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Office of Comptroller of Currency to Begin Considering Applications for Fintech Charters

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In December 2016, the ***Comptroller of the Currency*** announced that the Office of the Comptroller of the Currency (OCC) would begin considering applications for limited-purpose national bank charters from financial technology (*fintech*) companies. The OCC envisions granting charters to a variety of fintech companies, including marketplace lenders; payments-related, digital currency, and distributed ledger companies; and those offering financial planning and wealth management services. These companies could greatly benefit from the preemption of state licensing and other laws that would come with a national bank charter.

The OCC has long chartered limited-purpose national banks such as trust companies and credit card banks. As discussed in a simultaneously issued white paper, the OCC believes that it also has the authority to charter other limited-purpose banks as long as they are engaged in one of the core banking functions of receiving deposits, paying checks, or lending money, and do not engage in any activities that are impermissible for a national bank. The Comptroller cautions that fintech companies will be expected to meet high supervisory standards. Any prospective applicants are encouraged to meet in advance with the OCC staff to discuss how these expectations will apply to their proposed bank. The OCC's expectations include:

- **Robust, Well-Developed Business Plan.** The business plan must cover at least three years and describe the proposed operation of the bank in detail. The business plan must assess the risks inherent in the bank's products and services, including risks related to Bank Secrecy Act (BSA) and anti-money laundering (AML) law compliance, consumer protection, fair lending requirements, and the design of risk management controls.

- **Appropriate Governance Structure.** The OCC expects the corporate governance structure of the bank to be commensurate with the risk and complexity of the bank. This includes an active board of directors that oversees management, provides credible challenge, and exercises independent judgment.

- **Capital Adequacy.** The proposed bank must maintain minimum and ongoing levels of capital commensurate with the risk and complexity of proposed activities. When a fintech bank expects to have significant off-balance-sheet activities, the OCC may impose capital requirements in excess of regulatory minimums.

- **Liquidity**. The proposed bank must have the capacity to readily meet expected and unexpected cash flow needs without adversely affecting either daily operations or financial condition.

- **Compliance Risk Management.** Proposed banks must have well-developed compliance systems that include programs that ensure compliance with the BSA and AML statutes and related regulations as well as compliance with consumer protection laws.

- **Financial Inclusion**. The OCC expects all national banks to treat customers fairly and provide fair access to financial services. For insured depository institutions, this includes meeting the credit needs of low- and moderate-income customers under the Community Reinvestment Act (CRA). National banks that do not take insured deposits, however, are not subject to CRA. The OCC still expects applicants for special purpose charters that will not take insured deposits but will engage in lending activities to demonstrate a commitment to financial inclusion in their business plans.

- **Recovery and Exit Strategies.** The OCC expects the business plan to provide alternative strategies for addressing best-case and worst-case scenarios, including circumstances in which the board and management would consider unwinding the entity. While the business plan would focus on how to remain a viable entity in the face of a variety of threats, the OCC may also require applicants to have a clear exit strategy.

In light of the OCC's high application expectations, it appears that the most likely candidates for a fintech charter would be established companies that already have management structures and capital in place. At a recent meeting of the ABA Banking Law Committee, the OCC Chief Counsel stated that they do not want applications from two guys in a garage. Even established companies, however, may have difficulty meeting the OCC's expectations. The OCC expects the applicant to have an active and involved board of directors, which may not always be the case with entrepreneurial companies. Fintech companies would also need to be fully comfortable with their existing business plans since any deviations would require OCC approval. Fintech companies that seek the power to take deposits must also bear in mind that their large shareholders may be subject to regulation as bank holding companies if they obtain a charter.

Notwithstanding the OCC's receptivity to fintech charters, there are still uncertainties as to whether they will in fact be granted. Applicants for national bank fintech charters would need to be approved by the Federal Reserve to become members of a Federal Reserve Bank and by the FDIC for insurance of deposits if they will be deposit-taking organizations. Neither of these agencies has taken a position on fintech charters, and there is no guarantee that they will endorse them. In addition, fintech charters face opposition on other fronts. State banking supervisors have expressed concern that the fintech charter could be used to evade state consumer protection laws. Two Democratic senators, including the ranking minority member on the Senate Banking Committee, have questioned whether the OCC has the authority to issue such charters.

Nonetheless, the potential benefits of a national bank fintech charter make the effort worthwhile. Fintech companies operating on a nationwide basis would be able to operate under a single set of rules rather than under a patchwork of state rules. Although national bank preemption has been scaled back by the Dodd-Frank Act, important preemptions such as the most favored lender status and the ability to export interest rates still apply. Fintech companies engaged in payments-related businesses could offer insured deposits and would have access to the Federal Reserve's payment system. The OCC is to be commended for its forward-looking initiative.

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