

December 4, 2016

# Office of the Comptroller of the Currency Proposal to Charter Special Purpose National Banks for FinTech Companies

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## OCC Outlines Supervisory Expectations and Seeks Public Comment

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### SUMMARY

On December 2, 2016, Thomas J. Curry, Comptroller of the Currency, announced that the Office of the Comptroller of the Currency (OCC) would move forward with its plan to charter special purpose national banks for financial technology (FinTech) companies.<sup>1</sup> The OCC is the regulator and chartering authority for national banks and federal savings associations. According to Comptroller Curry, the OCC has decided to make special purpose national bank charters available to FinTech companies because doing so is in the public interest due to FinTech's "great potential to expand financial inclusion, empower consumers, and help families and businesses take more control of their financial matters." Comptroller Curry also announced that the OCC will establish a clear process, criteria and standards for FinTech companies to receive special purpose national bank charters. These standards will address, among other things, appropriate risk management, consumer protection and capital and liquidity.

Comptroller Curry has asked OCC staff to develop and implement a formal policy for evaluating special purpose national bank charter applications from FinTech companies, which will be informed by public feedback received by the OCC on a white paper released concurrently with the Comptroller's announcement. The white paper identifies a set of baseline supervisory expectations for special purpose charter applicants. The expectations will focus on an applicant's business plan, governance structure, capital and liquidity levels, compliance and risk management function, commitment to financial inclusion and recovery and resolution planning.<sup>2</sup> The white paper also describes the application filing and review process for these special purpose charters, indicating that it will generally adhere to the OCC's existing

procedures for full-service national bank charters. The OCC is seeking public comment on the white paper, including responses to a series of specific questions. The deadline for comment is January 15, 2017.

It is likely that many FinTech companies that seek special purpose charters would not take deposits. In part, this expectation is based on the desire for FinTech companies not to be subject to regulation under, among other things, the Bank Holding Company Act of 1956 (including its non-banking restrictions and the Volcker Rule) (BHC Act) and the requirements of the Community Reinvestment Act (CRA).

The OCC's announcement, which immediately drew a challenge from the New York State Department of Financial Services (NYSDFS), is likely to raise a number of issues. Among the principal issues will be (i) the actual willingness of the OCC to charter these new institutions, as the OCC has granted only one national bank charter in the last six years;<sup>3</sup> (ii) whether FinTech companies will be able to satisfy the OCC's supervisory expectations as a practical matter; (iii) whether the special purpose charter will provide enough benefit to FinTech companies to justify becoming subject to what is likely to be an intrusive and substantial federal regulatory regime; and (iv) the overall impact on consumers.

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## BACKGROUND

In August 2015, Comptroller Curry announced an initiative to develop a comprehensive framework to improve the OCC's ability to identify and understand trends and innovations in the financial services industry, as well as the evolving needs of financial services consumers.<sup>4</sup>

As the first major step in this initiative, on March 31, 2016, the OCC released a white paper that set forth its perspective on supporting responsible innovation in the federal banking system.<sup>5</sup> The OCC hosted a Forum on Responsible Innovation in June 2016, during which Comptroller Curry reiterated that the OCC's efforts to encourage responsible innovation were not meant to stifle growth and innovation, but rather to start a dialogue with FinTech companies, large and small.<sup>6</sup> Most recently, on October 26, 2016, the OCC released its Responsible Innovation Framework, which sets forth a number of specific actions that the OCC will implement when evaluating innovative financial products, services and processes and their associated risks. As part of its Responsible Innovation Framework, the OCC announced that it would create a new Office of Innovation, which will begin operations in the first quarter of 2017.<sup>7</sup>

Comptroller Curry's announcement that the OCC has decided to move forward with chartering special purpose national banks for FinTech companies represents the latest and most far-reaching step in this initiative. Comptroller Curry said that the OCC's decision to make special purpose national bank charters available to FinTech companies is driven by three primary considerations:

- First, the OCC believes that it is in the public interest to do so. It is the OCC's stated view that FinTech companies, although not without some risks, have the potential to expand financial

inclusion, to empower consumers and to deliver financial products and services that meet the shifting needs of increasingly technology-oriented consumers.

- Second, the OCC believes that FinTech companies offering banking products and services should have the choice to become national banks if they wish to do so, in a manner that is aligned with the FinTech company's business model and strategy to serve its intended customers.
- Third, the OCC believes that having a clear process, criteria and standards for FinTech companies to become national banks will ensure that regulators and FinTech companies openly vet risks and will also ensure that the institutions that receive special purpose charters have a reasonable chance of success, appropriate risk management, effective consumer protection and strong capital and liquidity. Through this chartering process, the OCC will be able to fully explore how the proposed special purpose national bank's policies, procedures and practices are designed to protect individuals and small business customers.<sup>8</sup>

Comptroller Curry's announcement comes at a time when other financial regulators, in the U.S. and internationally, are considering a number of different regulatory frameworks and tools to address the risks and opportunities presented by FinTech companies and their products and services. On the same day as Comptroller Curry's announcement, Federal Reserve Governor Lael Brainard, speaking at the Federal Reserve's Conference on Financial Innovation, indicated that the Federal Reserve's approach towards FinTech is to engage FinTech companies through new channels, to encourage responsible innovation by balancing safety and soundness and consumer protections with the efficiencies and new value FinTech companies seek to deliver, and to promote financial inclusion for underbanked individuals, communities and businesses.<sup>9</sup> These themes are consistent with the priorities identified by Comptroller Curry in his announcement, as well as in the OCC's previously released Responsible Innovation Framework, but it is not clear that there is agreement between the OCC and the Federal Reserve as to the best approach to accomplish these objectives.

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## CHARTERING AUTHORITY AND STATUTORY FRAMEWORK

In the white paper, the OCC pointed to its authority to grant charters for special purpose national banks under the National Bank Act and the Home Owners' Loan Act.<sup>10</sup> The OCC intends to exercise its authority to grant special purpose national bank charters to FinTech companies that conduct at least one of the three core banking functions of receiving deposits, paying checks and lending money.<sup>11</sup> Although special purpose national banks, including FinTech companies that obtain a charter through the OCC's new process, may engage only in activities that are permissible for national banks, in his remarks, Comptroller Curry appeared to suggest a potential expansion of these activities as the economy and prevailing business practices evolve. The OCC views the National Bank Act as sufficiently adaptable to permit national banks, including special purpose national banks, to engage in new activities as part of the business of banking or to perform traditional banking activities in new ways.<sup>12</sup> Accordingly, as part of its application review process, the OCC intends to consider on a case-by-case basis the permissibility of a FinTech company's current and proposed activities.

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The issuance of special purpose national bank charters is not an entirely new phenomenon. To date, special purpose national bank charters have been most commonly used to charter trust banks (although several years ago the OCC suspended the chartering of non-deposit taking trust-only banks) and credit card banks, and the OCC has chartered other types of special purpose institutions including bankers' banks, community development banks and cash management banks. Notably, however, with the exception of certain trust-only banks, these special purpose national banks typically take deposits, which subjects them to a number of other regulatory regimes, including supervision by the FDIC, regulation under the BHC Act (including the Volcker Rule) and the requirements of the CRA.<sup>13</sup> As noted above, it is likely that many FinTech companies that seek special purpose charters would not take deposits, so these regulatory regimes would not apply. However, the OCC Paper does note that the OCC could impose requirements on an uninsured special purpose national 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.<sup>14</sup>

In recent years, the OCC has been reluctant to grant special purpose charters, at least in part because of the relatively underdeveloped insolvency regime that would apply to a non-deposit taking entity chartered by the OCC. In the aftermath of the financial crisis, the ability to provide for a predictable and orderly resolution of a failed entity has been recognized as a key element in mitigating the risks posed by the entity to its customers and counterparties and to the financial system as a whole. If a special purpose national bank does not take deposits and is not insured by the FDIC, the provisions in the Federal Deposit Insurance Act governing the receivership of insured depository institutions would not apply, and these entities are not eligible to be debtors under the Bankruptcy Code. Instead, they would be subject to receivership under the relatively limited provisions of the National Bank Act and related provisions.<sup>15</sup> Although the OCC has not placed an uninsured national bank into receivership since the Great Depression, it has acknowledged the need to articulate a process for such receiverships.<sup>16</sup> On September 13, 2016, the OCC released a proposed rule that sets forth a framework for liquidating uninsured national banks.<sup>17</sup> The OCC's proposed framework is substantially similar to the FDIC's established approach for placing insured depository institutions into receivership, and includes provisions relating to the appointment of a receiver (which could be the OCC or another governmental entity or third party), resources available to the receiver, public notice, handling and priority of claims, receiver powers related to fiduciary and custodial accounts, distributions to shareholders and the termination of receivership. In its release, the OCC acknowledged that this proposed receivership framework could be applicable to FinTech companies operating under a special purpose national bank charter, noting that the adoption of clear rules governing such receiverships could facilitate the use of these entities to conduct FinTech-related businesses.<sup>18</sup>

In addition, the OCC has previously made clear that the prior notice and approval requirements of the Change in Bank Control Act and the OCC's regulations promulgated thereunder apply to both insured

and uninsured national banks, including uninsured special purpose national banks. Accordingly, persons that intend to acquire a controlling interest in a FinTech company operating under a special purpose national bank charter would need to comply with the prior notice and filing requirements of the Change in Bank Control Act, which require detailed disclosure of an applicant's personal financial and biographical information. These detailed disclosure requirements could give pause to financial investors considering a controlling investment in, or acquisition of, a FinTech company with a special purpose national bank charter and could discourage FinTech companies from applying for a special purpose charter if they already have such investors.<sup>19</sup>

The Federal Reserve Act requires all national banks (other than those located in territories or insular possessions of the U.S.), including special purpose national banks, to become members of the Federal Reserve System. FinTech companies that receive a special purpose national bank charter would apply to become members of the Federal Reserve System by submitting an application to the appropriate Reserve Bank on Form FR 2030 and subscribing for the capital stock of the Reserve Bank.<sup>20</sup> As members of the Federal Reserve System, they would be subject to the statutes and regulations that apply to all Federal Reserve member banks, including the restrictions on affiliate transactions set forth in the Federal Reserve's Regulation W, 12 C.F.R. Part 223.

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## COORDINATION WITH OTHER REGULATORS

Special purpose national banks have the same status and attributes under federal law as full-service national banks.<sup>21</sup> Of particular note, national banks are entitled to the benefits of preemption under the National Bank Act with respect to usury, as Section 85 of the National Bank Act permits national banks to "export" interest rates permitted by the laws of the state in which the bank is located, notwithstanding the usury laws of the states in which the bank's borrowers are located.<sup>22</sup>

Special purpose national banks are also subject to the same laws, regulation, examination, reporting requirements and ongoing supervision by the OCC as full-service national banks.<sup>23</sup> This includes compliance with the OCC's cybersecurity guidance,<sup>24</sup> the requirements of the Bank Secrecy Act (BSA) and other federal anti-money laundering (AML) laws.<sup>25</sup> Some FinTech companies considering a special purpose national bank charter, particularly those that offer lending services, mobile payments and peer-to-peer money transfer services, may already be subject to the BSA's reporting and compliance requirements,<sup>26</sup> and could benefit from having the OCC serve as a single regulator supervising the application of the BSA and related AML regulations to their business platforms on a daily basis. In addition, special purpose national banks that engage in consumer financial activities would generally be subject to supervision by the Consumer Financial Protection Bureau (CFPB), although the OCC would have exclusive supervisory and enforcement authority over special purpose national banks that are insured depository institutions and have assets of \$10 billion or less.<sup>27</sup>

In discussing the “hot button” preemption issue in his remarks, Comptroller Curry stated that, although state laws relating to licensing requirements would not apply to FinTech companies that obtain a special purpose national bank charter, charter recipients would still be required to follow other aspects of state law that apply to full-service national banks, including state laws relating to anti-discrimination, fair lending, debt collection, taxation, zoning, criminal law and torts.<sup>28</sup> Comptroller Curry specifically noted that state laws aimed at unfair or deceptive treatment of customers are not preempted and apply to all national banks, including special purpose national banks.<sup>29</sup>

State regulators and others have voiced concern that FinTech companies may seek a special purpose national charter to circumvent applicable state regulation. Shortly following the OCC’s announcement, Maria Vullo, the Superintendent of the NYSDFS, issued a statement in which she voiced the NYSDFS’ opposition to the issuance of special purpose national charters for FinTech companies, and argued that “any reliance on a federal FinTech regulatory framework would be irresponsible if it were to ignore the states’ historical role and longstanding expertise in [the consumer protection] arena.”<sup>30</sup> In addition, state regulators, including the NYSDFS, have sought to step forward as the presumptive licensing and regulatory authority for certain types of FinTech businesses, such as virtual currency services,<sup>31</sup> a role that may be more limited if the OCC proposal is able to offer a more streamlined path to providing these services on a national basis.

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## PROPOSED SUPERVISORY EXPECTATIONS AND CHARTERING PROCESS

In its white paper, the OCC proposed a set of baseline supervisory expectations for applicants.<sup>32</sup> These expectations consist of the following:

***Robust, well-developed business plan:*** The FinTech company seeking a special purpose charter must explain why it seeks a charter and provide significant detail about the proposed special purpose national bank’s activities.<sup>33</sup> The business plan, covering a minimum of three years, should define the market that the proposed special purpose national bank plans to serve and enumerate the products and services it will provide, with appropriate progress metrics and realistic risk assessments from management. The OCC expects that a business plan will outline initial and future capital contributions and provide specific information about how the special purpose national bank intends to maintain and monitor appropriate capital levels. In addition, the business plan should describe the experience and expertise of the institution’s proposed management and board of directors.<sup>34</sup>

***Governance structure:*** The OCC expects that the risks and complexity of proposed products and services offered by the special purpose national bank will be addressed by an appropriate governance structure that is commensurate with the risk and complexity of its proposed products, services and activities. Applicants must demonstrate that they have the expertise, financial acumen and risk management framework required to ensure oversight over the safety and soundness of the special

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purpose national bank.<sup>35</sup> In addition, the applicant's board of directors should play a prominent role in the institution's governance by participating in appropriate committees and being active in the implementation and maintenance of the risk management framework.

**Capital:** Minimum and ongoing capital levels at the proposed special purpose national bank must be commensurate with the risk and complexity of the bank's activities, both on- and off-balance sheet.<sup>36</sup> The OCC notes that applicants that conduct off-balance sheet activities would be subject to the OCC's minimum regulatory capital requirements, but that these minimum capital requirements may not adequately reflect the risks associated with these off-balance sheet activities. Accordingly, applicants are expected to propose a minimum level of capital that the proposed bank would meet or exceed at all times, and the OCC will also consider tailoring capital requirements applicable to applicants as necessary to adequately reflect each applicant's risks, to the extent consistent with applicable law.<sup>37</sup> Aside from meeting quantitative capital requirements, qualitative factors the OCC will apply to evaluate the institution's capital adequacy include the scope and nature of the applicant's proposed activities, quality of management, funds management, ownership, operating procedures and controls, asset quality, earnings and their retention, risk diversification and strategic planning.<sup>38</sup>

**Liquidity:** Minimum and ongoing liquidity for both operating and contingent obligations must be commensurate with the risk and complexity of the applicant's activities. Targeted areas of liquidity for OCC examination will include (i) projected funding sources, needs and costs; (ii) net cash flow and liquid asset positions; (iii) projected borrowing capacity; (iv) highly liquid asset and collateral positions; (v) requirements for unfunded commitments; and (vi) the adequacy of contingency funding plans.<sup>39</sup>

**Compliance risk management:** An applicant must demonstrate to the OCC that it has a culture of compliance including a top-down, enterprise-wide commitment to understanding and complying with applicable law and regulation.<sup>40</sup> An applicant's compliance program should be designed to meet the requirements of the Bank Secrecy Act and other federal anti-money laundering regulations. In addition, applicants should have a consumer compliance program in place that ensures fair treatment of customers, fair access to financial services and compliance with the Federal Trade Commission's and the Consumer Financial Protection Bureau's consumer protection regulations. The OCC acknowledges that this compliance risk management standard could raise novel issues when applied to a FinTech company's business model, due to the nature of the innovative products, services and activities offered by FinTech companies. Accordingly, the OCC will on a case-by-case basis consider how innovative elements of a FinTech business model may affect the proposed special purpose national bank's compliance risk profile.<sup>41</sup>

**Financial Inclusion:** Special purpose national banks that do not take deposits will not be subject to the CRA. However, the OCC expects that special purpose national banks will be guided by principles that encourage fair access to financial services and goals to meet the credit needs of the bank's entire

community.<sup>42</sup> Accordingly, in their business plans, applicants that engage in lending activities need to demonstrate a commitment to financial inclusion, with the nature of the commitment depending on the entity's business model and the types of loan products or services it intends to provide.

***Recovery and exit strategies; resolution plan and authority:*** An applicant's business plan must include alternative business and recovery strategies to address various best-case and worst-case scenarios. The OCC expects to see specific financial or other risk triggers that would prompt the applicant's board and management to make a determination to unwind the institution in an organized fashion. Management must consider severe financial stress and how it may affect the proposed special purpose national bank, and have an attendant framework for options for the bank to remain viable under such stress. Material changes to the bank's size, risk profile, activities, complexity and external threats should be integrated into the risk governance and compliance framework. The OCC may also require that an applicant have a clear exit strategy in addition to plans to remain a viable entity under stressed conditions.<sup>43</sup>

The white paper notes that the OCC will generally apply its standard process for reviewing and making decisions on charter applications submitted by FinTech companies. Under this process, the OCC's Licensing Department will review and process applications, applying the baseline supervisory expectations described above, to determine whether the proposed special purpose national bank will have 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. The OCC recommends that potential charter applicants carefully review the full description of the chartering process set forth in the OCC's Comptroller Licensing Manual and notes that the OCC's newly formed Office of Innovation can be an important resource to FinTech companies interested in exploring the possibility of a special purpose national bank charter.<sup>44</sup>

The OCC has requested public feedback on all aspects of the white paper, and the white paper lists a series of specific questions for which the OCC is soliciting public responses. Comments must be submitted by January 15, 2017.<sup>45</sup>

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## OBSERVATIONS

The white paper raises, both directly and implicitly, a number of issues and questions about the standards to be applied to special purpose national bank charters for FinTech companies, and whether they will ultimately be a useful and effective way for FinTech companies to organize their business activities. The white paper alludes to some of these issues in its enumerated list of questions, but they also include the following:

- Will the OCC actually be willing to charter these institutions, or, alternatively, can FinTech companies meet the OCC's standards as a practical matter? Many FinTech companies have

very narrow and undiversified business models similar to those for which banking regulators have expressed considerable concern in the past. In addition, startup or early-stage FinTech companies may not be able to satisfy many of the OCC's baseline supervisory standards. Furthermore, the OCC's willingness to charter these institutions will likely depend on the level of continued commitment the OCC's executive management demonstrates towards Comptroller Curry's responsible innovation initiative following the end of his term in April 2017.

- Will the special purpose charter provide enough benefit to FinTech companies to justify what is likely to be an intrusive and substantial federal regulatory regime? Preemption of licensing and similar requirements, along with the ability to export interest rates, would be substantial benefits to FinTech companies. The special purpose charter itself could serve as an enhancement to reputation and credibility with customers and the marketplace. However, the baseline supervisory standards – including capital and liquidity, expectations for management personnel and compliance risk management – coupled with any conditions to charter approval, could be costly and difficult to implement. Additional limitations would apply to special purpose charters, including OCC lending limits.<sup>46</sup>
- What will the capital and liquidity requirements for special purpose charters be? The OCC indicates the need for flexibility in light of varying FinTech business models, but does not provide any indication of how it will ultimately decide these requirements other than noting that the OCC's minimum capital requirements may apply.<sup>47</sup>
- What kind of conditions and limitations could be imposed in connection with charter approval, and how burdensome would they be? The OCC has historically included a variety of conditions and limitations in its approval orders and operating agreements for new charters or banks that have undergone changes in control. It is not clear how burdensome those conditions or limitations could be. The white paper does suggest that CRA-like requirements could be imposed for special purpose charters that are not subject to the CRA, and it seems clear that some form of tailored financial inclusion commitment would be required.
- What, if anything, would be the overall impact on consumers? For the most part, consumers served by a special purpose charter should be protected by the same consumer protection laws that apply to nonbank providers, particularly for lending activities. Federal preemption generally does not apply to state consumer protection laws.
- For proposals for special purposes charters that include taking deposits, will the FDIC be willing to grant approval for the required deposit insurance? Historically the FDIC has been reluctant to grant approval for deposit insurance to institutions with narrow and undiversified business models, and have imposed special capital and “source of strength” requirements.
- Can pure payment processors and virtual currency businesses utilize the special purpose charter? It is not clear whether payments processing and virtual currency businesses would be deemed as engaging in one of the three core banking functions of receiving deposits, paying checks and lending money.
- Would the Federal Reserve permit discount window borrowing access to FinTech companies operating under a special purpose national bank charter? While it is likely that many FinTech companies that seek special purpose charters would not take deposits, the Federal Reserve's discount window programs are generally open to depository institutions that maintain transaction accounts or non-personal time deposits, subject to reserve requirements.<sup>48</sup> It is not clear whether the Federal Reserve would distinguish between full-service national banks that take deposits and deposit-taking FinTech companies operating under a special purpose national bank charter with respect to access to its discount window programs.
- How will OCC assessments be calculated? The white paper does not contain guidance on how the OCC will calculate this cost, or how these assessments will compare to state licensing fees.

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- Will the disclosure requirements imposed by the Change in Bank Control Act deter financial investors, including hedge funds, private equity funds and venture capital funds, from making a controlling investment in, or acquisition of, a FinTech company with a special purpose national bank charter? In addition, will these disclosure requirements discourage FinTech companies from applying for a special purpose charter if they already have such investors?

These questions and issues, and likely many others, will be the subject of extensive public comment.

Many questions, however, will only be answered through the application process.

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## ENDNOTES

- 1 Remarks by Thomas J. Curry, Comptroller of the Currency, at the Georgetown University Law Center (Dec. 2, 2016), available at <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.
- 2 OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2, 2016), available at <https://www.occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf> (“OCC White Paper”).
- 3 FDIC, *Details and Financials – Institution Directory*, available at <https://www5.fdic.gov/idasp/advSearchLanding.asp>.
- 4 Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Federal Home Loan Bank of Chicago (Aug. 7, 2015), available at <https://www.occ.gov/news-issuances/speeches/2015/pub-speech-2015-111.pdf>.
- 5 OCC, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective* (Mar. 31, 2016), available at <http://occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>.
- 6 Remarks by Thomas J. Curry, Comptroller of the Currency, Before the OCC Forum on “Supporting Responsible Innovation in the Federal Banking System” (June 23, 2016), available at <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-74.pdf>.
- 7 OCC, *Recommendations and Decisions for Implementing a Responsible Innovation Framework* (Oct. 26, 2016), available at <https://occ.gov/topics/bank-operations/innovation/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf>.
- 8 Remarks by Thomas J. Curry, Comptroller of the Currency, at the Georgetown University Law Center (Dec. 2, 2016), available at <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.
- 9 Remarks by Lael Brainard, Member of the Board of Governors of the Federal Reserve System, at the Conference on Financial Innovation at the Board of Governors of the Federal Reserve System (Dec. 2, 2016), available at <https://www.federalreserve.gov/newsevents/speech/brainard20161202a.pdf>.
- 10 OCC White Paper at 3.
- 11 *Id.*
- 12 *Id.* at 4.
- 13 *Id.* at 6.
- 14 *Id.*
- 15 12 U.S.C. Chapter 2, Subchapters XIII and XIV.
- 16 *Receiverships for Uninsured National Banks*, 81 Fed. Reg. 177 (Sept. 13, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-09-13/pdf/2016-21846.pdf>. As of May 2016, the OCC supervises 52 uninsured national banks.
- 17 *Id.* The comment period to the OCC’s proposed receivership rule expired on November 14, 2016.
- 18 *Id.*
- 19 OCC, *Comptroller’s Licensing Manual, Change in Bank Control* (Jan. 2007), available at <https://occ.gov/publications/publications-by-type/licensing-manuals/cbca.pdf>.
- 20 12 U.S.C. §222.
- 21 OCC White Paper at 5-6.

ENDNOTES (CONTINUED)

- 22 12 U.S.C. §85. While FinTech companies operating under a special purpose national bank charter would presumably be entitled to the benefits of preemption under Section 85 of the National Bank Act, there is a question of whether purchasers of debt originated by special purpose national banks would be entitled to these same benefits. See *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2<sup>nd</sup> Cir. 2015).
- 23 *OCC White Paper* at 5-6.
- 24 OCC, Bulletin 2015-31 (Jun. 2015), available at <https://www.occ.treas.gov/news-issuances/bulletins/2015/bulletin-2015-31.html>.
- 25 *OCC White Paper* at 5-6.
- 26 The BSA (31 U.S.C. §5311 *et seq*) applies to “financial institutions,” which are defined to include banks as well as certain other entities including money service businesses and loan companies.
- 27 *OCC White Paper* at 7-8. 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. 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. The CFPB would supervise uninsured special purpose national banks engaged in certain consumer financial activities, regardless of their total asset size.
- 28 Remarks by Thomas J. Curry, Comptroller of the Currency, at the Georgetown University Law Center (Dec. 2, 2016), available at <https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.
- 29 *Id.*
- 30 Statement by NYSDFS Superintendent Maria T. Vuollo Regarding the OCC Special Purpose National Bank Charters for FinTech Companies (Dec. 2, 2016), available at <http://www.dfs.ny.gov/about/press/pr1612021.htm>.
- 31 23 C.R.R.-NY I Part 200.
- 32 *OCC White Paper* at 8.
- 33 *Id.*
- 34 *Id.* at 9. The OCC White Paper does not discuss whether any parent company will be obligated to serve as a “source of strength” for the special purpose national bank, which is required of bank holding companies. Capital and liquidity maintenance agreements, which replicate the source of strength obligation, have been used by banking regulators in similar contexts.
- 35 *Id.*
- 36 *Id.*
- 37 In recent years, the small number of *de novo* banks that have been chartered have been required to commit to capital levels above “well capitalized” standards.
- 38 *OCC White Paper* at 10.
- 39 *Id.*
- 40 *Id.* at 11.
- 41 *Id.*
- 42 *Id.* at 12.

ENDNOTES (CONTINUED)

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<sup>43</sup> *Id.* at 13. These requirements are drawn from the requirements that would be applicable to national banks under the OCC's recovery planning rule (Appendix E to 12 C.F.R. Part 30), and experience gained in resolution planning requirements that apply to insured depository institutions and bank holding companies with over \$50 billion in total consolidated assets.

<sup>44</sup> *Id.* at 13-14.

<sup>45</sup> *Id.* at 15.

<sup>46</sup> Comptroller Curry makes clear in his remarks that the special purpose charter is not intended to provide an avenue for regulatory arbitrage. He further notes that granting charters to FinTech companies should not create a competitive disadvantage to banks because FinTech companies are *already* competing with them.

<sup>47</sup> The national bank charter has certain formation and governance requirements that can be somewhat rigid, including with respect to capital structure, as compared to other forms of legal entity (e.g., limited liability companies). The capital requirements for special purpose charters may also limit more exotic capital structures.

<sup>48</sup> 12 C.F.R. Part 201.

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