

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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CONFERENCE OF STATE BANK SUPERVISORS,)	
1129 20 th Street, N.W.)	
Washington, D.C. 20036)	
)	
	Plaintiff,)	Civil Action No. _____
)	
	v.)	
)	
OFFICE OF THE COMPTROLLER)	
OF THE CURRENCY,)	
400 7th Street SW,)	
Washington, D.C. 20219)	
)	
and)	
)	
THOMAS J. CURRY,)	
COMPTROLLER OF THE CURRENCY,)	
400 7th Street SW,)	
Washington, D.C. 20219)	
)	
	Defendants.)	
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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 THOMAS J. CURRY, COMPTROLLER OF THE CURRENCY (“Comptroller Curry”) (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 recent decision to create a new special-purpose national bank charter for financial technology (“fintech”) and other nonbank companies.

2. 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 an almost unimaginably 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 bitcoins). Although the OCC’s decision primarily focuses on fintech companies, the OCC has declared that it is empowered to create a charter for nonbank financial services providers regardless of the extent to which they are technology-driven.

3. State authorities (including CSBS’s members) have been successfully overseeing and regulating nonbank companies—including those viewed as fintechs—for many years. 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. Among other prudential requirements, these companies are required to meet state safety and soundness requirements and 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 interest and attention of the OCC. 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. Regardless of the accuracy of the OCC’s calculations, it is without question that the OCC’s actions will have significant economic consequences—for example, the largest 100 money transmitters alone transferred more than \$800 billion in funds in 2014.

5. The OCC's interest in nonbanks culminated in Comptroller Curry's announcement in December 2016 that the OCC has decided to create a new national bank charter for nonbank companies, which would pull chartered nonbank fintech companies into the national banking regulatory system, potentially preempting and replacing the licensing, regulation, and supervision responsibilities of state authorities.

6. By creating a national bank charter for nonbank companies like fintechs, however, the OCC has gone far beyond the limited authority granted to it by Congress under the National Bank Act ("NBA") and other federal banking laws. Those laws authorize the OCC only to charter institutions to carry on either the "business of banking" or certain special purposes expressly authorized by Congress. It is well settled by court precedent, federal banking statutes, and industry custom 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 charter for nonbank companies that would not be engaged in deposit-taking and, thus, would not carry on either the business of banking or any expressly authorized special purpose.

7. Because the OCC has acted beyond its statutory authority, its creation of a national bank charter for non-depository companies, and the regulation upon which the OCC relies in doing so, are contrary to the NBA and violate the Administrative Procedure Act ("APA"), and therefore cannot stand.

8. Additionally, the OCC has created this sweeping new nonbank charter without following proper notice and comment procedures, instead opting merely to publish a high-level white paper 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

fintech and non-depository industries to the financial markets and the consequences of this new charter, the OCC has declined to pursue publicly vetted regulations.

9. Instead, the OCC has indicated that it will, as part of the chartering process, determine which (otherwise inapplicable) federal banking laws will be applied to each charter holder and will incorporate those laws through private operating agreements individualized to the business model of each applicant. The OCC does not intend to publicly disclose such operating agreements, and the OCC's negotiations with each charter holder will be secret. The OCC's failure to follow proper rulemaking procedures in effecting such a fundamental change in national bank regulatory policy likewise violates the APA.

10. Further, because the OCC made its decision to offer these special-purpose charters 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.

11. Finally, the OCC's creation of this nonbank charter program will allow chartered entities to operate outside the bounds of existing state regulation, thus creating conflicts between state and federal law that will trigger significant preemption issues. Yet the OCC's 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.

12. CSBS brings this action seeking declaratory and injunctive relief declaring the OCC's creation of this nonbank charter to be unlawful and enjoining the OCC from pursuing it.

PARTIES

13. 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.

14. For more than a century, CSBS has given state bank and financial services regulators a national forum to coordinate bank and non-depository 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 non-depository 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.

15. 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).

16. 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.

17. Defendant Thomas J. Curry is the current Comptroller of the Currency and is named in his official capacity.

JURISDICTION AND VENUE

18. 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.

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

FACTUAL BACKGROUND

The Role of the OCC and CSBS in the U.S. Dual-Banking System

20. The OCC and the members of CSBS each play an important role in this country's dual-banking system. For more than 150 years, commercial banks in the United States have had the option to organize as a national bank chartered by the OCC, or as a state bank with a charter issued by one of CSBS's members, a state government.

21. The choice of a national or state charter determines which agency or agencies supervise the bank. Nationally chartered banks are regulated primarily by the OCC, while state-chartered banks are regulated primarily by their state chartering authority, in conjunction with the Federal Deposit Insurance Corporation ("FDIC") or the Federal Reserve System.

22. Historically, the choice of a national or state bank charter has determined such matters as a bank's powers, capital requirements, lending limits, and other restrictions.

23. Significantly, courts have exempted national banks from the application of a number of state laws and regulations that conflict with the NBA. For example, courts have held that the NBA preempts the application of certain important categories of state law, including state licensing laws, state administrative supervision and enforcement laws, and state usury laws. These state laws, which face a clear threat of preemption under the OCC's unauthorized nonbank charter plan, provide vital protections to the economies, communities and citizens of every state.

24. As recent history has shown, however, broad preemption of state law with respect to nationally chartered banks is not good public policy. 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, state regulators are also uniquely locally accountable relative to centralized federal agencies.

25. Disregard for state regulatory expertise can have serious consequences—for example, although states adopted many years ago anti-predatory and other lending laws designed to protect consumers, federal preemption of those state laws in the mid-1990s and early 2000s contributed significantly to the mortgage crisis that followed. It would therefore not be good public policy for the OCC to assert authority to preempt state licensing laws, administrative supervision and enforcement laws, usury laws, and potentially other categories of state law with respect to nonbank financial services companies.

26. Additionally, for more than a century, state banking regulators have led the way in promoting and implementing innovation, being the first to introduce 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.

27. The U.S. dual-banking system functions best when there is a balanced state and federal regulatory structure—as was intended by the dual federal system established in the U.S. Constitution and upon which this country was founded.

The OCC’s Limited Power to Charter National Banking Associations for “Carrying on the Business of Banking”

28. 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).

29. 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.

30. The NBA is a general 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. Upon substantial compliance with all organizational requirements, the OCC is empowered to grant a national bank charter to associations to commence and carry on the “business of banking.” 12 U.S.C. §§ 26-27; *see, e.g., Texas & P.R. Co. v. Potorff*, 291 U.S. 245, 254 (1934).

31. Although the term “business of banking” is not expressly defined in the NBA, the legislative history of the Act shows that its principal author and other legislators identified the power to engage in receiving deposits as an essential function of the banking business at the time of the NBA’s adoption. Consequently, several provisions of the NBA, unmodified since the

Act's passage in the 1860s, identify deposit-taking as an indispensable function of the business of banking. For instance, the NBA requires incorporators to identify the place where the national bank's "operations of discount and deposit are to be carried on" and refers to such operations as "the general business of each national bank association." 12 U.S.C. §§ 22, 81. In addition, of the enumerated powers granted to national banks, the power to receive deposits is the least qualified, most general power. 12 U.S.C. § 24 (Seventh).

32. Further, historically, the term "business of banking" has been understood to include, at a minimum, receiving deposits. As the United States Supreme Court and other courts have long recognized, the "business of banking, as defined by law and custom, consists . . . in receiving deposits payable on demand." *Mercantile National Bank v. Mayor*, 121 U.S. 138, 156 (1887); *see also 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). Courts have held that the converse is therefore also true—a financial company or other firm that does not receive deposits is not engaged in the "business of banking" within the meaning of the NBA. *See, e.g., Independent Bankers Assn. of America v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529 at *32, Fed. Banking L. Rep. (CCH) P86, 178 (M.D. Fla. Feb. 15, 1985)

33. In other federal banking laws, Congress likewise has recognized that the acceptance of demand deposits (along with the making of commercial loans) is an historic core activity of banks and the very essence of the "business of banking"—for example, as reflected in the definition of "bank" provided in the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1841, *et seq.*, a complementary statute to the NBA.

34. Specifically, Section 2(c)(1) of the BHCA defines a “bank” to include an institution that is “an insured bank as defined in Section 3(h) of the Federal Deposit Insurance Act” or an institution that “*both . . .* (i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third party or others; *and* (ii) is engaged in the business of making commercial loans.” 12 U.S.C. § 1841(c)(1) (emphasis added).

35. In addition, upon becoming members of the Federal Reserve System, the Federal Reserve Act (“FRA”) requires national banks to become “insured bank[s]” under the Federal Deposit Insurance Act (“FDIA”), 12 U.S.C. § 222. To become an insured bank, a national bank must be eligible to apply for deposit insurance, which requires being “engaged in the business of receiving deposits.” 12 U.S.C. §§ 1813 and 1815.

36. Further reflecting Congress’ intent that carrying on the business of banking must require engaging in receiving deposits, it is a criminal offense for nonbanks or unauthorized individuals to engage in the “banking business,” which Congress has defined as “the business of receiving deposits subject to check or to repayment upon presentation of a pass book, certificate of deposit, or other evidence of debt, or upon request of the depositor . . .” *See* 12 U.S.C. § 378.

37. Read together and in a manner consistent with the NBA and the overall federal banking regime, these federal statutory provisions should be interpreted to reflect Congress’ understanding that engaging in deposit-taking is indispensable to “carrying on the business of banking.”

The OCC’s Narrow Authorization to Issue Special-Purpose Charters to Specific Categories of Special Purpose National Banks

38. For more than a century after the enactment of the NBA, the OCC’s chartering authority was limited to full-service national banks organized for the purpose of “carrying on the business of banking,” which required engaging in receiving deposits.

39. Indeed, when the OCC has attempted to issue a charter to entities that would not carry on the “business of banking,” the courts have struck down those efforts, concluding that the OCC is not empowered by the NBA or other law to charter institutions that do not take deposits (and make loans) unless specifically authorized to do so by Congress.

40. 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).

41. In response to this defeat, the OCC 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.

42. 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”—institutions that either did not accept demand deposits or make commercial loans. *Independent Bankers Assn. of America v. Conover*, 1985 U.S. Dist. LEXIS 22529.

43. 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 (via the Competitive Equality in Banking Act of 1987) (“CEBA”) to make it clear that financial institutions that do not accept deposits are not “banks.” *See* 12 U.S.C. § 1841(c).

44. Ultimately, in only two circumstances has the OCC been permitted to charter a national bank: (1) where the entity is organized to carry on “the business of banking” including, at a minimum, engaging in receiving deposits, or (ii) where Congress has, after an opportunity for consideration, granted specific statutory authority to the OCC to charter an entity to carry on a special purpose.

45. Currently, Congressional authorization exists to charter only three categories of special-purpose national banks: trust banks, banker’s banks, and credit card banks. *See* 12 U.S.C. § 27(a) and (b); 12 U.S.C. §§ 1841(c)(2)(D) and (F). This specific legislative authorization would not have been necessary if the OCC already possessed the broad authority to charter institutions not engaged in the “business of banking” under existing law.

46. Indeed, although legislation has previously been proposed that would have provided the OCC with the authority to charter non-depository institutions, this legislation has never been enacted. The failure to enact such proposed legislation underscores the conclusion that the OCC may not charter non-depository institutions on a generalized basis without specific Congressional authority, which has not been granted here. *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).

The OCC’s December 2016 Decision to Grant Special-purpose “Fintech” Charters

47. 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>).

48. 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 fintechs. *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.

49. Although this proposed rulemaking did not itself authorize a special-purpose charter for fintechs, 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 fintech 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 A).

50. 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>).

51. 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.

52. The OCC's consideration of the issue culminated in Comptroller Curry's announcement on December 2, 2016, that the OCC had decided to create a new special-purpose charter for fintech and nonbank companies (the "Nonbank Charter Decision"), stating that "the OCC *will* move forward with chartering financial technology companies that offer bank products and services and meet our high standards and chartering requirements." 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>) (attached hereto as Exhibit B).

53. Comptroller Curry's remarks left no doubt that the OCC's decision to offer special-purpose charters to fintech companies was final and not tentative or interlocutory: "We *have decided to move forward* and to make available special-purpose national charters to fintech companies . . ." *Id.* at p. 3 (emphasis added).

54. 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).

55. It is 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).

56. 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.

57. The white paper, entitled “Exploring Special-purpose National Bank Charters for Fintech Companies,” invited comments through January 15, 2017 (available at <https://www.occ.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>) (attached hereto as Exhibit C). It outlined certain general “baseline” supervisory requirements for charter holders, such as a robust business plan, effective governance structure, and capital and liquidity requirements to be determined on a case-by-case basis in the issuance of each charter. *Id.* pp. 8-13.

58. Although the white paper solicited “feedback” on the mechanics of implementing nonbank charters, it did not invite comment on the question of whether the OCC should grant such charters in the first place, or whether the OCC possessed valid statutory authority to do so. *Id.* pp. 15-16. For example, the white paper posed such questions as what criteria the OCC should consider when establishing capital and liquidity requirements, whether the OCC should seek a financial inclusion commitment from a charter holder that would not engage in lending,

and what information and assistance a prospective fintech applicant might find useful during the application process. *Id.*

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

60. 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.”

61. The Senators also questioned whether the OCC had the ability to issue charters to non-depository 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 the special-purpose charters because “[i]t is up to Congress to take action on these important matters.”

62. 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 fintech 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, supervision and examination, and whether the

new charter holders would have direct access to the Federal Reserve's clearing and payment system and its discount window.

63. 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.

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

65. CSBS itself submitted a 27-page explanation of its opposition to the Nonbank Charter Decision, expressing its views that:

- The OCC lacks statutory authority to issue these nonbank charters;
- Such a charter will distort the marketplace for financial services, with a federal agency arbitrarily picking winners and losers;
- 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
- The potentially 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 D).

66. 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, act to overturn that action.

The OCC's Implementation of the Nonbank Charter Program

67. Notwithstanding these numerous and significant concerns and the questions raised about its statutory authority, the OCC continued to move forward with the implementation of its Nonbank Charter Decision. On March 15, 2017, the OCC published a “draft” supplement to the Comptroller’s Licensing Manual, entitled “Evaluating Charter Applications From Financial Technology Companies,” (“Manual Supplement”) (available at <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf>) (attached hereto as Exhibit E).

68. The Manual Supplement makes explicit that the new nonbank charter is intended for companies that do not take deposits. Specifically, the Manual Supplement states that the charter will be available to a company that “engages in a limited range of banking activities, including *one of* the core banking functions described at 12 CFR 5.20(e)(1), but *does not take deposits* within the meaning of the Federal Deposit Insurance Act (FDIA) and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC).” Manual Supplement p. 2 (emphasis added).

69. 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. *Id.* p. 5.

70. Indeed, the Manual Supplement reflects the potentially startling breadth of the nonbank charter, noting that “[i]n some cases, the activities proposed for an SPNB may include activities that have not previously been determined to be part of, or incidental to, the business of banking or to fall within an established core banking function. If so, the company should discuss in prefiling meetings with the OCC the permissibility of the activities and their status as core banking activities.” *Id.* p. 5.

71. The Manual Supplement provides information regarding application procedures, general chartering standards, and the requirements of the nonbank company’s business plan. It specifically invites interested applicants to initiate the application process by making an initial inquiry to the OCC’s Office of Innovation to schedule a meeting. *Id.* p. 3.

72. 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 F).

73. This “Summary of Comments and Explanatory Statement” fell far short of addressing the numerous criticisms of the Nonbank Charter Decision. 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 non-depository companies. *See* Summary of Comments and Explanatory Statement at pp. 14-15.

74. 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.

75. 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 G).

76. To date, the OCC has not responded to the concerns articulated by CSBS and other commenters in response to the Manual Supplement.

The OCC Lacks Statutory Authority to Charter Non-Depository Fintech Companies

77. The OCC's Nonbank Charter Decision 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.

78. 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.

79. Applying fundamental principles of statutory construction, including *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other), 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, credit card banks, and trust banks redundant and mere surplusage, contrary to established canons of statutory construction.

80. Past unsuccessful efforts in 2011 and 2012 to introduce legislation that would expand the OCC's chartering authority to include non-depository entities (the FFSCC Charter Act and Consumer Credit Access, Innovation and Modernization Act) are further evidence of Congress's recognition that such broad authority does not currently exist.

81. 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 regulation cannot itself expand the nature or scope of agency authority—only Congress can do that.

82. 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 not engaged in the business of banking, it is patently inconsistent with the

NBA, BHCA, FDIA and FRA, as well as established court precedent. 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 Decision.

The OCC's Improper Rulemaking

83. Despite the substantive nature of the Nonbank Charter Decision, which fundamentally alters national bank regulatory policy by unilaterally creating a completely new and different type of special-purpose national bank charter, thereby triggering a wide range of important public policy considerations, the OCC did not follow the required notice and comment procedures for agency rulemaking or conduct a meaningful cost-benefit analysis. Instead, the OCC relied solely upon its white paper and Manual Supplement and invitations for informal feedback.

84. Nor has the OCC adopted comprehensive regulations related to this nonbank charter program. Rather, the OCC has stated that approval criteria, supervisory requirements, acceptable activities of the charter holder, and applicable federal banking laws will be determined on a case-by-case basis and embodied in individualized operating agreements that will be confidential and shielded from any public scrutiny.

85. Based on the way that the OCC has designed its nonbank fintech charter, most federal banking laws and protections will be inapplicable to charter holders because most such laws cover only "insured depository institutions," which holders of these charters will not be. Thus, unlike other special-purpose banks created by federal statute, the laws governing the activities of these nonbank charter holders will not be articulated in any federal statute, nor will

the rules governing the activities of such charters be reflected in any OCC or other federal banking agency regulations.

86. 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 agency rulemaking process established by the APA. The OCC has opted instead to approve nonbank charters pursuant to broadly worded policy statements that are subject to change at the whim of the agency and modification based on the type of business seeking a charter. The OCC likewise will incorporate otherwise inapplicable federal banking laws and protections on a confidential, non-transparent, case-by-case basis.

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

The OCC's Arbitrary and Capricious Rulemaking

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

89. Among other things, the OCC has wholly failed to respond adequately to the many relevant and significant public comments received in response to its informal request for "feedback" regarding its December 2016 white paper. This includes the many significant policy considerations that weigh strongly against the creation of this new special charter.

90. 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 Decision triggers concerns that:

- Many significant federal banking laws would not apply to these special-purpose 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 will 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 will enable 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 non-depository institutions;
- Special-purpose charter holders will not be subject to federal consumer protection laws to the same extent as full-service banks; and
- The special-purpose charter undermines and potentially preempts existing state regulation of financial services providers; charter holders may be entitled to preemption of some state laws, to the detriment of consumers.

91. The OCC has failed to acknowledge, much less analyze and address, most of these myriad concerns.

Harm to CSBS's Member Regulators and the OCC's Attempt at Unauthorized Preemption

92. The Nonbank Charter Decision triggers significant risks to traditional areas of state concern, many of which are outlined above.

93. The states have a vital interest in upholding the integrity and stability of the U.S. dual banking system and bank regulation. The Nonbank Charter Decision threatens to disrupt this system.

94. Specifically, 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 could escape state enforcement authority by obtaining a national charter.

95. Indeed, one reason that nonbank companies may seek a special purpose national charter from the OCC would be to avoid compliance with existing state laws.

96. For the same reasons, the Nonbank Charter Decision creates conflicts with state law and threatens to preempt state sovereign interests by purportedly empowering nonbank charter holders to disregard state laws of vital importance to the states and their economies, communities, and citizens, including requirements for obtaining state licenses, submitting to state administrative supervision and enforcement, and complying with state usury laws.

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

98. Here, as noted above, Congress has not authorized the OCC to issue national bank charters to nonbank entities that do not engage in deposit taking. Absent a clear expression of Congressional authority and intent to preempt state law, the states retain the power to regulate and supervise non-depository companies, and the Nonbank Charter Decision represents an unlawful and unconstitutional assertion of preemptive authority by the OCC.

CLAIMS FOR RELIEF

COUNT I

The OCC's Nonbank Charter Decision Exceeds its Statutory Authority

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

100. The NBA allows the OCC only 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.

101. As a result, the OCC lacks the authority to charter non-depository 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.

102. Plaintiff is entitled to relief pursuant to 5 U.S.C. §§ 702 and 706(2)(A) and (C). The OCC's Nonbank Charter Decision exceeds the OCC's statutory authority, and this Court should declare the Nonbank Charter Decision 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

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

104. As previously noted, the NBA allows the OCC only 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.

105. 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 non-depository 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.

106. Plaintiff 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, 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

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

108. The OCC's Nonbank Charter Decision is a “rule” of general application that creates new rights, privileges, and duties within the meaning of 5 U.S.C. §§ 551(4) and 553.

109. The OCC did not comply with the requirements of the APA in promulgating this rule. 5 U.S.C. §§ 551(5), 553.

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

COUNT IV

Arbitrary and Capricious Action

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

112. In making the Nonbank Charter Decision, 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 Decision, or to conduct an adequate cost-benefit analysis, and it did not offer a reasoned explanation for its decision.

113. 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).

114. The OCC's Nonbank Charter Decision 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 Decision unlawful and set it aside.

COUNT V

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

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

116. 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 eligible for the OCC’s new nonbank charter.

117. 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.

118. 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 and manifestly manifested its intent to preempt state law.

119. Because Congress did not intend to extend the OCC’s national bank chartering authority to include the non-depository entities described in the OCC’s Nonbank Charter Decision, Congress has not clearly and manifestly expressed an intent that the OCC’s new nonbank charter program should preempt state law.

120. 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.

121. 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 Decision 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 fintech and other 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 Decision was improperly reached without following proper notice and comment procedures required by the Administrative Procedure Act;
4. Declaring that the OCC’s Nonbank Charter Decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
5. Declaring that the Nonbank Charter Decision 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 Decision 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 pursuing and further implementing the Nonbank Charter Decision 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: April 26, 2017

Respectfully submitted,

/s/ Jennifer Ancona Semko

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EXHIBIT A



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

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 laws⁸ 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 activities⁹ 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*.

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

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

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.

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

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/bksjournalarticles/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

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 company²⁶ and a currency exchange²⁷ 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

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 B

Remarks

By

**Thomas J. Curry
Comptroller of the Currency**

Regarding

Special Purpose National Bank Charters for Fintech Companies

Georgetown University Law Center

December 2, 2016

It's an honor to be here at Georgetown University this morning. Today I will discuss the OCC's thinking about making a special purpose national bank charter available to financial technology companies that provide banking products and services. I want to thank Dean Treanor, Dr. Chris Brummer, and everyone here at Georgetown University Law Center for hosting us. I know how much effort goes into events like these, and I appreciate everyone who helped put this event together. Georgetown Law and the Institute of International Economic Law have long promoted thoughtful exploration of topics crucial to good government, making it the perfect place for today's conversation.

Over the past year, no topic in banking and finance has drawn more interest than innovative financial technology, and for good reason. The number of fintech companies in the United States and United Kingdom has ballooned to more than 4,000, and in just five years investment in this sector has grown from \$1.8 billion to \$24 billion worldwide.

But, there is more going on than just technological advances. Customer needs and expectations also are changing in dramatic ways. More than 85 million young adults in America are entering the financial world with the majority of their financial lives still ahead. They want

technologies and services that provide better, faster, more accessible products and services, and they are willing to switch providers or use multiple providers to get what they want. These consumers expect to be able to transact basic banking and financial business anywhere, anytime, from the palm of their hands.

What excites me most about the changes occurring in financial services is the great potential to expand financial inclusion, reach unbanked and underserved populations, make products and services safer and more efficient, and accelerate their delivery. To live up to that potential, innovators must demonstrate real responsibility—whether innovating within or outside the federal banking system.

At the Office of the Comptroller of the Currency, we are making certain that all institutions with federal charters have a regulatory framework that is receptive to responsible innovation along with the supervision that supports it. Since last year, we have conducted extensive research and discussions with technology companies, banks, community and consumer groups, academics, and other regulators. We articulated clear principles to guide the development of a framework for responsible innovation,¹ sought public comment,² and held a public forum in June to discuss the issues surrounding responsible innovation.³

Recognizing the need for a non-supervisory forum for banks and fintechs to interact with the OCC, in October, I established an Office of Innovation,⁴ which is now headed by acting

¹ See “Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective.” March 2016 (<https://occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>).

² See <https://occ.gov/topics/bank-operations/innovation/innovation-comments.html>.

³ See <https://occ.gov/topics/bank-operations/innovation/innovation-forum-videos.html>.

⁴ See News Releases 2016-35, “OCC Issues Responsible Innovation Framework.” October 26, 2016 (<https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-135.html>).

Chief Innovation Officer, Beth Knickerbocker. Once it is fully staffed, the office will be the central point of contact and clearinghouse for requests and information related to innovation. Its staff will conduct outreach and provide technical assistance, and will hold office hours in cities with significant interest in financial innovation to make candid regulatory advice more accessible and to facilitate open conversations. Its staff will promote training among agency employees to improve our capabilities and understanding of these important issues, and lead our collaboration with other regulators, foreign and domestic. We plan to have the new office up and running in the first quarter of 2017. Establishing this office and our framework are important parts of our responsible innovation efforts. I know these efforts will make a significant difference for the federal banking system, and I look forward to sharing our progress.

Our next step, which I am announcing here today, is that the OCC *will* move forward with chartering financial technology companies that offer bank products and services and meet our high standards and chartering requirements. We have published a paper today discussing several important issues associated with the approval of a national bank charter, and we are seeking stakeholder comment to help inform our path forward. Your comments will help us ensure that the agency's chartering decisions promote the safety and soundness of the federal banking system, increase financial inclusion, and protect consumers from abuse. I hope the professors and legal minds studying here will take the opportunity to read the paper and provide your thoughts.

We have decided to move forward and to make available special purpose national charters to fintech companies for a few basic reasons. First and foremost, we believe doing so is in the public interest. Fintech companies hold great potential to expand financial inclusion, empower consumers, and help families and businesses take more control of their financial

matters. Fintechs, while not without some risks, also can potentially deliver these products and services in a safer and more efficient manner. Preferences and needs of consumers, communities, and business are changing. And chartering companies that are finding new and better ways of satisfying those needs is another step toward supporting responsible innovation that is good for consumers, good for the federal banking system, and good for the country.

Second, we believe that companies that offer banking products and services should have the *choice* to become *national* banks if they wish to do so. Merely making a charter available, does not create a *requirement* to seek one. Nor does it displace the other choices a fintech company may have—for example, seeking a state bank charter in a state that makes one available or to continue operating outside the banking system. A company's choice to pursue a national charter should be driven by the company's business model and strategy on how best to serve their intended customers. The ability to choose a federal charter or state charter exists today for banks, and that choice is essential to the dual banking system just as it was in 1863 when the OCC was chartered. Preventing this class of companies from having that same option hurts the nation's dual banking system and could make the federal banking system less capable of adapting to the evolving business and customer needs of tomorrow. Providing a national charter to those responsible innovators who seek one and meet our high standards can help promote economic growth across the country and recognizes that technology-based products and services are the future of banking and the economy.

Third, having a clear process, criteria, and standards for fintechs to become national banks ensures regulators and companies openly vet risks and that the institutions that receive charters have a reasonable chance of success, appropriate risk management, effective consumer protection, and strong capital and liquidity. Through the chartering process, the OCC can fully

explore how the proposed bank's policies, procedures, and practices are designed to protect individuals and small business customers. Many fintechs will choose to partner with existing banks or provide services to banks and other financial companies, but some will seek to become a bank. In those cases, it will be much better for the health of the federal banking system and everyone who relies on these institutions, if these companies enter the system through a clearly marked front gate, rather than in some back door, where risks may not be as thoughtfully assessed and managed.

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. But, that authority is not to be taken lightly, which is why I have asked staff to develop and implement a formal agency policy for evaluating applications for fintech charters. The policy, informed by the comments we receive on our white paper, will articulate specific criteria for approval as well as issues that we should consider and conditions that should be met *before* granting such charters. Such policy helps ensure that we evaluate future fintech applications in a thoughtful and transparent manner and that we have necessary guard rails in place to ensure approvals consider safety and soundness, financial inclusion, consumer protection, community reinvestment, and corporate responsibility. Today's paper specifically asks for comment on what types of activities and expectations the OCC should require for entities seeking a special purpose national bank charter that demonstrates their commitment to financial inclusion that supports fair access to financial services and fair treatment of customers.

In addition to sharing our reasons for moving forward on fintech charters, I want to spend a little time discussing concerns some have already expressed. Issues fall in two equally

important categories—consumer protection and financial inclusion, and regulatory fairness and supervisory rigor.

Individuals and businesses should have access to useful and affordable financial products and services that meet their needs, and that are provided in a fair and responsible manner, no matter the source of those products and services. I understand and share the concerns about the applicability of laws meant to protect consumers, expand financial inclusion, and promote community reinvestment. For instance, there are certain laws, including the Community Reinvestment Act, that only apply to deposit-taking institutions insured by the FDIC. Consequently, thousands of fintech companies that provide bank-like services today and are not insured by the FDIC are not encouraged to meet the credit needs of the communities they serve through the application of CRA. *On the other hand*, the OCC has the unique ability to *impose* requirements in some or all of these areas through the chartering process to require companies seeking national charters to support financial inclusion in meaningful ways, as appropriate for the business model and activity of a particular company.

As a former state regulator, I also understand worries about the application of state law to national banks. That concern is not exacerbated by granting special purpose charters. State law applies to special purpose national banks in the same way and to the same extent as traditional national banks. Examples of state laws that generally apply to national banks include laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, foreclosure, and torts. In addition, any other law that only *incidentally* affects national banks' federally authorized powers to lend, take deposits, and engage in other federally authorized activities also still apply. The OCC has taken the position that state laws aimed at unfair or deceptive treatment of

customers also *apply* to national banks. The state laws that typically do not apply are those that impose licensing requirements on a company in order to engage in certain types of business.

The second issue we've heard relates to regulatory fairness and supervisory rigor. The worry here is that by providing a special purpose national bank charter we are somehow tipping the balance of competition by allowing special purpose banks to compete with full-service banks without assuming any of the responsibility.

But, the reality today is that the 4,000 fintech companies out there are already competing with national *and* state banks, without regard to any of the national bank responsibilities and under a patchwork of supervision. Granting national charters to the companies who desire and warrant one doesn't weaken the competitive position of existing banks or the dual banking system. In some ways, it levels the playing field because statutes that by their terms apply to national banks would apply to *all* special purpose national banks, even uninsured ones. This would include, for example, statutes and regulations on legal lending limits and limits on real estate holdings. And as far as providing "lighter touch" supervision, I have made it clear that if the OCC grants a national charter in this area, the institution will be examined regularly and held to the high standards the OCC has established for all federally chartered institutions.

These are important issues we must carefully consider as we implement our decision to entertain charter applications from fintech companies. I look forward to hearing from many of our stakeholders through their comments on our paper. I know folks will not be shy about providing their thoughts.

In closing, I want to thank all of the lawyers, licensing and policy experts, and examiners on our team for their work in putting these thoughts to paper and helping us move forward today

in this important, new direction. I especially want to acknowledge Karen Solomon, our Deputy Chief Counsel, for her leadership in this effort. I hope everyone appreciates the transparent and deliberate manner we have followed in considering this decision and all of our work on responsible innovation. We recognize that our decision will affect the federal banking system for many years to come, and I believe that effect will be a positive one. Dean Treanor, thank you again, and thanks to everyone here at Georgetown for inviting me here to share this announcement. I deeply appreciate your interest in this subject and look forward to the rest of our conversation.

EXHIBIT C



Exploring Special Purpose National Bank Charters for Fintech Companies

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

December 2016

Preface by the Comptroller of the Currency

When President Abraham Lincoln signed the law creating the national banking system and the Office of the Comptroller of the Currency (OCC), the very notion of establishing a national bank charter was itself innovative. Our country's leaders provided the Comptroller with the authority to grant a national charter because they recognized the public value of a robust, unified, and nationwide system of banks.

The national banking system became a source of strength for the nation and our economy. National banks and, later, federal savings associations became anchors of their communities and the predominant providers of financial services for consumers and businesses. The system flourished because it enabled and encouraged national banks and federal savings associations to adapt to the changing needs of their customers and the market.

More than 150 years later, we have a diversified and evolving financial services industry. New technology makes financial products and services more accessible, easier to use, and much more tailored to individual consumer needs. At the same time, consumer preferences and demands are evolving, driven by important demographic changes: for example, the entry of 85 million millennials into the financial marketplace in the United States. Responding to those market forces are thousands of technology-driven nonbank companies offering a new approach to products and services. Five years ago these services either were available only from traditional banks or not available at all. Initially, many of these nonbank providers of financial services viewed themselves as competitors of banks. Now, some financial technology—or fintech—companies are considering whether to become banks.

These industry developments raise fundamental policy questions. Is the nation better served when banking products are provided by institutions subject to ongoing supervision and examination? Should a nonbank company that offers banking-related products have a path to become a bank? And, what conditions should apply if a nonbank company becomes a national bank?

I challenged staff at the OCC to explore these important questions when I asked them to examine the agency's authority to grant special purpose national bank charters to fintech companies and the conditions under which we might do so. This paper summarizes that work, describes the OCC's legal authority to grant a special purpose charter, and articulates what the OCC considers to be necessary conditions if the OCC is to exercise that authority. It makes clear that if we decide to grant a national charter to a particular fintech company, that institution will 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.

Public comment will help inform our consideration of these issues. We welcome your feedback on all of the issues raised in this paper and on the specific questions included at the end.

Introduction

The OCC's chartering authority includes the authority to charter special purpose national banks. In fact, many special purpose national banks are operating today—primarily trust banks and credit card banks. A question raised by technological advances in financial services and evolving customer preferences is whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company. For a number of reasons, the OCC believes it may be in the public interest to do so.

First, applying a bank regulatory framework to fintech companies will help ensure that these companies operate in a safe and sound manner so that they can effectively serve the needs of customers, businesses, and communities, just as banks do that operate under full-service charters. Second, applying the OCC's uniform supervision over national banks, including fintech companies, will help promote consistency in the application of law and regulation across the country and ensure that consumers are treated fairly. Third, providing a path for fintech companies to become national banks can make the federal banking system stronger. The OCC's oversight not only would help ensure that these companies operate in a safe and sound manner, it would also encourage them to explore new ways to promote fair access and financial inclusion and innovate responsibly. Fintech companies vary widely in their business models and product offerings. Some are marketplace lenders providing loans to consumers and small businesses, others offer payment-related services, others engage in digital currencies and distributed ledger technology, and still others provide financial planning and wealth management products and services.

If the OCC decides to grant a charter to a particular fintech company, the institution would be held to the same rigorous standards of safety and soundness, fair access, and fair treatment of customers that apply to all national banks and federal savings associations. The OCC acknowledges, however, that to approve a fintech charter the agency may need to account for differences in business models and the applicability of certain laws. For example, a fintech company with a special purpose national charter that does not take deposits, and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC), would not be subject to laws that apply only to insured depository institutions.

Where a law does not apply directly, the OCC may, nonetheless, 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, taking into account any relevant differences between a full-service bank and special purpose bank. In this way, the OCC could advance important policy objectives, such as enhancing the ways in which financial services are provided in the 21st century, while ensuring that new fintech banks operate in a safe and sound manner, support their communities, promote financial inclusion, and protect customers.

This paper explores these and other issues related to the OCC's consideration of charter applications from fintech companies. The OCC welcomes comments about how it can foster responsible innovation in the chartering process while continuing to provide the robust oversight that its mandate requires.

Background

The OCC's responsible innovation work to date

In August 2015, the OCC began an initiative to better understand innovation occurring in the financial services industry and to develop a framework supporting responsible innovation. To gain a broad perspective, the OCC conducted extensive research and had discussions with fintech companies, banks, community and consumer groups, academics, and other regulators. This work led to the publication of a white paper in March 2016 that outlined clear principles to guide the development of a framework to support responsible innovation in the federal banking system.¹ In October 2016, the OCC announced plans to implement its framework for responsible innovation, including the establishment of an Office of Innovation to serve as the central point of contact and clearinghouse for requests and information related to innovation.² The office also will conduct outreach and provide technical assistance and other resources for banks and nonbanks on regulatory expectations and principles.

Chartering authority

The OCC has authority to grant charters for national banks and federal savings associations under the National Bank Act and the Home Owners' Loan Act, respectively.³ That authority includes granting charters for special purpose national banks. A special purpose national bank may limit its activities to fiduciary activities or to any other activities within the business of banking. A special purpose national 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.⁴

Special purpose national bank charters have been in use for some time. The most common types of these charters are trust banks (national banks limited to the activities of a trust company) and credit card banks (national banks limited to a credit card business).⁵ Though the focus of this paper is on fintech companies in particular, there is no legal limitation on the type of "special purpose" for which a national bank charter may be granted, so long as the entity engages in

¹ "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective" can be found at <https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>.

² "Recommendations and Decisions for Implementing a Responsible Innovation Framework" can be found at <https://www.occ.gov/topics/bank-operations/innovation/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf>.

³ See 12 USC 1 et seq. and 1461 et seq. The OCC also has authority, under the International Banking Act, 12 USC 3102, to license a foreign bank to operate a federal branch or agency in the United States.

⁴ See 12 CFR 5.20(e)(1). This paper focuses on the national bank charter, because it has more flexibility than the federal savings association charter. Federal savings associations are subject to asset and investment limitations and are required to have deposit insurance. See 12 CFR 160.30 and 5.20(e)(3).

⁵ The OCC also has chartered other special purpose national banks including bankers' banks, community development banks, and cash management banks.

fiduciary activities or in activities that include receiving deposits, paying checks, or lending money. As the next section describes, the OCC has the legal authority to construe these activities to include bank-permissible, technology-based innovations in financial services.

Features and attributes of a national bank charter

Corporate structure

A national bank charter is a federal form of corporate organization that authorizes a bank to conduct business on a nationwide basis and subjects the bank to uniform standards and rigorous federal oversight. All national banks, including special purpose national banks, are organized under, and governed by, the National Bank Act. The corporate organization and structure provisions of the National Bank Act (e.g., classes of shares, voting rights, number of directors, and term of office) govern the corporate structure of a special purpose national bank.

Bank-permissible activities

A special purpose national bank may engage only in activities that are permissible for national banks. Bank-permissible activities are identified in statutes, in the OCC's regulations, and in legal opinions and corporate decisions that the OCC regularly publishes.⁶ The OCC and the courts that have considered the scope of bank-permissible activities also recognize that the business of banking develops over time as the economy and business methods evolve.⁷

Consistent with legal precedent, the OCC views the National Bank Act as sufficiently adaptable to permit national banks—full-service or special purpose—to engage in new activities as part of the business of banking or to engage in traditional activities in new ways.⁸ For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically are the modern equivalent of paying checks. The OCC would consider on a case-by-case basis the permissibility of a new activity that a company seeking a special purpose charter wishes to conduct.

⁶ See OCC Interpretations and Actions at <https://www.occ.gov/topics/licensing/interpretations-and-actions/index-interpretations-and-actions.html>.

⁷ See generally *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995); *M&M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), cert. denied, 436 U.S. 987 (1978); OCC Conditional Approval No. 267 (January 12, 1998) (certification authority and repository and key escrow are part of the business of banking); OCC Interpretive Letter No. 494 (December 20, 1989) (allowing national banks to purchase and sell financial futures for their own account).

⁸ See, e.g., 12 CFR 7.5002 (OCC regulation authorizing national banks to use electronic means to conduct activities they are otherwise authorized to conduct, subject to appropriate safety and soundness and compliance standards and conditions).

Rules and standards applicable to a special purpose national bank

In general, a special purpose national bank is subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks. Statutes that by their terms apply to national banks apply to all special purpose national banks, even uninsured national banks. These laws include, for example, statutes and regulations on legal lending limits and limits on real estate holdings.⁹

Other laws that apply to special purpose banks include the Bank Secrecy Act (BSA), other anti-money laundering (AML) laws, and the economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). In addition, special purpose national banks generally are subject to the prohibitions on engaging in unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act and unfair, deceptive, or abusive acts or practices under section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The OCC's chartering regulation and licensing policies and procedures also would apply to a special purpose national bank. The established charter policies and procedures are set forth in 12 CFR Part 5 and the "Charters" booklet of the *Comptroller's Licensing Manual* and are discussed in the Chartering process section below.¹⁰

A special purpose national bank also has the same status and attributes under federal law as a full-service national bank.¹¹ State law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank. Limits on state visitorial authority also apply in the same way. A special purpose national bank would look to the relevant statutes (including the preemption provisions added to the National Bank Act by Dodd-Frank), regulations (including the OCC's preemption regulations), and federal judicial precedent to determine if or how state law applies. For example, under these statutes, rules, and precedents, state laws would not apply if they would require a national bank to be licensed in order to engage in certain types of activity or business. Examples of state laws that *would* generally apply to national banks include state laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, and torts. In addition, any other state laws that only incidentally affect national banks' exercise of their federally authorized powers to lend, take deposits, and engage in other federally authorized activities are not preempted. Moreover, the OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers apply to national banks.¹²

Many other federal statutes apply to any bank, financial institution, or other type of entity based on the activities in which the entity engages. For example, banks that engage in residential real

⁹ See 12 USC 84 and 12 CFR 32 (lending limits) and 12 USC 29 and 12 CFR 7.1000 (limits on holding real estate).

¹⁰ See 12 CFR Part 5 and the "Charters" booklet of the *Comptroller's Licensing Manual* (September 2016), <https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

¹¹ A special purpose national bank has the same charter as a full-service national bank. It limits its activities through the bank's articles of association or through OCC-imposed conditions for approving the charter.

¹² The OCC looks to the substantive content of the state statute and not its title or characterization to determine whether it falls within this category.

estate lending must comply with the Truth in Lending Act, Real Estate Settlement Procedures Act, Home Mortgage Disclosure Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Housing Act, Servicemembers Civil Relief Act, and Military Lending Act.

Some statutes, however, apply to a national bank only if it is FDIC-insured and, therefore, would not apply to an uninsured special purpose national bank. For example, certain provisions in the Federal Deposit Insurance Act (FDIA), such as section 1831p-1 (safety and soundness standards) and section 1829b (retention of records), only apply to insured depository institutions.¹³ In addition, if a national bank is not insured, the provisions in the FDIA governing the receivership of insured depository institutions would not apply. The OCC recently issued a proposed rule that would address this regulatory gap by establishing a framework for the receivership of an uninsured national bank under the receivership provisions in the National Bank Act.¹⁴ The proposed rule primarily focuses on uninsured national trust banks, but specifically contemplates application to other special purpose national banks. The Community Reinvestment Act (CRA) is an example of another law that only applies to insured institutions.¹⁵

As discussed in the Chartering process section below, the OCC could impose requirements on an uninsured special purpose bank as a condition for granting a charter that are similar to certain statutory requirements applicable to insured banks, if it deems the conditions appropriate based on the risks and business model of the institution.¹⁶

Coordination among regulators

The OCC is the primary prudential regulator and supervisor of national banks. Depending on the structure of the bank and the activities it conducts, other regulators will have oversight roles as well. A fintech company considering a special purpose national bank charter likely would need to engage with other regulators in addition to the OCC. The OCC traditionally coordinates with other banking regulators on charter-related activities and would continue to coordinate and communicate where appropriate with other regulators in the case of an application by a fintech company for a special purpose national bank charter.

Federal Reserve: With rare exceptions, all national banks, including insured and uninsured trust banks and other special purpose national banks, are required to be members of the Federal

¹³ While certain provisions of the FDIA do not apply to uninsured national banks, the OCC can address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices under its other supervisory and enforcement authorities. The FDIA's principal enforcement section, 12 U.S.C. 1818, generally would apply to any national banking association, including an uninsured national bank. See 12 USC 1818(b)(5).

¹⁴ The proposed rule was published in the Federal Register at 81 Fed. Reg. 62835 (September 13, 2016) and is available at <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-110a.pdf>.

¹⁵ 12 USC 2901 et seq. See also 12 CFR Part 25 (OCC CRA regulations).

¹⁶ Such conditions are conditions imposed in writing by the OCC in connection with any action on any application, notice, or other request under 12 USC 1818(b)(1). As such they are enforceable under 12 CFR 1818.

Reserve System.¹⁷ National banks become member banks by subscribing for the stock of the appropriate Federal Reserve Bank.¹⁸ Since most special purpose national banks would be member banks, the statutes and regulations that apply to member banks also would apply to them.¹⁹ These statutes and regulations are administered by the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Federal Reserve Banks.

In addition, the Federal Reserve Board administers and interprets the scope and requirements of the Bank Holding Company Act (BHCA). If a fintech company interested in operating as a special purpose national bank has or plans to have a holding company that would be the sole or controlling owner of the bank (and investors would, in turn, own shares in the holding company), the BHCA could apply. A national bank is a “bank” for purposes of the BHCA if (A) it is either (i) an FDIC-insured bank or (ii) a bank that both accepts demand deposits and engages in the business of making commercial loans and (B) it does not qualify for any of the exceptions from the definition of “bank” in the BHCA.²⁰

Federal Deposit Insurance Corporation: A fintech company that proposes to accept deposits other than trust funds would be required to apply to, and receive approval from, the FDIC. Generally, a bank must be engaged in the business of receiving deposits other than trust funds for the FDIC to consider granting deposit insurance.²¹ For example, some national trust banks engage only in fiduciary and related activities and do not engage in the business of receiving deposits other than trust funds. As a result, they are not FDIC-insured.²² If the OCC chartered another type of special purpose national bank that did not receive deposits other than trust funds, such as a fintech company, that new bank also would not be eligible for FDIC insurance.

Consumer Financial Protection Bureau: A special purpose national bank that engages in an activity that is regulated under a federal consumer financial law, as defined by Dodd-Frank, may also be subject to oversight by the Consumer Financial Protection Bureau (CFPB). A special purpose national bank that is an insured depository institution generally would be supervised by either the CFPB or the OCC for purposes of all federal consumer financial laws based on its

¹⁷ See 12 USC 222. National banks located in territories and insular possessions of the United States are not required to be member banks. See 12 USC 466.

¹⁸ See 12 USC 282; 12 CFR 209.2(b).

¹⁹ For example, the Federal Reserve Act imposes quantitative and qualitative restrictions on a member bank’s transactions with its affiliates. 12 USC 371c, 371c-1. These restrictions are implemented by the Federal Reserve Board. See 12 CFR Part 223.

²⁰ See 12 USC 1841.

²¹ See 12 USC 1815(a). The FDIC’s regulations provide that an institution is engaged in the business of receiving deposits other than trust funds if it maintains one or more non-trust deposit accounts in the minimum aggregate amount of \$500,000. 12 CFR 303.14(a).

²² There are several FDIC-insured trust banks. Currently, four national trust banks have FDIC insurance.

asset size.²³ Under Dodd-Frank, the CFPB would supervise an uninsured special purpose national bank engaged in certain activities for compliance with federal consumer financial law.²⁴

Baseline supervisory expectations

All national banks are required to meet high supervisory standards. Consistent with the OCC's mission, these standards include safety and soundness requirements, as well as requirements to provide fair access to financial services, treat customers fairly, and comply with all applicable laws and regulations. The OCC tailors these standards based on the bank's size, complexity, and risks. As a national bank, a special purpose national bank also would be expected to meet these high standards, tailored to its size, complexity, and risks.

The OCC has identified the following baseline supervisory expectations for any entity seeking a national charter. These baseline expectations stress the importance of a detailed business plan, governance, capital, liquidity, compliance risk management, financial inclusion, and recovery and resolution planning. As with other applicants seeking a national bank charter, applicants for a special purpose charter are strongly encouraged, prior to filing an application, to meet with the OCC to discuss these baseline expectations in detail and how the expectations (and any others arising from the particular proposal) apply to their proposed bank. Those meetings enable the OCC to work with the applicant to develop and tailor supervisory standards to each applicant based on the applicant's circumstances including its size, business model, complexity and risk profile.

Robust, well-developed business plan

A well-developed business plan is a key component of any charter proposal.²⁵ The OCC expects a company seeking any type of national bank charter to clearly articulate why it is seeking a national bank charter and provide significant detail about the proposed bank's activities. The business plan is a written summary of how the proposed bank will organize its resources to meet its goals and objectives and how it will measure progress. As such, the business plan should be comprehensive, reflecting in-depth planning by the organizers, Board of Directors, and management.

²³ The CFPB has exclusive supervisory authority and primary enforcement authority over special purpose national banks that are insured depository institutions and have assets greater than \$10 billion. See 12 CFR 5515. The OCC generally has exclusive supervisory and enforcement authority over special purpose national banks that are insured depository institutions and have assets of \$10 billion or less. See 12 USC 5516, 5581(c)(1)(B).

²⁴ See 12 USC 5514. Section 5514(a) defines the "scope of coverage" for the CFPB's supervisory authority over nondepository covered persons, which does not include all activities governed by a federal consumer financial law. Instead, the "scope of coverage" set forth in subsection (a) includes specified activities (e.g., offering or providing: origination, brokerage, or servicing of consumer mortgage loans; payday loans; or private education loans) as well as a means for the CFPB to expand the coverage through specified actions (e.g., a rulemaking to designate "larger market participants"). 12 USC 5514(a).

²⁵ See the "Charters" booklet of the *Comptroller's Licensing Manual* for more information on business plan requirements.

The plan should clearly define the market the proposed bank plans to serve and the products and services it will provide.²⁶ In addition, it should realistically forecast market demand, economic conditions, competition, and the proposed bank's customer base. The plan also must demonstrate a realistic assessment of risk, describing management's assessment of all risks inherent in the proposed products and services, including risks relating to BSA/AML requirements, consumer protection, fair lending requirements, and the design of related risk management controls and management information systems. Additionally, the plan should describe the experience and expertise of proposed management, including the Board, to manage the proposed bank.

The business plan should cover a minimum of three years and provide a full description of proposed actions to accomplish the primary functions of the proposed bank. The description should provide enough detail to demonstrate that the proposed bank has a reasonable chance for success, will operate in a safe and sound manner, and will have adequate capital to support its risk profile. The OCC expects a proposed bank's business plan to outline the plans for initial and future capital contributions, as well as to provide specific information on how the proposed bank intends to maintain and monitor appropriate capital levels. The plan should also identify external sources available to bolster capital levels, if needed. Additionally, the business plan should include comprehensive alternative business strategies to address various best-case and worst-case scenarios (e.g., financial performance, revenue growth, market share). The business plan also should include the organizing group's knowledge of and plans for serving the community, if applicable.

Governance structure

The OCC expects the governance structure for any proposed special purpose national bank to be commensurate with the risk and complexity of its proposed products, services, and activities, as it is for other national banks. The OCC sets high standards for governance and for risk management systems that identify, monitor, manage, and control risk in national banks. The OCC expects national banks to have the expertise, financial acumen, and risk management framework to promote safety and soundness oversight. The Board of Directors must have a prominent role in the overall governance structure by participating on key committees and guiding the risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

Capital

The OCC's evaluation of a bank's capital is important, not only to assess the strength of an individual bank, but also to evaluate the safety and soundness of the entire federal banking system. Bank capital, among other things, 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 possibility of unexpected loss.

Minimum and ongoing capital levels need to be commensurate with the risk and complexity of the proposed activities (including on- and off-balance sheet activities). The OCC's evaluation of capital adequacy (initial and ongoing) consider the risks and complexities of the proposed

²⁶ For example, the business plan for a proposed bank that will engage in payments activities should address how the bank proposes to access various payment systems.

products, services, and operating characteristics, taking into account both quantitative and qualitative factors. Key qualitative elements that influence the determination of capital adequacy include the scope and nature of the bank's proposed activities, quality of management, funds management, ownership, operating procedures and controls, asset quality, earnings and their retention, risk diversification, and strategic planning. In addition to assessing the quality and source of capital, the OCC also considers on- and-off balance sheet composition, credit risk, concentration, and market risks.

Special purpose national bank charter applicants whose business activities may be off-balance sheet would be subject to the OCC's minimum regulatory capital requirements, but the minimum capital levels required may not adequately reflect the risks associated with off-balance sheet activities.²⁷ To account for this gap, applicants are expected to propose a minimum level of capital that the proposed bank would meet or exceed at all times. For example, national trust banks typically have few assets on the balance sheet, usually composed of cash on deposit with an insured depository institution, investment securities, premises and equipment, and intangible assets. Because these 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. Similarly, the OCC would consider adapting capital requirements applicable to a fintech applicant for a special purpose national bank charter as necessary to adequately reflect its risks and to the extent consistent with applicable law.

Liquidity

The OCC's evaluation of liquidity focuses on a bank's capacity to readily and efficiently meet expected and unexpected cash flows and collateral needs at a reasonable cost, without adversely affecting either daily operations or the financial condition of the bank. As with capital, minimum and ongoing liquidity (both operating and contingent obligations) for a special purpose national bank need to be commensurate with the risk and complexity of the proposed activities. In assessing the liquidity position of a proposed bank, the OCC considers a proposed bank's access to funds as well as its cost of funding. Some key areas of consideration include projected funding sources, needs, and costs; net cash flow and liquid asset positions; projected borrowing capacity; highly liquid asset and collateral positions (including the eligibility and marketability of such assets under a variety of market environments); requirements for unfunded commitments; and the adequacy of contingency funding plans. All aspects of liquidity should address the impact to earnings and capital, and incorporate planned and unplanned balance sheet changes, as well as varying interest rate scenarios, time horizons, and market conditions.²⁸

²⁷ The OCC's capital requirements are set forth at 12 CFR Part 3.

²⁸ See the "Liquidity" booklet of the *Comptroller's Handbook* for more information. <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/liquidity.pdf>.

Compliance risk management

The OCC expects all national banks to manage compliance risks effectively. A strong compliance infrastructure contributes to a national bank's safe and sound operation, as well as the provision of fair access to financial services, fair treatment of customers, and compliance with applicable laws.

An applicant seeking a special purpose national bank charter, like any applicant for a national bank charter, is expected to demonstrate a culture of compliance that includes a top-down, enterprise-wide commitment to understanding and adhering to applicable laws and regulations and to operating consistently with OCC supervisory guidance. In addition, the applicant would need appropriate systems and programs to identify, assess, manage and monitor the compliance process (e.g., policies and procedures, practices, training, internal controls, and audit), and a commitment to maintain adequate compliance resources.

Appropriate compliance risk management includes a well-developed compliance management system that is commensurate with the risks to the proposed bank and includes:

- a compliance program designed to ensure and monitor compliance with the requirements imposed by the BSA, other AML statutes, and related regulations, as well as OFAC economic sanctions obligations; and
- a consumer compliance program designed to ensure fair treatment of customers and fair access to financial services, as well as compliance with Section 5 of the Federal Trade Commission Act, the unfair, deceptive, or abusive acts or practices prohibitions of Dodd-Frank, and all other applicable consumer financial protection laws and regulations.

The OCC expects any applicant seeking a special purpose national bank charter to provide a sufficient description of the proposed bank's activities for the OCC to fully understand the BSA/AML and compliance risks the proposed bank faces, how it intends to assess, manage, and monitor these risks, and how it would comply with relevant laws, regulations, and requirements.

As with any national bank, the compliance risk management system appropriate for a specific bank should consider the nature of the company's business, its size, and the diversity and complexity of the risks associated with its operations. While this general standard is consistent across all national banks, applying the standard to a fintech company's business model could raise novel considerations. The OCC would consider and address in its evaluation of a fintech charter application whether and how innovative elements of a business model may affect the proposed bank's compliance risk profile.

Financial inclusion

The OCC's statutory mission includes ensuring that national banks treat customers fairly and provide fair access to financial services.²⁹ This part of the OCC's mission is directly related to

²⁹ See 12 USC 1.

financial inclusion.³⁰ For insured depository institutions, this mission is advanced, in part, through the CRA framework, under which the OCC assesses an institution's record of helping meet the credit needs of its entire community, including low- and moderate-income neighborhoods, individuals, and underserved geographic areas. Special purpose national banks that are not insured depository institutions, however, are not subject to the CRA.³¹

Distinct from any direct CRA obligation, the OCC is guided by certain principles in determining whether to approve a charter application to establish a national bank. These principles include “encouraging” the 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.”³² The OCC expects an applicant seeking a special purpose national bank charter that engages in lending activities to demonstrate a commitment to financial inclusion that supports fair access to financial services and fair treatment of customers. The nature of the commitment would depend on the entity's business model and the types of loan products or services it intends to provide.

The OCC's chartering regulation generally requires an applicant for a 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.³³ Although this element of the business plan is not mandatory for all special purpose banks, the OCC expects a special purpose bank engaged in lending to explain its commitment to financial inclusion in its business plan. In developing the financial inclusion component of its business plan, a proposed special purpose bank engaged in lending should consider the following elements:

- an identification of, and method for defining, the relevant market, customer base, or community;
- a description of the nature of the products or services the company intends to offer (consistent with its business plan), the marketing and outreach plans, and the intended delivery mechanisms for these products or services;
- an explanation of how such products and services, marketing plans, and delivery mechanisms would promote financial inclusion (e.g., provide access to underserved consumers or small businesses); and

³⁰ The problem of financially unserved and underserved sectors of society is a global issue. The World Bank has described “financial inclusion” to mean that “individuals and businesses have access to useful and affordable financial products and services that meet their needs—transactions, payments, savings, credit and insurance—delivered in a responsible and sustainable way.” See the World Bank Financial Inclusion Overview page at <http://www.worldbank.org/en/topic/financialinclusion/overview>. Separately, recent final guidance from the Basel Committee on Banking Supervision addresses financial inclusion, focusing on unserved and underserved customers. See Guidance on the application of the Core Principles for Effective Banking Supervision to the regulation and supervision of institutions relevant to financial inclusion (September 2016) at <http://www.bis.org/bcbs/publ/d383.pdf>.

³¹ See 12 USC 2902 (defining “regulated financial institution” to mean an “insured depository institution”). See also 12 CFR 25.12 (defining “bank” as a national bank with federally insured deposits).

³² See 12 CFR 5.20(f)(1)(ii) and (iv).

³³ See 12 CFR 5.20(h)(5).

Exploring Special Purpose National Bank Charters for Fintech Companies

- full information regarding how the proposed bank’s policies, procedures, and practices are designed to ensure products and services are offered on a fair and non-discriminatory basis. For example, the OCC may ask an applicant that plans to extend credit to provide the terms on which it plans to lend, including a description of the protections it plans to provide to individuals and small business borrowers.

As with other elements of the applicant’s business plan, the OCC may require a company to obtain approval, or no-objection, from the OCC if it departs materially from its financial inclusion plans.

Recovery and exit strategies; resolution plan and authority

As noted above, the OCC expects a proposed bank’s business plan to include alternative business and recovery strategies to address various best-case and worst-case scenarios. Simply put, the OCC expects business plans to articulate specific financial or other risk triggers that would prompt the Board and management’s determination to unwind the operation in an organized manner. These strategies must provide a comprehensive framework for evaluating the financial effects of severe stress that may affect an entity and options to remain viable under such stress. The business plan must address material changes in the institution’s size, risk profile, activities, complexity, and external threats, and be integrated into the entity’s overall risk governance framework. Plans must be specific to that entity, aligned with the entity’s other plans, and coordinated with any applicable parent or affiliate planning. A plan should include triggers alerting the entity to the risk or presence of severe stress, a wide range of credible options an entity could take to restore its financial strength and viability, and escalation and notification procedures. While the objective of these business and recovery strategies is to remain a viable entity, the OCC may also require a company to have a clear exit strategy.

Chartering process

The OCC’s standard process for reviewing and making decisions about charter applications would apply to applications from fintech companies for a special purpose national bank charter. Charter applications are reviewed and processed through the OCC’s Licensing Department. The “Charters” booklet of the *Comptroller’s Licensing Manual*³⁴ contains detailed information about that process, which consists of four stages:

- The prefiling stage, in which potential applicants engage with the OCC in formal and informal meetings to discuss their proposal, the chartering process, and application requirements. At this stage, applicants also prepare a complete application, including a business plan.
- The filing stage, in which the organizers submit the application. Organizers also must publish notice of the charter application as soon as possible before or after the date of the filing.
- The review and evaluation stage, in which the OCC conducts background and field investigations, and reviews and analyzes the application to determine whether the proposed bank: has a reasonable chance of success; will be operated in a safe and sound manner; will

³⁴ See the “Charters” booklet of the *Comptroller’s Licensing Manual*.

provide fair access to financial services; will ensure compliance with laws and regulations; will promote fair treatment of customers; and will foster healthy competition.

- The decision stage, which includes three phases:
 - The preliminary conditional approval phase, when the OCC decides whether to grant preliminary conditional approval;
 - The organization phase, when the bank raises capital, prepares for opening, and the OCC conducts a preopening examination; and
 - The final approval phase, when the OCC decides whether the bank has met the requirements and conditions for opening.

The OCC imposes a number of standard requirements on a bank when it grants preliminary conditional approval, such as the establishment of appropriate policies and procedures and the adoption of an internal audit system appropriate to the size, nature, and scope of the bank's activities. The OCC may impose additional conditions for a variety of reasons, including for example to ensure the newly chartered bank does not change its business model from that proposed in the application without prior OCC approval; to mandate higher capital and liquidity requirements; or to require the bank to have a resolution plan to sell itself or wind down if necessary. In addition, in the case of an uninsured bank, the OCC may impose requirements by way of conditions similar to those that apply by statute to an insured bank, to the extent appropriate given the business model and risk profile of a particular applicant. The OCC likely would impose additional conditions in connection with granting a special purpose national bank charter requested by a fintech company based on the fintech company's business model and risk profile.³⁵

The OCC recognizes it also may need to tailor some requirements that apply to a full-service national bank to address the business model of a special purpose national bank. The OCC has experience in adapting legal requirements to different types of business models. For example, as noted above, the OCC has modified capital requirements for certain trust banks.³⁶ Similarly, the OCC would consider adapting requirements applicable to a fintech applicant for a special purpose national bank charter to the extent consistent with applicable law.

The OCC recommends that potential applicants carefully review the OCC chartering regulation and the "Charters" booklet of the *Comptroller's Licensing Manual* for a full description of the charter application process and requirements. The OCC also strongly urges groups or individuals interested in a special purpose national bank charter to engage with the OCC well in advance of filing an application to ensure they understand the requirements. In addition, interested parties

³⁵ An applicant may be required, as a condition of approval, to enter into an "operating agreement" with the OCC containing the substantive charter conditions. 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.

³⁶ The OCC is funded through assessments and fees charged to the institutions it supervises. See 12 USC 16. Consistent with this authorization, the OCC has modified the assessments it charges an independent trust bank or a credit card bank to account for the scope and activities of the entity and the amount and type of assets that the entity holds. The OCC would determine assessments for a fintech special purpose national bank to account for similar factors.

are advised to consult the *Comptroller's Handbook* for additional information on how the OCC supervises and examines national banks.³⁷ The Office of Innovation also can be an important resource to fintech companies interested in exploring the possibility of a special purpose national bank charter. Contact information for the Licensing Department and the Office of Innovation may be found on the OCC's website.

Request for comment

As the OCC considers the granting of special purpose national bank charters to fintech companies, it seeks feedback on all aspects of this paper. The OCC also solicits responses to the following questions. Respondents should provide written comments by January 15, 2017 (45 days from this paper's publication). Submissions should be sent to specialpurposecharter@occ.treas.gov.

1. What are the public policy benefits of approving fintech companies to operate under a national bank charter? What are the risks?
2. What elements should the OCC consider in establishing the capital and liquidity requirements for an uninsured special purpose national bank that limits the type of assets it holds?
3. What information should a special purpose national bank provide to the OCC to demonstrate its commitment to financial inclusion to individuals, businesses and communities? For instance, what new or alternative means (e.g., products, services) might a special purpose national bank establish in furtherance of its support for financial inclusion? How could an uninsured special purpose bank that uses innovative methods to develop or deliver financial products or services in a virtual or physical community demonstrate its commitment to financial inclusion?
4. Should the OCC seek a financial inclusion commitment from an uninsured special purpose national bank that would not engage in lending, and if so, how could such a bank demonstrate a commitment to financial inclusion?
5. How could a special purpose national bank that is not engaged in providing banking services to the public support financial inclusion?
6. Should the OCC use its chartering authority as an opportunity to address the gaps in protections afforded individuals versus small business borrowers, and if so, how?
7. What are potential challenges in executing or adapting a fintech business model to meet regulatory expectations, and what specific conditions governing the activities of special purpose national banks should the OCC consider?

³⁷ *The Comptroller's Handbook* is a collection of booklets that contain the concepts and procedures established by the OCC for the examination of banks. It is available at www.occ.gov.

Exploring Special Purpose National Bank Charters for Fintech Companies

8. What actions should the OCC take to ensure special purpose national banks operate in a safe and sound manner and in the public interest?
9. Would a fintech special purpose national bank have any competitive advantages over full-service banks the OCC should address? Are there risks to full-service banks from fintech companies that do not have bank charters?
10. Are there particular products or services offered by fintech companies, such as digital currencies, that may require different approaches to supervision to mitigate risk for both the institution and the broader financial system?
11. How can the OCC enhance its coordination and communication with other regulators that have jurisdiction over a proposed special purpose national bank, its parent company, or its activities?
12. Certain risks may be increased in a special purpose national bank because of its concentration in a limited number of business activities. How can the OCC ensure that a special purpose national bank sufficiently mitigates these risks?
13. What additional information, materials, and technical assistance from the OCC would a prospective fintech applicant find useful in the application process?

EXHIBIT D



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 OCC¹, 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 law⁴ 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

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.

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,

A handwritten signature in black ink, appearing to read "John W. Ryan". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

John W. Ryan
President & CEO

Attachment: CSBS Legal and Policy Assessment



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

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

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."

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.

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 exclusio 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

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

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

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

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.

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.

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

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 does not 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. The proposed special purpose national nonbank's potential access to the discount window raises significant public policy concerns.

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. The OCC’s proposal runs afoul of the principle of separation of banking and commerce.

In originally establishing a wall between banking and commerce, Congress explicitly relied on the business of banking concept³³, 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. The OCC’s proposal creates the opportunity for regulatory capital arbitrage.

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

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-subsiidiary 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. The proposed special purpose nonbanks will be exempt from the enforcement authority of the Securities and Exchange Commission.

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

³⁴ See 15 U.S.C. § 781(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

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

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

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.nationwidelicencingsystem.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 E

**COMPTROLLER'S LICENSING MANUAL
DRAFT SUPPLEMENT**

Evaluating Charter Applications From Financial Technology Companies

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Introduction

Purpose

The Office of the Comptroller of the Currency (OCC) has determined that it is in the public interest to consider applications for a special purpose national bank (SPNB) charter from financial technology (fintech) companies that engage in banking activities and that meet the OCC's chartering standards. The OCC has reached this decision for a number of reasons.¹

First, in the modern economy, where technology companies already are delivering key financial services to millions of Americans, an SPNB charter provides a framework of uniform standards and supervision for companies that qualify. Applying this framework to fintech companies will help ensure that these companies, like other banks that operate under federal charters, conduct business in a safe and sound manner while effectively serving the needs of consumers, businesses, and communities.

Second, an SPNB charter supports the dual banking system by providing fintech companies the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections. This is the same choice available to companies that deliver banking products and services in traditional ways.

Third, providing a path for fintech companies to become national banks can make the financial system stronger by promoting growth, modernization, and competition. Moreover, the OCC's supervision of fintech companies will deepen the expertise the OCC already has acquired in emerging technologies for banking services—through, for example, its supervision of technology service providers. This enhanced “window” into developing technologies and financial innovations positions the OCC to better evaluate and respond to the risks that accompany the delivery of those technologies. Finally, as *this Comptroller's Licensing Manual Supplement* (Supplement) explains, the chartering process will enable the OCC to encourage fintech companies to use innovative ways to promote financial inclusion.

¹ The OCC made this determination based on its work assessing the role of innovation in banking. In March 2016, the OCC published a paper to provide its perspective on responsible innovation in the financial services industry, outline principles guiding its approach to financial innovation, and solicit feedback on nine questions and other topics presented in the paper. See [Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective](#). On June 23, 2016, the OCC held a forum to discuss issues regarding responsible innovation. The forum included participants from the banking industry, fintech companies, academia, and community and consumer groups. On October 26, 2016, the OCC announced the decision to establish an Office of Innovation and implement a framework supporting responsible innovation. See [OCC Issues Responsible Innovation Framework](#). Then, on December 2, 2016, the OCC announced that fintech companies may qualify for SPNB charters under certain circumstances. The OCC published a paper discussing issues related to chartering special purpose national banks and solicited public comment to help inform its path forward. See [Exploring Special Purpose National Bank Charters for Fintech Companies](#). In developing this *Comptroller's Licensing Manual Supplement*, the OCC has carefully considered the comments it received.

Scope

The OCC has regulations and policies that govern its review and decision making with respect to chartering national banks. Consistent with administrative law terminology, these materials frequently refer to chartering as a “licensing” process. This Supplement explains how the OCC will apply the licensing standards and requirements in its existing regulations and policies to fintech companies applying for an SPNB charter.²

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 this Supplement, “SPNB” means a national bank that engages in a limited range of banking activities, including one of the core banking functions described at 12 CFR 5.20(e)(1), but does not take deposits within the meaning of the Federal Deposit Insurance Act (FDIA) and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC). This 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 current OCC Licensing Policy.³

The OCC recognizes that fintech companies that want to operate in the regulated space will choose different ways of doing so, and the SPNB charter is one option of many. Some may operate under state bank or state trust bank charters in states that offer those options. Some may apply for, or seek to acquire, full-service national bank charters; others may qualify to be another type of special purpose national bank. Still others may wish to continue, or initiate, partnerships with banks by providing technology-related services and expertise. This Supplement is not intended to discourage these other ways of conducting business but rather to clarify the OCC’s expectations for a particular segment of financial service providers—that is, fintech companies seeking an SPNB charter.

The OCC anticipates that the activities of fintech companies interested in a national bank charter may vary significantly. As noted above, national bank charters are varied and include full-service charters and other special purpose national bank charters, such as trust charters. National bank charter applicants are held to the same chartering standards and procedures whether seeking to become a full-service national bank, a national trust bank, or an SPNB. Moreover, while references to “full-service bank,” “trust bank,” and “SPNB” are convenient ways to distinguish among national banks based on their business models, these designations do not signify a difference in the character of the national bank charter. In each of these cases, an applicant that receives OCC approval for a charter becomes a national bank subject to the laws, regulations, and federal supervision that apply to all national banks.

² See 12 CFR 5.20(l) (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 OCC *Comptroller’s Licensing Manual*, “Charters.”

³ 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.

Initial Steps Toward an SPNB Charter

Applicable Licensing Procedures; Initial Contact With the OCC

The OCC uses its existing chartering standards and procedures as the basis for processing applications for all national banks. This Supplement describes the OCC’s approach to key aspects of the chartering process for fintech companies. It is not a comprehensive guide to all of the procedures and requirements relevant to filing an application for an SPNB charter. Fintech companies considering applying for an SPNB charter should carefully review the following materials:

- 12 CFR 5: The OCC’s Rules, Policies, and Procedures for Corporate Activities are found in 12 CFR 5, and regulations on organizing a national bank are set forth in 12 CFR 5.20. These regulations are applicable to all national banks.⁴
- The *Comptroller’s Licensing Manual*, including the “[Charters](#)” and “[Background Investigations](#)” booklets. The policies in the *Comptroller’s Licensing Manual* are generally applicable to all national banks, and prospective applicants are strongly encouraged to read the manual.
- The “Interagency Charter and Federal Deposit Insurance Application,” [Business Plan Guidelines](#).
- The OCC’s [The Director’s Book](#).

Fintech companies seeking an SPNB charter should make an initial inquiry concerning a charter application through the OCC’s Office of Innovation, innovation@occ.treas.gov. The Office of Innovation (Office) is the primary point of contact within the OCC for all inquiries by fintech companies, including questions and preliminary inquiries related to chartering. If a fintech company is interested in further discussions regarding an SPNB charter, the Office will schedule an exploratory meeting with the appropriate OCC staff, including the OCC Licensing Division (OCC Licensing).⁵ The meeting will include a discussion of the company’s business model, this Supplement, and the OCC’s expectations.

Prefiling Communications With the OCC

Applying for a national bank charter is an iterative process, and the OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the process. After the exploratory meeting, the OCC will begin to identify aspects of the proposed charter that present novel or complex issues.

⁴ See 12 CFR 5.20(c) (describing the procedures and requirements governing the OCC’s review and approval of an application to establish a national bank as applicable to a special purpose national bank).

⁵ An exploratory meeting is intended to provide the opportunity for a potential applicant to ask questions, clarify concerns, and become acquainted with the regulatory environment. See *Comptroller’s Licensing Manual*, “Charters.”

An OCC Licensing contact will be assigned. This contact will assemble other appropriate staff—including examiners, subject matter experts, legal staff, and staff from the Office—to informally discuss with the organizers the proposal, the chartering process, and the requirements that accompany a national bank charter.

The prefiling stage may include one or more formal prefiling meetings with OCC Licensing and other appropriate staff. The number and frequency of meetings will depend on the novelty and complexity of the applicant’s proposal.

Before the initial formal prefiling meeting, organizers should provide the OCC with an overview of the fintech charter proposal, including a discussion of the business plan and the relevant market, as well as any novel policy or legal issues and any unique aspects of the proposal.⁶ Applicants should also include information about the qualifications of the organizers and proposed senior management. In addition, the OCC will request informational submissions for review in advance of the submission of an application, such as a draft business plan.

The OCC will expect an SPNB applicant whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion. As described below, the OCC will condition its preliminary approval of an SPNB charter on the applicant’s implementation of a Financial Inclusion Plan (FIP). Accordingly, an applicant will be expected to include an FIP within its business plan and publish it for comment.

Activities of the Proposed SPNB

Bank-permissible activities: All activities of a national bank, including an SPNB, are limited to those that are permissible for national banks under a statute,⁷ regulation,⁸ or federal judicial precedent, or that the OCC has determined to be permissible.⁹

⁶ The term “organizers” generally refers to the individuals or group applying for the new bank charter. See *Comptroller’s Licensing Manual*, “Charters,” for a more detailed discussion of organizers.

⁷ 12 USC 24 expressly permits numerous specific activities for all national banks, including discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits; buying and selling exchange, coin, and bullion; lending money on personal security; and obtaining, issuing, and circulating notes. Section 24(Seventh) more generally authorizes national banks to engage in activities that are part of, or incidental to, the business of banking. 12 USC 92a authorizes national banks to engage in fiduciary activities.

⁸ Numerous activities are expressly authorized throughout OCC regulations, including, for example: establishing and operating a messenger service (12 CFR 7.1012), acting as a finder (12 CFR 7.1002), sales of equipment convenient for a customer’s use of electronic banking services (12 CFR 7.5001), providing electronic bill presentment services (12 CFR 7.5002), offering electronic stored value systems (12 CFR 7.5002), and producing and selling software that performs a service the bank could perform directly (12 CFR 7.5006).

⁹ The OCC and the courts that have considered the scope of bank-permissible activities also recognize that the business of banking develops over time as the economy and business methods evolve. See, e.g., *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995); OCC Interpretive Letter No. 494 (December 20, 1989) (allowing national banks to purchase and sell financial futures for their own account). The

Core banking activities: Under 12 CFR 5.20(e)(1), a special purpose national 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.¹⁰ This Supplement covers entities other than traditional trust companies or full-service national banks that accept deposits and therefore must be insured by the FDIC. Accordingly, the OCC anticipates that SPNBs likely will elect to demonstrate that they are engaged in paying checks or lending money.

Consistent with judicial precedent, the OCC views the National Bank Act, which is the primary statutory source of national banks' authority to conduct various types of business, as sufficiently adaptable to permit national banks to engage in new activities as part of the business of banking or to engage in traditional activities in new ways.¹¹ For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically may be considered the modern equivalent of paying checks.

In some cases, the activities proposed for an SPNB may include activities that have not previously been determined to be part of, or incidental to, the business of banking or to fall within an established core banking function. If so, the company should discuss in pre-filing meetings with the OCC the permissibility of the activities and their status as core banking activities. The OCC may ask the company to prepare a legal analysis supporting its view that its proposed activities are permissible and fall within one of the core banking categories. In connection with the chartering process, the OCC will conduct an independent legal analysis to determine whether the activities are permissible for an SPNB. As described in section V, the OCC publishes conditional approvals of charter applications; the approval typically would include the OCC's legal analysis supporting its decision. Publication will occur at the conclusion of the charter decision process.

Filing Procedures—Publication and Public Comment; Confidentiality

After the pre-filing phase, the organizers for an SPNB charter should file the charter application, including the business plan and the appropriate Interagency Biographical Report on all identified insiders. For additional information on filing the application, organizers should refer to the "Charters" booklet of the *Comptroller's Licensing Manual*. The filing procedures for an SPNB will be substantially the same as those applicable to any other

OCC expressly recognizes this proposition in 12 CFR 7.5002, which states that a national bank may provide through electronic means any activity, function, product, or service that it is otherwise authorized to perform.

¹⁰ See 12 CFR 5.20(e)(1)(i).

¹¹ See, e.g., 12 CFR 7.5002.

national bank.¹² An applicant for a national bank charter must publish notice of its charter in the community in which the proposed bank will be located as soon as possible before or after the filing date.¹³ A public comment period runs for 30 days after the publication of the public notice.¹⁴ 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 public website.¹⁵ Portions of the business plan of an SPNB, such as the FIP section, will be included in the public file. Applicants may request that confidential treatment be afforded to certain portions of the application, for example, portions containing proprietary information.¹⁶

Chartering Standards

Standards and Policy Considerations

Under the OCC's governing statutes and regulations, in evaluating an application to establish a national bank, including an SPNB, the OCC is guided by the following principles:

- Maintaining a safe and sound banking system
- Encouraging a national bank to provide fair access to financial services by helping to meet the credit needs of its entire community
- Ensuring compliance with laws and regulations
- Promoting fair treatment of customers, including efficiency and better service¹⁷

The OCC's regulations and policies also set forth additional considerations, including whether the proposed bank can reasonably be expected to achieve and maintain profitability¹⁸ and whether approving its charter will foster healthy competition.¹⁹

Once a firm submits a proposal, the OCC determines whether it satisfies the chartering standards in the OCC's regulations and policies. The OCC will not approve proposals that are contrary to OCC policy or other established public policy. For example, proposals to provide financial products and services that have predatory, unfair, or deceptive features or

¹² For details see 12 CFR 5 and *Comptroller's Licensing Manual*, "Charters."

¹³ See generally 12 CFR 5.8. Given the fact that many fintechs will operate online, the OCC will consider the operations of the SPNB in determining where publication of this notice would be appropriate.

¹⁴ See 12 CFR 5.10.

¹⁵ See 12 CFR 5.9(a) and (b).

¹⁶ See 12 CFR 5.9(c).

¹⁷ See 12 USC 1(a) and CFR 5.20(f)(1). See also *Comptroller's Licensing Manual*, "Charters."

¹⁸ See 12 CFR 5.20(f)(2).

¹⁹ *Comptroller's Licensing Manual*, "Charters."

that pose undue risk to consumer protection, compliance, or safety and soundness would be inconsistent with the OCC's chartering standards and will not be approved.²⁰

Further, the OCC will not approve proposals that would result in an inappropriate commingling of banking and commerce. As noted earlier, under its chartering standards the OCC considers whether a given proposal is consistent with maintaining a safe and sound banking system and will foster healthy competition. Proposals that inappropriately commingle banking and commerce could introduce into the banking system risks associated with non-banking related 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, and would thus be inconsistent with the OCC's chartering standards. Proposals from companies that implicate such concerns will not be approved. The OCC also will collaborate with other regulators as necessary to avoid the inappropriate mixing of banking and commerce.

Evaluating an Application

The OCC will evaluate an application from a fintech company for an SPNB charter to determine whether it meets the standards and policy considerations noted above. In evaluating whether these are met, the OCC will consider, among other things, whether the proposed bank

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

The OCC's evaluation may identify specific controls or requirements that are necessary for the success of the applicant's business plan or to ensure the OCC's chartering standards are met. The OCC will impose special conditions in connection with the charter approval to achieve these goals.²¹ Moreover, the OCC imposes certain standard conditions on all de novo charters, including the requirement that a bank obtain a supervisory non-objection letter from the OCC if it deviates significantly from its approved business plan. For a detailed discussion of conditions associated with approvals, see the "Chartering Decisions" section of this Supplement.

²⁰ See, e.g., [OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance"](#) (December 26, 2013); [OCC Advisory Letter 2000-7, "Abusive Practices"](#) (July 25, 2000).

²¹ An SPNB that does not take deposits will not be subject to certain requirements that apply only to insured depository institutions; for example, the safety and soundness standards contained in 12 CFR 30 of the OCC's regulations. The OCC has the authority to impose special conditions requiring the applicant to comply with standards that generally apply only to insured banks.

Coordination With Other Regulators; Continuation of Remedies

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

The OCC does not permit companies that are the subject of a formal investigation or enforcement action by another regulator to avoid the consequences of that investigation or enforcement action by seeking a national bank charter. A pending investigation or enforcement action may be grounds for denial of a charter application. At a minimum, 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.²²

Requirements for Organizing Group, Management, and Directors

OCC regulations and licensing policy provide guidance regarding the qualifications of organizers, management, and directors, as well as the respective roles of each.²³ These criteria and qualifications are generally applicable to SPNBs, although the OCC may tailor certain criteria as appropriate. As with all banks, organizers, managers, and directors are critical to the success of an SPNB. The OCC expects them to be well qualified, with diverse experience in relevant areas. Although the OCC would expect some members of the organizing group, the proposed board of directors, and management to have experience in regulated financial services, other relevant experience will depend on the specific products or services offered by the proposed SPNB. For example, it may be important for one or more of the organizers, managers, or directors of a proposed bank with novel technology-based products or services to have experience with those activities.

²² See, e.g., section 612 of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203, 124 Stat.1376) which prohibits, subject to exceptions, the conversion of a state bank or thrift to a national charter, or national bank or thrift to a state charter, if the converting institution's original regulator has subjected the institution to a formal enforcement action or memorandum of understanding with respect to a significant supervisory matter.

²³ See 12 CFR 5; the “Charters” and “Background Investigations” booklets of the [Comptroller's Licensing Manual](#), and the OCC's [The Director's Book](#).

Business Plan

Overview

All applicants for a national bank charter must submit a business plan to the OCC.²⁴ Having a comprehensive proposed business plan, including the bank’s financial projections, analysis of risk, and planned risk management systems and controls, is critical to the OCC’s decision whether to approve a charter proposal. Proposals from companies without an established business record are subject to a higher degree of scrutiny to evaluate whether the proposed bank has a reasonable likelihood of long-term success.

Detailed information about the elements of the business plan appears in the Interagency Business Plan Guidelines.²⁵ The Business Plan Guidelines, which are applicable to all national banks, describe the general elements of a business plan, including: description of the business; marketing plan; management plan; records, systems, and controls; the financial management plan; monitoring and revising the plan; alternative business strategies; and financial projections. The OCC recognizes, however, that applicants for an SPNB charter may have structures and business models that differ from those of traditional, full-service national banks. Thus, in addition to the generally applicable information in the Business Plan Guidelines, applicants should consider the supplemental guidance below on specific parts of the business plan.

Applicants are also encouraged to contact the OCC with questions regarding the content of their business plans.²⁶

Supplemental Guidance on Business Plan

(1) Risk Assessment

An applicant’s business plan should include a risk assessment that identifies and discusses the particular risks the organizers expect the proposed bank to face given its business model. Such risks may include, for example, concentration risk, compliance risk, reputation risk, strategic risk, and operational risk, including cybersecurity risk. The risk assessment should set out the degree of risk the bank would generally assume (its “risk appetite”) and how it would effectively manage the identified risks. The risk assessment factors in the target

²⁴ 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.

²⁵ In addition to the Business Plan Guidelines, *Comptroller’s Licensing Manual*, “Charters,” provides additional information regarding the business plan. The *Comptroller’s Handbook* and other resource materials should also be referenced for additional information related to specific products and services, and OCC expectations for all areas of operating a bank, including, for example, audit requirements, information technology, and corporate and risk governance.

²⁶ As noted in “Initial Steps Toward an SPNB Charter” in this Supplement, charter applicants may request confidential treatment of certain portions of their business plan. The FIP will be included in the public file.

markets' 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. These regulatory considerations include risks related to Bank Secrecy Act/Anti-Money Laundering (BSA/AML), consumer protection, and fair lending requirements. The risk assessment should also address the internal and system controls to monitor and mitigate risk, including management information systems, in accordance with the bank's established risk appetite.

(2) Records, Systems, and Controls

This section describes the bank's system for customer record keeping and transaction processing and the internal controls that will enable the bank to protect customer data and process transactions in an accurate and efficient manner. This section also describes the bank's compliance management programs. This section should include

- a description of the bank's information technology program, including
 - a general description of internal controls ensuring transaction and data integrity, security, and auditability;
 - overviews of the operational architecture, security framework, and resiliency structures;²⁷ and
 - a description of the framework that provides for effective cyber-risk governance, including continuous monitoring and management of cyber risk; strategies for cyber resilience; and processes for maintaining awareness of cybersecurity postures enterprise-wide.
- a description of the compliance management program, which should support a culture of compliance that includes a top-down, enterprise-wide commitment to understanding and adhering to applicable laws and regulations, including, but not limited to: the BSA, other AML statutes, Office of Foreign Asset Control economic sanctions obligations, statutes prohibiting discrimination or unfair or deceptive acts or practices, and other applicable consumer protection laws and regulations.
- a description of a structured plan to provide for independent testing of the business activities, systems and controls, and compliance management requirements, including but not limited to plans for independent audits.
- a description of outsourcing and third-party risk management, including a description of any functions or services that will be outsourced and risk management processes that are commensurate with the level of risk and complexity of the third-party relationships. For additional guidance, applicants should review [OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance"](#) (October 30, 2013).

²⁷ Applicants should review 12 CFR 30, appendix B, "Interagency Guidelines Establishing Information Security." These guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

(3) Financial Management

An SPNB will be subject to the minimum leverage and risk-based capital requirements in 12 CFR 3, which apply to all national banks. However, these requirements, 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. 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. As a result, additional approaches may be necessary to determine the minimum amount of capital needed to support the bank's activities. For example, for a proposed bank with limited on-balance-sheet assets, the OCC may consider other metrics related to activity—such as revenue—and the risks associated with the applicant's business plan when evaluating capital adequacy.

This section of the business plan should propose both minimum capital levels the bank will adhere to initially that are sufficient to support the proposed bank's business plan until the bank can achieve and sustain profitable operations and minimum capital levels the bank will adhere to after profitability that would be appropriate for its ongoing operations. This section should also discuss how the proposed 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 applicants should consider include the following:

- On- and off-balance-sheet composition, including credit risk, concentration risk, market risk, operational risk, 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.
- Sufficient additional capital to implement the exit strategy laid out in the business plan.

Consistent with the process for chartering other special purpose banks,²⁸ preliminary conditional approval for a fintech company will include a condition specifying a minimum capital level the bank must be at or above at all times. This amount would be based on the OCC's analysis of quantitative and qualitative factors, including those described above. The OCC expects that capital in a fintech company with an SPNB charter would increase beyond

²⁸ 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.

the initial minimum amount as the size, complexity, and corresponding risks of the firm evolve.

The financial management section should also 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.²⁹ The OCC will consider the proposed bank's specific business model when evaluating the SPNB's liquidity profile and processes for monitoring and mitigating liquidity risk.

For other special purpose banks, the OCC has imposed requirements tailored to the bank's business model to ensure it maintains adequate liquidity. Such requirements include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

(4) Monitoring and Revising the Plan

The Business Plan Guidelines provide that this section should include a discussion of how the board of directors will monitor adherence to the business plan and adjust or amend the business plan as appropriate to accommodate significant or material changes.³⁰ This is an ongoing requirement, and technology-dependent businesses will need to have mechanisms in place to accommodate new or evolving technologies.

(5) Alternative Business Strategy; Contingency Plans; Recovery and Exit Strategies

Depending on the applicant's proposed business strategy and structure, the OCC may require an applicant to include an alternative business strategy detailing how the bank will manage potential scenarios when expectations—such as operating expenses, marketing costs, or growth rates—differ significantly from the original plan.³¹

While it will not always be necessary for a bank to develop an alternative business strategy, all applicants should discuss

- realistic contingency plans based on critical assumptions;
- recovery planning, including financial or other risk triggers, and a range of credible options to remain viable under stress; and

²⁹ For additional details regarding liquidity, applicants may refer to the "Liquidity" booklet (June 2012) of the [Comptroller's Handbook](#).

³⁰ As discussed in the "Chartering Standards" section of this Supplement, significant deviations to the business plan may require OCC supervisory non-objection.

³¹ If the bank's alternative business strategy would be considered a significant deviation from the approved business plan, the OCC would expect the applicant to obtain a supervisory non-objection before executing the strategy.

- exit strategies that provide a means for the bank to unwind in an organized manner.

(6) *Financial Inclusion Plan (FIP)*

As noted earlier in the “Chartering Standards” section of this Supplement, the OCC’s chartering standards require consideration of whether the applicant will provide fair access to financial services and promote fair treatment of customers consistent with the safe and sound operations of the bank.³² OCC regulations require that applicants include in their business plans an indication of the organizing group’s knowledge of and plans to serve the community.³³ As discussed in detail in appendix B, “Financial Inclusion Plan Section of the Business Plan,” the OCC expects an applicant for an SPNB charter whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.

Applicants engaged in such activities should include in the business plan an FIP that describes the proposed goals, approach, activities, and milestones for serving the relevant market and community. The nature and scope of an FIP developed by an applicant for an SPNB charter will vary depending on the SPNB’s business model and the products or services it intends to provide to consumers or small businesses.

The OCC expects that the commitment to meet financial inclusion objectives that support fair access to financial services and fair treatment of customers will be ongoing, and accordingly, the OCC will expect the SPNB to update its FIP as appropriate.

Chartering Decision

As discussed in detail in the “Charters” booklet of the *Comptroller’s Licensing Manual*, the OCC grants approval of a charter application in two steps: preliminary conditional approval and final approval. The period between the preliminary conditional approval and final approval is referred to as the organization phase.

Preliminary Conditional Approval

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 plan set forth in the application and specifies standard requirements and enforceable supervisory conditions. The OCC will include in a preliminary conditional approval of any SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses an enforceable condition that will require the SPNB to implement its FIP.

³² See 12 USC 1(a) and 12 CFR 5.20(f)(1).

³³ See 12 CFR 5.20(h)(5).

A preliminary conditional approval decision is not an assurance that the OCC will grant final approval for a new bank charter. 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, including those relating to financial inclusion. A national bank must generally open for business within 18 months of the OCC's preliminary conditional approval, unless the OCC grants an extension.³⁴

Standard and Special Requirements

The OCC imposes a number of standard requirements on a bank when it grants preliminary conditional approval. Standard requirements are requirements imposed on all de novo national banks. For example, these 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 OCC may also place additional special requirements on SPNB charters with certain characteristics. While standard requirements apply to all de novo charters, special requirements are tailored to a particular applicant. A requirement for a bank to raise a higher amount of capital than proposed in the business plan is an example of a special requirement. The organizing group must satisfy standard and special requirements before the OCC grants final approval.³⁵

Standard and Special Conditions

In addition to the standard and special requirements discussed above, the OCC may also impose standard and special conditions that remain in place after the bank opens for business.³⁶

The OCC imposes certain standard conditions on all categories of de novo charters, and those would apply to SPNBs. These standard conditions address a variety of issues, including ensuring that the bank does not significantly deviate from the business model proposed in its application without prior OCC non-objection and guaranteeing maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan.³⁷ It is a standard condition for an SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses that the SPNB implement its FIP.

³⁴ See 12 CFR 5.20(i)(5)(iv).

³⁵ For additional information regarding the organization phase, please refer to *Comptroller's Licensing Manual*, "Charters."

³⁶ Conditions imposed in connection with the approval of a national bank charter are considered "conditions imposed in writing" and enforceable under the OCC's enforcement authority at 12 USC 1818. The OCC regularly examines for compliance with such conditions.

³⁷ For more information about significant deviations from business plans, see appendix F, "Significant Deviations After Opening," of *Comptroller's Licensing Manual*, "Charters."

The OCC may also impose special conditions on an individual SPNB. Examples of such conditions include requiring the bank to have a resolution plan to sell itself or wind down, if necessary, and requiring the bank to adhere to specific commitments, such as a requirement to enter into an operating agreement. In addition, in the case of an uninsured bank, the OCC can impose special conditions similar to those in laws that apply by statute to insured banks only. 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, taking into account any relevant differences between a full-service bank and special purpose bank.³⁸

In addition, the OCC will impose assessments on an SPNB through special conditions established at the time of preliminary approval. The OCC is funded through assessments and fees charged to the banks it supervises.³⁹ SPNBs will be subject to periodic assessments, just as other national banks are.⁴⁰ The OCC has modified the assessments it charges to other special purpose national banks, however, to account for the scope and activities of the bank and the amount and type of assets that the bank holds.⁴¹ The OCC would determine assessments for an SPNB to account for similar factors.⁴²

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 with the OCC. The operating agreement may impose safeguards to address certain aspects of a bank's operations, including growth, capital, or liquidity. As noted above, for all SPNBs engaged in lending or providing financial services to consumers or small businesses, implementation of an FIP will be a condition imposed through an operating agreement. The OCC publishes all conditional approvals, which disclose the existence of an operating agreement.⁴³

³⁸ For more information about the conditions that may be imposed, see Comptroller's Licensing Manual, "Charters."

³⁹ See 12 USC 16, 481.

⁴⁰ See 12 CFR 8.

⁴¹ 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).

⁴² As it gains experience with fintech companies, the OCC may amend its rules to address assessments for fintech companies.

⁴³ An operating agreement is enforceable under 12 USC 1818. That section of the FDIA contains the OCC's general enforcement authorities; it expressly applies to uninsured national banks. See 12 USC 1818(b)(5).

Final Approval

Receipt of final approval from the OCC means the OCC has issued a charter for the bank, and the bank can begin to conduct banking business.⁴⁴ After the OCC issues final approval and the SPNB opens for business, the OCC will supervise the SPNB, as all other national banks, under scheduled supervisory cycles, including on-site examination and periodic off-site monitoring. Any conditions imposed with the granting of a charter (e.g., operating agreement) will remain in place until removed or modified by the OCC and will be reviewed for compliance during the examination process.

Because this Supplement is focused on the licensing process for SPNBs, it does not provide extensive guidance regarding the OCC's supervisory expectations and the supervision of national banks. Key supervisory considerations, however, are highlighted in appendix A to this Supplement. For additional information on specific supervisory areas, applicants should refer to the booklets of the [*Comptroller's Handbook*](#), available on the OCC's website.

⁴⁴ Final approval occurs once the organizers have completed all key phases of organizing the bank as determined by the OCC and received any other necessary regulatory approvals. See *Comptroller's Licensing Manual*, "Charters," for more detail.

Appendices

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 a dedicated Assistant Deputy Comptroller (ADC), 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 requirements⁴⁵ and consistent with longstanding OCC de novo supervision policy,⁴⁶ 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. Examples of SPNB examination and supervision activities include frequent contact with the board of directors and bank management.

Similar to the OCC's supervision framework for existing special purpose national banks, SPNBs will be housed in a common portfolio, assigned individual portfolio managers, and overseen by an ADC for SPNB Supervision, who will be based in Washington, D.C., and report to the Deputy Comptroller for Thrift Supervision and Special Supervision.⁴⁷ Centralized oversight of SPNBs will provide for a consistent approach to supervision. 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, dedicated 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 as other national banks. As outlined in appendixes A-G of the ["Bank Supervision Process" booklet of the Comptroller's Handbook](#), national banks are assessed in accordance with the Uniform Financial Institutions Rating System (UFIRS). Composite ratings are based on an evaluation of an institution's managerial, operational, financial, risk management, and compliance performance.

Under this uniform system, the OCC ensures that all national banks are evaluated in a comprehensive and uniform manner and that supervisory attention is focused appropriately

⁴⁵ SPNBs will be subject to the statutory examination cycle prescribed by 12 USC 1820(d) and 12 CFR 4.6.

⁴⁶ PPM 5400-9 (REV), "De Novo and Converted Banks."

⁴⁷ Using dedicated subject matter experts across the OCC, the supervisory office will obtain assistance to participate on examinations and advise on complex issues that SPNBs might present.

on those banks that exhibit financial and operational weaknesses or adverse trends. The UFIRS helps identify adverse trends or deteriorating financial institutions, as well as categorizing deficiencies. The rating system is commonly referred to as the CAMELS/ITCC, and it assesses components of a bank's performance as well as specialty areas that include: capital adequacy, asset quality, management, earnings, liquidity, sensitivity to market risk, information technology, trust, consumer compliance, and performance under the Community Reinvestment Act (if applicable). Each component is rated based on an evaluation of factors relevant to the specific area.

Risk Management Framework

The OCC expects every national bank to have appropriate risk management systems to address all relevant risks in the bank. The structure, sophistication, and oversight of these systems should be commensurate with the complexity and volume of risk a bank assumes. Regardless of the bank's size or complexity, sound risk management systems 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 timely. 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. 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, consumer 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.

Corporate Governance Framework

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, as it is for other national banks. The OCC sets standards for governance and for risk management systems that identify, measure, monitor, and control risk in national banks. The OCC expects national banks to have expertise, financial acumen, and a risk management framework that includes the three lines of defense. The three lines of defense model explains governance and roles among the bank’s business units, support functions, and the internal audit function from a risk management perspective.

- First line of defense risk management activities take place at the frontline units where risks are created and owned.
- The second line of defense risk management activities occur in an area or function separate from the frontline unit, sometimes referred to as independent risk management (IRM). IRM oversees and assesses the frontline units’ risk management activities.
- The internal audit function is often referred to as the third line of defense in this model. In its primary responsibility of providing *independent* assurance and challenge, the internal audit function assesses the effectiveness of the policies, processes, personnel, and control systems created in the first and second lines of defense. 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.⁴⁸

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

OCC 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 will also summarize examination activities and findings identified during the supervisory cycle.⁴⁹

⁴⁸ For additional information on the audit function, see the “Internal and External Audits” booklet of the *Comptroller’s Handbook*.

⁴⁹ Additional information about communication guidance can be found in the the “Bank Supervision Process” booklet of the *Comptroller’s Handbook*.

Appendix B: Financial Inclusion Plan Section of Business Plan

Overview and Process

The OCC expects an SPNB covered by this Supplement whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.⁵⁰

As part of the prefiling process, the OCC expects a fintech company seeking an SPNB charter to provide information describing how it proposes to engage with its relevant market and community, including any underserved populations, and how it proposes to identify and address that community's financial needs.⁵¹ The OCC recognizes that outreach to interested community and consumer groups may be particularly helpful in determining these community financial needs.

A fintech company's SPNB charter application should include in the FIP section of its business plan a description of its proposed goals, approaches, activities, and milestones for serving the relevant market and community.⁵² The OCC recognizes that some applicants may have a business model incorporating financial inclusion as an integral aspect of the products and services they provide, and in those cases, the applicant should identify and discuss with the OCC the aspects of its business plan that address its financial inclusion goals, approach, activities, or milestones.

The OCC will include in a preliminary conditional approval of any SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses an enforceable condition that will require the SPNB to implement its FIP.

Developing the FIP

The nature and scope of an FIP will vary depending on the applicant's business model and the products or services it intends to provide to consumers or small businesses. An FIP should describe:

- The products or services the SPNB intends to offer, including any financial products or services that will foster financial inclusion, whether defined by income, geography, or other criteria such as unserved or underserved populations.

⁵⁰ See 12 CFR 5.20(f)(1) and 5.20(h)(5); see also 12 USC 1 (providing that the OCC is "charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services and fair treatment of customers" by the institutions it supervises).

⁵¹ The prefiling process is discussed in more detail in this Supplement.

⁵² As noted in this Supplement, portions of the business plan, including the FIP, will be included in the public file.

- Identification of, and method for defining, the SPNB’s relevant market and community, including underserved populations or geographies, which may include, for example, low- and moderate-income individuals.
- Identification of, and method for defining, the financial services needs of the relevant market and community and how some of those needs could be met by the SPNB’s products and services.
- Identification of milestones, including measurable goals, for the accomplishment of the SPNB’s financial inclusion objectives and description of a reasonable approach for meeting those goals.
- Identification of terms and conditions under which the SPNB will provide lending or financial products and services to consumers or small businesses.⁵³

Review of Financial Inclusion Factors

The OCC will review the adequacy of the applicant’s FIP and consider whether the SPNB has addressed factors that would support fair access to financial services and fair treatment of customers, such as the following:

- The SPNB’s ability, efforts, and commitment to meet various community financial needs based on the applicant’s financial condition and size, economic conditions in the relevant market and community, and other factors, including any expected participation by the SPNB in governmentally insured, guaranteed, or subsidized loan programs for housing, small business, community development, or small farms.
- How the SPNB’s policies, procedures, and practices, including those described in its compliance management program, are designed to ensure products and services will be offered and provided on a fair and non-discriminatory basis, with full disclosure of terms and conditions to all customers, and in compliance with applicable laws and regulations.⁵⁴

⁵³ The OCC has issued guidance cautioning national banks about lending activities that may be considered predatory, unfair, or deceptive or that may present safety and soundness and other risks. See, for example, OCC Advisory Letter 2000-7, “Abusive Lending Practices” (July 25, 2000) (identifying interest rates and fees that far exceed the true risk and cost of making loans as indicia of such lending practices); [OCC Bulletin 2013-40, “Deposit Advance Products: Final Supervisory Guidance”](#) (December 26, 2013) (clarifying the OCC’s application of principles of safe and sound banking practices and consumer protection in connection with deposit advance products).

⁵⁴ Applicable laws vary, depending on the characteristics of the specific product or service, and may include the following laws and any implementing regulations: Truth in Lending Act, Equal Credit Opportunity Act, Credit Card Accountability Responsibility and Disclosure Act, Electronic Fund Transfer Act, and section 5 of the FTC Act.

- 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 relevant market and community.

Implementation and Ongoing Communication

The SPNB's commitment to meet its financial inclusion goals, approach, activities, and milestones that support fair access to financial services and fair treatment of customers is ongoing through the life of the charter. For this reason, the OCC will require that the SPNB update its FIP in appropriate circumstances. The FIP should address how the SPNB will continue serving the needs of the relevant market and community beyond the initial years after a charter is granted, including how the SPNB will do the following:

- Communicate, and receive public input, regarding its progress in executing on its FIP.
- Update or modify its FIP in appropriate circumstances, including significant deviations to its business plan, the products or services offered, or relevant markets and communities served.
- Obtain, consider, and address public input in connection with updates to its FIP, when appropriate.

After the OCC issues final approval and the SPNB opens for business, the OCC will approach supervision of the SPNB in a manner consistent with its scheduled supervisory cycle applicable to other national banks. Conditions imposed with the approving the charter, including the condition related to implementation of the FIP, will remain in place until removed or modified by the OCC and will be reviewed for compliance during the examination process.

EXHIBIT F



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 announced¹ 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 banks⁷ 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

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

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 practices¹⁶ 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

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.

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 pre-filing 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 G



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 gaps²⁷ and jurisdictional overlaps²⁸ 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,

A handwritten signature in black ink, appearing to read "John W. Ryan". The signature is fluid and cursive, with the first name "John" being the most prominent.

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. Liggett 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.

<input type="radio"/> G. Habeas Corpus/ 2255 530 Habeas Corpus – General 510 Motion/Vacate Sentence 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act 895 Freedom of Information Act 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) 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	<input type="radio"/> L. Other Civil Rights (non-employment) 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	<input type="radio"/> M. Contract 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	<input type="radio"/> N. Three-Judge Court 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.)

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: <input type="checkbox"/> YES <input type="checkbox"/> NO
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form

DATE: _____	SIGNATURE OF ATTORNEY OF RECORD _____
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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.

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 \$ _____.

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:

Civil Action No. _____

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designated by law to accept service of process on behalf of *(name of organization)* _____
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I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____ .

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Server's address

Additional information regarding attempted service, etc: