OCC Issues New Policy Permitting FinTechs to Apply for Bank Charters

**Overview:** On July 31, the Office of the Comptroller of the Currency (“OCC”) announced its much-anticipated decision to permit non-depository financial technology (“FinTech”) companies to apply for special purpose national bank (“SPNB”) charters. The announcement came on the heels of a Treasury Department report issued the same day that, among other things, encouraged the OCC to finalize the SPNB charter proposal. Details about the new SPNB charter were published in the form of a Policy Statement and a Supplement to the Comptroller’s Licensing Manual. Although the long awaited policy governing SPNB charter applications has now been issued, the OCC’s awarding of such charters may be affected by renewed litigation challenging the OCC’s authority, as well as the willingness of FinTechs to serve as “guinea pigs” under the new SPNB charter regime.

**The FinTech SPNB Charter Regime**

Under the new policy, a FinTech company is eligible to apply for a SPNB charter if it is engaged in at least one of two “business of banking” core functions—paying checks or lending money. Though these functions are customarily conducted by traditional national banks, the OCC makes clear that the new policy is part of a greater push for the federal banking system to evolve and embrace innovation. The agency explains that, for SPNB purposes, new and non-traditional mechanisms, delivery channels, or technologies may be used to perform these core banking functions. For instance, the Supplement notes that “facilitating payments electronically may be considered the modern equivalent of paying checks,” indicating flexibility in what may be deemed an eligible activity. Moreover, the OCC stresses that each SPNB application will be “evaluated on its unique facts and circumstances,” and acknowledges that SPNB applicants will likely have funding models and risk profiles that are different from traditional applicants.
The new policy offers both benefits and drawbacks for FinTech companies considering pursuit of an SPNB charter. Some of the key issues raised by the new policy include the following:

- **Preemption.** FinTech companies granted a SPNB charter will be supervised and regulated as similarly situated national banks, under one federal regulator. This change has the potential to eliminate inefficiencies and inconsistencies that are characteristic to the current state-based regulatory regime. While the SPNB materials do not address preemption in detail, the Policy Statement affirms that “consistency in the application of laws and regulations across the country” is a worthy policy goal. Interestingly, neither the Supplement nor the Policy Statement explicitly identify a wide variety of state laws that will still apply to SPNBs, including state UDAP and anti-discrimination laws, as previous OCC issuances related to proposals for a FinTech charter have done.

- **Commingling Banking and Commerce.** Notably, the Supplement does not directly address the OCC ban on commingling banking and commerce as applied to FinTechs, though it does outline a process for raising questions about the permissibility of certain activities early in the application process. In addition, FinTech companies may find language in the Policy Statement regarding companies engaging “in the business of banking in new and innovative ways” encouraging. However, a continuing strict interpretation of the line between banking and commerce could have a significant effect on an applicant, and would likely require FinTechs to engage in discussions with the OCC about potential issues during the pre-application period.

- **Capital and Liquidity Requirements.** The OCC did appear to take into account that capital and liquidity requirements may be distinct for FinTech banks and acknowledged that its chartering authority allows it to tailor capital/liquidity requirements based on prudential considerations. However, the OCC’s statements generally appear to conclude that capital and liquidity requirements should not necessarily be reduced—and in some cases, should be increased—for FinTechs, given that such businesses often feature limited on-balance-sheet assets or nontraditional strategies. This could have the consequence of significantly limiting the number of FinTech companies eligible for the SPNB charter.

- **Application of Community Reinvestment Act.** It is noteworthy that the Supplement does not explicitly reference the applicability of the Community Reinvestment Act (“CRA”) to SPNBs, although the Policy Statement does call for SPNBs to meet a “high standard similar to the Community Reinvestment Act’s expectations for national banks that take insured deposits.” The Supplement also calls more generally for an applicant to “demonstrate a commitment to financial inclusion” and, following conditional approval, to “develop policies and procedures that address the SPNB’s implementation of its financial inclusion commitment.” It is possible that the OCC decided to limit discussion regarding the CRA’s applicability to SPNB charters because it has recently commenced a rulemaking to reform the CRA.

**Background on the FinTech SPNB Charter**

The OCC has demonstrated interest in developing a SPNB charter for FinTech companies at least since December 2016, when it released and sought public comment on a paper exploring the subject. Three months later, the agency issued a Draft Licensing Manual Supplement detailing a proposal for how it would evaluate FinTech applications for SPNB charters, and again asking for public comments on the proposal. According to the OCC’s most recent announcement on July 31, the new policy was designed to be consistent with the agency’s review of the public comments from the paper and draft supplement, as well as its extensive stakeholder outreach.
Still, the new SPNB charter has already seen some resistance. Back in 2017, the New York Department of Financial Services (“DFS”) and the Conference of State Bank Supervisors (“CSBS”) filed federal lawsuits, challenging the OCC’s authority to grant the proposed charters. Although both courts had dismissed the actions by May of this year, the dismissals were based on lack of standing and ripeness. Now that the OCC has finalized its proposal, the door remains open for challenges from these same groups—see, for instance, the DFS’s public statement opposing the new policy the same day it was announced—as well as from potential new players, including banks and credit unions.

Outlook: Generally speaking, it appears that FinTech applicants for an SPNB charter will be subject to many of the same OCC regulatory expectations as traditional national banks (e.g., requirements involving capital, liquidity, and financial inclusion commitments, financial stress contingency plans, etc.). Still, the OCC also makes reference to special conditions being imposed on FinTech SPNBs. In some respects, these conditions may be of concern to FinTechs, since they could create requirements that are more burdensome than those faced by traditional banks. On the other hand, there are numerous statements that point to the OCC’s view that flexibility is needed in assessing FinTech charter applications. Ultimately, how the OCC chooses to strike this balance will be borne out by its consideration of individual SPNB charter applications, once FinTech companies begin submitting such applications.