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## OCC Consideration of Special Purpose Fintech Charters Draws Rapid Reaction from State Banking Regulators

On Dec. 2, 2016, the Office of the Comptroller of the Currency (OCC) published a preliminary proposal to create a national bank charter for financial technology companies (fintech).<sup>1</sup> The rationale in support of the proposal was that such a charter could promote the safety and soundness of fintech institutions, bring greater legal and regulatory uniformity and consistency, and strengthen the federal banking system.

While the proposal was not specific as to what the requirements would be for a national charter, it elicited prompt reaction from state financial regulators, highlighting some of the tensions inherent in any eventual OCC charter for fintech. The superintendent of the New York Department of Financial Services issued a statement the same day “oppos[ing] any effort to federalize what states have been doing – and doing well – for over a century.”<sup>2</sup> Other state banking regulators have reacted with a similar lack of enthusiasm for the proposal, stressing concerns about pre-emption of state consumer protection laws.<sup>3</sup>

The reason why a somewhat amorphous proposal would prompt such strong reaction is that an OCC charter could significantly restrict state regulatory authority over such institutions, as is the case now for federally-chartered banks and savings associations. As the OCC proposal set forth, a special purpose national bank charter would limit the applicability of

<sup>1</sup> “Exploring Special Purpose National Bank Charters for Fintech Companies,” <https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>.

<sup>2</sup> “Statement by DFS Superintendent Maria T. Vullo Regarding the OCC Special Purpose National Bank Charters for Fintech Companies,” <http://www.dfs.ny.gov/about/press/pr1612021.htm>.

<sup>3</sup> “States Hurry to Boost Their Fintech Appeal in Wake of OCC Plan,” Lalita Clozel, Dec. 9, 2016, American Banker.

various state laws and regulations, in particular state “visitorial” authority, or the authority to conduct examinations of companies with such a federal charter. Similarly, such entities would no longer require a state license issued by the relevant state financial regulators in order to engage in their business activities.<sup>4</sup> The ability to conduct examinations, and to impair or withdraw an entity’s license to do business in a particular state, has long been a key weapon in the regulatory arsenal at the state level, and a national charter would presumably curtail that power.

On the other hand, any nationally chartered entity would be subject to new safety and soundness requirements. While certain states have minimum net-worth or other financial requirements as part of their licensing regimes, the OCC’s broad authority to ensure the safety and soundness of the financial markets could require greater liquidity and net worth than is currently required under any state’s licensing regime. OCC requirements regarding governance, compliance risk management, financial inclusion, and resolution planning could also exceed any such formal requirements at the state level. Similarly, an OCC charter will likely require a commitment to financial inclusion measurement that would be a new requirement for fintech companies. As such, any federal charter may prove to be a practical option for only a subset of the fintech space, benefiting the larger and well-capitalized entities, but potentially leaving smaller entities at a competitive disadvantage as they grapple with a variety of state regulatory requirements from which their federally-chartered competitors would be exempt.

It is further worth noting that certain of the claimed advantages of federal oversight are already in place for many such entities under Dodd-Frank. The Consumer Financial Protection Bureau (CFPB) already requires its regulated entities to have a well-developed compliance management system in place that ensures adequate board and management oversight over compliance issues, ensures that compliance responsibilities are established, communicated and monitored, and that consumer complaints are properly reviewed and handled to ensure that breakdowns in compliance have not occurred.<sup>5</sup> If the scope of a federal fintech charter is co-extensive with the universe of regulated entities under the CFPB’s authority, then OCC supervision would not be likely to bring any new consumer protections at the federal level. However, an OCC charter would add requirements regarding risk management and contingency planning that is beyond the ambit of the CFPB, which could help protect against market disruptions.

The OCC proposal was short on specific requirements, but the fact that it prompted strong reactions from state regulators, even as a conceptual exercise, reveals the degree to which an OCC charter could be game-changer for eligible companies. While the proponents of Dodd-Frank may have sought to level the playing field between federally-chartered institutions and state-licensed institutions, it did not pre-empt most state regulations, and therefore in practice it merely added a new regulator, with state-licensed entities still struggling with myriad regulatory approaches to which their federally-chartered competitors are largely immune. As a new administration pledges to reduce the number of regulations (and regulators) in the financial services space, this proposal from the OCC could turn out to be a significant shift if it moves forward.

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<sup>4</sup> Individuals engaged in certain licensable activity might still require licensure, such as is the case for mortgage loan originators.

<sup>5</sup> CFPB Supervision and Examination Manual, October 2012, p. 35, [http://files.consumerfinance.gov/f/201210\\_cfpb\\_supervision-and-examination-manual-v2.pdf](http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf)

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