comptroller's attempt as unlawful in *Independent Bankers Ass'n of America v. Conover*.[10] In that case, the court held that the Comptroller lacked the authority to charter such special purpose "nonbank banks" because those special purpose institutions (1) did not accept deposits and thus would not carry on the business of banking and (2) were not otherwise specifically authorized by the NBA or federal banking law.

In 1987, with the passage of CEBA, Congress effectively ratified the court's decision by redefining the term "bank" in the BHC Act to include any institution that either (1) accepts deposits subject to withdrawal on demand or by check and also makes commercial loans, or (2) accepts deposits that are insured by the Federal Deposit Insurance Corporation. The term "bank," as so defined, does not include a special purpose institution that makes loans but does not accept deposits.

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[5] *See National State Bank of Elizabeth v. Smith*, supra note 3.
[6] *See id*.
[7] *See IBAA v. Conover*, at *34, supra note 3.
[8] *See* 12 U.S.C. 27(a), enacted as part of FIRIRCA, supra note 4.
[9] *See IBAA v. Conover*, supra note 3. See also CEBA, supra note 4.
[10] *See IBAA v. Conover*, supra note 3.

As indicated above, the first basis for the court's decision in *Independent Bankers Ass'n of America v. Conover* was that the Comptroller may not validly approve a full-service national bank charter unless the power to receive deposits is conferred and exercised by the chartered institution, because the acceptance of deposits is required in order to carry on "the business of banking" under the National Bank Act. That holding finds clear, indisputable support in applicable judicial precedents and federal banking statutes.[11] The second basis for the court's decision—that the Comptroller could not approve limited purpose charters for "nonbank banks"—relied on the canon of statutory interpretation known as *expressio unius est exlusio alterius* (the expression of one or more items of a class implies that those not identified are to be excluded). Applying that canon, the court reasoned that, since Congress included specific grants of authority in the NBA and the BHC Act that enable the Comptroller to issue special-purpose charters for trust companies and banker's banks, Congress must have intended to prohibit the OCC from chartering other types of special-purpose national banks that were not expressly authorized.[12]

After *IBAA v. Conover*, Congress did not confer the requisite special purpose chartering authority for "nonbank banks" that the OCC had unsuccessfully asserted.[13] On the contrary, as noted above, Congress precluded the Comptroller from chartering special purpose "nonbank banks" by enacting the Competitive Equality in Banking Act of 1987 (CEBA), which closed the "nonbank bank" loophole and made clear that

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[11] *See IBAA v. Conover*, at *25-*26, supra note 3 (citing *Mercantile National Bank v. Mayor*, 121 U.S. 139 (1887); U.S. v. *Philadelphia National Bank*, 374 U.S. 321 (1963)). *See e.g., Opinion of the Attorney General* (March 31, 1915) ("The power to receive deposits, expressly granted to every national bank is, of course, indispensable to the conduct of the business of banking: and the extent of its exercise is in a degree the measure of the success of the bank."); *Warren v. Shook*, 91 U.S. 704 (1875) ("Having a place of business where deposits are received *and* paid out on checks, *and* where money is loaned upon security, is the substance of the business of a banker."); *People v. Utica Insurance Co.*, 15 Johns. 538 (1819) ("The principal attributes of a bank are the right to issue negotiable notes, discount notes *and* receive deposits.").
The court also held that the BHC Act and the NBA should be read together *in pari materia* because they constitute a "joint regulatory scheme". Specifically, the court found that the definition of "bank" in the BHC Act should be construed as a limit on the Comptroller's full-service chartering authority which would prohibit the Comptroller from using this authority to charter an institution which refrained from either receiving deposits or making loans. *See IBAA v. Conover*, at *32, supra note 3; 12 U.S.C. 1841(c)(1) (defining "bank" for purposes of the BHC Act). *See also*, 12 U.S.C. § 22 (requiring organization certificate to specify "place where its operation of discount and deposit are to be carried on."); 12 U.S.C. 378 (prohibiting all persons other than chartered depository institutions from accepting deposits).

[12] For similar decisions striking down unauthorized actions of the Comptroller under the same canon of statutory constructions, see *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1923) (holding, prior to the enactment of the McFadden Act in 1927, that the Comptroller could not give to national banks a general power of establishing branches in view of the narrowly-defined grants of branching authority made by Congress); *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (holding that the Comptroller could not give national banks a broad power to act as insurance agents in view of the narrowly-defined grants of insurance agency authority made by Congress).

[13] Earlier iterations of CEBA in the 1980s would have authorized the Comptroller to charter "consumer banks," but the pertinent language was omitted prior to enactment by Congress. More recently, legislation has been proposed which would provide the OCC with the authority to charter special purpose nondepository institutions, but such legislation has never been enacted by Congress. See FFSCC Charter Act of 2011, H.R. 1909, 112th Cong. (2011); Consumer Credit Access, Innovation, and Modernization Act, H.R. 6139, 112th Cong. (2012). Nevertheless, the fact that proposed legislation was introduced in order to authorize the OCC to charter a special purpose nonbank underscores the need for Congressional authorization with respect to the special purpose nonbank charter currently under consideration.
See also, Peter J. Wallison, *Reform Bills Don't Go Far Enough*, American Enterprise Institute, Oct. 22, 1999 (stating that, absent further legislative reform, "*IBAA v. Conover* would prevent the Comptroller from chartering federal banks as nonbank banks").

financial institutions that do not accept deposits are not "banks."[14] In fact, despite the many major financial services reforms promulgated by Congress in the years and decades that followed, including many amendments to the NBA and the BHC Act, Congress has never given the OCC a general authority to charter special purpose nonbanks.

c. *Despite being unlawful and prohibited, the OCC rehabilitated the nonbank bank charter through an invalid regulation.*

In the absence of Congressional authorization, the Comptroller decided instead, in 2003, to amend its chartering regulations to enable the chartering of a nondepository institution that ". . . limits its activities . . . to any other activities within the business of banking."[15] When CSBS and other organizations objected to this unauthorized expansion of the Comptroller's chartering authority, the Comptroller added in the final rule the following requirement: "A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money."[16] This unprecedented and unauthorized regulatory expansion of the OCC's special purpose chartering authority continued to lie dormant until the OCC issued its white paper announcing the OCC's intention to create a new special purpose national bank charter for a wide range of nondepository institutions, including fintech firms.

d. *The historical development of the OCC's special purpose chartering authority demonstrates that the OCC's chartering regulations are invalid.*

Several conclusions can be drawn from the historical development of the Comptroller's chartering authority. First, carrying on the "business of banking" under the NBA—and thereby qualifying for a full-service national bank charter—requires, at a minimum, being empowered to and actually exercising the power to receive deposits. Second, the OCC's authority to charter special purpose national banks is separate and distinct from its authority to charter full-service national banks to carry on the business of banking. The OCC's authority to charter special purpose national banks has been carefully limited by Congress through a series of specific, narrowly drawn legislative authorizations for trust banks, bankers' banks and credit card banks. Finally, Congress has never conferred upon the OCC any type of broad power to grant special purpose nonbank charters for institutions that only lend money or pay checks without accepting deposits.

Based on these conclusions, it is clear that the regulation on which the OCC now relies, 12 C.F.R. 5.20(e)(1)(i), to charter a special purpose nonbank exceeds the statutory bases of the OCC's chartering authority. The chartering regulation does not implement a statute enabling the chartering of special purpose nonbanks—because no such statute exists. Thus, the regulation has no basis in the OCC's special purpose chartering authority. Furthermore, the chartering regulation is not a rational implementation of the OCC's statutory authority to charter full-service banks, because it enables the OCC to charter an

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[14] *See* CEBA, supra note 4 (amending 12 U.S.C. 1841(c)). There is considerable evidence in the several hearings held on the issue of nonbank banks, that advocates of closing the nonbank bank loophole considered the CEBA amendments to make permanent the ruling of the court in *IBAA v. Conover*. See, e.g., Sen. Rept. No. 99-15 (statements of the Federal Reserve Board, Conference of State Bank Supervisors, Independent Bankers Association of America, National Conference of State Legislatures, U.S. League of Savings Institutions, Association of Bank Holding Companies, the National Small Business Association, and the National Federation of Independent Businesses).

[15] *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6371 (Feb. 7, 2003) (proposed rule).

[16] *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 70122, 70126 (Dec. 17, 2003) (final rule).

institution to refrain from engaging in deposit-taking—a function which is indispensable to the business of banking. Thus, Section 5.20(e)(1)(i) is in excess of statutory authority and, accordingly, invalid.

2. The OCC intends to use its enforcement authority in an unauthorized manner to create an unlawful and invalid special purpose nonbank charter.

National banks are authorized and created by the Congress pursuant to the NBA. While authority has been delegated to the Comptroller to grant corporate charters to national banks, Congress retains absolute authority over the National Bank Act and the specific statutory conditions under which the business of national banks may be carried on. The OCC has no authority to issue regulations or orders that expand the powers or immunities of national banks beyond the limits established by Congress.[17] In view of the white paper's assertion of a broad power to grant special purpose charters to national nonbanks, the Comptroller is clearly attempting to usurp authority that has not been granted to him by Congress. The Comptroller has no prerogative to create a special purpose chartering system that lacks any basis in the National Bank Act and other federal statutes and is contrary to the long history of the national banking system.

As mentioned above, the OCC's white paper claims that the authority to charter full-service national banks includes an implicit authority to charter special purpose nonbanks that voluntarily agree to refrain from engaging in deposit-taking or other aspects of the "business of banking." Specifically, the OCC asserts that a special purpose national bank operates under the same charter as a full-service national bank but "voluntarily" agrees to limit its activities by entering into an operating agreement with the OCC. The OCC contends that such an operating agreement is enforceable based on the OCC's general enforcement authority under the Federal Deposit Insurance Act (FDIA).[18]

In addition to the deeply alarming policy implications created by this unlawful method of chartering special purpose nonbanks, discussed more fully in Part II, the OCC's reliance on its enforcement authority to expand the statutory limits of its chartering authority ignores judicial precedent that forbids this method of chartering and contradicts the clear intent of Congress in enacting the enforcement authority upon which the OCC now relies.

a. Requiring a full-service national bank to refrain from engaging in deposit-taking has been held to be unlawful and invalid.

In *IBAA v. Conover*, after the court concluded that engaging in deposit-taking was essential to the chartering of national banks under the National Bank Act (except for the specially authorized categories of trust banks and bankers' banks), the Comptroller argued, as it does today, that ". . . even if associations must have the power to accept demand deposits and make commercial loans, the charters [issued] to nonbank banks qualify fully. They are full charters, and [the Comptroller] has placed no conditions on them. If the nonbank banks have relinquished any of their powers, they have done so through voluntary agreement . . . ".[19] The court specifically rejected this argument and held that the OCC cannot condition the approval of a charter to carry on the business of banking by arranging for the applicant to agree to refrain from exercising a power essential to carrying on the business of banking (namely, deposit-taking). According to the court, it was immaterial that the proposed limits on permissible bank activities were

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[17] *See*, e.g., *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009); *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1923); *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000).

[18] *See* 12 USC § 1818(b)(1),(5).

[19] *See IBAA v. Conover*, at *38, supra note 3.

contained in operating agreements rather than the approved charters, because, as the court stated, "the substantive effect is the same as if the charters contained terms limiting them."[20]

The court's reasoning is consistent with a fundamental principle of corporate law, which holds that a corporation's authority to amend its charter does not allow the corporation to add provisions that would not be permissible in its original charter.[21] Thus, amendments to corporate charters are generally void if they could not have lawfully been made part of the original charters. Such a principle is intended to prevent usurpations of power by chartering authorities or chartered institutions. For a chartering authority to condition the approval of a charter on the recipient agreeing not to fulfill the purpose for which the charter was granted is an unlawful and blatant attempt to circumvent the statutory limits on the power of the chartering authority itself.

In attempting to enlarge its special purpose chartering authority through an unauthorized reliance on its alleged authority to enforce operating agreements, the Comptroller would allow applicants to organize national banks for a purpose that the Comptroller cannot itself sanction (namely, to engage exclusively in a nondepository business outside the categories that Congress has expressly authorized). The Supreme Court has recently and strongly warned the OCC that it cannot expand its supervisory authority by asserting enforcement powers that have not been granted by Congress and impair the historic public safety and consumer protection functions of the states.[22]

b. *Requiring a full-service national bank to enter into an operating agreement to refrain from engaging in deposit-taking would constitute an unauthorized use of the OCC's enforcement authority.*

Since, as outlined above, the OCC lacks any statutory authority to charter special purpose nonbanks, the OCC places considerable reliance on Section 8 of the FDI Act to create a new, unauthorized type of special purpose charter. Specifically, the OCC claims that it will grant a full-service national bank charter to a prospective special purpose nonbank and then, in the chartering process, condition the approval of the charter on the applicant entering into an "operating agreement" with the OCC in which the applicant commits to "voluntarily" limit its activities to certain nondepository core banking functions, such as lending money and/or paying checks. This agreement, according to the OCC, is enforceable as a "condition imposed in writing" under Section 8(b)(1) and is authorized with respect to uninsured national banks under Section 8(b)(5).[23]

This framing of the OCC's special purpose chartering authority is premised upon an interpretation of the OCC's enforcement authority which defies the legislative intent underlying the relevant provisions of Section 8 of the FDI Act. The reference to "uninsured associations" in Section 8(b)(5) of the FDI Act was added in 1982 with the passage of the Garn-St. Germain Depository Institutions Act, based on Congress's concerns regarding the Comptroller's lack of explicit enforcement authority with respect to the newly sanctioned but carefully limited categories of special purpose national banks—namely, trust banks and bankers' banks. Based on the clear legislative intent underlying Section 8(b)(5), the FDI Act's principal enforcement provision was extended to cover special purpose national banks to fill an existing gap in the OCC's enforcement authority relative to its newly created special purpose chartering authority, and not to

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[20] *See* id.
[21] *See Henry v. Markesan State Bank*, 68 F.2d 554 (C.C.A. 8th Cir. 1934). See generally *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).
[22] *See Cuomo v. Clearing House Ass'n, supra*.
[23] *See* 12 USC § 1818(b)(1),(5).

authorize the OCC to create new types of special purpose charters not specifically authorized by Congress.

II. Policy Issues with the Proposed Supervisory Framework.

As described in Part I, because the Comptroller lacks any statutory authority to charter special purpose nonbanks, the Comptroller intends to use its enforcement authority in an unauthorized manner to expand its special purpose chartering authority beyond the carefully defined limits established by Congress. In addition to the unlawful and invalid nature of a special purpose national nonbank charter, many significant policy considerations counsel strongly against the OCC attempting to create new types of special purpose charters which Congress has not specifically authorized. As discussed in this Part, the OCC's proposed system of regulating special purpose nonbanks through individualized operating agreements not only highlights the benefits of the activities-based focus of State law but also creates great concerns about the near impossibility of maintaining and assuring a level playing field, assuring the protection of consumers, and upholding a safe and sound financial system.

A. The OCC's proposed approach of regulation by operating agreement creates an opaque legal and regulatory framework inconsistent with federal banking law.

1. Significant federal banking laws would not apply to the proposed special purpose nonbank.

As stated above, the business of national banks has been considered so intimately connected with the public interest that Congress prescribes, through statute, the conditions under which it may be carried on. However, because the OCC now intends to exceed the confines of its statutory authority by chartering a broad range of special purpose nonbanks, there is an almost complete absence of generally applicable rules prescribing the conditions under which the business of such special purpose nonbanks may be conducted. For instance, special purpose nonbanks would be exempt from many of the rules that apply to insured depository institutions, including prompt corrective action requirements, source of strength requirements, restrictions on management interlocks, generally applicable prudential safeguards, community reinvestment act requirements and uniform accounting standards.

Furthermore, if such special purpose nonbanks are not members of the Federal Reserve System (FRS) they will be exempt from major prudential policies, including restrictions on affiliate transactions, restrictions on insider loans, and generally applicable safety and soundness standards. The fact that such institutions would not be covered by most federal banking laws should not be surprising as Congress did not confer upon the Comptroller the requisite authority to charter special purpose nonbanks and thus did not contemplate their existence in enacting federal banking laws.

2. The OCC's proposed approach of incorporating otherwise inapplicable rules by agreement on an ad-hoc, confidential basis creates an unlevel playing field.

To fill these major gaps, the OCC gives its assurance that it can "impose requirements . . . that are similar to certain statutory requirements applicable to insured banks" by incorporating such requirements into the operating agreement entered into with the special purpose nonbank. However, the OCC gives no assurance that such requirements will be uniform across special purpose nonbanks or comparable to the requirements applicable to full-service national banks. Indeed, the white paper states that the OCC will only incorporate otherwise "inapplicable" rules into an operating agreement for a special purpose national nonbank "if it deems the conditions appropriate based on the risks and business model of the institution". While state regulators agree that tailoring regulatory and supervisory requirements to the size, risk, and complexity of regulated institutions is an important priority, we also believe that the extent of the tailoring

planned by the OCC is so extreme and confidential as to raise serious concerns regarding equal treatment, fair competition, and administrative impartiality.

3. The lack of transparency regarding specific regulatory requirements nullifies any promise of a level playing field.

The OCC's white paper provides no meaningful standards or guidelines for determining the circumstances under which the OCC will, or will not, require special purpose national nonbanks to comply with the rules that apply to full-service national banks and competing state banks.

Even if the OCC were to commit to imposing similar requirements on similarly-situated applicants, such a commitment would be a poor substitute for generally applicable rules enacted by Congress and implemented through proper notice-and-comment rulemaking procedures. A special purpose nonbank applicant would have no assurance that the otherwise inapplicable rules incorporated through its operating agreement are incorporated to the same extent as in the operating agreements of other special purpose nonbanks. Such assurance is unobtainable because the OCC will not publicly disclose these operating agreements—despite arguably being required to do so under Section 8 of the FDI Act.[24] Moreover, this lack of transparency means that state regulators and consumers will have no means of verifying that special purpose nonbanks are lawfully entitled to exercise powers purportedly granted in these operating agreements.

Although the OCC may attempt to provide, by means of informal guidance, the requirements or standards that will apply to proposed special purpose nonbanks, any such bank would have no assurance that the OCC will not deviate from such ad hoc requirements or standards. Any such assurance would be illusory because the OCC would be acting outside the authority granted to it by Congress and could not be held accountable for deviations from its informal guidance to the same extent as it could for failing to comply with governing federal statutes.

For decades, the OCC has been criticized for a lack of transparency in its chartering process; to now graft onto that opaque process an informal, ad hoc standard-setting function in which the OCC negotiates every rule governing the operation of the proposed special purpose national nonbank precludes any possibility of maintaining a level playing field.[25] Special purpose national nonbanks, and the banking industry in general, will be required to merely trust, without any means for verification, that the OCC is actually maintaining a level playing field between special purpose nonbanks themselves as well as between special purpose nonbanks and full-service national banks.

B. Activities-based state licensing encourages and enables financial innovation.

The lack of generally applicable law and the lack of uniformity and transparency in the OCC's regulatory and supervisory expectations underscore the benefits of maintaining the viability of the transaction-oriented focus embodied in State laws governing providers of financial services. In the regulation of financial services, three broad regulatory models are recognized: transactional regulation, institutional regulation, and individuated regulation.[26]

Transactional regulation generally regulates any persons that engage in a particular type of transaction (subject to *de minimis* exemptions) without regard to their status as a particular type of financial intermediary. State licensing of nonbank financial services providers is a type of transactional regulation.

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[24] *See* 12 U.S.C. § 1818(u).

[25] *See* generally Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. Chi. L. Rev. 235 (1975).

[26] *See* Governor Daniel K. Tarullo, *Pedagogy and Scholarship in a Post-Crisis World* (Oct. 21, 2016).

Banks—whether state or national and whether commercial or thrift—are generally subject to institutional regulation which imposes a uniform set of rules on institutions with substantially similar business models. Finally, individuated regulation is regulation that applies not because of the business model of the regulated institution, but rather because of the particular, unique characteristics of that institution. Institutions subject to individuated regulation include institutions designated systemically important and, as has been made apparent in the white paper, prospective special purpose nonbanks.

Transactional, activities-based regulation, such as state licensing, is generally more transparent, and more impartial and equitable than individuated regulation. The impartial nature of transactional regulation involved in state licensing of financial services is, in part, what has enabled the emergence of the tremendous financial innovations we are witnessing today. The degree of flexibility accorded state-licensed financial service providers with respect to their business models is precisely what has enabled such institutions to more effectively meet and adapt to the evolving needs of consumers of financial services. Additionally, the transactional focus of state licensing has maintained a level playing field in the financial services industry and thereby has ensured that emerging and innovative financial services providers are not excluded from the market by high barriers to entry erected by large, entrenched industry incumbents.

By contrast, the individuated regulation the Comptroller intends to impose on special purpose national nonbanks will be significantly less transparent and less impartial than the transactional, activities-based approach extant at the state level. The OCC's approach provides no assurance or method of verifying that such charters will be or are granted in an equitable, impartial manner. It is highly probable, as a former OCC senior official recently noted, that only the largest nonbank financial services providers will succeed in obtaining special purpose national nonbank charters,[27] fundamentally distorting the competitive environment for companies seeking to develop and offer innovative financial services. In the end, despite the OCC's assurance that the charter will technically be voluntary, it will be effectively mandatory and the Comptroller will have established his office as the ultimate and final arbiter of financial innovation as well as the self-appointed umpire, effectively picking winners and losers in the fintech industry.

III. Legal Uncertainty and Special Purpose Nonbank Charters.

Given that Congress has not granted to the OCC any authority to issue special purpose national nonbank charters, there is significant uncertainty surrounding the applicability of many federal laws to an institution operating under such a charter, including federal banking law, federal securities law, and federal consumer financial law. The white paper addresses a few of the applicable legal issues in a perfunctory manner, such as the discussion of membership in the FRS, access to Federal Reserve services, and the jurisdiction of the Consumer Financial Protection Bureau (CFPB). In this Part, we will provide the State regulators' perspective on these issues and many other legal uncertainties that the OCC has failed to address.

[27] *See* Zach Fox, *OCC's fintech charter unlikely to kill bank partnerships*, SNL Financial, (Dec. 2, 2016) (quoting former Deputy Comptroller of the Currency, Jo Ann Barefoot: "I do not expect a stampede of small fintechs into national bank charters . . . I don't think they would try and — even if they do — I don't think they would succeed.").

A. The uncertain scope of the incidental powers conferred through a special purpose national nonbank charter raises significant safety and soundness concerns.

The general powers of full-service national banks are expressly delineated in various sections of Title 12 of the U.S. Code, primarily in 12 U.S.C. 24. Section 24(Seventh) expressly authorizes national banks:

> "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes."

In Section 24(Seventh), the "business of banking" is represented by the series of express powers mentioned. However, the first clause, the so-called incidental powers clause, grants banks the power to conduct activities incidental to the business of banking. The "incidental powers" concept has often been used by the Comptroller to justify new powers that might not intuitively be thought of as banking powers. In attempting to craft some sort of limiting principle as to what constitutes an incidental power, courts have generally held that an incidental power must either be "directly related to one or another of a national bank's express powers" or "convenient and useful in connection with the performance of one of [a] bank's established activities".[28] This requirement that a "functional equivalence" be identified between express statutory powers and claimed incidental powers, presents novel issues with respect to special purpose national nonbanks.

As discussed above, the Comptroller claims that a special purpose national nonbank receives the same charter as a full-service national bank, but, as a condition for approving the charter, agrees to refrain from exercising certain enumerated powers in Section 24(Seventh). The question thus arises as to whether a special purpose nonbank that is not authorized to exercise an express power within the business of banking would be authorized to exercise any incidental power that is directly related to the prohibited express power. For instance, if the OCC charters a special purpose national nonbank that agrees to refrain from exercising the express power to receive deposits, there would be no legal basis for such an institution to exercise any incidental power that is related to the express deposit-taking power that has been abdicated.

The legal uncertainty as to the scope of incidental powers that a special purpose national nonbank may exercise presents a serious safety and soundness concern that the OCC has not, to date, addressed. Many of the incidental powers authorized by the Comptroller and sanctioned by the courts since the passage of the NBA were granted on the premise that they would be exercised by a full-service national bank endowed with all the express powers and limitations contemplated by the NBA. State regulators believe that allowing special purpose national nonbanks to exercise incidental powers deemed functionally equivalent to express powers not conferred upon the institution would be irresponsible. State regulators request that the OCC clarify how it intends to ensure that special purpose national nonbanks will refrain from exercising incidental powers that have been permitted only for full-service national banks that operate with entirely different business models.

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[28] *Compare* Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) *with* M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977).

B. The uncertain status of special purpose nonbanks in the Federal Reserve System raises significant public policy concerns.

Pursuant to the Federal Reserve Act, a special purpose national nonbank chartered by the OCC would generally be required to become a member of the FRS.[29] The membership of special purpose national nonbanks in the FRS would raise several legal and policy concerns, including whether membership is or should be required and whether such institutions would be subject to regulation by the FRS and would have access to services offered by the FRS, including the discount window and the payments system. These concerns are addressed in the sections that follow.

1. The OCC's proposal lacks clarity on the membership of special purpose nonbanks in the Federal Reserve System.

After stating that national banks are generally required to be members of the FRS, the OCC notes an exception to the membership requirement for national banks located in territories and insular possessions of the United States. While it is unclear whether this reference should be taken as an indication that the OCC intends to charter special purpose nonbanks in territories and insular possessions in order to avoid the membership requirement, such an arrangement would certainly present a number of complications. For instance, despite not being members in the FRS, national banks located in dependencies and insular possessions are generally subject to a reserve requirement under 12 U.S.C. § 143 requiring that such banks have on hand, at all times, an amount equal to 15 percent of the aggregate amount of its deposits.[30]

State regulators believe that the OCC should clarify whether it intends to charter special purpose nonbanks in territories and insular possessions of the United States to avoid the requirement that national banks be members of the FRS. Furthermore, State regulators request that the OCC clarify how a national nonmember bank located in a dependency or insular possession would comply with such a requirement, particularly, for an institution which refrains from engaging in a deposit-taking function.

2. The OCC's proposal lacks clarity on the access of special purpose nonbanks to the federal safety net and critical public resources.

In addition to the membership status of potential special purpose national nonbanks, the issue of whether such institutions qualify as "depository institutions" under the Federal Reserve Act will have very significant consequences due to the bearing that such a designation would have on their access to Federal Reserve services, including access to the Federal Reserve payments systems and access to the discount window. In general, special purpose national banks are prohibited from accessing or significantly limited in their access to such services. Congress intended for access to Federal Reserve services to be a privilege enjoyed by those engaged in the business of receiving deposits, not by nondepository institutions whose activities bear some resemblance to a deposit-taking function but who are ultimately dependent upon the deposit-taking services of institutions *truly* engaged in the business of banking.

The subsections that follow discuss whether a special purpose nonbank of the type contemplated in the white paper would have access to Federal Reserve services and the policy issues pertaining to allowing such institutions to gain access.

a. The uncertain degree of access afforded special purpose national nonbanks to the FRS payments system raises significant public policy concerns.

Although not susceptible to precise definition, the term "payments system" generally refers to the clearing and settlement services that are provided by the FRS through the regional Federal Reserve Banks, and by

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[29] *See* 12 U.S.C. 222.
[30] *See* 12 U.S.C. § 143.

other clearing and settling organizations that interact with the FRS and carry on their activities under the guidance of the operating rules and procedures established by the Board of Governors of the FRS. Many significant functions are performed by the payments system, including the traditional clearing and settlement of paper checks through the FRS and regional clearinghouses, and the electronic clearance and settlement of the transfer of funds (principally large dollar transfers) through automated clearinghouses or electronic funds transfer services such as the FRS's FedWire.

Generally, direct access to the payments systems has been limited to "depository institutions", including member banks and nonmember banks. Since they do not accept deposits, nonbanks are generally not permitted to have direct access to the FRS payments services, but must instead use these services indirectly as customers of depository institutions. The term "depository institution" is defined in Section 19 of the Federal Reserve Act to mean, in relevant part, ". . . any insured bank as defined in section 3 of the Federal Deposit Insurance Act or any bank which is eligible to make application to become an insured bank under section 5 of such Act; . . .".[31] To be eligible to apply to become an insured bank, a bank must be "engaged in the business of receiving deposits". Given that the OCC seems to indicate in the white paper that it intends to charter a special purpose nonbank that <u>does not</u> accept deposits, such a special purpose nonbank would not be engaged in the business of receiving deposits and therefore would not be eligible to apply to become an insured bank. This ineligibility would entail that the special purpose nonbank would not be a "depository institution" and thus would not be permitted direct access to the FRS payments systems.

The legal barrier preventing special purpose national nonbanks from directly accessing the FRS payments systems due to their nondepository nature accords with legitimate regulatory concerns. Chief among such concerns is the principle that access to the payments systems should be limited to financial institutions that conduct their activities in such a manner as to ensure the proper functioning and safety and soundness of that system. Essential to the willingness of economic actors to accept payment in mediums other than cash is the confidence that, when requested, cash will be received in a timely manner. Were this confidence to be shaken by a disruption to the normal functioning of the payments system—for instance, if a payments systems participant were to default on their obligations or fall victim to a security breach which spread throughout the system—a severe disruption in the normal flow of commerce and finance could ensue.

The likelihood of such disruption is greatly amplified by permitting institutions to directly access the payments systems when they are not subject to the same heightened prudential and safety and soundness regulatory and supervisory framework to which depository institutions are subject. In light of the legal barriers to allowing nonbanks direct access to the FRS payments system and the strong policy rationales for limiting access, State regulators are opposed to allowing special purpose national nonbanks to directly access the FRS payments systems.

b. <u>*The proposed special purpose national nonbank's potential access to the discount window raises significant public policy concerns.*</u>

As with access to the FRS payment systems, the issue as to whether a special purpose national nonbank would have access to the Federal Reserve discount window is a matter of significant consequence. The concern here is whether a special purpose national nonbank will enjoy the same discounting and borrowing privileges enjoyed by full-service banks under the normal lending authority of the Federal

[31] *See* 12 U.S.C. § 461(b)(1)(A)(i).

Reserve Banks. The issue, again, is whether these special purpose nonbanks will be members of the FRS, and, if not, whether they will be "depository institutions".

If a special purpose nonbank is either a member of the FRS or a nonmember "depository institution", then it will enjoy the same discounting and borrowing privileges traditionally enjoyed by full-service national member banks. However, as discussed above, the special purpose national nonbanks discussed in the white paper will most likely not be "depository institutions" under the Federal Reserve Act provided that the OCC requires such institutions to refrain from exercising a deposit-taking function. A special purpose nonbank which is not a member of the FRS and is not a depository institution will still be eligible to borrow from Federal Reserve Banks, but as a nonmember nonbank will be subject to the relatively more demanding collateral requirements applicable to nonbank entities.[32] State regulators believe that, for special purpose national nonbanks that refrain from deposit-taking, providing such institutions with the same borrowing and discounting privileges conferred upon member and nonmember depository institutions would be unwarranted and inequitable.

C. The OCC's proposed special purpose nonbank charter is structured to evade the coverage of the Bank Holding Company Act.

The OCC has intentionally structured the special purpose nonbank charter to avoid being classified as a "bank" for purposes of the Bank Holding Company Act. Evading this Act means that special purpose nonbanks would not be subject to consolidated supervision by the Federal Reserve and the parent companies of special purpose nonbanks would not be subject to the anti-tying rules, restrictions on proprietary trading, and restrictions on affiliations with commercial companies. Accordingly, the OCC intends, without discussion, to simply violate the fundamental policy goals of Congress in enacting the BHC Act, namely to maintain a separation between banking and commerce.

1. <u>The OCC's proposal runs afoul of the principle of separation of banking and commerce.</u>

In originally establishing a wall between banking and commerce, Congress explicitly relied on the business of banking concept[33], precisely because economic neutrality ought to be required in the exercise of banking powers. If the OCC charters an institution which engages exclusively in nondepository core banking functions, the fact that the institution is characterized as, in itself, conducting the business of banking should warrant the separation of its credit granting and credit exchange functions from general commercial enterprises. However, because the novel charter type would be exempt from coverage under the BHCA, there would be no federal mechanism to ensure that its activities remain divorced from ownership or control by commercial enterprises.

Accordingly, if an institution that engages exclusively in nondepository core banking functions thereby engages in the business of banking under the NBA, then, state regulators believe, the fundamental principle mandating the separation of banking and commerce is in jeopardy. Thus, state regulators urge the Comptroller to avoid relying upon an expansive interpretation of its chartering authority to create novel, unprecedented charter types that dilute the very meaning of the business of banking and thereby undermine the wall established by Congress between banking and commerce.

2. <u>The OCC's proposal creates the opportunity for regulatory capital arbitrage.</u>

Since a special purpose nonbank would qualify as a depository institution under the generally applicable risk-based capital rules, bank holding companies would likely be able to arbitrage the capital

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[32] *Compare* 12 U.S.C. § 347c (corporation, partnerships, and individuals) *with* 12 U.S.C. § 347 (member banks).
[33] *See* 12 U.S.C. § 1843(c)(8).

requirements by maintaining a special purpose nonbank as an unconsolidated subsidiary. If special purpose nonbanks are not consolidated with their parent holding company for reporting purposes, and the parent company only maintains a minority interest in the subsidiary, the parent holding company will only be required to maintain capital for its equity investment in the subsidiary despite being financially responsible for the totality of the subsidiary's liabilities. Alternatively, if the special purpose nonbank is consolidated with its parent holding company for reporting purposes, then it will be permitted to count the equity investments in its nonbank subsidiary (likely funded by debt issued and guaranteed by the parent) towards its own capital requirements, and thereby mask the double leverage inherent in the parent-subsidiary structure.

The largest bank and financial holding companies would experience the largest benefit from maintaining a special purpose nonbank as a subsidiary, since they generally employ the advanced approaches methodology for calculating risk-based capital. Specifically, since a special purpose nonbank would be a "regulated financial institution" for the purposes of the risk-based capital rule, an advanced approaches holding company would generally not be subject to the increased asset value correlation factor for wholesale exposures to unregulated financial institutions and large regulated financial institutions, and, accordingly, not be held to the same stringent capital requirements applicable absent the existence of a special purpose nonbank. Put simply, the creation of the special purpose nonbank charter will be a means for bank holding companies to reduce the quality and quantity of capital they are required to hold under the risk-based and leverage capital rules. The benefits of this arbitrage enabled through the structuring of transactions with special purpose nonbank charters will accrue to the greatest extent to the largest institutions. A similar type of arbitrage under the liquidity rules applicable to advanced approach institutions will also likely be made possible through the creation of special purpose nonbanks.

State bank regulators believe that maintaining a high quantity and quality of capital is the cornerstone of bank regulation and supervision—a belief edified through the experiences of the recent financial crisis. For this reason, we urge the OCC to refrain from creating new types of institutions which will enable the largest institutions to engage in regulatory arbitrage in a manner that would lead to a lower quality and quantity of capital.

D. The OCC's proposal lacks clarity on the applicability of federal securities laws to special purpose nonbanks.

1. <u>The proposed special purpose nonbanks will be exempt from the enforcement authority of the Securities and Exchange Commission.</u>

Although the OCC discusses how it intends to collaborate with various federal banking regulators in the regulation and supervision of the proposed special purpose nonbanks, the OCC does not discuss how such an institution would be governed under the federal securities regulatory framework. To a varying degree, banks enjoy exemptions from federal securities laws and the authority to enforce federal securities laws is generally the responsibility of the institution's federal banking regulator rather than the Securities Exchange Commission. As discussed in this section, the fact that Congress did not contemplate the OCC chartering a special purpose nonbank creates uncertainty not only as to whether such institutions will be exempt from various requirements under federal securities laws but also as to which agency is responsible for the enforcement of federal securities laws.

A special purpose nonbank would likely qualify for the exemption for banks under the Securities Act of 1933, Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. The exemptions for banks in federal securities laws is generally predicated upon such institutions being subject to substantially similar registration, disclosure and antifraud rules by their

primary federal banking regulator and the requisite enforcement authority being delegated to these agencies to ensure compliance with these requirements.

2. The OCC lacks the authority to enforce federal securities laws against special purpose nonbanks.

Section 12(i) of the Securities Exchange Act delegates to the OCC "the powers, functions, and duties" vested in the SEC to administer and enforce various enumerated sections of the Act, including rulemaking powers, a delisting power, a trading suspension power, a power to issue orders, an investigatory power, and a litigating power.[34] However, based on the plain meaning of Section 12(i), this enforcement authority is not delegated to the OCC with respect to special purpose nonbanks. Specifically, Section 12(i) only delegates the powers, functions and duties of the SEC "[i]n respect of any securities issued by banks . . . the deposits of which are insured in accordance with the Federal Deposit Insurance Act."[35]

Accordingly, with respect to special purpose national nonbanks which refrain from receiving deposits, the Comptroller will lack the requisite authority to enforce the requirements of the Securities Exchange Act. Nevertheless, since they will qualify as "banks" under the federal securities laws, special purpose national nonbanks will be exempt from the requirements of that Act and the enforcement authority of the SEC. Thus, in addition to enjoying an exemption from the requirements of federal securities law and the jurisdiction of the SEC, special purpose national nonbanks that refrain from receiving deposits will also not be subject to the requirements of federal securities law imposed by or the enforcement authority delegated to the OCC.

State regulators believe that an exemption of this magnitude would be unprecedented and should counsel against the OCC using its chartering authority in such a manner as to create types of special purpose institutions clearly not contemplated by Congress. State regulators request that the OCC clarify how and on what legal basis the OCC will ensure compliance with the requirements of the Securities Exchange Act.

E. The OCC's proposal lacks clarity on the applicability of federal consumer financial laws to special purpose nonbanks.

1. The proposed special purpose nonbanks would not be subject to federal consumer protection laws to the same extent as full-service banks.

In outlining the extent to which the Consumer Financial Protection Bureau (CFPB) will oversee special purpose national nonbanks, the OCC discusses how federal consumer financial law will apply to such institutions. Specifically, the OCC notes that the "CFPB would supervise an uninsured special purpose national bank *engaged in certain activities* for compliance with federal consumer financial law" (emphasis added). The OCC qualifies the extent to which federal consumer financial law will apply to special purpose nonbanks because such institutions will not be subject to the entirety of federal consumer financial law, as would an insured depository institution, but rather only to the limited set of rules which apply to nondepository covered persons and only if they qualify as larger participants.[36]

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[34] *See* 15 U.S.C. § 78l(i).
[35] *See* id.
[36] *See* 12 U.S.C. § 5514.

2. The OCC is shirking its authority to apply federal consumer financial laws to special purpose nonbanks to the same extent as full-service banks.

To avoid creating an unlevel playing field in favor of special purpose nonbanks, State regulators believe it is imperative that special purpose national nonbanks be required to comply with federal consumer financial law to the same extent as full-service national banks. In transferring authority to the CFPB, the Dodd-Frank Act expressly enabled the OCC to use its enforcement authority under Section 8 of the FDIA to subject special purpose national nonbanks to the requirements of federal consumer financial law to the same extent as full-service national banks.[37]

The fact that the OCC refrains from using its enforcement authority in this respect to ensure a level playing field between banks and nonbanks fails to instill any confidence that the Comptroller will be even-handed in the use of its enforcement authority in the operating agreements entered into in chartering special purpose nonbanks. Likewise, the OCC's abdication of its authority under 12 U.S.C. 5581 does not bode well for other federal and state laws the applicability of which is left to the discretion of the Comptroller, including state laws on anti-discrimination, fair lending, and debt collection.

State regulators believe that, for the Comptroller's commitment to "high supervisory standards" to be anything more than a hollow platitude, the OCC must use its enforcement authority under the Consumer Financial Protection Act to subject special purpose nonbanks to the requirements of federal consumer financial law to the same extent as full-service national banks. Any measure short of full incorporation of federal consumer financial law (verifiable through the public availability of the operating agreements between the OCC and special purpose nonbanks) ought to cast doubt as to the commitment of the Comptroller to maintaining a level playing field while also ensuring compliance with any purportedly applicable federal and state laws.

IV. Preemption of State Law

In the wake of the financial crisis, there is a plethora of evidence that broad preemption is simply not good public policy. Understanding local markets and business practices requires a strong presence in the community. While financial technologies are deployed on a national and international basis, consumer interaction still occurs at a local level that requires local oversight. The Constitution established a federalist system to balance local and national priorities, and the emergence of financial technology does not change the fact that a balanced State-federal regulatory structure is vital to the strength of our financial system.[38]

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[37] *See* 12 U.S.C. § 5581(c)(2)(C).

[38] For more information on the traditional role of the States in licensing nondepository financial services providers and its constitutional underpinnings, see CSBS's previous comment letter on the OCC's proposed rule establishing a framework to govern receiverships for uninsured national banks, available at: CSBS Comment Letter on Proposed Rule on Receiverships for Uninsured National Banks.

A. The proposed special purpose nonbank will entitle fintech and other nondepository companies to federal preemption to the detriment of consumers.

Experience has shown the States not to trust the OCC when it seeks to expand its power.[39] Policymakers needn't look further than the mortgage crisis for an illustration of the disastrous results of the OCC's preemption of locally identified needs and priorities.[40]

In 1982, the OCC nullified state restrictions on adjustable rate mortgages, eliminating the ability of states to respond to lending practices that hurt consumers.[41] This laid the groundwork for predatory lending practices, culminating in state action to protect consumers where federal regulators refused to act. In 1999, North Carolina became the first State to enact a comprehensive anti-predatory law. Other states followed suit as the devastating results of predatory mortgage lending became apparent through increased foreclosures and disinvestment.

Unfortunately, rather than supporting these anti-predatory lending laws, federal regulators preempted them. In 1996, the OCC's predecessor for federal thrifts – the Office of Thrift Supervision ("OTS") – preempted all state lending laws. The OCC followed suit in 2003 with a determination that the Georgia Fair Lending Act did not apply to national banks.[42] A 2004 rule followed, exempting all national banks from state lending laws, including anti-predatory lending laws like those of Georgia and North Carolina. At a hearing on the OCC's preemption rule, Comptroller Hawke acknowledged, in response to questioning from Senator Sarbanes, that one reason Hawke issued the preemption rule was to attract additional charters, which helps to bolster the budget of the OCC.[43]

These actions removed an extra layer of regulatory protection. State officials have a unique expertise in local banking practices and local markets, which makes them uniquely situated to recognize and act upon consumer financial protection issues. Licensure is one of the key tools available to state regulators under the police powers preserved to the States by the Constitution. However, in 2006, the OCC supported an interpretation of the National Bank Act that led to the preemption of state licensing laws for operating subsidiaries of national banks.[44]

As a result of 25 years of policy that swept state responses under the rug, the mortgage crisis emerged. National bank subsidiaries offered abusive products while state regulators were powerless to enforce laws state legislators enacted to stop harm. While the OCC and supporters of the national bank system have

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[39] Past Comptrollers have gone as far as saying that national bank preemption "may operate in some cases to the disadvantage of consumers," and that losing market share [charters] "is a matter of concern to us." Jess Bravin & Paul Beckett, Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers, WALL ST. J., Jan. 28, 2002, at A1 (summarizing and quoting from an interview with Comptroller Hawke).

[40] *See* Di Maggio, Marco and Kermani, Amir and Korgaonkar, Sanket, *Partial Deregulation and Competition: Effects on Risky Mortgage Origination*, Columbia Business School Research Paper No. 15-47 (November 17, 2016) (finding "national banks' supply of loans with prepayment penalties and longer prepayment terms increased significantly" after state anti-predatory lending laws were preempted). Available at SSRN: https://ssrn.com/abstract=2591434 or http://dx.doi.org/10.2139/ssrn.2591434.

[41] *See Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983).

[42] *See* Preemption Determination and Order, 68 Fed. Reg. 46264 (August 5, 2003) (preempting "the provisions of the [Georgia Fair Lending Act] affecting national banks' real estate lending" in response to a request from National City).

[43] *See* Senate Banking Committee Hearing, *Review of the National Bank Preemption Rules* (June 7, 2004).

[44] *See Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007).

suggested the cause was unregulated nonbank mortgage companies,[45] there can be no logical support for this argument when reviewing the evidence, which even includes abuses of financial technology.

Wachovia Mortgage Loan Trust, Series 2006-AMN1 is a mortgage backed security issued in 2006.[46] The loans backing the security were originated by American Mortgage Network ("AmNet"), "an indirect wholly owned subsidiary of Wachovia Bank and Wachovia Corporation."[47] AmNet originated Alt-A mortgages through branches and "over the Internet."[48] These Alt-A loans were originated with "reduced documentation programs," including a "'No Income/No Assets/No Employment' program, where there is no verification of income, assets or employment."[49] To CSBS's knowledge, the OCC never examined this company as an operating subsidiary of Wachovia Bank, N.A.

The lending "programs" used by AmNet would have been illegal under many state laws, and examination of nonbank subsidiaries would have revealed the predatory loans. However, the OCC's preemption determinations prevented the states from examining AmNet and stopping lending practices known to local governments as predatory and counter to sound financial dealings.

B. The OCC's proposed special purpose nonbank charter will preempt the States' activities-based nondepository licensing and regulatory regimes.

Distressingly, the OCC white paper makes no reference to the state regulatory system and disingenuously suggests that entities potentially eligible for the special purpose nonbank charter are currently subject to no regulation. Equally disingenuous is the OCC's claim in the white paper that certain state laws will generally apply to national banks including laws on anti-discrimination, fair lending, and debt collection. Because the OCC is not, as a public servant, charged with the enforcement of these state laws, it is questionable whether they will "apply" as the OCC claims. In the end, these state laws will apply only at the discretion of the Comptroller which is a prerogative the OCC has tended to employ to defeat, rather than enforce, the application of state law.

In addition to supervising approximately 4,790 state-chartered banks,[50] most state banking departments also regulate a variety of nondepository financial services providers, including money transmitters, mortgage lenders, and consumer lenders. According to the OCC white paper, any of these 20,000 plus companies would qualify for a national bank charter because they send money or lend.[51] Like state banks, nondepositories licensed by state regulators are required to meet safety and soundness requirements and conform to both state and federal consumer protection laws. This is accomplished by licensing and subsequently examining nondepository companies on a regular basis. Examination of multi-state entities

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[45] *See* Jesse Stiller, *Banking Modern America: Studies in Regulatory History* (2016).
[46] *See* Prospectus Supplement, Wachovia Mortgage Loan Trust, Series 2006-AMN1 (May 23, 2006). *Available at* https://www.sec.gov/Archives/edgar/data/1326845/000128269506000309/e65745_424b5.htm.
[47] *See* id. at S-30.
[48] *See* id. AmNet was later rolled into Wachovia Securities. *See* http://www.prnewswire.com/news-releases/american-mortgage-network-and-wachovia-third-party-lending-rebranded-to-create-vertice-51630642.html.
[49] *See* id. at 31.
[50] *See* FDIC Statistics on Depository Institutions as of Year End 2015. Available at https://www.fdic.gov/bank/statistical/.
[51] As of year end 2015, there were 20,440 state licensed entities on the Nationwide Multi-State Licensing System. *See 2015 Annual Report*, State Regulatory Registry. *Available at* http://mortgage.nationwidelicensingsystem.org/about/Documents/SRR_2015AR_Web.pdf.

is performed on a collaborative basis with multi-state teams, reducing regulatory burden and improving allocation of resources among states.[52]

As proposed, and without any discussion, a special purpose national bank charter will preempt this regulatory framework for any charter recipient. The only likely charter recipients will be those financial technology firms and nondepository companies with sufficient legal resources to navigate and comply with the OCC's opaque, unarticulated chartering requirements and supervisory standards. In the end, the proposed chartering and supervisory framework will benefit large, entrenched incumbents and create a larger barrier to entry for the vast majority of financial technology firms.

[52] *See* Multi-state Mortgage Committee Report to State Regulators (2015) *available at* https://www.csbs.org/news/presentations/annualreports/Documents/MMC%202015%20Annual%20Report_FINAL_0505.pdf; Multi-state MSB Examination Taskforce Report to State Regulators (2015) *available at* https://www.csbs.org/news/presentations/annualreports/Documents/2015%20MMET%20Annual%20Report.pdf.

EXHIBIT G

Office of the Comptroller of the Currency

OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies

Office of the Comptroller of the Currency
Washington, D.C.

March 2017

Introduction

The Office of the Comptroller of the Currency (OCC) has considered whether it is in the public interest to entertain applications for a special purpose national bank (SPNB) charter from financial technology (fintech) companies that engage in banking activities and meet the standards applicable to national banks. The OCC has carefully considered the issues outlined in and the comments received on the OCC's paper *Exploring Special Purpose National Bank Charters for Fintech Companies* (SPNB Paper). This summary of comments and explanatory statement addresses key issues raised by commenters and explains the OCC's decision to issue for public comment a draft supplement to the *Comptroller's Licensing Manual* (Supplement) providing guidance to any fintech company that may wish to file a charter application.

The OCC will accept comments on the Supplement through close of business April 14, 2017. Comments should be submitted to specialpurposecharter@occ.treas.gov.

OCC Support for Responsible Innovation

The OCC has long supported innovation in the national banking system. Federally chartered institutions have continually sought new approaches to meet the needs of customers and an evolving marketplace. It has been and remains the OCC's role to encourage and support institutions' efforts to engage in responsible innovation to meet the needs of consumers, businesses, and communities. The OCC's decision to issue the draft Supplement is consistent with that support. It is also one component of an initiative that began in 2015, when Comptroller of the Currency Thomas J. Curry announced[1] the agency's efforts to better understand innovation occurring in the financial services industry and to develop a framework to support responsible innovation in the federal banking system. To gain a broad perspective, the OCC conducted extensive research and held numerous discussions with fintech companies, banks, community and consumer groups, academics, and other regulators. This work led to the publication of a paper, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*,[2] outlining principles to guide the OCC's development of a responsible innovation framework. A wide range of stakeholders provided comments on that paper, including some who suggested the OCC consider issuing federal charters to fintech companies. Charter discussions continued at the OCC's June 2016 Forum on Responsible Innovation. Since then, there has been significant and growing interest in federal bank charters for fintech companies.

Work also has continued on the development of the OCC's framework to support responsible innovation. In October 2016, the OCC established a stand-alone Office of Innovation (Office) to serve as a clearinghouse for innovation-related matters and a central point of contact for OCC staff, banks, and nonbanks. The Office conducts outreach to a variety of financial services stakeholders and provides technical assistance and other resources for banks and nonbanks on

[1] Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Federal Home Loan Bank of Chicago, August 7, 2015.

[2] OCC, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, March 2016.

the OCC's expectations and guiding principles regarding responsible innovation. The Office also promotes awareness of industry developments among OCC staff and other regulators.

SPNB Paper and SPNB Licensing Manual Draft Supplement

In December 2016, Comptroller Curry announced that the OCC would move forward with considering applications from fintech companies to become SPNBs. The OCC published and requested public comment on the SPNB Paper describing the issues associated with offering national bank charters to fintech companies.[3] The paper described the OCC's legal authority to grant a national bank charter to companies with limited purposes and articulated what the OCC considers the requirements for obtaining a charter. In particular, the paper made clear that if the OCC grants a national charter to a particular fintech company, the agency will hold that institution to the same high standards of safety and soundness, fair access, and fair treatment of customers that all federally chartered institutions must meet.

The Comptroller also asked staff to develop the draft Supplement to provide guidance for evaluating fintech charter applications and to ensure that the agency considers safety and soundness, risk management, financial inclusion, and compliance with applicable consumer protection and other laws and regulations were it to entertain applications from fintech companies. The draft Supplement, informed by the comments received on the SPNB Paper, explains how the OCC would evaluate applications from fintech companies and the conditions for approving such charters. The OCC welcomes additional comments on the draft Supplement.

While the term "special purpose national bank" is used elsewhere in the OCC's rules and policies to refer to a number of types of special purpose national banks, for purposes of the draft Supplement and this statement, "SPNB" means a national bank that engages in a limited range of banking activities, including one of the core banking functions, but does not take deposits and is not insured by the Federal Deposit Insurance Corporation (FDIC). The draft Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter an SPNB and does not apply to other types of special purpose banks described in the current *Comptroller's Licensing Manual*.[4]

OCC Responses to Comments on SPNB Paper

The OCC received more than 100 comment letters on the SPNB Paper. After considering those comments, the OCC states that in evaluating applications from fintech companies for an SPNB charter, the agency would be guided by certain threshold principles that inform the draft Supplement:

- The OCC will not allow the inappropriate commingling of banking and commerce.

[3] OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (PDF), December 2, 2016.

[4] For example, the draft Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

- 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.

Aligned with those principles, the OCC believes that making SPNB charters available to qualified fintech companies would be in the public interest. An SPNB charter provides a framework of uniform standards and robust supervision for companies that qualify. Applying this framework to fintech companies would help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities. In addition, the OCC believes supervision by a federal regulator would promote consistency in the application of federal laws and regulations across the country.

Further, making charters available to qualifying fintech companies supports a robust dual banking system by providing these companies the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections. This is the same choice Congress has made available to companies that deliver banking products and services in traditional ways.

Moreover, providing a path for fintech companies to become national banks can make the financial system stronger by promoting growth, modernization, and competition. The OCC believes that denying fintech companies this option could make the federal banking system less capable of adapting to evolving business and consumer needs. Additionally, the OCC's supervision of fintech companies chartered as SPNBs would deepen the agency's expertise in the emerging technologies that will be crucial to delivering banking products and services in the future.

Finally, the OCC believes innovation has the potential to broaden access to financial services. Many fintech companies state that they offer products and services that reach consumers who have had limited access to banks in the past. Chartering fintech companies increases the potential to reach consumers and thereby promote financial inclusion.

General Comments

Many commenters supported the OCC's decision to consider charter applications from fintech companies and noted many of the same public benefits cited by the OCC. For example, many agreed that a national charter would provide fintech companies with uniform, clear, and consistent supervision and regulation. Numerous commenters also viewed the national bank charter as a means to empower consumers and provide greater access to credit in underserved communities. Others said the availability of a national charter would spur innovation and encourage competition. One commenter pointed out that a federal charter would give the OCC a better-informed, direct view of innovations that are reshaping the financial system. Several commenters also noted that having a national bank charter would eliminate the need for state-by-state licenses, thereby reducing regulatory burdens and costs and facilitating growth.

Other commenters warned of possible risks of permitting fintech companies to operate as national banks. Some expressed concern about the potential for consumer harm, noting that a fintech company chartered as an SPNB could avoid consumer protections granted by state laws or federal laws that only apply to deposit-taking banks. Other commenters warned that the OCC has not limited SPNB charters to fintech companies, and thus the charters could be used by payday lenders.

In addition, several commenters expressed concern that the OCC's supervision of fintech companies chartered as national banks would be less stringent than the supervision fintech companies receive from state regulators today. Others were concerned SPNBs might receive less rigorous supervision than full-service national banks.

In contrast, some commenters were concerned that a rigid regulatory framework could stifle innovation and urged the OCC to provide flexible regulation tailored to the fintech company's business model and risks. Moreover, some argued that imposing standards that only the largest fintech companies could meet could lead to industry consolidation and ultimately less innovation.

Certain commenters opposed to the charter challenged the OCC's chartering authority and suggested that a national bank charter for fintech companies could undermine the separation of banking and commerce.

Charter proponents and critics alike urged the OCC to establish clear supervisory standards in advance and to make the charter approval process transparent. Many commenters supported requiring fintech banks to demonstrate a commitment to financial inclusion.

The following sections of this statement address these and other key issues raised by commenters.

Consumer Protection

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. Other commenters argued that federal preemption of state law could encourage charter shopping. In particular, some commenters expressed concern that SPNBs would not be subject to state laws prohibiting unfair or deceptive acts or practices. Further, some commenters stated that granting a national bank charter to fintech companies would weaken states' ability to enforce consumer protection laws by removing their visitorial oversight, thereby making it more difficult to investigate and prosecute potential violations of law.

The OCC disagrees. Consumer protection laws and enforcement activities vary from state to state. A fintech company that is approved for a national bank charter would be subject to consistent federal consumer protection standards and federal supervision and regulation.

With the passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank Act), Congress expanded federal protections for consumers through the Consumer Financial Protection Act and the establishment of the Consumer Financial Protection Bureau (CFPB).[5] Other federal laws also contain extensive protections for consumers. The Federal Trade Commission Act (FTC Act) provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful.[6] The OCC enforces the FTC Act with respect to both insured and uninsured national banks[7] and has taken a number of public enforcement actions against national banks for unfair or deceptive acts or practices.[8] Many state laws prohibiting unfair or deceptive acts or practices borrow FTC Act language and explicitly reference FTC standards and related judicial precedents. Consequently, OCC enforcement actions under the FTC Act often address the same conduct as is covered under the state "mini-FTC Acts."[9]

Congress has also carefully considered the OCC's use of federal preemption, and the Dodd-Frank Act clarified the standards and scope of the OCC's application of federal preemption for national banks and federal savings associations. The OCC acts in accordance with those provisions, which would also apply to the OCC's regulation of SPNBs. Thus, state law applies to an SPNB in the same way and to the same extent as it applies to other national banks. For example, state laws that address anti-discrimination, fair lending, debt collection, taxation, zoning, crime, and torts, generally apply to national banks and would also apply to SPNBs. In contrast to commenters' assertions, state laws that prohibit unfair or deceptive acts or practices, for example, business conduct laws that address consumer protection concerns such as material

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[5] For example, in addition to prohibiting unfair or deceptive acts or practices, the Dodd–Frank Act prohibits "abusive" acts or practices as well. Dodd–Frank, section 1031, codified at 12 USC 5531. The Dodd-Frank Act also generally preserves any state law that affords consumers greater protection than Title X of the Act, including with respect to unfair, deceptive, or abusive acts or practices. The Dodd–Frank Act, section 1041(a)(2), codified at 12 USC 5551(a)(2). Title X, section 1011(a), codified at 12 USC 5491(a), created the CFPB.

[6] See 15 USC 45(a)(1) and 15 USC 45(n). See also "FTC Policy Statement on Unfairness," Federal Trade Commission (December 17, 1980); "FTC Policy Statement on Deception," Federal Trade Commission (October 14, 1983).

[7] See 12 USC 1818(b). OCC regulations regarding non-real estate and real estate lending, as well as the OCC's enforceable "Guidelines for Residential Mortgage Lending Practices," expressly reference the FTC Act standards. See 12 CFR 7.4008(c); 12 CFR 34.3(c); 12 CFR 30, appendix C. Further, OCC guidance also directly addresses unfair or deceptive acts or practices with respect to national banks. See OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002); OCC Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (February 21, 2003) (OCC Advisory Letter 2003-2); OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (February 21, 2003) (OCC Advisory Letter 2003-3); OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013) (OCC Bulletin 2013-40); OCC Bulletin 2014-37, "Risk Management Guidance: Consumer Debt Sales" (August 4, 2014) (OCC Bulletin 2014-37); and "Interagency Guidance Regarding Unfair or Deceptive Credit Practices" (August 22, 2014).

[8] For example, OCC actions have addressed national banks' failure to: provide sufficient information to allow consumers to understand the terms of the product or service being offered; adequately disclose when significant fees or similar material prerequisites are imposed in order to obtain the particular product or service being offered; and adequately disclose material limitations affecting the product or service being offered.

[9] Moreover, as explained in this statement, generally state laws prohibiting unfair or deceptive acts or practices are not preempted by either the FTC Act or the National Bank Act.

misrepresentations and omissions about products and services in billing, disclosure, and marketing materials, generally would apply to national banks, including SPNBs. The OCC understands that this would be the result even when the language of the state statute does not specifically refer to banks. Moreover, to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank and provides consumers with the right to bring a lawsuit against the bank, that remedy would be available against an SPNB. In addition, to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank and authorizes the state attorney general to enforce the law through judicial action, the state attorney general could bring an action in court against an SPNB for violation of the law.[10]

In addition to concerns regarding consumer protection laws, certain commenters expressed concerns that state laws establishing interest rate caps would be preempted for federally chartered banks. In particular, commenters warned that preemption and the availability of a fintech national bank charter could open the door for predatory lenders.

The OCC shares commenters' concerns about predatory lending and has taken significant steps to eliminate predatory, unfair, or deceptive practices in the federal banking system. For example, the OCC requires national banks engaged in lending to take into account the borrower's ability to repay the loan according to its terms.[11] Additionally, the OCC has cautioned national banks about lending activities that may be considered predatory, unfair, or deceptive, and notes that many of these lending practices already are unlawful under existing federal laws and regulations, including the FTC Act, and otherwise present significant safety and soundness and other risks. The highlighted practices include those that target prospective borrowers who cannot afford credit on the terms being offered, provide inadequate disclosures of the true costs and risks of transactions, involve loans with high fees and frequent renewals, or constitute loan "flipping" (frequent refinancings that result in little or no economic benefit to the borrower that are undertaken with the primary or sole objective of generating additional fees).[12] The OCC's policies establish that such practices conflict with the high standards expected of national banks and also present significant safety and soundness, reputation, and other risks.

The OCC does not approve charter applications from any company that plans to offer financial products and services with predatory, unfair, or deceptive features and so would not approve any such application from a fintech company. Further, the OCC takes appropriate supervisory action

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[10] See *Cuomo v. Clearing House Assn., LLC*, 557 U.S. 519 (2009).

[11] See, e.g., 12 CFR 7.4008(b) (secured consumer lending); 12 CFR 34.3(b) (secured consumer real estate lending). In addition, insured depository institutions must consider, as part of prudent credit underwriting practices, "the borrower's overall financial condition and resources . . . and the borrower's character and willingness to repay as agreed." See 12 CFR 30, appendix A, "Safety and Soundness Standards." As described in the draft Supplement, the OCC could impose special conditions on SPNBs that are similar to certain laws that apply by statute to only insured banks, to the extent appropriate given the business model and risk profile of the applicant.

[12] See OCC Advisory Letter 2000-7, "Abusive Lending Practices" (July 25, 2000); OCC Advisory Letter 2000-10, "Payday Lending" (November 27, 2000); OCC Advisory Letter 2003-2; OCC Advisory Letter 2003-3; OCC Bulletin 2013-40; OCC Bulletin 2014-37.

to ensure compliance with applicable laws, address unsafe or unsound banking practices, and prevent practices that harm consumers.[13]

Finally, it is important to remember that although a national bank can export the usury laws of the state in which it is located,[14] Congress provided this same benefit to state-chartered banks in 1980, by giving insured state banks the same ability as national banks to extend credit under their home state usury rules.

Small Business Protections

In addition to consumer protections, many commenters urged the OCC to address gaps in protection for small business customers. Some commenters suggested that the OCC look to the Small Business Borrowers' Bill of Rights, an agreement by certain online lenders to provide certain disclosures to small business borrowers. Others suggested that the OCC impose consumer protections whenever an individual may be held personally liable for the loan.

Some commenters argued against the OCC's imposition of small business borrower protections, however, noting that Congress has not extended consumer borrower protections to small businesses. They noted that Congress has repeatedly recognized important distinctions between individuals and small businesses, such as their level of sophistication. Some commenters warned that imposing any such requirements could impede the flow of capital to more sophisticated borrowers.

Other commenters argued that small business lending is regulated sufficiently by such laws as the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the FTC Act, and, thus, additional protections are not required. Some commenters urged the OCC to rely on industry developed standards and not impose standards of its own.

The OCC would take appropriate supervisory action to ensure compliance with all applicable laws,[15] including laws that address unfair or deceptive practices[16] that affect small business borrowers.[17] In addition, the OCC would expect an SPNB involved in lending to provide sufficient disclosures and clear information to ensure that all borrowers, including consumers and small businesses, can make informed credit decisions. The OCC recognizes the efforts by some companies in the online lending community to address this important issue. The OCC

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[13] Federal consumer financial laws are supervised and enforced by either the OCC or CFPB as set forth in Title X of the Dodd–Frank Act.

[14] See 12 USC 85.

[15] Applicable laws include for example the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and section 5 of the FTC Act.

[16] The FTC Act, by its terms, does not limit the prohibition against unfair or deceptive acts or practices to individual consumers. 15 USC 45(a) (". . . unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful").

[17] As previously noted, federal consumer financial laws are enforced by either the OCC or CFPB, as set forth in Title X of the Dodd–Frank Act.

would look favorably on an applicant's commitment to educate small business borrowers about their rights and responsibilities.

Financial Inclusion

The OCC's statutory mission includes ensuring that national banks provide fair access to financial services and treat customers fairly.[18] To fulfill that mission, the OCC is guided by certain principles in determining whether to approve a charter application to establish a national bank. These principles include encouraging a national bank "to provide fair access to financial services by helping to meet the credit needs of its entire community" and "promoting fair treatment of customers, including efficiency and better service."[19]

The OCC requires an applicant for a traditional national bank charter to submit a business plan that demonstrates how the proposed bank plans to respond to the needs of the community, consistent with the safe and sound operation of the bank.[20] As outlined in appendix B to the draft Supplement, the OCC also would expect an applicant for an SPNB charter that intends to engage in lending or provide financial services to consumers or small businesses to include a financial inclusion plan as a component of its business plan. The nature of the commitment would depend on the entity's business model and the types of products or services it intends to provide.

The OCC received many comments on whether it should seek a financial inclusion commitment from SPNBs and how these institutions could promote financial inclusion. Many commenters argued that SPNBs can provide valuable services to underserved communities and should make a commitment to financial inclusion. They urged the OCC to require financial inclusion plans that include measurable goals and are formulated with input from the community. Without requiring a financial inclusion commitment, one commenter warned, many individuals and communities could remain underserved.

Other commenters were opposed to requiring such a commitment. Some commenters suggested that fintech companies naturally promote financial inclusion, and therefore no formal commitment is necessary.

Many commenters urged the OCC to be flexible in evaluating how different SPNBs promote financial inclusion. Some commenters proposed specific activities SPNBs could engage in to demonstrate their commitment. For example, a number of commenters suggested that SPNBs could establish financial literacy programs or provide funding for credit building and credit counseling services in low- and moderate-income communities. Other commenters viewed partnerships and investments as promising means for SPNBs to promote financial inclusion. Some commenters specifically identified Community Development Financial Institutions as potential partners or investments for SPNBs.

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[18] See 12 USC 1(a).

[19] See 12 CFR 5.20(f)(1)(ii) and (iv).

[20] See 12 CFR 5.20(h)(5).

The OCC agrees that many fintech companies have significant potential to expand access to financial services. To help ensure that this potential is realized, the OCC would expect a formal commitment to, and plan for, financial inclusion from SPNBs engaged in lending activities or providing financial services to consumers or small businesses.

The OCC also agrees that there are many different activities SPNBs could engage in to promote financial inclusion. The OCC encourages the development of innovative products or services designed to address the needs of low- and moderate-income individuals and communities. SPNBs could also demonstrate their commitment to financial inclusion in more traditional ways. For example, the OCC has supported national banks' participation in programs, such as financial literacy and credit counseling services, that improve individuals' understanding of the financial products and services that meet their needs. Investments in certain funds or organizations may also be part of an effective financial inclusion plan. The OCC looks forward to working with potential SPNB applicants on both new and conventional ways to promote financial inclusion.

Regulatory and Supervisory Standards

The OCC has been clear that it would hold companies granted SPNB charters to the same high standards of safety, soundness, and fairness that all other federally chartered banks must meet. As it does for all banks, the OCC would tailor these requirements based on the bank's size, complexity, and risk, consistent with applicable law. While most commenters agreed with that standard, some commenters urged the OCC to be flexible in its regulation and supervision of fintech companies that become national banks. For example, certain commenters questioned whether start-up fintech companies would be able to meet the OCC's standards, even when tailored to the companies' size, risk, and complexity. These commenters asked whether the OCC would consider adapting its standards for fintech start-ups, with some suggesting that the OCC consider separate, more lenient standards for start-ups.

The OCC is sensitive to commenters' concerns regarding the need for appropriate standards. As the prudential regulator for approximately 1,400 national banks and federal savings associations, including nearly 1,200 community banks and savings associations, the OCC is experienced in evaluating whether a proposed bank would be able to meet the criteria to become an SPNB. Size alone is not a disqualifying factor. As explained in the draft Supplement, there are, however, certain minimum statutory and regulatory standards an institution must meet to qualify for a national bank charter. For example, an applicant must demonstrate that the bank has a reasonable chance of success, will operate in a safe and sound manner, and will foster healthy competition. In evaluating whether an institution meets those standards, the OCC considers, among other factors, whether the organizers and proposed management have the appropriate skills and experience to operate as a national bank. Further, banks must maintain sufficient liquidity and adequate capital. Additional criteria are outlined in the draft Supplement and the "Charters" booklet of the *Comptroller's Licensing Manual.*

Other commenters emphasized the need for flexibility to give SPNBs the ability to innovate rapidly. For example, some commenters expressed concern that the OCC may require SPNBs to obtain the OCC's approval before making significant deviations from their business plans and that such a requirement could make them less nimble. Specifically, these commenters referred to

the condition imposed on all de novo banks to provide notice and obtain a supervisory non-objection letter from the OCC before making significant deviations from their approved business plans.

The OCC recognizes that certain deviations may be necessary and desirable to meet changes in market conditions or to introduce technological innovations that improve the customer experience. As explained in appendix F of the "Charters" booklet, however, new banks are particularly vulnerable to significant internal and external risks until they achieve a certain level of stability and profitability. The significant deviation condition provides the OCC with the opportunity to evaluate whether a proposed change could significantly increase a bank's risk profile and whether the bank can properly manage any increased risk.

It is also important to understand that the condition does not apply to all changes, just those changes that constitute significant deviations from a bank's business plan.[21] For example, a bank may decide to significantly reduce its emphasis on its targeted niche (e.g., consumer or small business lending) in favor of expanding into another area (e.g., payments processing). In that case, the bank would need to obtain the OCC's supervisory non-objection before undertaking changes to its business plan or operations. The significant deviation condition, however, would not preclude limited testing or piloting of new products or services, provided the bank has put in place appropriate internal controls and protections for targeted customers.

Capital and Liquidity Requirements

Commenters also addressed potential capital and liquidity requirements for SPNBs. Some commenters felt strongly that capital and liquidity requirements should be as consistent with current national bank chartering requirements as possible. They argued that without consistent requirements, fintech companies chartered as special purpose national banks would have a competitive advantage. Others held that capital and liquidity requirements should be commensurate with the scope of activities contemplated in the company's charter application. Some commenters recommended that a fintech company chartered as a special purpose national bank only be required to have the capital and liquidity necessary to wind down its business plan without harming customers in the event of failure. Along these lines, some suggested that companies with simpler business models or a narrower range of services, such as an online lending platform, should have lower capital requirements than full-service national banks.

Capital

Like all national banks, SPNBs would be subject to the leverage and risk-based capital requirements in 12 CFR 3. As commenters pointed out, however, for any entities that have few on-balance-sheet exposures, it will be necessary to tailor an SPNB's capital requirements to capture the different risks associated with limited balance sheets or nontraditional strategies. The

[21] See appendix F, "Significant Deviations After Opening," of the *Comptroller's Licensing Manual*, "Charters," pp. 105-06. The "Charters" booklet defines "significant deviation" as a "material variance from the bank's business plan or operations, or introduction of any new product, service, or activity or change in market that was not part of the approved business plan." Significant deviations may include, but are not limited to, significant deviations in the bank's projected growth, business strategy, lines of business, or funding sources.

OCC acknowledges that the minimum capital requirements set forth in 12 CFR 3, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, may not be sufficient for measuring capital adequacy for some SPNBs. In those cases, the OCC will use alternative approaches to determine the appropriate capital requirement. As noted in the draft Supplement, the OCC has considerable experience imposing individual capital and liquidity requirements when appropriate.

Beyond those minimum requirements, capital levels must be commensurate with the risk and complexity of the bank's proposed activities (including on- and off-balance-sheet activities). The OCC's evaluation of capital adequacy considers the risks and complexities of the proposed products, services, and operating characteristics, taking into account factors such as the scope and nature of the bank's proposed activities, quality of management, and stability or volatility of sources of funds. The OCC also considers on- and off-balance-sheet composition, credit risk, concentrations, and market risk.

Liquidity

As with capital, the OCC would consider any applicant's specific business model when evaluating its liquidity profile and liquidity risk management. For other types of special purpose national banks, the OCC has imposed tailored requirements to ensure adequate liquidity. Such requirements could include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

Some commenters urged the OCC to require SPNBs to assess their liquidity needs over various periods and scenarios, including normal and stressed conditions. They highlighted that many fintech companies emerged during a period of strong credit conditions and have not yet been tested throughout a full credit cycle. One commenter suggested that fintech companies chartered as national banks engaged in lending be required to have adequate funds to meet a specified level of future loan originations, to ensure lending continues during a liquidity crisis.

The OCC is aware that many companies and business models have not yet operated in stressed conditions. As a result, the OCC expects any charter applicant to consider and address, among other items, projected borrowing capacity under normal and adverse market conditions. For instance, a fintech bank could establish a minimum number of months of current projected operating expenses to maintain adequate liquidity. In addition, the OCC believes SPNBs should establish comprehensive contingency funding plans, just as other national banks do.

Charter Application Process

While many commenters wanted flexible and tailored regulation, they also advocated for a clear understanding of the standards that would apply during the chartering process. In particular, they urged the OCC to make the application process transparent by establishing at the outset the conditions a fintech company would be required to meet. Other commenters advised the OCC to adopt a clear definition of "fintech" and identify the types of companies the OCC views as eligible for an SPNB charter.

Commenters also expressed concern that having the OCC make chartering decisions on a case-by-case basis could lead to inconsistent treatment. Certain commenters were concerned that exercising such broad discretion could put the OCC in the position of picking winners and losers. To ensure consistent treatment, a number of commenters urged the OCC to outline the criteria for charter approval clearly, limit the use of charter conditions and operating agreements, and make chartering decisions, including applicable conditions, publicly available.

The OCC strives to make the charter application process clear, understandable, and transparent. The OCC provides detailed information about this process in its charter regulation at 12 CFR 5.20 and in the "Charters" booklet. These materials list the OCC's criteria and requirements for charter approvals of national banks, including special purpose national banks. As discussed above, the OCC is also issuing for public comment a draft Supplement to the *Comptroller's Licensing Manual* for any fintech companies seeking an SPNB charter. In addition, applicants would have an opportunity to ask questions about the process, including the conditions for approval, through multiple prefiling meetings with OCC Licensing and supervisory staff. The OCC's Office of Innovation also is available to facilitate the application process.

The decision to impose special conditions for approval of a charter application is made on the basis of many factors, including the applicant's business plan, proposed management, and relevant experience. Conditions may be imposed directly in the preliminary approval letter, or the OCC may require as a condition of approval that the applicant enter into an operating agreement. The operating agreement may impose safeguards to address certain aspects of a bank's operations, including growth, capital, or liquidity. The OCC publishes all conditional approvals, which disclose the existence of an operating agreement.

As the prudential regulator for national banks and federal savings associations, the OCC must exercise its judgment in deciding whether to approve a national bank charter to a particular company. As explained in the "Charters" booklet and the draft Supplement, the OCC's decision to approve a charter is guided by its mission to promote a vibrant and diverse banking system that benefits consumers, communities, businesses, and the U.S. economy. In general, the OCC would approve applications to charter an SPNB from any companies that have a reasonable chance of success, will provide fair access to financial services, will ensure compliance with applicable laws and regulations, and will promote fair treatment of customers and foster healthy competition.[22]

Coordination Among Regulators

Many commenters urged the OCC to coordinate with other federal and state regulators to provide consistency and clarity regarding the regulation of fintech companies. Some commenters suggested this coordination could be achieved by the creation of an interagency working group or a special subcommittee of the Federal Financial Institutions Examination Council (FFIEC).

The OCC agrees with commenters that coordination among federal and state regulators is essential to fostering responsible financial innovation. The OCC will continue to engage with

[22] The charter regulation, 12 CFR 5.20(e), *Comptroller's Licensing Manual*, "Charters," and the draft Supplement outline the factors the OCC considers in reviewing a charter application.

other regulators in a collaborative way regarding financial technology to promote a common understanding and consistent application of laws, regulations, and guidance. The OCC regularly coordinates with other state and federal banking regulators through its participation in the FFIEC. For example, the OCC participated in the FFIEC's cybersecurity initiative to raise financial institutions' awareness of cybersecurity concerns and strengthen the oversight of cybersecurity readiness.[23] The OCC also currently chairs the FFIEC Task Force on Consumer Compliance. In addition, the OCC collaborates with the CFPB on consumer-related matters, and the OCC is an active member of many of the U.S. Department of the Treasury's working groups and committees, including one for marketplace lending. The OCC also co-chairs the Basel Committee's Task Force on Financial Technology (TFFT).[24] The OCC will continue to leverage these channels of communication to collaborate and share information regarding the chartering and supervision of SPNBs.

Depending on the structure of a fintech bank and the activities it conducts, other regulators may have oversight roles as well. As a result, any fintech company considering an SPNB charter likely will need to engage with other regulators in addition to the OCC. In considering applications, the OCC would coordinate as appropriate with other federal regulators with jurisdiction over the SPNB, including to facilitate simultaneous consideration of any applications or approvals that may be required by those regulators.

Ongoing Supervision

Commenters questioned how the OCC would supervise fintech companies that become national banks. Several commenters asserted that SPNBs should be subject to the same oversight and regular examination as traditional banks. Specifically, commenters noted the importance of having regular, rigorous examinations to ensure compliance with requirements regarding safety and soundness, Bank Secrecy Act/anti-money laundering (BSA/AML) provisions, financial inclusion, fair lending, and other applicable laws. Other commenters asserted that the OCC did not have the resources or expertise necessary to properly supervise fintech companies that would become SPNBs.

As discussed in appendix A of the draft Supplement, an SPNB would be subject to the same oversight and supervision as other national banks. The OCC's supervisory process for all national banks and federal savings associations establishes minimum supervisory standards, reflects the unique characteristics of each institution, and is responsive to changes within individual institutions and the markets where they compete. Consistent with the OCC's supervision of other national banks, the OCC's supervisory strategy for SPNBs would be tailored to each bank's business model and include on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team.

[23] FFIEC Cybersecurity Awareness Initiative, available at https://www.ffiec.gov/cybersecurity.htm.

[24] The TFFT fosters financial stability through the assessment of the risks and supervisory challenges associated with innovation and technological changes affecting banking. The TFFT's work is currently focused on the impact that fintech has on banks and banks' business models, and the implications this has for supervision.

The OCC has technical expertise in a number of areas that would likely be relevant for a newly chartered SPNB, including compliance with capital, liquidity, risk management, and consumer protection requirements. As it does with any other de novo charter, the OCC would leverage those examiners who have expertise appropriate for the bank's business model and activities. Likewise, dedicated licensing specialists, economists, other subject matter experts (e.g., those specialized in credit risk, compliance, financial inclusion, BSA/AML, operational risk, cybersecurity, or information technology), lawyers, and other staff would be assigned to individual charters, as appropriate, to support their supervision. For example, the examination team for a fintech company specializing in payment processing technology would be assisted by the OCC's Payments Systems Policy Group, whose expertise includes the latest innovations in payments systems, including distributed ledger technology. In addition, the OCC has significant experience assisting national banks in their assessment and management of risks associated with technology service providers and other third-party relationships.[25] Further, to ensure consistency in OCC supervision, a dedicated Assistant Deputy Comptroller would oversee any SPNB.

Other commenters noted the importance of ensuring that SPNBs maintain robust compliance and risk management programs. As detailed in the draft Supplement, the OCC would require any SPNB to establish and maintain well-developed, robust compliance and risk management programs that address, among other things, BSA/AML, consumer protection, third-party risk management, and data and information security requirements. The OCC expects a bank's risk management systems to be commensurate to the size, complexity, and risks of its activities. Regardless of the risk management program's design, it should address the following: risk identification, risk measurement, risk monitoring, and risk control. For example, the OCC would expect SPNBs to have a rigorous cybersecurity framework in place to assess cybersecurity risks and respond to, manage, and defend against cyber attacks.

Some commenters recommended that the OCC develop and deploy technology to modernize its approach to regulation and supervision. The OCC is committed to broadening and increasing its expertise in areas related to innovation. As part of its Responsible Innovation initiative, the OCC is open to considering ways current procedures and processes can be improved through the use of technology.

Chartering Authority

Some commenters questioned the OCC's authority to charter SPNBs that are not authorized to offer FDIC-insured deposits. They asserted that the OCC could only charter non-deposit-taking banks when expressly authorized by statute, as is the case for trust banks, bankers' banks, and credit card banks. In these commenters' view, to be chartered as a national bank under the National Bank Act, the bank must engage in the "business of banking," which they suggest requires, at a minimum, taking deposits.

Under the National Bank Act, the OCC has broad authority to grant charters for national banks to carry on the "business of banking." The OCC has interpreted the "business of banking" to include any of the three core banking functions of receiving deposits, paying checks, or lending money. The Act does not require that a bank take deposits in order to be engaged in the

[25] See OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance" (October 30, 2013).

"business of banking." Rather, under the Act, performing only one of these three activities is sufficient to be performing core banking functions. This is reflected in the OCC's regulation 12 CFR 5.20, which provides that, to be eligible for a national bank charter, a special purpose bank must either be engaged in fiduciary activities or conduct at least one of three core banking functions: receiving deposits, paying checks, or lending money.

Separation of Banking and Commerce

Some commenters expressed concern that granting a national bank charter to a non-depository fintech company could erode the traditional separation of banking and commerce. As noted in the draft Supplement and above, the OCC will not approve charter proposals that would result in the inappropriate commingling of banking and commerce. Such proposals could introduce into the banking system risks associated with nonbanking commercial activities, interfere with the efficient allocation of credit throughout the U.S. economy, and foster anti-competitive effects and undesirable concentrations of economic power.

Conclusion

The OCC appreciates the suggestions, issues, and concerns raised in the more than 100 comment letters that we received in response to the SPNB Paper. These comments informed our development of the draft Supplement, which explains how the OCC would evaluate applications from fintech companies for SPNB charters. For more information about the envisioned application process for fintech companies seeking an SPNB charter, please refer to the draft *Comptroller's Licensing Manual Supplement: Evaluating Charter Applications From Financial Technology Companies*.

The OCC will accept comments on the Supplement through close of business April 14, 2017. Comments should be submitted to specialpurposecharter@occ.treas.gov.

EXHIBIT H

CSBS SINCE 1902
CONFERENCE OF STATE BANK SUPERVISORS

April 13, 2017

Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
400 7th Street SW, Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

Re: *Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies*

Dear Comptroller Curry,

State regulators remain firmly opposed to the Comptroller's unprecedented, unlawful expansion of its chartering authority to create a national nonbank charter. As we have discussed at length in previous comment letters, the OCC lacks the requisite authority to issue the proposed nonbank charter. Courts have long held and Congress has long since affirmed that a national bank must possess and exercise the power to receive deposits to carry on "the business of banking"—the purpose for which national banks are chartered. Unless an institution can be chartered for a special purpose expressly authorized by Congress—as are trust banks, bankers' banks and credit card banks—the failure of the institution to possess and exercise the power to receive deposits precludes the institution from carrying on the business of banking and renders its charter unlawful and invalid.[1]

In addition to the OCC's manifest lack of authority to approve nonbank charters, the OCC's approval of such charters would inflict enormous harms on our economy and citizens and would also undermine the carefully-designed regulatory and supervisory frameworks that Congress has established for our banking and financial systems. As shown below, the OCC's nonbank chartering proposal, if implemented, would:

- create tremendous distortions in the nondepository financial services industry through inconsistent and *ad hoc* regulatory treatment for recipients of the proposed nonbank charters;
- create an unlevel playing field to the advantage of recipients of the proposed nonbank charters and to the disadvantage of traditional, full-service banks;
- erode and potentially destroy the congressionally-mandated policy of separating banking and commerce; and
- create significant consumer harm by allowing recipients of nonbank charters to assert that they are entitled to preemption of vital state consumer protection laws.

Fundamental Flaws in the Regulatory Framework

State regulators have already demonstrated that the OCC lacks the requisite authority to create the proposed nonbank charter.[2] Predictably, the OCC's response is devoid of any citation of authority except for its own regulation, 12 C.F.R. § 5.20. If a federal agency could expand its authority by simply relying on previous unlawful assertions of authority, then no federal agency would be governed by law.[3] Having previously demonstrated that the OCC's claim of authority to approve nonbank charters is unprecedented and unlawful, this letter will illustrate how the implementation of the OCC's nonbank chartering proposal would cause great harm to our economy and citizens while undermining and destabilizing the regulatory and supervisory frameworks that Congress has established for our banking and financial systems.

The many fundamental flaws evident in the nonbank regulatory framework are symptomatic of the fact that the OCC is acting beyond the limits of its chartering authority. If Congress had intended for the OCC to charter national nonbanks, Congress would have specifically authorized the granting of special purpose nonbank charters and made clear how federal banking laws would apply to such nonbanks. However, Congress has not done so. Thus, the OCC is fundamentally in error when it asserts that a nondepository institution, upon receiving OCC approval for a nonbank charter, "becomes a national bank subject to the laws, regulations, and federal supervision that apply to all national banks."[4]

Most federal banking laws apply to FDIC-insured banks, not uninsured nonbanks.[5] Requirements applicable to FDIC-insured banks under these laws that would not, based on their terms, apply to the proposed nonbanks include:

- prompt corrective action rules,
- risk-based capital rules,
- safety and soundness standards,
- prudential safeguards,
- source of strength requirements,
- community reinvestment rules,
- change in control and merger restrictions,
- audit requirements,
- uniform accounting standards,
- record retention rules,
- anti-tying rules,
- commercial affiliation restrictions,
- proprietary trading restrictions, and
- consolidated supervision.

To the extent that the OCC asserts that its regulations implementing these laws will directly apply to the proposed nonbanks as purported "national banks," the regulations themselves would be overbroad and invalid.[6] In the same vein, to the extent that the OCC attempts to incorporate requirements imposed under these laws and regulations through "conditions" imposed on the approval of a nonbank charter, the conditions themselves would be subject to potential legal challenges as unauthorized and invalid.

Nevertheless, because most federal banking laws will *not* apply to the proposed nonbank charters, the OCC states that it will "impose special conditions similar to those in laws that apply by statute to insured banks only" through an "operating agreement" entered into in the chartering process.[7] State regulators believe that the OCC cannot lawfully truncate and vitiate the requirements of federal banking laws by imposing watered-down "conditions" on nonbank charters through operating agreements formulated on an *ad hoc* basis. In any event, the use of *confidential* "operating agreements" is a poor substitute for the *public* federal banking laws and regulations and the uniformity, impartiality, and fairness such laws guarantee in the regulation of the banking business.

Several commenters requested that the OCC make publicly available the contents of each operating agreement entered into with each national nonbank. Those requests were motivated by serious concerns about the unqualified breadth and potential arbitrariness of the discretion that the OCC evidently intends to exercise in establishing regulatory and supervisory "conditions" for each nonbank charter. Making the operating agreements publicly available would help to ensure that otherwise inapplicable rules are incorporated in a more uniform, impartial and consistent manner rather than on an *ad hoc*, preferential and arbitrary basis. The OCC has refused this request for transparency.

According to the OCC, there should be no concern because the "existence" -- but *not* the contents -- of the operating agreement will be disclosed in the conditional approval of charter applications.[8] Given that the vast majority of federal banking laws and regulations will need to be incorporated through an operating agreement if they are to apply at all, and thus these agreements will essentially function as individualized regulatory codes, it remains a critical deficiency of the OCC's regulatory framework that the contents of *each* agreement would not be made publicly available in *full* detail.

Consequences of Fundamental Flaws in the Regulatory Framework

The breadth of the discretion the OCC intends to exercise in establishing regulatory requirements for nonbanks undercuts any promise of uniform, consistent, impartial treatment among the proposed nonbanks themselves as well as any assurance that the proposed nonbanks will be subject to the *same* regulatory and supervisory standards as insured banks.[9] Two consequences inevitably flow from the OCC's planned use of *ad hoc* and confidential operating agreements to compensate for the absence of generally applicable laws: (1) the creation of an unlevel playing field that favors approved nonbanks and disadvantages traditional, full-service banks and (2) the establishment of the OCC as the official arbiter of financial innovation, picking winners and losers in the nondepository financial services industry as it accords preferential regulatory treatment to its preferred nonbank business models.

Absence of Regulatory Consistency and Impartiality

The OCC claims that the proposed nonbanks would be held to "the same high standards of safety and soundness, fair access, and fair treatment of customers that all federally chartered institutions must meet." The OCC then contradicts this claim by stating that it would "tailor these requirements based on the bank's size, complexity, and risk, *consistent with the applicable law*" (emphasis added).[10] In fact, because the vast majority of federal banking laws will not apply to the proposed nonbank charters, there is no "applicable law" with which the OCC must remain consistent as it constructs *ad hoc* regulatory and supervisory "conditions" to fit the business models of nonbank applicants. The OCC evidently plans to exercise arbitrary and unbridled discretion in determining the degree to which, and the manner in which, otherwise inapplicable laws and regulations will or will not apply to the favored recipients of nonbank charters.

If the OCC were committed to applying a uniform and impartial regulatory system across prospective nonbank charters, then presumably it would expand the scope of its regulations which currently only apply to insured national banks, for instance, its prompt corrective action and safety and soundness regulations, as well as limits on loans to bank insiders.[11] The OCC's failure to expand the scope of these regulations demonstrates a lack of commitment to uniform and impartial treatment across nonbanks. In sum, the lack of generally applicable rules for national nonbanks means that the OCC will not apply uniform, consistent regulation and supervision to chartered nonbanks, and the confidentiality of the operating agreements precludes any assurance that otherwise inapplicable rules are incorporated and made applicable to different nonbanks to the same extent and in the same manner.

Threats to Regulatory Fairness and Competitive Markets

The OCC's regulatory framework for chartered nonbanks will inevitably create an unlevel playing field that favors chartered nonbanks and imposes great disadvantages on traditional, full-service, FDIC-insured banks.[12] Due to the absence of generally applicable laws and the lack of any transparency in the rule setting process, it is virtually certain that chartered nonbanks will *not* "be held to the same high standards that all federally chartered banks must meet," contrary to the OCC's assurances.[13]

It is manifestly inconsistent for the OCC to claim, on the one hand, that chartered nonbanks will be subject to the same regulatory requirements as a full-service bank, and, on the other hand, state that "where a law does not apply directly, the OCC may *work with a fintech company to achieve the goals of a particular statute or regulation* through the OCC's authority to impose conditions on its approval of a charter . . .".[14] If the OCC actually intended to subject chartered nonbanks to the same rules that apply to a full-service national bank, then the OCC would be willing to disclose the contents of the operating agreements to demonstrate its commitment to preserving competitive equality between chartered nonbanks and full-service banks. Instead, as stated above, the OCC has indicated that it will not disclose the contents of the operating agreements that govern chartered nonbanks.

However, even if the operating agreements were made public in full detail, an unlevel playing field would still prevail, for the OCC intends to afford chartered nonbanks the luxury of proposing and customizing the regulatory requirements that will govern their operations. Full-service insured banks have never been afforded such latitude in proposing, and persuading their regulators to accept, the rules and regulations that will govern their activities, including the applicability and content of safety and soundness requirements, prompt corrective action rules, merger restrictions, insider lending limits, and change in control rules.

In sum, the OCC's regulatory framework for chartered nonbanks will create severe regulatory disadvantages for traditional full-service banks because the lack of generally applicable rules entails that the many rules and requirements with which traditional insured banks must comply will not apply to the proposed nonbanks. Moreover, due to the confidentiality of the operating agreements for chartered nonbanks, industry competitors and the public will never know the extent to which particular chartered nonbanks have benefited from special regulatory deals crafted by the OCC as it picks winners and losers among its preferred nonbank business models. In combination, these two sources of regulatory disparity will inevitably create an unlevel playing field that is heavily tilted in favor of the chartered nonbanks, to the detriment of traditional, full-service, FDIC-insured banks.

Undermining the Separation of Banking and Commerce

In September 2016, the Fed, FDIC and OCC issued a joint report to Congress pursuant to Section 620 of the Dodd-Frank Act.[15] That report included the following statement about the importance of the longstanding federal policy of separating banking and commerce: "For many years, Congress has sought to maintain the general separation of banking and commerce in the United States out of concern that the mixing of banking and commerce might, in effect, extend the federal safety net to commercial entities and make insured banks susceptible to the reputational, operational, and financial risks of their commercial affiliates. Congress also expressed concern that allowing banks and commercial firms to affiliate with each other could lead to the concentration of economic power in a few very large conglomerates."[16]

The 2016 interagency report cited a Senate committee report, which was issued when Congress closed the "nonbank bank loophole" through the passage of the Competitive Equality Banking Act of 1987 (CEBA).[17] The Senate committee report strongly reaffirmed the policy of separating banking and commerce and criticized the OCC for attempting to circumvent that policy by allowing commercial and industrial firms to acquire national banks that refrained from engaging in either the acceptance of demand deposits or the making of commercial loans. In adopting CEBA, Congress declared its intention to prevent a dangerous expansion of the federal safety net for banks and to protect the integrity of the payments system administered by the Fed.[18] Furthermore, after the OCC announced its intention to create the proposed nonbank charter in 2016, two members of the Senate Banking Committee urged the OCC not to proceed with the creation of a nonbank charter, in part because "nothing would ensure" that the

proposed nonbank charters would not threaten to erode the separation of banking and commerce. In keeping with the congressional policy affirmed by CEBA in 1987, the Senators expressed their strong opposition against any acquisitions of chartered nonbanks by commercial firms because of the strong risk of an undesirable expansion of the federal safety net.[19]

The OCC has stated that it will not allow an "inappropriate commingling of banking and commerce" when it approves nondepository fintech national bank charters.[20] However, as shown by Congress' decisive action in closing the "nonbank bank loophole" in 1987, the OCC does not have authority to allow *any* "commingling of banking and commerce," and it therefore does not have authority to decide *how much* "commingling" would be "inappropriate." The OCC has no power to assume the responsibilities of the Federal Reserve (Fed) under the BHC Act, including the duty to uphold the congressional policy separating banking and commerce, particularly given that the OCC has, through this process, demonstrated a tenuous fidelity to the law that it is actually charged with implementing, the National Bank Act.

Potential Threat of Preemption with Resulting Consumer Harms

In creating the proposed nonbank charter, the OCC would create a potential risk of tremendous harms to consumers by enabling chartered nonbanks to assert that they are entitled to immunity, through federal preemption, from critical consumer protections afforded under state law. The OCC states that some types of state laws would *apply* to the proposed nonbank charter. State regulators doubt the extent to which such state laws would actually “apply” to chartered nonbanks, as a practical matter, given the disregard that the OCC has previously shown towards recognizing and enforcing compliance with State law. The long history of OCC disregard for state laws and the fact that the OCC' is not officially responsible for enforcing compliance with state consumer protection laws, have prompted significant concerns among State regulators that the OCC will be far from rigorous and vigilant in enforcing state laws against chartered nonbanks and that a long train of consumer harm and abuses will naturally follow.

At least some important categories of state law—including state licensing laws, state administrative supervision and enforcement authorities, and state usury laws—would potentially be subject to preemption if the OCC grants nonbank charters to nondepository providers of financial services.[21] In this regard, it is important to note that an uninsured national bank, like an uninsured state bank, has never been given the privilege of exporting the usury law in the state in which it is located on loans made to borrowers in other states. The OCC has suggested that, because FDIC-insured state banks can export their home state usury rates, the OCC is justified in permitting uninsured national nonbanks to avoid state interest rate caps. However, the exportation privilege is available only to FDIC-insured state banks and has never been made available to uninsured nondepository state-chartered institutions.[22] State regulators strongly oppose the OCC's unlawful attempt to permit uninsured, national nonbanks to benefit from exportation provisions that have been traditionally reserved to FDIC-insured banks, which must comply with the full range of regulatory requirements that accompany FDIC-insured status.

Finally, in discussing preemption, the OCC failed to address the specific and detailed requirements of the Dodd-Frank Act, which apply to any OCC regulation or order that has preemptive effect.[23] Under 12 U.S.C. 25b, the OCC must satisfy stringent standards and is subject to demanding scrutiny from the courts whenever it issues a regulation or order that has the effect of preempting state consumer financial laws (except for state usury laws). Whenever the OCC issues a regulation or order that has the effect of preempting state consumer protection laws, the OCC must proceed on a "case-by-case basis" and must also show “substantial evidence” of each claim of preemptive authority.[24] The OCC has not satisfied any

of these standards or procedural requirements for preemption determinations, despite the fact that the prospective nonbank charter could have far-reaching preemptive implications.

Lack of Interagency Coordination and Consultation

Federal Agencies

Under the Federal Reserve Act, any national nonbank will automatically become a member of the Federal Reserve System.[25] The OCC has not addressed the questions of whether the proposed nonbanks will have access to the discount window or whether they will be given access to the payments system. Both questions raise grave concerns about the potential extension of the federal safety net and the payments system to benefit and protect nontraditional providers of financial services and their commercial affiliates, none of which will be subject to consolidated supervision by the Fed.

The OCC has not disclosed whether it has discussed the proposed nonbank charter with the Fed or how the Fed intends to regulate the proposed nonbanks.[26] Similarly, the OCC has not indicated that there has been any effort to consult or coordinate with the Securities and Exchange Commission (SEC) and the CFPB. Despite the fact that CSBS has pointed out significant regulatory gaps[27] and jurisdictional overlaps[28] in previous letters, these issues remain unaddressed in the draft supplement. The apparent lack of interagency consultation and coordination at the federal level on a plan with such enormous implications for the future of our financial system is a fundamental and fatal flaw.

State Regulators

Since the Comptroller first announced its intention to offer a nonbank charter, the OCC has failed to acknowledge or address its encroachment upon an existing regulatory system of great national importance, namely, the state system for licensing and regulating nondepository financial services providers. State regulators have worked diligently over the past decade to establish the Nationwide Multistate Licensing System (NMLS) in order to increase uniformity, reduce regulatory burden and enhance consumer protection in the licensing and supervision of nondepository financial service companies. In facilitating and streamlining the licensing and regulatory functions of State regulators, NMLS has served an invaluable role in enabling the emergence of innovative financial services and products without sacrificing critical consumer protections or safety and soundness standards.

The OCC's failure to acknowledge the state licensing system is troubling, not only because it discounts the pivotal role of NMLS in fostering financial innovation, but also because, as the OCC acknowledges, Dodd-Frank imposed restrictions on the ability of the Comptroller to charter an institution which is subject to formal investigation or enforcement action by another regulator, including state regulators.[29] The OCC's failure to consult with State regulators at any point throughout this entire process does not inspire confidence that the OCC will consult with state regulators in the future to "ensure that a company's obligation to remediate or pay penalties for any violations" stemming from a state enforcement action are not flouted by allowing that company to seek refuge under a national charter. State regulators take seriously their official duty to enforce their respective laws and therefore strongly oppose the OCC's nonbank charter proposal, which poses a clear threat of jeopardizing the ability of state regulators to fulfill their oversight and enforcement responsibilities.

Conclusion

State regulators remain firmly opposed to the OCC's intended actions due to: the unprecedented and unlawful nature of the proposed nonbank charter; the unlevel playing field and competitive distortions that would result from fundamental flaws in the nonbank regulatory framework; the dangerous hazards

that would be created by commingling banking and commerce; the consumer harms that would flow from the threatened preemption of state consumer protection laws; and the OCC's lack of interagency coordination and consultation before advancing such an unprecedented and radical change to our banking and financial regulatory systems. Thus, State bank regulators strongly oppose the OCC's intended actions, for, if taken to their logical conclusion, such actions would result in the dismantling of many fundamental institutions and policies that are of crucial importance for the financial and economic welfare of this country—including the separation of banking and commerce, the dual banking system, and the inherent authority of the States under our federal Constitution to protect the welfare of their communities and citizens.

Sincerely,

//S//

John W. Ryan
President & CEO

[1] *See* CSBS Comment Letter, Exploring Special Purpose National Bank Charters for Fintech Companies, Jan. 13, 2017 (hereinafter "White Paper Comment Letter"); CSBS Comment Letter, Receiverships for Uninsured National Banks, Nov. 14, 2016 (hereinafter "Receivership Comment Letter"). Nevertheless, given the OCC's stated intentions, this issue will continue to be subject to dispute, even if that culminates in the forfeiture of the "rights, privileges, and franchises" the Comptroller unlawfully attempts to afford in granting a nonbank charter. *See* 12 U.S.C. § 501a (triggered by a violation of 12 U.S.C. § 222).

[2] *See supra* note 1, White Paper Comment Letter at 1-9; Receivership Comment Letter at 2-4.

[3] The Supreme Court has repeatedly rejected such claims, declaring that "an agency may not bootstrap itself into an area where it has no jurisdiction by repeatedly violating its statutory mandate." *See SEC v. Sloan*, 436 U.S. 103, 119 (1978) (quoting *FMC v. Seatrain Lines*, Inc., 411 U.S. 726, 745 (1973).

[4] *See* Draft Supplement to the Licensing Manual, March 2017 (hereinafter "Draft Supplement"), at 2. *See also* OCC Summary Comments and Explanatory Statement, March 2017 (hereinafter "Comments Summary"), at 2.

[5] The following federal banking laws apply, in whole or in part, to "insured depository institutions" and, accordingly, will not apply to the proposed nonbanks: the Federal Deposit Insurance Act, the Federal Reserve Act, the Bank Holding Company Act, the Bank Service Company Act, the Community Reinvestment Act, the Change in Bank Control Act, the Bank Merger Act, and the Dodd-Frank Act. *See supra* note 1, White Paper Comment Letter, at 9.

[6] The following OCC regulations apply to "national banks" and implement laws applying only to insured banks: 12 C.F.R. Part 3 (regulatory capital requirements), Part 6 (prompt corrective action requirements), Part 11 (securities exchange act disclosure rules), Part 12 (recordkeeping and confirmation requirements for securities transactions), Part 14 (consumer protection in sales of insurance), Part 16 (securities offering disclosure rules), Part 26 (management official interlocks), Part 31 (extensions of credit to insiders and transactions with affiliates), Part 34 (real estate lending and appraisals). In addition, the portions of 12 C.F.R. Part 5 implementing the Change in Bank Control Act and the Bank Merger Acts and the portions of 12 C.F.R. Part 19 implementing the anti-tying provisions of the BHCA (12 U.S.C. 1971 et. seq.) apply to "national banks" and implement laws applying only to insured banks. Again, to the extent that the OCC declares that these regulations apply to the proposed nonbanks, the regulations themselves are overbroad and invalid. When Congress clearly defines the scope and applicability of a law, a federal agency cannot simply expand the scope of the law through regulatory implementation. *See, e.g., Metro. Sch. Dist. of Wayne Twp. v. Davila*, 969 F.2d 485, 488-89 (7th Cir. 1992) (if an interpretive rule creates a new duty, it functions like a legislative rule and is, therefore, unlawful).

[7] *See supra* note 4, Draft Supplement at 15.

[8] *See supra* note 4, Draft Supplement at 15; Comments Summary at 12.

[9] If the OCC were authorized to exercise the degree of discretion contemplated in the Draft Supplement, then the scope of the OCC's authority itself would implicate constitutional doctrines barring the delegation of legislative power. *See DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015). A federal agency's exercise of rulemaking authority, regardless of whether it is styled an "operating agreement" or a "supervisory standard", is lawful only insofar as it is bound by statutory law. *See generally* Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881 (2016).

[10] *See supra* note 4, Comments Summary at 9.

[11] *See* 12 C.F.R. 30. Of course, this is not to say that amending 12 C.F.R. 30 to cover uninsured nonbanks would be a valid implementation of 12 U.S.C. 1831p-1. Rather, it simply points out that, since the OCC believes it can validly apply regulations to uninsured institutions even if the law only covers insured institutions, there is no reason for the OCC not to amend 12 CFR 30 to cover uninsured institutions.

[12] *See supra* note 1, White Paper Comment Letter at 4, 9-10.

[13] *See supra* note 4, Comments Summary at 3. The OCC concedes this point when it states "SPNB charter provides a framework of uniform standards and robust supervision for companies that qualify". *See supra* note 4, Draft Supplement at 1. This assertion turns on its head the traditional approach to bank regulation which has prevailed for nearly two centuries, namely, that a chartered institution operates within a regulatory framework based on generally applicable regulations implementing generally applicable laws promulgated by Congress. Instead, as the OCC surprisingly admits, the regulatory and supervisory framework will flow from each individual nonbank charter, with each nonbank being endowed with a unique set of powers and subject to a unique set of regulatory and supervisory requirements.

Students of banking history will recognize this method of special chartering and *ad hoc* regulation as reminiscent of an era in which each individual banks was chartered and regulated by special acts passed by the legislature. *See* Susan Pace Hamil, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 146-158 (1999). Due to opposition by Jacksonian democrats, this system of special chartering was done away with both to democratize access to bank and corporate charters and to limit rampant cronyism, in particular, wariness surrounding favoritism exercised by the legislatures in the granting of special privileges. See *Louis K. Ligget Co. v. Lee*, 228 U.S. 517, 549. *See generally* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988). For banks, the system of special chartering finally disappeared with the emergence of the federal deposit insurance system in the 1930s. *See* Hamil, at 152. It is unsurprising that, as the OCC attempts today to divorce national charters from the deposit insurance system, many of the same critiques are applicable, by way of analogy, to the proposed nonbank charter and associated regulatory framework.

[14] *See supra* note 4, Draft Supplement at 15 (emphasis added).

[15] *See* Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act (September 2016) (hereinafter "Section 620 Report").

[16] *See supra* note 15, Section 620 Report at 33.

[17] *See supra* note 15, Section 620 Report at 33 (citing S. Rep. No. 100-19 (1987)).

[18] *See* S. Rep. No. 100-19, at 7-8 (1987) ("The impetus for nonbank banks stems primarily from large diversified companies wanting to invade the banking business while avoiding the regulatory restraints of the Bank Holding Company Act."). The Report goes on to state that "[t]he need for prompt congressional action to close the nonbank bank loophole has been greatly enhanced by recent developments in the courts. . . . [T]he Comptroller of the Currency has moved to vacate the district court injunction that prevents him from chartering new nonbank banks." The Report is referencing the preliminary injunction entered by the Florida district court in *Independent Bankers Ass'n of America v. Conover*, 1985 U.S. Dist. LEXIS 22529 (M.D. Fla. Feb. 15, 1985) on the basis that nonbanks that refrained from engaging in deposit-taking were not engaged in the business of banking under the National Bank Act. That district court decision was never vacated or reversed and remains an applicable legal precedent today. It is noteworthy that the OCC has not mentioned the decision in any of its materials related to the proposed nonbank charter. *See supra* note 1, White Paper Comment Letter at 4.

[19] *See* Letter from Senators Sherrod Brown and Jeff Merkley to Comptroller Curry, at 4 (Jan. 9, 2017).

[20] *See supra* note 4, Comments Summary at 2, 15 (emphasis added); *see also supra* note 4, Draft Supplement at 7.

[21] *See* 12 U.S.C. 25b(b)(f). See, e.g., *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009).

[22] *See* Remarks by Thomas J. Curry, Comptroller of the Currency at LendIt USA 2017 ("[I]t is important to remember that state banks have the same power as national banks to export the usury laws in their home state. Congress granted this power to state banks in 1980.").

[23] *See* Dodd-Frank Act, sections 1044-1046, 124 Stat. at 2014-2017.

[24] Under Section 25b(b)(5), the OCC is not entitled to judicial deference when it issues rules or orders with preemptive effect and instead has the burden of showing the "thoroughness" and "validity of its reasoning" as well as "consistency with other valid determinations made by the agency". *See* 12 U.S.C. 25b(b)(5).

[25] *See* 12 U.S.C. 222.

[26] Equally noteworthy, the OCC has not discussed how a proposed nonbank could possibly comply with a mandate under the Federal Reserve Act that all national banks become insured banks upon becoming members of the FRS. *See* 12 U.S.C. 222.

[27] The OCC will not have at its disposal the enforcement authority under federal securities law that it typically enjoys with respect to full-service national banks, because the exercise of that authority hinges upon the regulated institution being engaged in the business of receiving deposits. *See supra* note 1, White Paper Comment Letter at 16.

[28] Under the Dodd-Frank Act, the OCC must consult with the CFPB whenever the OCC issues a regulation or order that will have a preemptive impact on multiple state consumer financial laws. *See* 12 U.S.C. 25b(b)(3). The OCC has not disclosed whether it has discussed its fintech charter plan with the CFPB, let alone, how the CFPB proposes to regulate the proposed national nonbanks.

[29] *See supra* note 4, Draft Supplement at 8, n. 22.

EXHIBIT I

BankThink OCC's Otting: Why do state regulators want to limit consumer choice?

By **Joseph Otting**
Published **September 18 2018, 9:55am EDT**

More in **Fintech,Fintech regulations,Joseph Otting,OCC,CSBS,NYDFS**

The decision by the Office of the Comptroller of the Currency to begin accepting applications for special purpose national bank charters from fintech companies promotes innovation, gives consumers and businesses greater choice and creates economic growth and opportunity.

It is also good for America's dual banking system, which the president of Conference of State Bank Supervisors and the superintendent of the New York Department of Financial Services ignore in their recent articles and statements.

Since 1863, the United States has benefited from a dual banking system in which companies seeking to conduct the business of banking can choose to operate via state licenses and charters or apply for federal charters and operate nationwide. Each option has unique advantages, and prospective banks can choose based on their business strategies. That system allows the greatest variety of choices for consumers and businesses and has the positive benefit of increasing competition. I am puzzled by their efforts, and presumption of authority, to limit the choice of consumers and businesses in a way that harms the dual banking system and the citizens it serves.

My decision to exercise the OCC's authority to consider national bank charter applications from fintech companies engaged in the business of banking maintains *parity* with options already available in certain states. An example of similar actions taken at the state level include New York's recent decision to license two cryptocurrencies.

It remains to be seen how many fintech companies will seek to become a national bank. Fintech companies that become national banks will be expected to meet the same standards and will be subject to the same supervision and regulation that similarly situated banks receive. When fintech companies discover the expectations for capital, liquidity, consumer protection, financial inclusion and contingency planning, many realize that a federal charter may not be in their future. Many will choose to continue operating at the state level, provide services to banks and consumers directly or pursue partnerships or other business combinations with banks, as they do today.

A few will choose to become federal banks. For those that do, we welcome the innovation and competition they bring that will provide more choice and promote improving banking products and services that benefit consumers, businesses, and communities across the nation. Contrary to reports, interest in the charter remains robust, and we expect multiple applications by the end of the year.

The few critics of the OCC's decision to accept special purpose charter applications make three basic arguments, all of which are without basis.

First, critics allege national charters for fintech companies undermine consumer protection and will pave the way to widespread predatory payday lending. That's wrong. The consumer protection regime has changed significantly in the past decade. Congress created the Bureau of Consumer Financial Protection and gave it broad authority to write rules that apply to banks and nonbanks. If a fintech that becomes a national bank grows beyond $10 billion in assets, they would be subject to supervision by the bureau as well as the OCC. It also is incorrect to assume that all state consumer protection laws cease to apply when a company becomes a national bank. State laws that address anti-discrimination, fair lending, debt collection, taxation, zoning, crime and torts all generally apply to national banks and would also apply to special purpose national banks. Additionally, state laws that prohibit unfair or deceptive acts or practices that address concerns such as material misrepresentations and omissions about products and services in billing, disclosure

and marketing materials also generally apply to national banks. The law also recognizes the authority of state attorneys general to bring an action in court against a national bank to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank. Finally, it is fiction to suggest that state-regulated institutions have treated consumers any better than federally regulated institutions. Simply consider the fact that where predatory payday lending and high-fee check cashing operates today, it exists in state-licensed and regulated service providers as pointed out by the Pew Charitable Trusts.

The second argument is that state regulators are better suited to supervise financial innovation. Many states *are* well resourced and have professional experienced staff who perform their jobs well. At the same time, revenue pressure strains other states' capabilities and budgets. State law, state requirements and state supervisionvary wildly. The OCC has resources to support consistently robust supervision from year to year, bank to bank, without being affected by budget shortfalls, revenue pressures or politics. The OCC also has a long history supervising banking technology and innovation. The OCC's national perspective informs its oversight, allowing companies to benefit from broad industry-wide perspective as well as in-depth on-site knowledge and expertise. Every onsite OCC examiner is supported by policy, risk, information technology and legal experts who support their supervision. As a banker with more than three decades of experience, OCC's local presence and national perspective is one of the distinguishing traits of the OCC I have come to appreciate, which is one of the reasons I always sought as a banker to operate under a national charter.

The third argument goes to authority. Under the National Bank Act, the OCC has broad authority to grant charters for national banks to carry on the "business of banking." The OCC has interpreted the "business of banking" to include any one of the three core banking functions of receiving deposits, paying checks or lending money. The law does not require that a bank take deposits in order to be engaged in the "business of banking." Rather, under the law, performing any one of these three

activities is sufficient, as reflected in OCC regulation. I am confident that courts, if necessary, will uphold this authority if challenged.

The complaints about the OCC's decision really come down to defending turf and licensing revenue of a few big states at the expense of economic opportunity for others. What is masquerading as concern for the health of the nation's banking system is really a protectionist effort to set federal standards and limit competition for state institutions. The effort to promote interstate branching and banking in the early 1990s was met with similar reactionary criticism, even though that change ultimately resulted in more choice for consumers, greater accessibility to financial services and lower costs, and it was affirmed by Congress and the courts.

Fortunately, the nation *has* a dual banking system that supports banking on a national level as well as a state level. The nation benefits from a strong federal banking system that provides an opportunity for banking to grow and evolve responsibly so that it can continue to be a source of strength for the nation and to serve consumers, businesses and communities nationwide, under a single primary prudential regulator and a uniform framework of laws and regulations. That system includes more than a thousand small community banks as well as the nation's largest and most internationally active banks.

It is the responsibility of the Comptroller of the Currency to ensure that system continues to operate in a safe and sound manner, treats customers fairly and serves the interest of the nation and its economy. That's what President Lincoln intended when he signed the National Bank Act, and that's what we are committed to today.

Joseph Otting

BankThink submission guidelines

BankThink is American Banker's platform for informed opinion about the ideas, trends and events reshaping financial services. View our **detailed submission criteria and instructions**.

EXHIBIT J

POLITICO

POLITICO PRO

MY SHORTCUTS:

FINANCIAL SERVICES

CALENDAR DATAPOINT DIRECTORY DOCUMENTS LEGISLATION

FINANCIAL SERVICES WHITEBOARD

Otting sees OCC ready for fintech decisions by mid-2019

By **ZACHARY WARMBRODT**

Comptroller of the Currency Joseph Otting today said his agency would be able to approve or deny charters for fintech companies by the middle of next year.

Speaking at an event in Washington, the top banking regulator said there were "a number of highly interested institutions" and that he expects a couple to file for Office of the Comptroller of the Currency charters by the end of this year.

"They're meeting regularly with our people," he said. "I would guess by mid-2019 we'll be in a position to approve or decline a charter."

In addition, Otting said the target for issuing rules stemming from this year's bank deregulation law is the third quarter of next year.

Oct 17, 2018 3:21 PM EDT

Support

CIVIL COVER SHEET

JS-44 (Rev. 6/17 DC)

I. (a) PLAINTIFFS

CONFERENCE OF STATE BANK SUPERVISORS
1129 20th Street, N.W, Washington, D.C. 20036

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 11001
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

OFFICE OF THE COMPTROLLER OF THE CURRENCY and JOSEPH M. OTTING, COMPTROLLER OF THE CURRENCY (see complaint for addresses)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Jennifer Ancona Semko; Baker & McKenzie LLP
815 Connecticut Ave., NW
Washington, DC 20006; (202) 835-4250

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ● 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ **A. *Antitrust***

- ☐ 410 Antitrust

○ **B. *Personal Injury/ Malpractice***

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

○ **C. *Administrative Agency Review***

- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ **D. *Temporary Restraining Order/Preliminary Injunction***

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

● **E. *General Civil (Other)*** **OR** ○ **F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

G. *Habeas Corpus/ 2255*	H. *Employment Discrimination*	I. *FOIA/Privacy Act*	J. *Student Loan*
☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
K. *Labor/ERISA (non-employment)*	**L. *Other Civil Rights (non-employment)***	**M. *Contract***	**N. *Three-Judge Court***
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

☒ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

5 U.S.C. §§ 500-596, 701 et seq. (Administrative Procedure Act and constitutional claims for unlawful agency action)

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint **YES** ☐ **NO** ☒

VIII. RELATED CASE(S) IF ANY (See instruction) **YES** ☒ **NO** ☐ If yes, please complete related case form

DATE: 10/25/2018 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Jennifer Ancona Semko

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

CO-932
Rev. 4/96

CLERK=S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 40.5(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk=s records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 40.5(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 40.5(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff , defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(e=s) below.]

- [ ] (a) relates to common property
- [ ] (b) involves common issues of fact
- [ ] (c) grows out of the same event or transaction
- [ ] (d) involves the validity or infringement of the same patent
- [ ] (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: [✘]

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

4. CAPTION AND CASE NUMBER OF RELATED CASE(E=S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

CSBS v. OCC et al. (closed case) C.A. No. 17-cv-763

10/25/2018
DATE

/s/ Jennifer Ancona Semko
Signature of Plaintiff /Defendant (or counsel)

CO-932
Rev. 4/96

CLERK=S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 40.5(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk=s records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

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NOTICE TO ALL COUNSEL

Rule 40.5(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff , defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(e=s) below.]

- [ ] (a) relates to common property
- [x] (b) involves common issues of fact
- [x] (c) grows out of the same event or transaction
- [ ] (d) involves the validity or infringement of the same patent
- [ ] (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: [ ]

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

United States District Court for the Southern District of New York

4. CAPTION AND CASE NUMBER OF RELATED CASE(E=S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

Vullo v. **OCC et al. (closed case)** C.A. No. **18-cv-8377**

10/25/2018
DATE

/s/ Jennifer Ancona Semko
Signature of Plaintiff /Defendant (or counsel)

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

CONFERENCE OF STATE BANK SUPERVISORS *Plaintiff(s)* v. OFFICE OF THE COMPTROLLER OF THE CURRENCY and JOSEPH M. OTTING COMPTROLLER OF THE CURRENCY *Defendant(s)*	))))))))))))	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Office of the Comptroller of the Currency
400 7th Street SW
Washington, D.C. 20219

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jennifer Ancona Semko
Baker & McKenzie LLP
815 Connecticut Avenue NW
Washington, DC 20006

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

CONFERENCE OF STATE BANK SUPERVISORS *Plaintiff(s)* v. OFFICE OF THE COMPTROLLER OF THE CURRENCY and JOSEPH M. OTTING COMPTROLLER OF THE CURRENCY *Defendant(s)*	)))))))))))))	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Joseph M. Otting
Office of the Comptroller of the Currency
400 7th Street SW
Washington, D.C. 20219

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jennifer Ancona Semko
Baker & McKenzie LLP
815 Connecticut Avenue NW
Washington, DC 20006

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

CONFERENCE OF STATE BANK SUPERVISORS *Plaintiff(s)* v. OFFICE OF THE COMPTROLLER OF THE CURRENCY and JOSEPH M. OTTING COMPTROLLER OF THE CURRENCY *Defendant(s)*	)	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jeffrey Sessions, Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jennifer Ancona Semko
Baker & McKenzie LLP
815 Connecticut Avenue NW
Washington, DC 20006

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

CONFERENCE OF STATE BANK SUPERVISORS *Plaintiff(s)* v. OFFICE OF THE COMPTROLLER OF THE CURRENCY and JOSEPH M. OTTING COMPTROLLER OF THE CURRENCY *Defendant(s)*	)	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jessie K. Liu, U.S. Attorney for the District of Columbia,
555 Fourth Street, N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jennifer Ancona Semko
Baker & McKenzie LLP
815 Connecticut Avenue NW
Washington, DC 20006

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

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❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset