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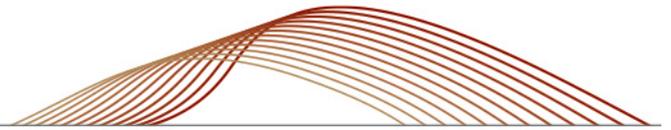
The OCC's Proposed Fintech Charter: If It Walks Like a Bank and Quacks Like a Bank, It's a Bank

By [Lawrence D. Kaplan](#), [Chris Daniel](#), [Thomas P. Brown](#), [Gerald S. Sachs](#) & [Lauren Kelly D. Greenbacker](#)

The Office of the Comptroller of the Currency (“OCC”) has announced that it may charter a new type of special purpose national bank to facilitate the provision of core banking activities—receiving deposits, paying checks or lending money—through financial technology (“Fintech”). The OCC’s announcement of a new form of special purpose national bank charter intended for Fintech (the “[Fintech Bank Charter](#)”) came in the form of a whitepaper entitled *Exploring Special Purpose National Bank Charters for Fintech Companies*, which was released on December 2, 2016 (the “[Whitepaper](#)”).¹ Through its willingness to consider applications for a Fintech Bank Charter, the OCC is acknowledging that the financial services industry is evolving, and recognizing that technology makes financial products and services more accessible and easier to use. Notwithstanding the foregoing, Fintech special purpose national banks (“[Fintech Banks](#)”) will be subject to the same rigorous standards of safety and soundness, fair access and fair treatment that apply to all national banks and federal savings associations under its jurisdiction.

The OCC recognizes that the demographics of the financial marketplace also are changing with 85 million millennials becoming consumers of financial services—a demographic that has come of age using and relying on technology. As the Whitepaper notes, these market forces have resulted in technology-driven nonbank companies seeking new ways to deliver financial products and services. While frequently viewed as competition to traditional banks, given the challenges of bank regulation, technology companies frequently consider whether to become banks themselves. The Fintech Bank Charter may be a vehicle to do so. Whether the Fintech Bank Charter would carry with it all of the obligations of being a full-service bank, including the application for and receipt of FDIC insurance, and the significant regulation of bank holding companies under the Bank Holding Company Act (“[BHCA](#)”)² remains uncertain.³ To be clear, and we think this thought has been lost by some commentators on the Whitepaper, this entity will be a bank and will be regulated as a bank with all of the requisite burdens and obligations of being a bank.

Notwithstanding the limited nature of the Fintech Bank Charter, as discussed below, the OCC has noted its intention to impose conditions on approval of a Fintech Bank Charter; accordingly, even when available, it will not be the right mechanism for every Fintech company. While half a loaf is better than none, the limitations and obligations imposed on an entity with a Fintech Bank Charter are a sobering reminder to the Fintech community that bank regulators regulate, and that the price of admission to become even a special purpose bank with a limited focus will likely be high. Marketplace forces and careful consideration of the broader legal landscape will determine whether such steep price is worth it.



I. OCC's Chartering Authority and Applicable Law

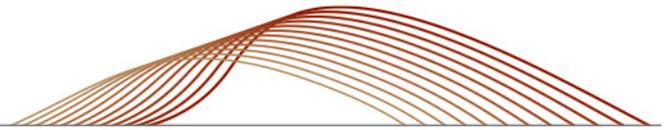
The Whitepaper is significant for its reaffirmation that the OCC has the authority to grant special purpose charters for national banks and federal savings associations under the National Bank Act and the Home Owners' Loan Act ("HOLA"), respectively.⁴ Existing OCC regulations define a "special purpose national bank" as a bank that conducts activities other than fiduciary activities that engages in at least one of the following three core banking functions: receiving deposits; paying checks; or lending money.⁵ The OCC previously has used such authority to charter other types of national banks including credit card banks. Because the OCC views the provision of financial services through Fintech as merely an extension of its existing chartering authority, this reaffirmation of its chartering authority was not effectuated through a formal rulemaking under the Administrative Procedure Act (the "APA").⁶

A national bank is a type of corporate organization authorized under the National Bank Act and the laws of the United States⁷ that engages only in activities deemed to be permissible as identified in statutes, OCC regulations, and guidance issued by the OCC.⁸ Specifically, the National Bank Act affirmatively permits national banks to engage in lending.⁹ The Whitepaper further notes that issuing debit cards or engaging in other means of facilitating payments electronically is the modern equivalent of "paying checks," which is identified as another core activity of national banks.

A significant benefit to Fintech entities operating under a Fintech Bank Charter would be that a Fintech Bank would have the same status and attributes under federal law as a full-service national bank, and thus would be able to operate with the benefit of federal law preemption of inconsistent state laws, subject, of course, to limitations imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").¹⁰ Limitations on state examination or visitorial authority would also apply.¹¹

Under the current standard for federal preemption, specific state laws do not apply if they would require a national bank to be licensed in order to engage in certain types of activity or business (e.g., making loans). However, 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.¹² Moreover, the OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers apply to national banks. Finally, 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 would not be preempted and thus would be applicable to a Fintech Bank Charter.

As noted in the Whitepaper, Fintech Banks will be subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks. Statutes and regulations that by their terms apply to national banks would apply to all special purpose national banks, even uninsured national banks, include legal lending limits, as well as restrictions on transactions with affiliates and insider lending requirements.¹³ Other laws that apply to all entities engaged in financial services include the Bank Secrecy Act ("BSA"),¹⁴ other anti-money laundering ("AML") laws,¹⁵ and the economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control,¹⁶ Electronic Funds Transfer Act,¹⁷ Truth in Lending Act,¹⁸ Real Estate Settlement Procedures Act,¹⁹ Home Mortgage Disclosure Act,²⁰ Equal Credit Opportunity Act,²¹ Fair Credit Reporting Act,²² Fair Housing Act,²³ Service Members Civil Relief Act,²⁴ and Military Lending Act²⁵ and each law's respective implementing regulations. A special purpose national bank also would be subject to the prohibitions on engaging in unfair or deceptive acts or practices under Section 5 of the Federal Trade Commission Act²⁶ and unfair, deceptive or abusive acts or practices under Section 1036 of the Dodd-Frank Act.²⁷



While not discussed in the Whitepaper, special purpose national banks are subject to the Change in Bank Control Act, which would require that any person acquiring control of a Fintech Bank obtain prior OCC approval after at least a 60-day public notice and comment period.²⁸ As a result, prior agency approval would be required for a Fintech Bank to engage in an exit transaction or a material capital raising transaction. In addition, if a Fintech Bank is deemed to have insured deposits, a transfer of such deposit liabilities or an assumption of another bank's deposit liabilities would be subject to the Bank Merger Act²⁹ and change in control transactions could involve approval by the Board of Governors of the Federal Reserve System.³⁰ In addition, changes in a national bank's permanent capital could require notice to or an application for prior approval to the OCC,³¹ which also could impact the timing of capital raising transactions.

Fintech Banks also would be subject to limitations on their ability to pay dividends, which are restricted to undivided profits during the current year, with a one- or two-year look back as a limitation.³² In addition, Fintech Banks would be subject to restrictions on certain incentive compensation arrangements that are deemed to pose inappropriate risks to the bank.³³

Furthermore, a Fintech Bank that makes a material change to its approved business plan would also need prior OCC approval, which could impact the ability of a Fintech company to quickly change its focus.³⁴

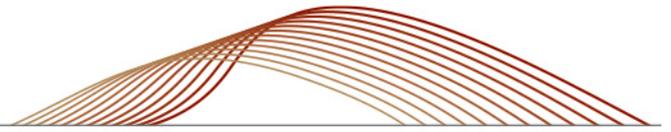
We also want to reiterate that there is a question about whether the OCC can grant a Fintech Bank Charter that does not include the power to take deposits. Deposit-taking is a defining attribute of a bank, and if the OCC charters a Fintech Bank that does not have deposit-taking powers, the question is whether that entity could actually be deemed to be a "bank" (i.e., has the OCC exceeded its statutory chartering authority?). If the Fintech Bank accepts deposits (other than trust deposits), it must apply to the FDIC for deposit insurance, and the Fintech Bank would, therefore, be a "bank" for purposes of the BHCA, necessitating the regulation of the Fintech Bank's corporate parent(s) to regulation as a bank holding company, including restrictions on its nonbanking activities.

II. Regulation of Fintech Banks

While the OCC would be the primary prudential regulator and supervisor of a special purpose national bank, depending on the structure of the bank and the activities it conducts, other federal regulators may have oversight roles over its ownership structure and/or the operations of the bank.

While the OCC contemplates in the Whitepaper that issuers of debit cards could obtain a Fintech Bank Charter, the structure of the underlying accounts accessible through the debit card will be critical, unless the underlying accounts are de-coupled and held as deposits at a separate depository institution. While it is possible to structure a payment transmission through a fiduciary relationship, thereby avoiding the need for FDIC deposit insurance,³⁵ such structure could raise issues from a consumer protection perspective, leaving consumers with little if the bank were to fail and subjecting the bank's management to claims of breaches of their fiduciary duty to protect funds in transit. This structure also could be implemented today through a national trust bank.

As the concept of what is or is not a deposit as defined under Section 3(l) of the Federal Deposit Insurance Act ("FDI Act"),³⁶ the FDIC would appear to have significant input into the efficacy of a Fintech Bank Charter for entities engaged in payments. In its capacity as an insurer, the FDIC is risk-adverse, and if it determines that funds accepted by a Fintech Bank should be classified as "deposits," the Fintech Bank would be required to obtain deposit insurance issued by the FDIC, subjecting such bank to FDIC jurisdiction and backup enforcement authority. The OCC's push for a Fintech Bank



Charter has historical precedent, as at the inception of internet banking it was the FDIC that raised red flags to internet companies seeking to form banks, even though the OCC was willing to charter such entities.³⁷ Accordingly, industry interest and the OCC's willingness to charter special purpose national banks could be tempered if the FDIC deems a Fintech Bank to be accepting deposits.

Moreover, if a Fintech Bank accepts deposits, its corporate shareholders would be subject to the BHCA and rules and regulations of the Board of Governors of the Federal Reserve System thereunder.³⁸ If the bank is deemed (i) an insured depository institution or (ii) accepts demand depositors and is engaged in the business of making commercial loans, provided that the entity does not qualify for any of the exceptions from the definition of "bank" in the BHCA, such as trust banks, credit card banks, credit unions and industrial loan companies. If subject to the BHCA, a corporate shareholder would be subject to Federal Reserve oversight and supervision, including significant limitations on its nonbank activities.

Corporate shareholders of a Fintech Bank that only engages in lending, and is funded without deposits, would not be a "bank" for purposes of the BHCA. However, corporate shareholders of entities "receiving deposits" and some entities "paying checks" could be subject to the BHCA as well depending upon the structure of the funds held by the bank paying such checks. If structured in a fiduciary capacity, the shareholder would not be subject to the BHCA; however, if the underlying funds of the payments transaction are deemed as deposits, then the shareholder is subject to the BHCA and the bank would also be subject to FDIC supervision.

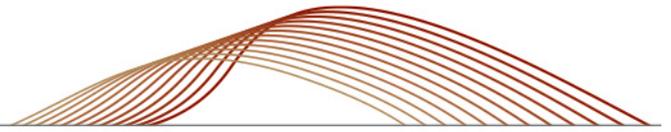
Compliance with laws and regulations promulgated by the Consumer Financial Protection Bureau ("CFPB") would be regulated by the OCC, unless the Fintech Bank is over \$10 billion in assets, which would cause its compliance with consumer laws to be regulated by the CFPB.³⁹ The CFPB also maintains jurisdiction over certain nonbank financial services providers such as mortgage originators or servicers and entities the CFPB designates as "larger market participants" through rulemaking.⁴⁰ Nonetheless, establishment of a Fintech Bank Charter could benefit nonbanks engaged in mortgage origination or servicing, if such entities maintain less than \$10 billion in assets.

III. Chartering Process

The chartering process for a Fintech Bank would be the same as for a full-service national bank, applying supervisory standards involving safety and soundness, as well as requirements to provide fair access to financial services, treat customers fairly, and comply with all applicable laws and regulations. The OCC traditionally tailors these standards based on a bank's size, complexity, and risk profile.

Initially, formation of all national banks involves three key components – a well-developed business plan, sufficient capital, and qualified management. Each of the following factors will be critical in an OCC determination to charter a Fintech Bank:

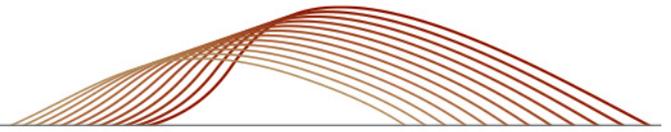
- A. *Business Plan.* The business plan of a bank is the key component of any charter proposal, as it articulates a bank's activities and how the bank will use its resources to meet its goals and objectives and will set forth metrics of progress. As in the formation of a full service bank, the OCC expects a three-year comprehensive plan for a Fintech Bank Charter applicant to discuss:



- Markets to be served;
 - Products and services;
 - Assessments of risks inherent with the proposed products and services, including BSA/AML, consumer protection, and fair lending;
 - Risk controls and management information systems;
 - Capital and metrics to monitor appropriate capital levels, as discussed below;
 - Financial inclusion, as discussed below; and
 - Recovery and exit strategies, as discussed below.
- B. *Capital.* As set forth in the Whitepaper, the OCC is not setting specific capital requirements for Fintech Banks, but will require that applicants identify 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). This is similar to how the OCC evaluates capital at national trust banks.⁴¹

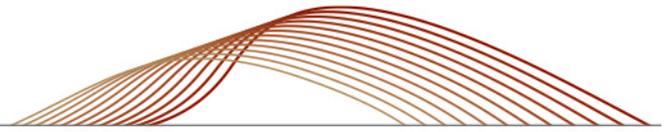
The OCC's evaluation of capital adequacy (initial and ongoing) will then consider the risks and complexities of the proposed products, services, and operating characteristics, taking into account both quantitative and qualitative factors.⁴² In addition to assessing the quality and source of capital, the OCC also considers on- and off-balance sheet composition, credit risk, concentration, and market risks. Moreover, Fintech Bank Charter applicants whose business activities include off-balance sheet would be subject to the OCC's minimum regulatory capital requirements; however, the minimum capital levels required may not adequately reflect the risks associated with off-balance sheet activities. Accordingly, Fintech Bank Charter applicants will be expected to propose a minimum level of capital that the proposed bank would meet or exceed at all times. This requirement parallels an existing requirement imposed on national trust banks, which typically have few assets on the balance sheet than other institutions, and are typically required 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 Bank Charter applicant as necessary to adequately reflect its risks and to the extent consistent with applicable law.

- C. *Liquidity.* Similarly, the OCC will focus on a Fintech Bank Charter applicant's liquidity management and 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. Liquidity will be evaluated commensurate with the risk and complexity of the proposed activities. In assessing the liquidity position of a Fintech Bank Charter applicant, the OCC considers a proposed bank's access to funds as well as its cost of funding.⁴³
- D. *Fair Lending and Financial Inclusion.* While not formally subjecting non-depository Fintech-Chartered banks to the Community Reinvestment Act ("CRA"),⁴⁴ the Whitepaper notes that the OCC's statutory mission includes ensuring that national



banks treat customers fairly and provide fair access to financial services, factors typically addressed through CRA compliance by full service banks. Nonetheless, in an attempt to placate community groups that fear a transfer of banking services from entities subject to the CRA to entities exempt from the CRA, the OCC will require an applicant seeking a Fintech 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. For example, Fintech Bank Charter applicants seeking to engage in lending will need to address 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
 - 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.
- E. *Alternative Business Strategies and Recovery.* Like the OCC requires of full service banks subject to a business plan requirement, Fintech Banks will be required to propose alternative business and recovery strategies to address various best-case and worst-case scenarios and identify 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.



The OCC's formal licensing process will involve four stages:⁴⁵

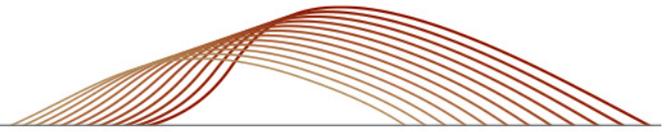
1. *The prefilling stage*, in which potential applicants engage with the OCC in formal and informal meetings to discuss their proposal, the chartering process, and application requirements.
2. *The filing stage*, in which the organizers prepare and submit the application, including a three-year business plan. Organizers also must publish notice of the charter application as soon as possible before or after the date of the filing. An applicant's senior management and management of controlling shareholders also must submit biographical information, personal financial information, and be fingerprinted.
3. *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 provide fair access to financial services; will ensure compliance with laws and regulations; will promote fair treatment of customers; and will foster healthy competition.
4. *The decision stage*, which includes three phases:
 - (i) the **preliminary conditional approval phase**, during which the OCC decides whether to grant preliminary conditional approval of the proposed special purpose charter;
 - (ii) the **organization phase**, during which the bank in organization raises capital, prepares for opening, and the OCC conducts a preopening examination; and
 - (iii) the **final approval phase**, during which the OCC decides whether the bank has met the conditions for opening.

Like with full service charter proposals, the OCC has noted that it will impose a number of standard conditions on a Fintech 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. Moreover, 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,⁴⁶ 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 Fintech Bank Charter based on the Fintech applicant's business model and risk profile.

IV. Initial Views of Winners and Losers

A special purpose national bank clearly will benefit:

- Fintech companies seeking to operate under one national license rather than on a state-by-state regime (e.g., lenders, mortgage lenders, mortgage services, and money transmitters);



- Nonbank lenders, mortgage originators, and servicers with less than \$10 billion in assets, which can avoid CFPB supervision;
- Payment processors or prepaid card program managers, which can control their own operations without being subjugated to a bank partner; and
- Full service banks, which no longer will have to compete with nonbank Fintech companies, which they perceive are operating on an uneven playing field, as the laws and regulations applicable to all banks will apply to Fintech Banks.

However, as discussed above, special purpose national banks will impose a host of requirements that nonbank Fintech companies currently are not subject to, including:

- Higher capital and liquidity requirements than a full-service bank;
- Compliance with obligations to ensure financial inclusion;
- Ongoing monitoring of business activities;
- Rigorous examinations by the OCC (and perhaps the FDIC and Federal Reserve);
- FDIC and possibly Federal Reserve oversight if the Fintech Bank accepts deposits; and
- Regulation of significant corporate transactions under the Change in Bank Control Act and, perhaps, the Bank Merger Act and/or the BHCA.

In addition, Fintech Banks could adversely impact:

- State banking departments, which depend on licensing and examination revenue; and
- Full service banks, which franchise their charters for programs managed by nonbank Fintech companies.

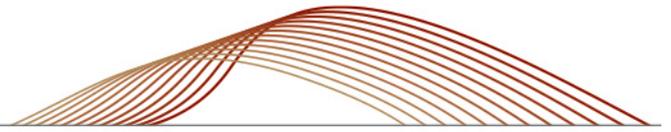
V. Action Plan

A. Considerations in Applying for a Fintech Bank Charter

While the Whitepaper confirms that the OCC will consider charter applications by companies engaged in financial technology that are engaged in core banking activities such as receiving deposits, paying checks or lending money, such entities must explore whether or not a special purpose national bank charter would enhance their operations. Principally, such analysis must consider whether cost of federal regulation and the benefit of federal preemption outweigh the cost of state-by-state system licensure or partnering with an existing bank.⁴⁷ Similarly, such analysis clearly must focus on whether converting to a national charter would cause a change in operations, such as from a licensed money transmitter to an entity that could be deemed to be receiving deposits, which would cause a cavalcade of additional regulatory obligations.

B. OCC Solicitation of Comments

Moreover, in addition to evaluating the consequences of converting to a Fintech Bank Charter companies should also consider commenting on types of activities and expectations that the OCC



should require for entities seeking a Fintech Bank Charter. Specifically, the OCC is seeking input on 13 questions by **January 15, 2017**:

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?
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?

Paul Hastings attorneys are experienced in working with clients seeking banking charters as well as state-licensing issues, and are assisting clients navigating the OCC's Fintech Bank Charter framework.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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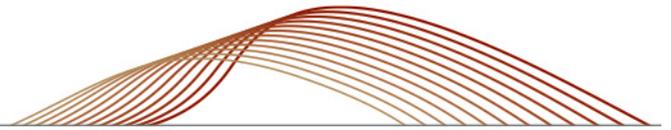
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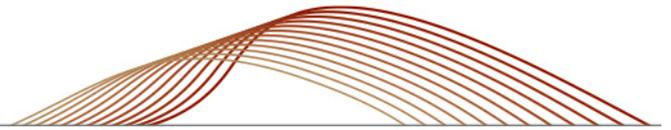
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- ¹ See OCC, *Exploring Special Purpose National Bank Charters*, (Dec. 2016) available at <https://occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>; see also, *Remarks by Thomas J. Curry Regarding Special Purpose National Charters for Fintech Companies* (Dec. 2, 2016), available at <https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.
- ² 12 U.S.C. §§ 1841 *et seq.*
- ³ See Letter of the Conference of State Bank Supervisors to OCC, *Receiverships for Uninsured National Banks* (Nov. 14, 2016), available at <https://www.csbs.org/regulatory/policy/Documents/2016/CSBS%20Comment%20Letter%20on%20OCC%20Receiverships%20for%20Uninsured%20National%20Banks%20NPRM.pdf>. (hereinafter, “CSBS Letter”).
- ⁴ See 12 U.S.C. §§ 1 *et seq.* and 1461 *et seq.* The OCC also has authority, under the International Banking Act, 12 U.S.C. § 3102, to license a foreign bank to operate a federal branch or agency in the United States. Given that all federal savings associations chartered under the HOLA must have deposit insurance issued by the Federal Deposit Insurance Corporation (the “FDIC”), the Whitepaper focuses only on chartering national banks, which are only required to obtain deposit insurance if they accept deposits. Whether the OCC may grant a charter for a national bank that does not accept deposits is an issue that will be subject to significant debate. See, *e.g.*, CSBS Letter.
- ⁵ See 12 C.F.R. § 5.20(e)(1).
- ⁶ 5 U.S.C. § 551-9. However, challenges to this regulatory interpretation could be forthcoming. For instance, a challenge pursuant to the federal APA may be leveled at the OCC following the granting of the first such Fintech Bank Charter.
- ⁷ 12 U.S.C. §§ 21 *et seq.*
- ⁸ 12 U.S.C. §§ 24 *et seq.* and 12 C.F.R. Parts 1-199.
- ⁹ 12 U.S.C. § 24 (seventh).
- ¹⁰ 12 U.S.C. §§ 5301 *et seq.*
- ¹¹ 12 C.F.R. § 7.4010.
- ¹² See 12 C.F.R. §§ 7.4001, 7.4007, 7.4008.
- ¹³ 12 U.S.C. § 84 and 12 C.F.R. Part 32; 12 U.S.C. §§ 371c and 371c-1 and 12 C.F.R. Part 223; and 12 U.S.C. §§ 375a(a) and (b) and 12 C.F.R. Part 215.
- ¹⁴ 31 U.S.C. §§ 5311-5330; 12 U.S.C. §§ 1818(s), 1829(b), and 1951-1959; 31 C.F.R. Part 103; 31 C.F.R. Chapter X.
- ¹⁵ 18 U.S.C. §§ 1956-57; 31 U.S.C. §§ 5301, 5340-5342, 5351-5355; Pub. L. 102-550, 106 Stat. 4044; Pub. L. 104-132, 114 Stat. 1214; and Pub. L. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).
- ¹⁶ 31 C.F.R. Chapter V.
- ¹⁷ 15 U.S.C. § 1693b and 12 C.F.R. Part 205.
- ¹⁸ 15 U.S.C. §§ 1601 *et seq.* and 12 C.F.R. Part 1026.
- ¹⁹ 12 U.S.C. §§ 2601-2617 and 12 C.F.R. Parts 1024 and 1026.
- ²⁰ 12 U.S.C. §§ 2801 *et seq.* and 12 C.F.R. Part 1003.
- ²¹ 15 U.S.C. §§ 1691 *et seq.* and 12 C.F.R. Part 1002.
- ²² 15 U.S.C. §§ 1681 and 12 C.F.R. Part 222.
- ²³ 42 U.S.C. §§ 3601-3619 and 24 C.F.R. Part 100.
- ²⁴ 50 U.S.C. app. §§ 501 *et seq.*
- ²⁵ 10 U.S.C. § 987; 32 CFR Part 232.
- ²⁶ 15 U.S.C. § 45.
- ²⁷ 12 U.S.C. § 5531.
- ²⁸ See 12 U.S.C. § 1817(j); 12 C.F.R. § 5.50. If the Fintech Charter is owned by a bank holding company, a change in control of such bank holding company would be subject to the BHCA.
- ²⁹ 12 C.F.R. § 1828(c) and 12 C.F.R. § 5.33.
- ³⁰ 12 U.S.C. § 1842.
- ³¹ 12 C.F.R. § 5.46.
- ³² 12 U.S.C. § 60 and 12 C.F.R. § 5.64.

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- ³³ See Section 965 of the Dodd-Frank Act and proposed regulations promulgated by the OCC at 81 *Fed Reg.* 37670 (June 10, 2016), available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-06-10/pdf/2016-11788.pdf>.
- ³⁴ See 12 C.F.R. § 5.53; see also OCC, *OCC Significant Deviation Policy* (Aug. 21, 2003), available at <https://www.occ.gov/static/licensing/form-deviation-policy-v2.pdf>.
- ³⁵ 12 U.S.C. § 1815(a). “Trust funds” for purposes of the FDI Act means “funds held by an insured depository institution in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent.”
- ³⁶ 12 U.S.C. § 1813(l).
- ³⁷ See, e.g., OCC Conditional Approval 312 (May 1999) and subsequent OCC Corporate Decision 99-30 (Sept. 1999).
- ³⁸ 12 U.S.C. § 1841.
- ³⁹ 12 U.S.C. § 5515.
- ⁴⁰ Given the current political climate, such rulemakings are unlikely. See e.g., Paul Hastings StayCurrent [Back to the Future – Trump Administration Seeks to Roll Bank Financial Services Regulation](#) (December 2016).
- ⁴¹ See OCC Bulletin 2007-21: [Revised Guidance: Capital and Liquidity](#) (June 2007).
- ⁴² 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.
- ⁴³ Key areas of consideration identified by the OCC 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.
- ⁴⁴ 12 U.S.C. §§ 2901 *et seq.*
- ⁴⁵ See OCC’s Licensing Manual OCC, “Charters,” *Comptroller’s Licensing Manual* (Sept. 2016), available at <https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf>, applies to both full service and special purpose national banks.
- ⁴⁶ See also OCC, *OCC Significant Deviation Policy* (Aug. 21, 2003), available at <https://www.occ.gov/static/licensing/form-deviation-policy-v2.pdf>.
- ⁴⁷ While the OCC has long allowed banks to franchise their charters, subject to appropriate risk-management, the Whitepaper reaffirms that national banks and federal savings banks are authorized to engage in relationships with nonbank third parties. See, e.g., OCC Bulletin 2001-47, *Third Party Relationships* (Nov. 1, 2001), available at http://ithandbook.ffiec.gov/media/27914/occ-bul_2001_47_third_party_relationships.pdf, which was then superseded by OCC Bulletin 2013-29, *Risk Management Guidance*, available at <https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html>.