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Fed Proposal to Revise Control Rules Would Not Create Alternative to OCC Fintech Charter

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The Federal Reserve Board has published in the *Federal Register* a notice of proposed rulemaking with request for comment on a proposal to simplify and increase transparency of its rules for determining control of a banking organization. The proposal's comment period closes on July 15, 2019.

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The proposed revisions to the Board's control regulations would significantly expand the number of presumptions used by the Board to determine control and would, in codifying those presumptions, provide transparency to investors (including private equity investors) regarding what types of relationships and what types of activities would constitute control of a financial institution or holding company under the Bank Holding Company Act (the "BHC Act"). Under current regulations, private equity firms are ineligible to register as bank holding companies because they are control companies that are engaged in impermissible activities.

Unfortunately, it appears that the proposal will not expand the ability of an entity to control a bank or bank holding company without being presumed to control the bank or bank holding company or enhance the ability of private equity investors to invest in banks and bank holding companies. As a result, it would not provide an alternative for fintech companies that are considering filing an application with the OCC for a special purpose national bank (SPNB) charter or for an industrial bank charter in a state such as Utah, that permits such charters

Earlier this month, the New York federal district court hearing the lawsuit filed by the New York Department of Financial Services (NYDFS) seeking to block the OCC's issuance of SPNB charters dealt a blow to the charter. In denying the OCC's motion to dismiss, the court concluded not only that the NYDFS had established standing to sue and that its claims were ripe for decision, but also that the NYDFS had stated a claim under the Administrative Procedure Act. In doing so, the court found that the term "business of banking" as used in the National Bank Act "unambiguously requires receiving deposits as an aspect of the business."

As we previously commented, the court's conclusion on this point strikes us as incorrect and outcome-oriented. Nevertheless, because the decision makes clear that seeking an SPNB charter entails legal risk, companies in a position to do so may wish to consider other alternatives. Since the Board's proposal would not make it easier for a company to control a bank or bank holding company without being presumed to be in control, the two other "bank" alternatives would be to acquire or charter a full service national bank or state bank, where ownership would be subject to the BHC Act, or to acquire or charter an industrial bank under Utah law, where ownership would not be subject to the BHC Act.

A third alternative is to continue or revisit bank partnerships and address the risks created by the Madden decision and "true lender" issues. Risks inherent in these partnerships could (and should) be mitigated by careful structuring and, potentially, OCC and/or FDIC rulemaking.