



April 10, 2017

Thomas Curry
Comptroller of the Currency
U.S. Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219
specialpurposecharter@occ.treas.gov

Re: Responses to the Office of the Comptroller of the Currency's Licensing Manual Draft Supplement on Evaluating Charter Applications from FinTech Companies

Dear Comptroller Curry,

The Milken Institute Center for Financial Markets would like to thank you for the opportunity to respond to the Office of the Comptroller of the Currency (OCC) draft supplemental guidance to the agency's existing Licensing Manual (herein referred to as the "draft supplement") covering the evaluation of charter applications from financial technology (FinTech) firms.¹

The Milken Institute (the Institute)² is a nonprofit, nonpartisan think tank determined to increase global prosperity by advancing collaborative solutions that widen access to capital, create jobs, and improve health. The Center for Financial Markets (CFM)³ promotes financial-market understanding and works to expand access to capital, strengthen and deepen financial markets, and develop innovative financial solutions to the most pressing global challenges.

The Institute again commends efforts being made at the state and federal level to provide for a more uniform, nationwide licensing regime for FinTech companies. The current hodgepodge of licensing requirements across the 50 states, coupled with the lack of a primary federal regulator for FinTech firms makes it exceedingly difficult for innovative platforms to market their products and services across borders. In an era where borderless platforms are leveraging the internet of finance to meet the needs of consumers and small businesses in a more efficient and arguably cost-effective manner, legacy frameworks at the state and federal levels often inhibit innovative platforms from reaching their full potential.

While we are supportive of the OCC's efforts to create a uniform licensing framework with primary oversight from a single federal regulator, we are concerned that the current draft supplement, as proposed, does not go far enough to create a policy framework that supports innovation.

Our comments reflect on the following observations from the OCC's draft supplement:

¹ Available at: <https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-31.html>

² <http://www.milkeninstitute.org/>

³ <http://www.milkeninstitute.org/centers/markets>

- 1. Coordination with other regulators is welcome, provided the OCC makes it clear that it accepts the responsibility as primary federal regulator for FinTech firms.** *The overlapping nature of today's regulatory environment necessitates regulatory coordination to reduce legal uncertainty and ensure a well-informed and straightforward application process.*
- 2. The draft supplement builds in flexibility to the application process, but guiding principles are needed.** *We often talk about the difficulty in finding the right balance between supporting innovation and protecting the customer, but the OCC's draft supplement creates another balancing act between flexibility and legal certainty.*
- 3. The built-in flexibility, while commendable, increases the likelihood for subjective determinations, and protocols are needed to mitigate the potential for delays in the application process.** *The OCC should incorporate into its supplement a set of procedures and protocols to ensure OCC staff respond in a timely manner to a FinTech applicant, given the level of change occurring within the financial services space.*
- 4. The Financial Inclusion Plan is a laudable effort, but the language used to describe the types of covered Special Purpose National Bank (SPNB) models requires clarification.** *While domestic and international efforts to foster financial inclusion should be commended, we are concerned that the language used in the draft supplement could unintentionally capture FinTech platforms whose business models have nothing to do with financial inclusion.*

1. Coordination with other regulators is welcome, provided the OCC makes it clear that it accepts the responsibility as primary federal regulator for FinTech firms.

A FinTech platform's ability to operate across multiple areas in the financial services space and offer a diverse array of products makes it susceptible to oversight from multiple financial services regulatory authorities at the federal level. We are encouraged that the OCC will work closely with additional regulatory agencies that may have oversight and supervisory roles over a SPNB. Communication in a diverse regulatory environment is essential, especially given the importance of the OCC's FinTech charter, and regulators need to ensure uniformity when it comes to assessing a charter application. Contrasting viewpoints between the OCC and other regulators with jurisdiction will make the SPNB charter impractical. As the primary regulator for SPNB charters, the OCC must take the lead role in developing a uniform view of the SPNB among the various regulators that have jurisdiction to ensure the process does not become bogged down as a result of regulatory divergence.

2. The draft supplement builds in flexibility to the application process, but guiding principles are needed.

As was stated in our prior comment letter,⁴ we commend the OCC in recognizing the fact that there are different models in the FinTech space, and for building a degree of flexibility into the application process instead of imposing rigid standards that may not appropriately capture the entirety of a FinTech firm's model or operations.

We would note, however, that too much flexibility could lead to greater degrees of legal uncertainty. Bank-permissible activities, as defined by the OCC, are quite broad, potentially encompassing a wide variety of FinTech platforms engaged in similar, if not the same, activities as nationally chartered banks.

⁴ Milken Institute comment letter to the OCC regarding special purpose national bank charters for FinTech companies, January 15, 2017. Available at: <http://www.milkeninstitute.org/publications/view/843>

Applying oversight appropriate with the model and risks posed by a specific platform will be a massive undertaking. As the OCC notes in its draft supplemental, “The scope of supervision activities will follow a risk-based approach commensurate with the size and complexity of the institution, focusing on any elevated risks and unique supervisory challenges presented by a given SPNB.”

Rather than seek to apply separate, prescriptive requirements to each and every platform that applies to be a SPNB, thereby creating fragmentation in the OCC’s oversight of FinTech platforms and generating confusion as to how two similar platforms are treated, we would suggest the OCC develop principles-based standards that each platform must meet based on its primary activity. Guiding principles would inform applicants of how the OCC views each FinTech activity and its expectations, while providing innovative firms with the ability to maneuver so long as they adhere to the guidelines.

3. The built-in flexibility, while commendable, increases the likelihood for subjective determinations, and protocols are needed to mitigate the potential for delays in the application process.

We would note that there are a number of instances throughout the application process where subjective determinations are likely to be made, resulting in a drain on resources and time. We are concerned that the lack of proper procedures and protocols to ensure a timely response by the OCC staff reviewing each applicant could result in a prolonged application process where delay in response time could ultimately decrease interest in a SPNB charter.

The below list includes a few instances in the application process where subjective determinations are likely to be made. They are:

- Identification of novel or complex issues raised by the applicant;
- Organization of staff to review each applicant;
- Determination in one or more pre-filing meetings whether a platform’s activity is part of the business or banking or falls into a core banking function, including independent legal analysis;
- Judgment as to whether certain portions of a business plan should be kept confidential;
- Identification of specific controls or requirements necessary to a successful business plan;
- Additional approaches or other metrics to consider beyond risk-based capital and leverage requirements to ensure the stability of a FinTech platform, not to mention an analysis of the quantitative and qualitative factors to determine a minimum capital level requirement;
- Assessment of the adequacy of each applicant’s Financial Inclusion Plan (FIP),
- Potential inclusion of an alternative business strategy depending on how the OCC views a platform’s proposed business strategy or structure.

Given the ongoing changes occurring within the financial services space, prompt notice from the regulator to the applicant is essential.

As such, we are also particularly concerned about the OCC’s “significant deviation” policy. Under the OCC’s significant deviation requirements, FinTech platforms for at least the first three years of operation as a national bank would be required to submit notice to the OCC before a significant deviation, as defined in the Comptroller’s Licensing Manual, takes place.⁵ Barring supervisory concerns, the OCC would then issue a non-objection letter to the FinTech platform, allowing the platform to pursue said deviation.

⁵ See: Appendix F, “Significant Deviations After Opening,” of the Comptroller’s Licensing Manual, “Charters,” pp. 105-06. Available at: <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf>

As the OCC is well aware, non-bank FinTech platforms continue to evolve, and business models and objectives are in constant flux. To begin with, over the course of three years a FinTech platform's operations may change considerably. For instance, SoFi, which had originally focused its business plan on student loan refinancing, is now entering the life insurance business.⁶ Square and PayPal, traditionally known as payments platforms, have entered into the lending space.⁷⁸ The proliferation of data and enhanced analytics, for instance, allows FinTech firms to expand their business operations at breathtaking pace, often leveraging the internet of finance to move into different markets and offer products and services beyond what the platform had originally envisioned. FinTech firms can look remarkably different over the course of three years.

It is imperative that the OCC is able to respond to such notice in quick fashion given the level of innovation and change occurring in the financial services sector. The OCC cannot, for example, take roughly nine months to respond to a request for no supervisory objection.⁹ That is a lifetime in the FinTech space. The more time the OCC takes to respond, the less competitive a FinTech platform will be.

We urge the OCC to establish protocols to ensure timely response from OCC staff, thereby allowing FinTech firms to continue through the application process or deviate from their original business plan in a timely manner.

4. The Financial Inclusion Plan is a laudable effort, but the language used to describe the types of covered SPNB models requires clarification.

In its draft supplement, the OCC states that FinTech platforms that are engaged in lending activities or providing financial services to customers or small businesses must file a Financial Inclusion Plan (FIP) along with its business plan.

While the Milken Institute continues to support efforts to enhance financial inclusion around the world, we note that not all FinTech platforms are engaged in efforts to foster inclusion, nor are all of their technologies appropriate for such efforts. Some platforms are simply driving greater efficiencies in certain areas of today's financial markets. For example, more effective trade settlement and robust cybersecurity tools would not lend themselves to financial inclusion efforts. Without further clarifications, the OCC runs the risk of creating more opposition to a laudable effort.

We ask the OCC to clarify this phrase to provide certainty to FinTech platforms interested in a charter, but unsure of whether they are captured by this language.

⁶ Buhayar, Noah, SoFi Expands Into Life Insurance Through Deal With Protective, November 14, 2016. Available at: <https://www.bloomberg.com/news/articles/2016-11-14/sofi-expands-into-life-insurance-through-deal-with-protective>

⁷ Weber, Harrison, Square starts loaning cash to small businesses with 'Square Capital', May 28, 2014. Available at: <http://venturebeat.com/2014/05/28/square-starts-loaning-cash-to-small-businesses-with-square-capital/>

⁸ Barr, Alistair, PayPal launches financing business to drive more sales, September 24, 2013. Available at: <http://www.usatoday.com/story/tech/2013/09/24/paypal-working-capital/2858933/>

⁹ Office of the Comptroller of the Currency response to First National Bank of California's request for no supervisory objection to significantly deviate from its business plan, February 16, 2016. Available at: <https://www.occ.gov/topics/licensing/interpretations-and-actions/2016/feb-2016/scl2016-02.pdf>

The Milken Institute would again like to thank the Office of the Comptroller of the Currency for opening up the draft supplement for comment. The OCC's FinTech charter is a difficult balancing act across three different scales: innovation and consumer protection, bank and non-bank regulation, and flexibility and legal certainty. Finding balance won't be easy, and we would encourage the OCC to remain open to suggestions and comments on how to improve the chartering process for FinTech firms going forward.

Please let us know if we can provide any additional information, and we would be honored to have the opportunity to continue this discussion in person.

Sincerely,

A stylized, handwritten signature in black ink, appearing to read 'JMIV'.

Jackson Mueller
Associate Director
Center for Financial Markets
Milken Institute

A handwritten signature in black ink, appearing to read 'Aron Betru'.

Aron Betru
Managing Director
Center for Financial Markets
Milken Institute