



January 15, 2017

Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219

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's (OCC) request for comments regarding special purpose national bank charters for FinTech companies¹.

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.

We commend Comptroller Curry and the OCC staff for their efforts to develop a modern regulatory framework⁴ responsive to the innovations occurring at the intersection of finance and technology (or "FinTech"). Under a special purpose charter, not only has the OCC established itself as the primary regulator for FinTech chartered firms⁵, but through the use of existing authority the OCC has effectively moved FinTech chartered firms under a regulatory framework applicable to existing federally chartered banks, resulting in regulatory uniformity and a more streamlined compliance process under a single national license.

¹ Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for FinTech Companies, December 2, 2016. Available at: <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html>

² <http://www.milkeninstitute.org/>

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

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

⁴ Chris Brummer and Daniel Gorfine, FinTech: Building a 21st-Century Regulator's Toolkit, October 21, 2014. Available at: <http://www.milkeninstitute.org/publications/view/665>

⁵ The OCC has effectively answered one of the most common questions offered by FinTech platforms, "Who's my primary regulator?" While the Federal Reserve, the FDIC, and the Consumer Financial Protection Bureau may have a role to play in the supervision of a special purpose national bank, not uncommon in the complex US regulatory environment, FinTech chartered firms are now beholden to the requirements and expectations imposed by the OCC, first-and-foremost. Additional information pertaining to the current regulatory environment for FinTech platforms can be viewed here: <http://www.milkeninstitute.org/publications/view/794>.

The white paper, along with the OCC's adoption of a final rule implementing a receivership framework for national banks not insured by the Federal Deposit Insurance Corporation (FDIC)⁶, demonstrates the OCC's commitment to rightsizing regulations to fit the realities and demands of a 21st century, internet-based economy. Rather than recreate the regulatory wheel, the OCC has sought to apply existing regulatory frameworks applicable to national banks to FinTech platforms in a more tailored way. We are encouraged to hear of the OCC's view that special purpose FinTech charters "may need to account for differences in business models and the applicability of certain laws,"⁷ and would urge the agency to continue to bring fresh thinking to decades-old regulatory frameworks amenable to current and future innovations in the financial services industry.

Our comments reflect on the following observations from the OCC's white paper:

- **A special purpose FinTech charter could address competitiveness concerns raised by currently chartered national banks and FinTech platforms.** FinTech chartered firms will now be subject to the regulatory framework applicable to national banks, resulting in a more competitive, nationwide marketplace. However, not every FinTech firm will seek (or have the means to seek) a charter. Despite efforts by the OCC to tailor the charter framework based on a platform's size, complexity, and risks posed, if the costs are not less than or proportional to the benefits of a charter then FinTech firms will continue to register state-by-state or partner with existing chartered institutions.
- **A special purpose FinTech charter will not undermine – but rather enhance – oversight of FinTech chartered platforms.** Contrary to some suggestions, federal laws that govern FinTech platforms and applicable state consumer-protection and fair-treatment laws will continue to apply to special purpose FinTech chartered firms, just as they do for chartered banks under the National Bank Act. Under the OCC charter regime, however, chartered FinTech platforms would now have a direct federal regulator, which can only enhance oversight.
- **The requirements under a forward looking business plan for both insured and uninsured national banks may impede their ability to respond and adapt to changes in the financial services sector.** The FDIC, for insured national banks, and the OCC, for special purpose national banks, require a forward looking business plan and prior approval before any material changes are made to an approved business plan. Given the breadth and rapidity of changes occurring in the financial services sector, business plans for both insured and uninsured national banks may shift considerably and in quick-fashion. If the process to obtain regulatory approval is convoluted or takes considerable time, we could see reduced interest on the part of insured and uninsured national banks to innovate or adapt to change.
- **The perceived ad hoc review process for FinTech platforms interested in seeking a special purpose charter could lead to confusion and claims that the OCC favors a particular model or activity.** The lack of guidelines and/or parameters as to whom the OCC views as worthy of a special purpose charter could result in an inundation of FinTech applicants interested in a FinTech charter.

⁶ OCC Bulletin 2016-46, December 20, 2016.

⁷ Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for FinTech Companies, December 2, 2016. Available at: <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html>

- **The OCC’s interest in determining how a special purpose charter could address borrower “protection gaps” between consumer and small business finance risks conflating the two forms of finance, irrespective of the models and current efforts to improve disclosure in the small business finance space.** Consumer and small business financing are distinct from one-another and shaped by a long history of regulations and legal precedent. Attempts to address the gaps risk conflating the two forms of finance without accounting for the different models and products deployed in the small business financing space.

A special purpose FinTech charter could address competitiveness concerns raised by currently chartered national banks and FinTech platforms.

A special purpose charter for FinTech firms has the potential to reduce competitiveness concerns raised by both nationally chartered banks and FinTech platforms. Nationally chartered banks argue that non-bank FinTech platforms should be brought under the same financial regulatory frameworks that they’re subjected to, while FinTech firms continue to make the case that forcibly having to register state-by-state or partner with an existing chartered institution reduces the level of competition in the marketplace and does not make sense at a time when borderless platforms are leveraging the internet of finance.

A special purpose charter enhances uniformity and promotes competition by placing FinTech firms under a regulatory framework applicable to nationally chartered banks, while providing FinTech platforms with the ability to launch their products and services nationally without having to go through cumbersome state-by-state licensing requirements or relinquish control/oversight of operations through a partnership with an existing chartered institution.

We note, however, that these competitiveness concerns will only be reduced if the OCC is able to properly tailor its chartering authority in a responsible manner that is reflective of the models, activities and actual risks posed by a FinTech firm, where the costs are proportional or less than the benefits that come with a special purpose charter. The advantages of a special purpose charter come with heightened regulatory requirements, as it should, but it is unlikely that platforms will engage with the OCC if the costs of a federal charter go beyond the intended benefits.

A special purpose FinTech charter will not undermine – but rather enhance – oversight of FinTech chartered platforms.

By placing newly chartered FinTech platforms under the OCC’s supervision, not only has the OCC placed itself as the prominent supervisory authority for FinTech chartered firms, but it has effectively removed the “shadow” from “shadow banking” by moving FinTech firms under a more transparent, well-established banking regulatory framework.

The current patchwork of federal and state regulations applicable to FinTech platforms⁸, particularly those offering bank permissible activities, can cause confusion and result in gaps in regulatory oversight. Under a special purpose charter, many of the current laws and regulations applicable to FinTech firms will be brought under a more coherent, well-established chartering framework tailored to the activities and risks posed by a platform that are now directly overseen by a federal regulator. Concerns regarding the wholesale abdication of regulatory oversight by state or federal regulators once a FinTech firm

⁸ See: Comments to the OCC’s Responsible Innovation Framework, the U.S. Treasury Department’s Request for Information on Marketplace Lending.

obtains a special purpose charter are unfounded and detrimental to efforts to adapt legacy regulatory frameworks to the realities of the 21st century.

The requirements under a forward looking business plan for both insured and uninsured national banks may impede their ability to respond and adapt to changes in the financial services sector.

The OCC and the FDIC require uninsured and insured national banks, respectively, to provide a forward looking business plan, as well as advanced notification (and regulatory approval) before material changes can be made to an approved plan.

In an environment where innovation and technological advancement are fundamentally changing how the end customer receives and interacts with financial services and products, FinTech platforms and traditional banks are constantly having to recalibrate their services and introduce new products to meet market demands in order to remain competitive. If the process to receive regulatory approval to deviate from an original business plan is convoluted or takes considerable time to complete, it could reduce a chartered firms' desire to expand its business models and activities beyond currently approved practices.

We encourage both the OCC and the FDIC to reexamine existing business plan requirements to determine whether the current level of prescriptiveness required is detrimental to a chartered firms' ability to respond effectively to the pace of change and innovations occurring in today's financial services space.

With regards to lending, the OCC states in its white paper that a proposed special purpose national bank should consider certain elements in developing the financial inclusion component of its business plan, including "full information regarding how the proposed bank's policies, procedures, and practices are designed to ensure products and services are offered on a fair and non-discriminatory basis." We recommend the OCC provide clarification to the phrase "full information" as it is inherently broad.

The perceived ad hoc review process for FinTech platforms interested in seeking a special purpose charter could lead to confusion and claims that the OCC favors a particular model or activity.

In its white paper the OCC notes that "there is no legal limitation on the type of 'special purpose' for which a national bank charter may be granted, so long as the entity engages in fiduciary activities or in activities that include receiving deposits, paying checks, or lending money."⁹ The OCC also indicates that it will consider "on a case-by-case basis the permissibility of a new activity that a company seeking a special purpose charter wishes to conduct."

While the OCC provides legal justification for offering special purpose charters to FinTech firms, we are concerned about the lack of clear guidelines and parameters in determining whom to charter. The lack of guidance could add to the perception that this is an arbitrary process and could result in claims that the OCC is favoring a particular activity or company over another, which could prolong the application process or result in the OCC becoming reluctant to provide special purpose charters.

The establishment of guidelines and parameters will be critical to understanding whom (and how) the OCC intends to charter. It is important to note that while the OCC has wisely determined not to define

⁹ Office of the Comptroller of the Currency, Exploring Special Purpose National Bank Charters for FinTech Companies, December 2, 2016. Available at: <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html>

“FinTech” for the purposes of a special purpose national charter, the wide variety of models and activities employed by FinTech firms¹⁰ crisscrossing various bank-permissible activities, in some cases, will present a challenge to the OCC, especially if guidelines and parameters are not established or robust enough. This will likely result in the OCC becoming inundated with requests from a variety of firms confused as to whom the OCC views as chartable¹¹.

We recommend the OCC develop robust guidelines and parameters to provide FinTech platforms with clarity in whom (and how) the OCC intends to charter in order to avoid arbitrariness and potential inundation from all sorts of firms interested in a special purpose charter.

The OCC’s interest in determining how a special purpose charter could address borrower “protection gaps” between consumer and small business finance risks conflating the two forms of finance, irrespective of the models and efforts to improve disclosure in the small business finance space. It is perplexing to see the inclusion of question six in the list of questions the OCC provided at the end of the white paper as we believe it to be outside the scope of this effort. That said, it is important for regulators to understand the distinctions between consumer and small business finance and the potential ramifications of extending one-size-fits-all consumer protections on small business borrowers irrespective of the types of business models¹² in existence.

This is not the first report to suggest regulators take a closer look at the “protection gaps” between consumer and small business finance¹³. While interest in applying additional protections covering small business finance is not unwarranted, we would encourage regulators to be mindful of the different small business products and models available in the market and to engage with industry stakeholders currently involved in efforts to improve small business lending disclosures before suggesting the need for new laws or policies¹⁴.

The Milken Institute appreciates the opportunity to provide feedback on OCC efforts to develop special purpose national bank charters for FinTech firms. Properly tailoring special purpose charters to certain FinTech platforms’ models has the potential to provide firms with much needed legal certainty, enhance

¹⁰ Without a universal definition of FinTech, industry estimates of the size of the FinTech sector may differ. For instance, a recent EY report, *Capital Markets: innovation and the FinTech landscape*, finds that there are more than 5,000 FinTech firms operating around the world. However, according to a Boston Consulting Group report, *Fintech in Capital Markets: A Land of Opportunity*, there are more than 8,000 FinTech firms in operation.

¹¹ Lalita Clozel, Will OCC's New Charter Go Beyond FinTech Firms?, January 3, 2017. Available at: <http://www.americanbanker.com/news/law-regulation/will-occs-new-charter-go-beyond-fintech-firms-1093150-1.html>

¹² For an in-depth look at various FinTech consumer and small business financing platforms, see here: <http://www.milkeninstitute.org/publications/view/806>

¹³ In the U.S. Treasury report, *Opportunities and Challenges in Online Marketplace Lending*, the agency states there is “strong evidence” that small business loans under \$100,000 share common characteristics with consumer loans. Furthermore, the report also notes that the industry has begun to organize around transparent pricing and terms before suggesting “this can be done without adding undue burden or cost to this emerging industry.” Available at: https://www.treasury.gov/connect/blog/Documents/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf

¹⁴ Industry-led attempts at more transparent borrower disclosures include: Innovative Lending Platform Association’s Straightforward Metrics Around Rate and Total cost (SMART) Box model disclosures unveiled in October 2016, the Coalition for Responsible Business Finance’s code of ethics and responsible business practices unveiled in July 2016, and the Responsible Business Lending Coalition’s Borrowers’ Bill of Rights unveiled in August of 2015.

transparency, and provide the end user with more choice and on competitive terms. We are living in an era of limitless technological innovation and advancement composed of borderless platforms that leverage the internet of finance. We are encouraged to see U.S. regulators beginning to adapt/modernize legacy financial regulatory frameworks to fit the demands and realities of the 21st century.

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