

OCC to Accept Applications from Fintech Companies Seeking National Bank Charters

Article By:

Alan S. Kaplinsky

Jeremy T. Rosenblum

Scott M. Pearson

Scott A. Coleman

The Office of the Comptroller of the Currency's (OCC) announcement this week that it will begin accepting applications for special purpose national bank (SPNB) charters from financial technology (Fintech) companies represents a major development that provides Fintech companies with the opportunity to take advantage of the benefits of federal preemption available to full-service national banks. Most significantly, the OCC's decision means that obtaining an SPNB charter is now an option for Fintech companies that would be disqualified from obtaining a full-service national bank charter due to their own non-financial activities or those of an affiliate.

As set forth in a new [Policy Statement](#), it is now the OCC's policy to consider applications for SPNB charters from Fintech companies "that are engaged in the business of banking but do not take deposits." The statement confirms the OCC's authority under the National Bank Act (NBA) to grant the charters and generally describes the chartering standards the OCC will apply and its supervisory expectations for Fintech companies that receive an SPNB charter. The application and decision process is described more fully in a supplement to the OCC's existing Licensing Manual, "[Considering Charter Applications from Financial Technology Companies](#)." The supplement describes an SPNB as a bank "that would engage in one or more of the core banking activities of paying checks or lending money, but would not be insured by the Federal Deposit Insurance Corporation (FDIC)."

The supplement discusses:

- the application process, including prefiling communications with the OCC's Office of Innovation and Licensing Department;
- key factors considered by the OCC in reviewing an application, including the qualifications and experience of organizers, managers, and directors, as well as the applicants' business

plan, and the SPNB's capital and liquidity, commitment to financial inclusion, and contingency planning;

- the OCC's chartering decision, including conditions of approval; and
- OCC supervision of approved SPNBs.

Below are some items of particular note in the supplement:

- An SPNB's organizers will be expected to propose a minimum level of capital the bank will meet or exceed at all times. If preliminary approval of an SPNB charter is granted, the approval will include a condition specifying the minimum level of capital that the bank must meet or exceed at all times. Organizers will also be expected to describe how the SPNB can be funded and maintain sufficient liquidity under stressed conditions.
- Because it is uninsured, an SPNB, as a condition of charter approval, must have a contingency plan that includes options to sell itself, wind down, or merge with a nonbank affiliate, if necessary.
- Assessments imposed on an SPNB as a condition of charter approval will be modified from those charged to full-service national banks based on factors tailored to the SPNB's business model.
- In considering applications, the OCC will coordinate with other regulators to facilitate consideration of any applications or approvals required by those regulators.
- A pending enforcement action involving a significant supervisory matter may be grounds for denial of an application. If an application is approved for a company that has an obligation to remediate or pay penalties for violations cited by another regulator, the OCC will ensure that the obligation is carried forward and enforced through conditions imposed on a charter approval.

A SPNB charter would allow Fintech companies that engage in lending activities or payment services to enjoy the benefits of federal preemption afforded to full-service national banks under the NBA. (In the supplement, the OCC states that "facilitating payments electronically may be considered the modern equivalent of paying checks.") An SPNB charter would allow such Fintech companies to avoid burdensome state licensing requirements for lending activities and money transmission. They would also be entitled to the NBA's preemption of state consumer financial laws that "prevent[] or substantially interfere[] with the national bank's exercise of its powers."

For Fintech companies engaged in lending activities, an SPNB's entitlement to federal preemption would eliminate the need for a bank partner and the potential for "true lender," *Madden*, and other legal challenges arising from such relationships. In particular, an SPNB would be entitled to the NBA's preemption of state usury laws so that it could export the maximum interest rate allowed in the state where the bank is located and make loans in other states without regard to their usury laws.

Under the Bank Holding Company Act (BHCA), a "bank" is defined as an institution that is an "insured bank" as defined in the Federal Deposit Insurance Act (FDIA) or that both receives "demand

deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others" and makes "commercial loans." The parent company of an SPNB that does not take deposits, but only makes loans, will not be deemed a bank holding company under the BHCA or be subject to Federal Reserve oversight. As a result, the activities in which the parent company could engage would not be restricted by the BHCA. It is uncertain, however, whether the Federal Reserve would assert jurisdiction over, and thereby seek to restrict the activities of, the parent company of an SPNB that offers payments services that are akin to the payment of checks but does not have deposit insurance or take deposits.

SPNBs also would not be subject to the FDIA's provisions applicable to "insured depository institutions" because they would not be required to have deposit insurance. However, in the Policy Statement, the OCC made clear that it would not approve charter applications from Fintech companies that include "financial products and services that have predatory, unfair, or deceptive features or that pose undue risk to consumer protection."

While not discussed in the supplement, it appears that a Fintech company holding an SPNB charter would be required to be a member of the Federal Reserve System and be subject to oversight as a member bank. As a Federal Reserve member, an SPNB would have access to the Federal Reserve discount window and other Federal Reserve services. To become a Federal Reserve member, an SPNB would have to subscribe to the capital stock of the Federal Reserve, a requirement that should not be particularly burdensome. However, since Federal Reserve membership would make the affiliate transaction restrictions of Sections 23A and 23B of the Federal Reserve Act applicable to the SPNB, a Fintech company interested in obtaining an SPNB charter should consider the potential impact of these restrictions.

The OCC's decision to begin accepting SPNB charter applications from nondepository Fintech companies is consistent with the views of the Treasury Department set forth in its report, "[Nonbank Financials, Fintech, and Innovation](#)," which was issued the same day as the OCC's announcement. In the report, the Treasury Department endorsed the OCC's proposal to grant the charters and recommended that it finalize the proposal.

The OCC's decision to begin accepting applications, however, is likely to be challenged by state regulators who have opposed the proposal. Lawsuits challenging the OCC's authority to grant SPNB charters to nondepository Fintech companies filed by the Conference of State Bank Supervisors (CSBS) and the New York Department of Financial Services (DFS) were dismissed for lack of standing and ripeness by federal district courts in [D.C.](#) and [New York](#) respectively. Indeed, the DFS Superintendent [released a statement](#) on the day of the OCC's announcement in which she stated that the OCC's decision to begin accepting the charter applications was "wrongly supported by the Treasury Department" and "is clearly not authorized under the [NBA]." In addition, according to media reports, the OCC's decision has also been criticized by the CSBS President.

It is unclear whether, based on the decisions dismissing the two lawsuits, the OCC's announcement that it will begin accepting applications would be sufficient to allow state regulators to file new lawsuits that would survive a motion to dismiss for lack of standing and ripeness or whether the OCC would first have to approve an application. In its opinion dismissing the DFS complaint, the court noted that the DFS had sent it a letter asking it to require the OCC to promptly notify the DFS "if and when" the OCC decided to accept SPNB charter applications and allow the DFS to reinstate the case and litigate its challenge before an application is approved. The court indicated that it did not have the subject matter jurisdiction necessary to grant the relief requested but indicated that it would be "sensible" for the OCC to provide such notice.

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