UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and KEITH A. NOREIKA, in his official capacity as Acting Comptroller of the Currency, Defendants.	)	Civil Action No. 17-CV-00763 (JEB)

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

Defendants Office of the Comptroller of the Currency and Keith A. Noreika in his official capacity as Acting Comptroller of the Currency (together, "OCC"), by and through undersigned counsel, hereby move to dismiss this action for lack of jurisdiction and failure to state a claim upon which relief can be granted under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The reasons supporting this motion are set forth in the accompanying Memorandum of Points and Authorities and attached exhibits. A proposed order is also attached for the Court's consideration.

THEREFORE, the OCC respectfully requests that the instant motion be GRANTED and that this action be DISMISSED.

Date: August 2, 2017

Respectfully submitted,

/*s*/Douglas B. Jordan

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CERTIFICATE OF SERVICE

In accordance with LCvR 5.3, I certify that on August 2, 2017, a true and correct copy of the foregoing *Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim* was served on all counsel of record through the Court's CM/ECF system.

Respectfully submitted,

/s/Douglas B. Jordan

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[PROPOSED] ORDER

THIS MATTER having come before the Court on Defendants' Motion to Dismiss and the opposition thereto, and the Court having considered the matter, it is hereby:

ORDERED that Defendants' Motion to Dismiss is GRANTED and this action is hereby DISMISSED.

SO ORDERED.

Dated: _____

_____
JAMES E. BOASBERG
United States District Judge

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

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INTRODUCTION

The Complaint by the Conference of State Bank Supervisors ("CSBS") represents a fatally premature attempt to invoke the jurisdiction of this Court to remedy a speculative harm that CSBS alleges may arise from future action by the Office of the Comptroller of the Currency ("OCC") – action that the OCC may never take. The CSBS Complaint challenges: (1) provisions of an OCC regulation amended in 2003 to authorize special purpose charters that have, to date, never been used to charter a bank; and (2) a series of public OCC statements as part of an ongoing policy initiative that CSBS alleges to be a final decision by the OCC to make charters available to "nonbank" financial technology ("fintech") companies. CSBS's denomination of these public statements as a "Nonbank Charter Decision," Compl. ¶ 52, is wrong in two fundamental respects: it ignores that the proposal contemplates a form of national bank charter and that no final decision has been reached.

The Court should conclude that none of the allegations contained in the Complaint presents either a justiciable case or controversy under the Constitution or a reviewable final agency action under the Administrative Procedure Act. Stated succinctly, the OCC has not yet reached any decision with respect to whether it will offer the specific type of national bank charter — a charter for a Special Purpose National Bank ("SPNB") that does not take deposits and conducts activities other than fiduciary activities (referred to hereinafter as a "5.20(e)(1) Charter") — that is the subject of the present challenge. As noted recently by Acting Comptroller of the Currency Keith A. Noreika, the OCC is actively exploring different approaches to leveraging its authority to charter national banks that would allow the banking sector to take advantage of new ideas and new technology. *See Keith A. Noreika, Acting Comptroller, the Office of the Comptroller of the Currency, Exchequer Club Remarks* (July 19,

2017) ("Exchequer Speech") (attached hereto as Exhibit A). While the OCC is studying all aspects of the issue, it is clear that the OCC has made no final decision whether it will make a 5.20(e)(1) Charter available. Ex. A at 9. Acting Comptroller Noreika has clarified for the public record that the OCC is not accepting applications for this type of charter at this time and, if a decision were made to proceed, an application for a 5.20(e)(1) Charter would be subject to a thorough and public review process.

In short, nothing approaching what CSBS has labeled in their Complaint as the OCC's "Nonbank Charter Decision" has occurred. Given the scant record[1] to date, including the absence of allegations of cognizable harm in the Complaint and the as-yet interlocutory process embarked upon by the OCC to determine the position that it may eventually take, the Court should conclude that the facts as alleged do not present a justiciable controversy. Accordingly, the Court should dismiss CSBS's Complaint.

In the alternative, should the Court reach the merits of the OCC's authority to promulgate 12 C.F.R. § 5.20(e)(1), the Complaint should be dismissed because the OCC's authoritative interpretation of the ambiguous statutory term "the business of banking" is entitled to deference under the *Chevron* framework and is supported by Supreme Court and D.C. Circuit authority.

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[1] In deciding whether to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6), a court may consider (1) the facts alleged in the complaint, (2) documents attached as exhibits or incorporated by reference in the complaint, and (3) matters about which a court may take judicial notice. *See*, *e.g.*, *Ahuja v. Detica Inc.*, 742 F. Supp. 2d 96, 102 (D.D.C. 2010); *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002). Defendants' Exhibits B-G are documents that are attached to, referred to, or relied upon in the Complaint or its exhibits. Defendants' Exhibit A is a public speech by the Acting Comptroller of the Currency available on the OCC's public website at https://www.occ.gov/news-issuances/speeches/2017/pub-speech-2017-82.pdf. (Defendants' Exhibits B-G are also available on the OCC's public website.) Defendants' Exhibit H, which is a docket sheet from the U.S. District Court for the Middle District of Florida. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (court may take judicial notice of facts contained in public records of other proceedings).

The OCC's exploration of mechanisms that could enable national banks to provide financial technology services to customers rests comfortably within the long legacy of the evolution of national bank powers endorsed by the Ninth Circuit in 1977: "[W]hatever the scope of [incidental bank] powers may be, we believe that the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977).

BACKGROUND

I. GENERAL BACKGROUND

The OCC is an independent bureau of the U.S. Department of the Treasury with primary supervisory responsibility over national banks under the National Bank Act of 1864, codified at 12 U.S.C. § 1 *et seq.*, as amended. The OCC is charged with assuring that national banks (and other institutions subject to its jurisdiction) operate in a safe and sound manner and in compliance with applicable laws and regulations and that they offer fair access to financial services and provide fair treatment of customers. 12 U.S.C. § 1(a). The OCC's activities in furtherance of its mission include receiving applications for and determining whether to grant new national bank charters to associations formed to carry out the "business of banking." *See*, *e.g.*, 12 U.S.C. §§ 21, 26, 27. Under Section 27(a), the OCC may grant a charter "[i]f . . . it appears that such association is lawfully entitled to commence the business of banking" and that "such association has complied with all provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business." "[T]he Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

II. OCC CHARTERING PROCEDURES

The OCC's chartering regulations, set forth at 12 C.F.R. Part 5 ("Part 5"), provide a thorough and public process for receiving and considering applications for national bank charters. The OCC's procedures for implementing its chartering regulations are collected in the Comptroller's Licensing Manual, Charters (Sept. 2016) ("Charters Booklet" or "CB") (attached hereto as "Exhibit B"). While the OCC charters various types of SPNBs with limited purpose operations, *see* Ex. B at 1, CSBS is challenging only one subset of national banks, defined for the purpose of this brief as 5.20(e)(1) Charters – SPNBs that do not take deposits.

Under its statutory authorities, the OCC may charter new national banks to undertake either "full service" or more limited "special purpose" operations. Ex. B at 1. A full-service bank generally exercises broad express and implied powers consistent with its charter. *Id.* at 50. In contrast, special purpose banks may offer only a small number of products, target a limited customer base, or have narrowly targeted business plans. *Id.* Banks with special purpose operations may include "trust banks, credit card banks,[2] bankers' banks, community development banks, cash management banks, and other banks that limit their activities." *Id.* at 1. As discussed more fully below, Part 5 was amended in 2003 to clarify the OCC's interpretation of its authority to charter an SPNB. *See* 12 C.F.R. § 5.20(e)(1) (a "bank may be a special purpose bank that limits its activities to fiduciary activities or any other activities within the business of banking").

[2] Credit card banks are "institutions whose primary business line is the issuance of credit cards, the generation of credit card receivables, and activities incidental to that line of business. Some credit card banks may have other lines of business but they are not generally material to the bank." Ex. B at 51.

Applications for all national bank charters are submitted to the OCC's Licensing Division and are processed in accordance with the OCC's Part 5 regulations. The application process is initiated by publishing a newspaper notice of the application, followed by receipt of public comments. The OCC reviews each application on a case-by-case basis to determine whether statutory and regulatory requirements have been met. Ex. B at 1, 4. If the application is successful, the OCC grants charters in two steps: a preliminary conditional approval and then a final approval. *Id* at 3. Prior to final approval, the OCC generally requires the organizers to raise capital within 12 months and open within 18 months of a grant of preliminary conditional approval. *Id.* If the organizers receive final approval, the OCC will issue a charter and the new bank can commence the business of banking. *Id.* at 3, 39, 48; 12 C.F.R. § 5.20(d)(3).

III. THE ALLEGED "NONBANK CHARTER DECISION"

In an attempt to manufacture a final agency action that would be subject to judicial review, *i.e.* a final decision by the OCC to grant a 5.20(e)(1) Charter, CSBS draws upon speeches by the Comptroller of the Currency, agency "white papers," a draft supplement to an OCC manual, and an amendment of a regulation in 2003 to construct what CSBS calls the "Nonbank Charter Decision." Compl. ¶ 52. While a decision by the OCC on a specific charter application would be a final agency action subject to judicial review, *see Camp v. Pitts*, 411 U.S. 138, 141-42 (1973), neither the 2003 regulation nor the various agency statements relied upon by CSBS provide the necessary foundation for their claims.

A. The 2003 Regulatory Amendment

In 2003, the OCC amended its chartering regulations to clarify its authority to charter an SPNB. 68 Fed. Reg. 70122 (Dec. 17, 2003). Among the amendments initially proposed by the OCC on February 7, 2003 was a revision to Section 5.20(e)(1) providing that a newly organized

bank "may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking." 68 Fed. Reg. 6363, 6373 (Feb. 7, 2003). In the Final Rule, published on December 17, 2003, the OCC clarified the scope of activities permissible for a special purpose bank to respond to commenters' concerns that the proposed amendment was too broad and that the special purpose charter had the potential to extend to activities "only loosely related to banking." 68 Fed. Reg. at 70126. The final rule clarified that "[a] special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits; paying checks; or lending money." *Id.* at 70129. The OCC explained that these core banking functions were based on 12 U.S.C. § 36, "which identifies activities that cause a facility to be considered a bank branch." *Id.* at 70126.

Since adopting this amendment, the OCC has not used its authority under 12 C.F.R. § 5.20(e)(1) to issue a national bank charter to an SPNB of the type that is identified in the Complaint: a charter for a bank that does not receive deposits. More fundamentally, the OCC has not yet received any applications for a 5.20(e)(1) Charter, nor has it yet reached a final decision regarding whether the agency will ultimately make a 5.20(e)(1) Charter available to a fintech. *See infra* pp. 8-9.

B. OCC Policy Initiatives Related to Responsible Innovation and the Agency's Chartering Authority: 2015-2017

The question whether the OCC should use its chartering authority to bring fintechs into the national banking system emerged out of a broader initiative, launched in 2015 by Comptroller of the Currency Thomas J. Curry. This broader initiative examined how the OCC could best support responsible innovation in the financial services industry. *See Thomas J. Curry, Former Comptroller, The Office of the Comptroller of the Currency, Remarks for Federal*

Home Loan Bank of Chicago (Aug. 7, 2015) (attached hereto as Exhibit C). While CSBS's Complaint cites a number of OCC actions in this area as proof that the agency has already made up its mind regarding 5.20(e)(1) Charters, it places particular importance on three events: a speech by the Comptroller in December of 2016, the issuance of a white paper on the subject of SPNBs, and a draft proposed supplement to the OCC's chartering manual.

1. Former Comptroller Curry's December 2016 Speech

In a speech at the Georgetown University Law Center on December 2, 2016, Comptroller Curry announced that "the OCC *will* move forward with chartering financial technology companies that offer bank products and services and meet our high standards and chartering requirements." *Thomas J. Curry, Former Comptroller, the Office of the Comptroller of the Currency, Remarks at Georgetown University Law Center: Special Purpose National Bank Charters for Fintech Companies* (Dec. 2, 2016) ("December Speech") (attached hereto as Exhibit D) at 3 (emphasis in original). Comptroller Curry told the audience that he had "asked [OCC] staff to develop and implement a formal agency policy for evaluating applications for fintech charters." *Id.* at 5.

2. SPNB White Paper and Request for Public Comment

In tandem with Comptroller Curry's December 2016 speech, the OCC published a white paper titled *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016) ("SPNB White Paper") (attached hereto as Exhibit E). The SPNB White Paper summarizes conditions under which the OCC might grant an SPNB charter to a fintech. *Id.* at 2. The SPNB White Paper (1) addressed how such charters "could advance important policy objectives, such as enhancing the ways in which financial services are provided in the 21st century, while ensuring that new fintech banks operate in a safe and sound manner, support their

communities, promote financial inclusion, and protect customers;" (2) reviewed the various federal and state law standards that would be applicable to fintech SPNBs; (3) explained how the OCC could impose other requirements on SPNBs as conditions of charter approval, such as the safety and soundness standards found at 12 U.S.C. § 1831p-1; and (4) outlined baseline supervisory expectations. *Id.* at 5-6, 8-13.

The OCC solicited public feedback on the SPNB White Paper. *Id.* at 15-16. In March 2017, the OCC published *OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies* (Mar. 2017) ("Explanatory Statement") (attached hereto as Exhibit F). The Explanatory Statement reviewed more than 100 public comments that the OCC received on the SPNB White Paper on topics such as consumer protection, regulatory and supervisory standards, and the separation of banking and commerce. *Id*. Simultaneously, the OCC issued a draft supplement to the Comptroller's Licensing Manual, titled *Evaluating Charter Applications from Financial Technology Companies* (Mar. 2017) ("Draft Supplement") (attached hereto as Exhibit G), for public comment. The comment period on the Draft Supplement closed on April 14, 2017. Ex. F at 1. The OCC has not issued a final supplement to the Comptroller's Licensing Manual dealing with applications for 5.20(e)(1) Charters from fintechs.

IV. ACTING COMPTROLLER NOREIKA'S SPEECH TO THE EXCHEQUER CLUB: JULY 19, 2017

In a speech to the Exchequer Club on July 19, 2017, Acting Comptroller Noreika summarized the OCC's efforts to date and the potential direction of the agency in the area of fintech and "responsible innovation." Acting Comptroller Noreika told his audience that the OCC was considering the "idea of granting national bank charters to fintech companies that are engaged in the business of banking and requiring them to meet the high standards for receiving a

charter." Ex. A at 4. He said: "Quite simply, I think it is a good idea that deserves the thorough analysis and the careful consideration we are giving it." *Id*. at 5. Crucially, however, he clearly indicated that the OCC had not received any applications from nondepository companies for 5.20(e)(1) Charters, and that the precise course that the OCC will pursue with this type of charter remains undecided:

> [A]t this point the OCC has not determined whether it will actually accept or act upon applications from nondepository fintech companies for special purpose national bank charters that rely upon [Section 5.20(e)(1)]. And, to be clear, we have not received, nor are we evaluating, any such applications from nondepository fintech companies.

Id. at 9. As possible alternatives to a *de novo* 5.20(e)(1) Charter, the Acting Comptroller suggested that the OCC might consider addressing fintech innovation using full-service national bank and federal savings association charters, or other special purpose national bank charters, such as trust banks, banker's banks, and credit card banks. *Id.*

ARGUMENT

I. BECAUSE CSBS FAILS TO SHOW COGNIZABLE HARM TO ITSELF OR TO ITS MEMBERS CAUSED BY ANY OCC ACTION, CSBS LACKS ARTICLE III STANDING AND THIS COURT LACKS JURISDICTION OVER THE COMPLAINT

The Court should dismiss this case because CSBS has not and cannot make the showing of standing necessary to meet the "case or controversy" requirement of Article III of the Constitution. Because neither the relevant provisions of Section 5.20(e)(1) nor the series of OCC public statements identified in the Complaint has had any cognizable real-world effect on anyone, including the members of CSBS, CSBS cannot show, as required, any injury-in-fact caused by the OCC's actions that would be redressed by the requested relief.

The "irreducible constitutional minimum" for standing contains three requirements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). "First and foremost," a plaintiff

must allege an "injury in fact – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id*. at 103 (internal quotations omitted). "Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Id.* "This triad of injury in fact, causation and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Id.* at 103-04 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 103-04 (D.D.C. 2016). "A deficiency on any one of the three prongs suffices to defeat standing." *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000).

Here, CSBS has not and cannot establish any of these requirements because the OCC has yet to take any relevant action that could have a concrete effect of any kind. No tangible effect on CSBS or CSBS's members could even arguably occur until a 5.20(e)(1) Charter has been issued to a specific applicant. This has not happened. No Section 5.20(e)(1) Charter has been issued (*i.e.*, to a non-deposit taking bank). *See* Ex. A at 9. No applications for such an institution have been received by the OCC. *Id.* No final procedures for processing such an application by the OCC are in place – the proposed supplement to the chartering manual remains in draft. *See supra* p. 8. Each of the OCC's public statements in 2016 and 2017 identified in the Complaint were part of ongoing policy development that is not final. *See supra* pp. 6-9.

When and if an application is received, the application would require agency consideration that would entail a public comment process before any preliminary or final approval would be possible. *See supra* p. 5. Again, there is no current or near-term prospect that

an application for a 5.20(e)(1) Charter will come under active agency consideration, let alone the more distant possibility that an applicant would actually commence the business of banking under such a charter. Accordingly, CSBS has not and cannot meet its burden of showing a "concrete" "actual or imminent" injury-in-fact, and *a fortiori* cannot show causation or redressability.

CSBS makes no attempt to show how the three-part test for standing is satisfied. This is because each of the alleged "harms" asserted in the Complaint is vague, future-oriented and, above all, speculative:

- The "Nonbank Charter Decision triggers significant risks to traditional areas of state concern," Compl. ¶ 92;
- The Nonbank Charter Decision "threatens to disrupt" the "integrity and stability of the U.S. dual banking system and bank regulation," *id.* at ¶ 93;
- The OCC's actions "impede the states' ability to continue their existing regulation of financial service companies within their borders and to enforce state laws designed to protect the consuming public and ensure the safety or soundness of nondepository companies," and creates difficulties in detecting unlicensed activity, *id.* at ¶ 94; and
- The "Decision creates conflicts with state law and threatens to preempt state sovereign interests," *id.* at ¶¶ 96-98.

The fundamental flaw in CSBS's argument is that the harms it alleges are inchoate. Until the OCC actually issues a 5.20(e)(1) Charter, *none* of the harms referenced by CSBS can materialize or be identified with the requisite certainty; the alleged harms are now merely hypothetical. *Cf. Mylan Pharm., Inc. v. F.D.A.*, 789 F. Supp. 2d 1, 6-10 (D.D.C. 2011) (no standing where drug approval process had not reached even tentative approval). "A 'concrete' injury must be *de facto*; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). CSBS has averred no such existing injury. "Allegations of possible future injury do not satisfy

the requirements of Article III. A threatened injury must be *certainly impending* to constitute injury in fact." *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 24 (D.D.C. 2014) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149 (1990)).

CSBS's only statement regarding standing is a conclusory allegation as to "associational standing" derivative of the alleged harm to its members. Compl. ¶ 15, citing *CSBS v. Lord*, 532 F. Supp. 694 (D.D.C. 1982), *aff'd CSBS v. Conover*, 710 F.2d 878 (D.C. Cir. 1983). But CSBS makes no attempt to show how its individual members satisfy the three-part test for standing, a necessary element to establish its associational standing. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1243-44 (D.C. Cir. 2003); *Int'l Acad. of Oral Med. & Toxicology v. F.D.A.*, 195 F. Supp. 3d 243, 263 (D.D.C. 2016). In *Lord*, a final OCC regulation addressing adjustable rate mortgages had a preemptive effect on state laws and thus an actual ongoing effect upon CSBS members. 532 F. Supp. at 695-96; *see also CSBS v. Conover*, 710 F.2d at 880-81. This Court found associational standing in a case where plaintiff's members were "directly regulated by the regulation being challenged" and "suffering from additional, allegedly unlawful reporting requirements, causing them injury." *Florida Bankers Ass'n v. U.S. Dept. of the Treasury*, 19 F. Supp. 3d 111, 120 (D.D.C. 2014), *judgment vacated on other grounds by* 799 F.3d 1065 (D.C. Cir. 2015). Here, in contrast, any adverse effect on CSBS members cannot conceivably be felt unless and until a 5.20(e)(1) Charter is issued. Accordingly, CSBS fails to make the necessary showing that the claimed harms satisfy the necessary requirements for standing.

At this stage, any attempt to draw a legal conclusion regarding the likelihood that CSBS or its members would be harmed is an exercise in speculation: no applications are pending, and

potential applicants may vary widely in the nature of their business models, including the location of the activity and the identity of competitors. The time for assessing whether and which CSBS members have been actually harmed would be after a charter application has been approved. In the absence of constitutional standing, the Complaint should be dismissed for lack of jurisdiction.

II. BECAUSE OCC PUBLIC STATEMENTS DO NOT CONSTITUTE FINAL AGENCY ACTION, CSBS'S COMPLAINT FAILS TO STATE A CLAIM

The majority of the OCC "actions" that the CSBS attempts to aggregate into what they call the "Nonbank Charter Decision" are, at bottom, nothing more than a collection of non-final policy papers and solicitations for input from the public that, whether considered separately or collectively, do not represent a "final agency action" subject to review under the Administrative Procedure Act ("APA"). Under the APA, judicial review is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Agency action is final when it satisfies the two-part test stated in *Bennett v. Spear*, 520 U.S. 154 (1997): when it (1) "mark[s] the consummation of the agency's decision-making process," and (2) is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-78 (internal citations and quotation marks omitted). To be final, an agency must state an "unequivocal position," *Ciba–Geigy Corp. v. EPA,* 801 F.2d 430, 436 (D.C. Cir. 1986), rather than one contingent on future agency actions, *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). Because neither of the two *Bennett* requirements is here satisfied, the Complaint should be dismissed for failure to state a claim.

A. Because the OCC Has Not Completed Its Decision-Making Process, the First Part of the *Bennett* Test Is Not Satisfied

CSBS alleges that Comptroller Curry's December Speech and the OCC SPNB White Paper compel the Court to conclude that the OCC reached a "final decision" in December 2016 to grant 5.20(e)(1) Charters to fintech companies. Compl. ¶¶ 52-57. This is simply not the case. The OCC public statements relied upon by CSBS instead demonstrate that the OCC's decision-making process is still under way.

1. The December 2016 Speech Was Not a Final Agency Action

CSBS alleges that the OCC decisional process "culminated" in the December Speech, Ex. D, and the publication of the SPNB White Paper, Ex. E, Compl. ¶¶ 52-56. These arguments are refuted by the statements themselves. *See supra* pp. 6-8. In the December Speech, Comptroller Curry stated:

> We have published a paper today discussing several important issues associated with the approval of a national bank charter, and we are seeking stakeholder comment to help inform our path forward. Your comments will help us ensure that the agency's chartering decisions promote the safety and soundness of the federal banking system, increase financial inclusion, and protect consumers from abuse. I hope the professors and legal minds studying here will take the opportunity to read the paper and provide your thoughts.

Ex. D at 3. Far from indicating consummation of any final agency action, the former Comptroller made clear that the OCC was actively seeking comments to inform the OCC's path forward. At the same time, Comptroller Curry emphasized that: (1) staff was being directed to "develop" and "implement" a formal agency policy; (2) the OCC was in the process of requesting comments on the SPNB White Paper; and (3) those comments would inform the development of the OCC's policy. This context establishes that the former Comptroller's statement that the OCC "*will* move forward with chartering financial technology companies,"

Ex. D at 3, does not rise to the level of final agency action that is reviewable under the APA. These statements confirm that the OCC's decision-making process was still unfolding in December 2016. The Comptroller's speech committed the agency to moving forward in this area but nothing had been decided regarding *how* the agency would move forward, such as what types of charters might be offered.

2. The SPNB White Paper Was Not a Final Agency Action

A review of the SPNB White Paper, Ex. E, published on December 16, 2016, further refutes CSBS's arguments. *See*, *e.g.*, Compl. ¶¶ 57-58; *see supra* pp. 6-8. The SPNB White Paper demonstrates that the agency's decision-making process was still incomplete in December 2016. For example, in the preface, the SPNB White Paper states an intent to explore "what the OCC considers to be necessary conditions if the OCC is to exercise that authority." Ex. E at 1. The SPNB White Paper further requested "feedback on all aspects of this paper" and solicited responses to 13 questions to assist the OCC in policy formulation. *Id.* Again, the request by the OCC for feedback from stakeholders on a wide range of issues about whether to grant 5.20(e)(1) Charters makes clear that no final decision had yet been made.

3. The Explanatory Statement and Draft Supplement Were Not Final Agency Actions

CSBS further alleges, incorrectly, that two publications issued by the OCC in March 2017, the Explanatory Statement, Ex. F, and the Draft Supplement, Ex. G, show that the OCC completed its decision-making process concerning 5.20(e)(1) Charters for fintechs. Compl. ¶¶ 67-76. As with the December Speech and the SPNB White Paper, these publications demonstrate, by their draft form and conditional language, that the Agency had neither reached a final decision nor implemented a fintech chartering program. As CSBS concedes, the OCC invited public comment on the Draft Supplement, Compl. ¶ 74, which shows that it was still

under development. *See*, *e.g.*, *Oconus DOD Emp. Rotation Action Grp. v. Cohen*, 140 F. Supp. 2d 37, 43-44 (D.D.C. 2001) (draft subchapter of personnel manual not final agency action because it was still in process of being developed). The Explanatory Statement "addresses key issues raised by commenters" regarding the SPNB White Paper. Ex. F at 1. It also "explains the OCC's decision to issue for public comment" the Draft Supplement. *Id.*

4. The Exchequer Speech Confirms That There Has Been No Final Agency Action

Acting Comptroller Noreika's July 19, 2017 Exchequer Speech further confirmed the indeterminate status of the OCC's thinking on 5.20(e)(1) Charters. "[A]t this point the OCC has not determined whether it will actually accept or act upon applications from nondepository fintech companies for special purpose national bank charters that rely upon [Section 5.20(e)(1)]." Ex. A at 9. As possible alternatives to a *de novo* 5.20(e)(1) Charter, the Acting Comptroller suggested that the OCC might consider addressing fintechs using full-service national bank and federal savings association charters, or recognized special purpose national bank charters, such as trust banks, banker's banks, and credit card banks. *Id.* Accordingly, the OCC has demonstrably not "made up its mind," *AT&T*, 270 F.3d at 975, has not consummated its decision-making process, and has not yet engaged in reviewable final agency action.

B. Because the OCC's Actions Have Not Affected Rights or Obligations or Resulted in Legal Consequences, the Second Part of the *Bennett* Test Is Not Satisfied

In order to be final, the agency action must also have had an effect on rights or obligations or caused legal consequences. *Bennett*, 520 U.S. at 177-78. Here, even if the OCC had completed its decision-making process – and it has not – no legal consequences have flowed from the OCC's actions to date because no 5.20(e)(1) Charter has been issued. *See Peoples Nat'l Bank v. OCC*, 362 F.3d 333 (5th Cir. 2004) (no reviewable final agency action when bank

challenged OCC banking bulletin limiting the scope of OCC Ombudsman review of examination ratings because bank did not use bulletin review process). As in *Peoples Nat'l Bank*, CSBS "simply takes issue with the idea that" the OCC might issue a 5.20(e)(1) Charter at some future date. *Id*. at 337. CSBS alleges several legal consequences that *might* in the future flow from an OCC decision to issue such charters. *See supra* p. 11. As in *Peoples Nat'l Bank*, however, these consequences, even if they later come true, could potentially affect CSBS's rights adversely only "on the contingency of future administrative action," 362 F.3d at 337, an actual grant of a 5.20(e)(1) Charter. At this time, however, no such charters have even preliminarily been granted. Accordingly, as in *Peoples Nat'l Bank*, any alleged chartering decision "should not be reviewed by a court until it has" actually occurred "and resulted in a final agency action." *Id.*

III. BECAUSE THIS MATTER IS NOT RIPE FOR JUDICIAL REVIEW, CSBS'S COMPLAINT SHOULD BE DISMISSED

The Court should also conclude that this matter is not yet ripe for judicial review because no final agency action has taken place. Ripeness, at its core, "is about whether a federal court 'can or should decide a case.'" *Zuckerberg v. D.C. Bd. of Elections & Ethics*, 999 F. Supp. 2d 79, 83 (D.D.C. 2013) (quoting *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012)). Even where standing exists under Article III, there may still be "prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Courts assess the prudential ripeness of a case based on a two-prong inquiry: (1) the "fitness of the issues for judicial decision" and (2) the "extent to which withholding a decision will cause 'hardship to the parties.'" *Am. Petroleum Inst.*, 683 F.3d at 387 (quoting *Abbott Labs.*, 387 U.S. at 149). Because CSBS cannot satisfy either prong of this test, the case should be dismissed.

The first prong, fitness, turns on, among other things, "whether the agency's action is sufficiently final." *Am. Petroleum Inst.*, 683 F.3d at 387 (citation omitted). For the reasons

already addressed *supra* pp. 5-9, 13-16, the OCC's inquiry regarding whether to offer a 5.20(e)(1) Charter is still ongoing. More to the point, the OCC has not decided whether it will accept applications for 5.20(e)(1) Charters. By any measure, whatever agency "action" that may exist at this point is certainly not final and, therefore, not yet fit for review. *See N.Y. Stock Exch. v. Bloom*, 562 F.2d 736, 740-43 (D.C. Cir. 1977) (challenge to opinion letters of Comptroller of the Currency not ripe for review because opinions contained therein were tentative and not final); *Am. Land Title Ass'n v. Clarke*, 743 F. Supp. 491, 492-99 (W.D. Tex. 1989) (interpretive letters issued by the OCC did not announce a final agency position and were not ripe for judicial review).

Under the second prong, hardship, the "institutional interests in the deferral of review" are only outweighed where the hardship caused by that deferral is "immediate and significant." *Am. Petroleum Inst.*, 683 F.3d at 389. Further, considerations of any hardship that may flow from such a deferral "will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions." *Id*. (quoting *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984)). Here, CSBS will not suffer any immediate or significant hardship if this Court were to delay review of this matter. On the contrary, CSBS tacitly admits that it has not suffered any actual, concrete injury from any of the challenged OCC actions. *See supra* p. 11. In the absence of any conceivable concrete hardship, this matter is not yet ripe for judicial review. *See Zuckerberg*, 999 F. Supp. 2d at 85–86 (challenge to city council act that was not yet in effect not ripe for review because it imposed no concrete hardship and its impact was not sufficiently direct and immediate).

IV. BECAUSE THE OCC HAS NOT ISSUED ANY LEGISLATIVE RULE SPECIFIC TO THE CHARTERING OF FINTECH COMPANIES THAT WOULD REQUIRE NOTICE AND COMMENT, COUNTS III AND IV SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

CSBS also errs in its argument that the OCC has engaged in improper rulemaking by failing to comply with the APA's notice and comment procedures, by failing to conduct a cost-benefit analysis, and by acting in an arbitrary and capricious manner when the OCC issued its Draft Supplement, Ex. G, and SPNB White Paper, Ex. E. *See* Compl. ¶¶ 83-87, 107-110 (Count III); ¶¶ 88-91, 111-114 (Count IV). None of these arguments have merit.

A. The APA's Notice and Comment Procedures Do Not Apply

The Court should conclude that Count III fails at the outset because, as previously explained, *see supra*, pp. 13-16, neither document constitutes final agency action. Both documents are part of a still evolving decision-making process and are not indicative of any final action, including a legislative rule where notice and comment would be required. Even if the Draft Supplement and SPNB White Paper were final agency actions – which they are not – CSBS's argument would still fail because it is erroneously premised on the notion that the documents create a "legislative rule" rather than a general statement of policy to which notice-and-comment requirements do not apply.

"Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (citing 5 U.S.C. § 553); *see also Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (same). As the D.C. Circuit has explained:

> An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule. An agency action that sets forth legally binding requirements for a private party to obtain a permit or

> license is a legislative rule. * * * An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.

McCarthy, 758 F.3d at 251-52; s*ee also Huerta*, 785 F.3d at 717 (same); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (same). The "most important factor" in differentiating between legislative rules and nonbinding actions such as a general statement of policy is "the actual legal effect (or lack thereof) of the agency action in question." *Huerta*, 785 F.3d at 717 (quoting *McCarthy*, 758 F.3d at 252); *see also Am. Mining Cong. v. Mine Safety & Health Admin.,* 995 F. 2d 1106, 1112 (D.C. Cir. 1993) (same).

The wording of a document is significant in determining whether it is a legislative rule or a policy statement. "[A] document that reads like an edict is likely to be binding, while one riddled with caveats is not." *Huerta*, 785 F.3d at 717. As previously noted, the language used in the SPNB White Paper is neither mandatory nor obligatory; it is indefinite and conditional. *See supra* p. 15. Indeed, the document concludes with a "Request for Comment" seeking feedback from stakeholders to assist the OCC in the decision-making process. *See supra* p. 15. Thus, the language used in the SPNB White Paper is incompatible with any notion that the document creates definitive rights or imposes definitive obligations or limits in any way the OCC's discretion with respect to chartering decisions.

The Court should reach a similar conclusion regarding the Draft Supplement. First, to the extent the Draft Supplement proposes application procedures specific to fintechs, it is a *draft* document and is not evidence of an implemented policy. *See supra* pp. 15-16. Second, the document is explanatory in nature. "This Supplement *explains* how the OCC will apply the

licensing standards and requirements in its *existing* regulations and policies to fintech companies applying for an SPNB charter." Ex. G at 2 (emphasis added).

Therefore, taken together, the SPNB White Paper and Draft Supplement provide nothing more than a first take on what may eventually be adopted as generalized guidance. This is far from what the courts have previously construed to be a legislative rule. Accordingly, Count III should be dismissed, in the alternative, for failure to state a claim.

Moreover, the OCC followed notice-and-comment procedures when promulgating the 2003 amendment to 12 C.F.R. § 5.20(e)(1) and does not understand Count III to argue otherwise. CSBS's cost-benefit claim also fails because the APA's arbitrary and capricious standard does not in itself require an agency to engage in cost-benefit analysis. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011); *see also Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-12 & n.30 (1981) ("[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," and has used "specific language" to express that intent).

B. The Arbitrary and Capricious Standard Is Inapplicable

CSBS also asserts in Count IV that the series of OCC public statements identified in the Complaint are arbitrary, capricious, and an abuse of discretion. This claim fails for the same reason that Count III fails: only final agency actions are subject to judicial review under the APA's arbitrary and capricious standard. 5 U.S.C. §§ 704, 706. No final agency action has occurred. *See supra* pp. 13-16. Accordingly, Count IV should be dismissed for failure to state a claim.

V. BECAUSE CSBS'S FACIAL CHALLENGE TO THE OCC'S REGULATION IS TIME-BARRED, IT SHOULD BE DISMISSED

An additional basis for dismissing the Complaint's challenge to the relevant provisions of Section 5.20(e)(1) is that, to the extent CSBS's claims present a facial challenge to the regulation, the cause of action is time-barred by the statute of limitations applicable to civil actions against the United States and federal agencies. "Except as provided [in the Contract Disputes Act of 1978], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). A cause of action under the APA accrues on the date of the final agency action. *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). "Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987).

Here, if the adoption of the amendments to Section 5.20(e)(1) at issue constituted final agency action, the cause of action under the APA accrued on January 16, 2004 when the Final Rule became effective. 68 Fed. Reg. 70122 (Dec. 17, 2003). Accordingly, the time for filing a facial challenge to the regulation expired in January 2010, and this Court lacks jurisdiction over the cause of action.

VI. ALTERNATIVELY, BECAUSE THE OCC REASONABLY INTERPRETED THE AMBIGUOUS NATIONAL BANK ACT TERM "THE BUSINESS OF BANKING," CSBS'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

The absence of jurisdiction and nonexistence of final agency action prevent the Court from reaching the merits of the validity of 12 C.F.R. § 5.20(e)(1). Even if this Court were to reach the merits, however, the Complaint should be dismissed for failure to state a claim

because, under the framework articulated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), Section 5.20(e)(1) represents a reasonable OCC interpretation of the undefined and ambiguous statutory term "business of banking."

The Supreme Court has repeatedly applied the deferential *Chevron* framework to the OCC's interpretation of the terms of the National Bank Act. *Cuomo v. Clearing House, Ass'n, LLC*, 557 U.S. 519, 525 (2009); *Smiley v. Citibank (South Dakota),* 517 U.S. 735, 739 (1996); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). The *Chevron* framework proceeds in two analytical steps. "Where a statute is clear, the agency must follow the statute." *Cuzzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). "But where a statute leaves a 'gap" or is 'ambigu[ous],' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Id.* (citing *U.S. v. Mead Corp*., 533 U.S. 218, 229 (2001)); *Chevron,* 467 U.S. at 843.

CSBS concedes that the term "business of banking" is not "expressly defined." Compl. ¶ 31. Because the National Bank Act does not establish a plain meaning as to what it means to be engaged in the "business of banking," the OCC has the "leeway" to address that ambiguity or "gap" in the statute by enacting rules that are "reasonable in light of the text, nature, and purpose of the statute." *Cuzzo Speed Tech.,* 136 S. Ct. at 2142. Applying this test, the OCC's interpretation is reasonable and entitled to deference under the *Chevron* doctrine: the OCC's interpretation is not precluded by statutory text, the OCC's reading is supported by judicial authority — including Supreme Court and D.C. Circuit precedent — and the OCC's interpretation of the term is consistent with the text, nature, and purpose of the statute.

Accordingly, should the Court reach the merits, the Complaint should be dismissed for failure to state a claim.

A. Because the Statutory Text Has No Plain Meaning Under *Chevron* Step One, the OCC Has Discretion in Reasonably Interpreting That Text

An examination of the relevant text of the National Bank Act makes clear that, under the *Chevron* framework, the phrase "business of banking" is ambiguous, having no fixed meaning that precludes the OCC's interpretation set forth in Section 5.20(e)(1). The term "business of banking" appears in several National Bank Act provisions, without definition or textual elaboration that could add meaning. *See* 12 U.S.C. §§ 21 ("Associations for carrying on the business of banking may be formed by any number of natural persons, not less in any case than five"); 24(Seventh) (dealing with bank powers); 26 (compliance with requirements of "title 62 of the Revised Statutes" that are "required to be complied with before an association shall be authorized to commence the business of banking …."); and 27(b)(1) (the Comptroller of the Currency may issue a "certificate of authority to commence the business of banking") to [a bankers' bank]). In addition, a similar term, "the general business of each banking association" is contained in a geographic restriction in 12 U.S.C. § 81("The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any…"). Section 27, the general chartering provision, states:

> If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller . . . it appears that such association is lawfully entitled to commence the **business of banking**, the Comptroller shall give to such association a certificate . . . that such association has complied with all the provisions required to be complied with before commencing the **business of banking** and that such association is authorized to commence such business.

12 U.S.C. § 27(a) (emphasis added). In addition to this general chartering authority, Section 27

also recognizes two forms of special purpose national banks: trust banks and "bankers' banks." The National Bank Act does not set forth any mandatory activities that must be performed in order for a bank to be engaged in the "business of banking." Indeed, the text in general is permissive and therefore consistent with an expansive grant of discretion in the Comptroller to assign content to the phrase. Accordingly, there is nothing in the text of the National Bank Act that precludes the OCC's interpretation codified at 12 C.F.R. § 5.20(e)(1).

1. In *NationsBank*, the Supreme Court Recognized the OCC's Authority to Interpret the Ambiguous Term "Business of Banking"

These statutory references to the "business of banking" have rarely been the subject of litigation that has added interpretive meaning, with the exception of Section 24(Seventh), which has been litigated throughout the history of the National Bank Act. *See, e.g., Merchants' Bank v. State Bank*, 77 U.S. 604 (1870) (power to certify checks); *First Nat'l Bank of Charlotte v. Nat'l Exch. Bank*, 92 U.S. 122 (1876) (power to purchase securities in the course of settling a claim); *Clement Nat'l Bank v. Vermont*, 231 U.S. 120 (1913) (power to pay state taxes on depositors' accounts); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1940) (power to operate a safe deposit business); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (power to advertise). Section 24(Seventh) provides that national banks are authorized:

> To exercise . . . **all such incidental powers as shall be necessary to carry on the business of banking**; by discounting and negotiating promissory notes drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes [and provisions limiting securities and stock sales].

12 U.S.C. § 24(Seventh) (emphasis added). The Supreme Court explicated this text definitively in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). In *NationsBank*, the OCC had interpreted the Section 24(Seventh) text to permit the Comptroller

to authorize national banks to sell annuities to bank customers. 513 U.S. at 254. That interpretation was challenged by an insurance agents' association that argued that the text should instead be read to limit the scope of permissible banking powers under Section 24(Seventh) to activities connected with the five statutorily enumerated powers: discounting, deposit-taking, trading in exchange and money, lending, and dealing in notes. Under this theory, an implicit *expressio unius est exclusio alterius* statutory structure argument, the general authorization to "exercise . . . all such incidental powers as shall be necessary to the business of banking" would be circumscribed by the succeeding text listing specific powers. 513 U.S. at 257-58. The Supreme Court expressly and emphatically rejected that argument.

First, the Court reviewed the OCC's interpretation through the framework of *Chevron* deference. 513 U.S. at 256-57. "As the administrator charged with supervision of the National Bank Act, see § 1, 26-27, 481, the Comptroller bears primary responsibility for surveillance of the 'business of banking' authorized by § 24 Seventh." 513 U.S. at 256.

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Id. at 256-57 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987)).

Applying this standard of review, the Court affirmed the OCC's construction of the Section 24(Seventh) phrase "incidental powers . . . necessary to carry on the business of banking" as an independent grant of authority, not limited by the specified enumerated grants of authority, *id.* at 257, rejecting the argument by the insurance agents to the contrary:

> We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those

> specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments – for example, operating a travel agency – may exceed those bounds.

Id. at 258 n.2. This analysis resolved the preexisting question whether there is a distinction between "business of banking" and "all such incidental powers as shall be necessary to carry on the business of banking." Before *NationsBank*, there were active questions whether a given power was "part of" the business of banking or "incidental to" the business of banking. By equating the Section 24(Seventh) text with the "business of banking," *NationsBank* established that it is a unitary inquiry.

NationsBank marked a watershed in construing the term "business of banking," resolving an analytical dispute that had sharply divided courts of appeals for two decades. On one side of the divide, the D.C. Circuit had prefigured *NationsBank* by rejecting a narrow interpretation of Section 24(Seventh), instead deferring to the "expert financial judgment" of the Comptroller. *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (municipal bond insurance part of the business of banking). On the other side of the divide, two courts of appeals had adopted a more restrictive test limiting the scope of permissible powers to those related to the enumerated powers in Section 24(Seventh). *See M&M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (power "must be 'convenient or useful' in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act") (equipment leasing); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) (test is whether the activities were "directly related to one or another of a national bank's express powers") (travel agency not authorized). *NationsBank* rejected that test, implicitly superseding *Arnold Tours*, *M&M Leasing*, and other decisions that had relied upon

them.[3] Accordingly, the reasoning of any "business of banking" decisions that preceded *NationsBank* is subject to reconsideration in light of its holding.

2. The D.C. Circuit Has Confirmed the OCC's Authority to Issue a Limited Purpose National Bank Charter

Just as the OCC was afforded deference in *NationsBank* in broadly interpreting the general powers of national banks under the "business of banking," the OCC has received deference in defining narrowly the scope of a particular national bank's powers in a case that strongly supports the Comptroller's authority to charter a special purpose national bank, and by extension, to codify that authority in 12 C.F.R. § 5.20(e)(1). *Indep. Cmty. Bankers Ass'n of South Dakota, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 820 F.2d 428 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) ("*ICBA v. FRB*"). In a chartering decision made long before the 2003 amendment of Section 5.20(e)(1), the OCC issued a limited purpose national bank charter, upheld by the D.C. Circuit, authorizing a national bank to exercise limited powers so as to comply with state law to enable it to engage in interstate banking under the Bank Holding Company Act ("BHCA"). At the time, the BHCA accorded states some control over the ability of bank holding companies to acquire a national bank in a state other than the institution's home state. 820 F. 2d at 430-31. Then-applicable South Dakota law limited the operations of such national banks, in particular the deposit-taking function, in order to protect state-chartered institutions from competition. *Id.* at 431.

ICBA v. FRB, a suit against the Federal Reserve Board, involved challenges to actions by the Federal Reserve Board and (embedded within the same petition) the OCC: (1) the Federal

[3] While the *NationsBank* holding displaced the test applied by *M&M Leasing, NationsBank* fully vindicated the policy observation articulated in *M&M Leasing:* "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.*, 563 F.2d at 1382.

Reserve Board's approval of the acquisition of a South Dakota-based national bank, newly created to carry out the credit card business of a Texas-based bank holding company; and (2) the OCC's issuance of a charter to that credit card national bank with powers limited to conform to the South Dakota restrictions.[4] The D.C. Circuit noted that the Comptroller's decision to charter the limited purpose bank built upon a prior OCC chartering decision reflected in a Federal Reserve order, *Citicorp*, 67 Fed. Res. Bull. 181 (1982). There, the Comptroller had noted that the grant of authority to national banks under Section 24(Seventh) is "permissive, rather than mandatory," and that a national bank "rarely contemplates engaging in the full range of permissible activities." 820 F.2d. at 439. The Comptroller assessed that the decision to operate as a limited service bank so as to avoid conflict with a state statute is "a business decision." *Id.*

Among the arguments made by the ICBA against the validity of the Federal Reserve's decision was that there is "no such institution as a 'special purpose' national bank," and that the limited national bank charter was otherwise inconsistent with federal law. 820 F. 2d at 438-40. The D.C. Circuit rejected those arguments and held the limited purpose bank charter to be within the Comptroller's "particular expertise."

> We have no doubt but that the Comptroller's construction and application of the National Bank Act in this context is reasonable. There is nothing in the language or legislative history of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory. Restriction of a national bank's activities to less than the full scope of statutory authority conflicts with the purposes of the Act only if it undermines the safety and soundness of the bank or interferes with the bank's ability to fulfill its statutory obligations. That judgment requires consideration of the particular legal and business circumstances of

[4] The national bank charter application at issue in *ICBA v. FRB*, while proposing the primary activity of the new bank to be credit card services, also proposed to provide limited deposit-taking, lending, and checking services to the local community to the extent permitted under state law. 820 F.2d at 439. There is nothing in the reasoning of the D.C. Circuit opinion that placed any weight on the existence of those nominal activities.

> the individual banks—a judgment within the particular expertise of the Comptroller and reserved to his chartering authority.

820 F.2d at 440. Accordingly, the reasoning of *ICBA v. FRB* supports the OCC's authority to promulgate Section 5.20(e)(1) and illustrates that the legal concept of a special purpose national bank charter is not novel or unprecedented, but rather follows a decades-old OCC practice.

Shortly after *ICBA v. FRB* was decided in June 1987, Congress amended the BHCA to create an exception from the definition of "bank" applicable to credit card banks. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (August 10, 1987) *codified at* 12 U.S.C. § 1841(c)(2)(F). There is no express statutory chartering authority for credit card banks in the National Bank Act; instead, the OCC has chartered credit card banks relying on the general statutory authority endorsed in *ICBA v. FRB.*

B. Under *Chevron* Step II, the OCC Reasonably Interpreted the Statutory Term "Business of Banking" by Reference to Three Core Banking Activities Identified in the National Bank Act

In considering the 2003 amendment of Section 5.20(e)(1), *see supra* pp. 5-6, the OCC weighed the ways in which to give content to the statutory term "business of banking" in determining eligibility for a national bank charter. The OCC's Final Rule provided, "A special purpose bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits; paying checks; or lending money." 12 C.F.R. § 5.20(e)(1). In its Complaint, CSBS objects to Section 5.20(e)(1), arguing that it is unreasonable on policy and historical grounds for the OCC not to require deposit-taking as a necessary activity for a national bank. To the contrary, historical understanding and caselaw support the reasonable choices made by the OCC in interpreting the "business of banking" in a

manner reflected by the regulation in its current form.

In the preamble to the Final Rule that promulgated amendments to 12 C.F.R. § 5.20(e)(1) in 2003, the OCC explained that it added the "core banking activities" requirement by reference to 12 U.S.C. § 36, which defines a national bank "branch" as a branch place of business "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). While Section 36 does not include the term "business of banking," the OCC looked for guidance to a Supreme Court decision construing the statutory phrase the "general business of each national banking association" in 12 U.S.C. § 81 by reference to the core activities of Section 36. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987) ("*Clarke v. SIA*"). Section 81 restricts the locations at which a national bank may conduct business. "The **general business of each national banking association** shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of [12 U.S.C. § 36]." 12 U.S.C. § 81 (emphasis added). The close textural resemblance of "the business of banking" to the "general business" of each bank supports the OCC's reliance upon *Clarke v. SIA* to connect the "core activities" of Section 36 to the OCC's chartering authority.

In *Clarke v. SIA*, the OCC had approved a national bank's application to offer discount brokerage services at, *inter alia*, non-branch locations both inside and outside the bank's home state. A securities trade association challenged the approval, arguing that the phrase "general business" of each banking association in Section 81 should be read more broadly than the Section 36 activities to include all activities statutorily authorized for national banks, including the sale of securities, which would therefore limit where such sales could be conducted. 479 U.S. at 406. The Supreme Court rejected that argument. The Court noted that the phrase "the general business of each national banking association" is ambiguous and held the Comptroller's

interpretation entitled to deference. 479 U.S. at 403-04. The Court observed that national banks engage in many activities, and there was no evidence that Congress intended all of those activities to be subject to the geographical limitations of Sections 81 and 36. 479 U.S. at 406-09. Instead, the Court found reasonable the OCC's conclusion that the general business of the bank under Section 81 included only "core banking functions," and not all incidental services that national banks are authorized to provide. 479 U.S. at 409. The Court also held that the OCC reasonably equated "core banking functions" with the activities identified in Section 36, which defined "branch" as any place "at which deposits are received, or checks paid, or money lent." *Id.*

The Court's endorsement of the OCC's analysis — that national banks engage in many activities, but that only these three activities represent "core banking functions" and so define the "general business" of the bank — provides support for treating any one of these same three activities as the required core activity for purposes of the chartering provisions. Just as the "general business" of each national bank is undefined in the location restriction of Section 81, the "business of banking" is undefined in the chartering provisions of Sections 21 and 27(a). The natural reading of the two phrases is similar in meaning, which supports the reasonableness of using the common source of Section 36(j) for the interpretation of each. Because the terms of Section 36 are linked by "or," performing only *one* of the activities is sufficient to meet the statutory definition and to cause the location restrictions to apply. *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 135 (1969) (because the "activities" element of the definition "is written in the disjunctive, the offering of any one of the three services will provide the basis for finding that 'branch' banking is taking place."). This interpretation provides symmetry and consistency between the chartering and the location provisions of the National Bank Act.

VII. BECAUSE CSBS FAILS IN ITS ARGUMENTS THAT THE OCC LACKS STATUTORY AND CONSTITUTIONAL AUTHORITY TO ISSUE A 5.20(e)(1) CHARTER, IT FAILS TO STATE A CLAIM

The CSBS Complaint outlines a variety of arguments against the OCC's proposed use of Section 5.20(e)(1) to charter as a national bank an entity that does not take deposits, including arguments predicated on policy, statutes other than the National Bank Act, caselaw, the legislative history of the National Bank Act, historical practice, and the Constitution. None of these arguments can be sustained.

CSBS's central thesis, that the OCC's statutory authority under 12 U.S.C. § 27(a) to charter an entity to "commence the business of banking" does not extend to authority to charter a national bank that does not accept deposits, Compl. ¶¶ 6, 7, 65, 77-82, is contrary to the Supreme Court (*NationsBank*; *Clarke v. SIA*) and D.C. Circuit (*ICBA v. FRB*) authority discussed above. CSBS's *expressio unius* argument that principles of statutory construction applied to the chartering provisions at 12 U.S.C. § 27(a), (b), and the definition of "bank" for purposes of the Bank Holding Company Act at 12 U.S.C. § 1841(c)(2)(D) and (F) yield the result that special purpose charters require express statutory authorization, Compl. ¶¶ 38-41, cannot be sustained in light of the statutory structure and history of Section 27 and the rejection of an analogous argument by the Supreme Court in *NationsBank*. CSBS's statement that the legislative history of the National Bank Act identifies receiving deposits as an essential function, Compl. ¶ 31, fails to offer a citation to authority to support that proposition. The 19th and 20th century Supreme Court cases that CSBS cites for the proposition that receiving deposits is essential to the business of banking, Compl. ¶ 32, did not directly address that issue. The two district court opinions cited by CSBS for the proposition that a bank that does not receive deposits is not in the "business of banking," Compl. ¶¶ 32, 40, 42-43, quickly ceased to be viable law and have since been

superseded by legislation or subsequent Supreme Court authority. The provisions of non-National Bank Act statutes such as the BHCA relied upon by CSBS, Compl. ¶¶ 33-37, 43, have no bearing upon the OCC's interpretation of the National Bank Act. Historical sources do not yield the conclusion that deposit-taking is a function indispensable to the definition of the "business of banking," Compl. ¶ 32, but show instead that 19th Century authority recognized a variety of functions that could be, or need not be, performed by a "bank." Finally, long-established Supreme Court authority, reiterated in 2007, defeats CSBS's appeal to the Supremacy Clause and the Tenth Amendment. Compl. ¶¶ 115-121.

A. CSBS's Statutory Construction Arguments Lack Merit

1. Judicial Authority and Statutory Context Defeat CSBS's *Expressio Unius* Argument

CSBS cannot sustain its argument that the *expressio unius* canon of statutory construction yields the result that the specific legislation allegedly authorizing or recognizing the chartering of special purpose national banks – trust banks, banker's banks, and credit card banks – creates an inference that Congress intended to withhold inherent special purpose chartering authority from the OCC. Compl. ¶ 79. First, the text of Section 27 does not reflect the structural pattern that triggers the canon's application. "As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of 'an associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see U.S. v. Vonn*, 535 U.S. 55, 65 (2002). No such inference is available for Section 27, where the provisions do not present a like series, but are different in kind: a general chartering authority, a specific chartering authority (banker's banks), and a ratification of charters issued under unspecified authority (trust banks). Moreover, because

the general chartering authority dates from 1864, the recognition of trust banks was added by legislation in 1978,[5] and the authority for banker's banks was added in 1982, the structure of the statute is not the product of a single Congress to which any intent can be attributed. The distinct provisions instead reflect discrete legislation by different Congresses, widely separated in time, responding to disparate reasons for legislation. "The possibilities either of [congressional] neglect or of implied delegation to the agency grow more likely as the contrasted contexts grow more remote from each other." *Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990). "The canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013).

Additionally, because the canon of *expressio unius* is inherently statute-specific, no meaningful inference can be drawn from the provisions of non-National Bank Act statutes such as the credit card bank exception in the BHCA. *See* 12 U.S.C. § 1841(c)(2)(F).[6] Finally, in *NationsBank*, as discussed *supra* pp. 25-27, the Supreme Court rejected an implicit *expressio unius* argument with respect to the enumerated express powers in Section 24(Seventh) that, "as

[5] The trust bank text in part retroactively ratified previously issued charters. This text therefore should be read as a *post-hoc* congressional endorsement of the OCC's authority to issue special purpose charters under its general chartering authority.

[6] Indeed, the BHCA exception for credit card banks in 12 U.S.C. § 1841(c)(2)(F) is at odds with CSBS's theory of the case because there is no corresponding chartering authority for credit card banks in the National Bank Act. Notwithstanding the absence of any such specific National Bank Act authorization for credit card banks, the OCC has chartered such credit card banks and has been sustained in so doing. *See* discussion of *ICBA v. FRB*, *supra* pp. 28-30. Credit card banks, therefore, stand as a counterexample to CSBS's argument that special purpose charters require specific statutory authority.

an associated group or series," would more plausibly satisfy the legislative pattern associated with application of the canon than does the structure of Section 27.

More generally, the Supreme Court and the D.C. Circuit have repeatedly expressed caution in the application of the canon, especially in an administrative context. "The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (2014), *quoting Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990); *see also Mobile Commc'n Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-05 (maxim, unsupported by arguments based on the statute's structure and legislative history, "too thin a reed" to support the conclusion that Congress had clearly resolved the issue); *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (same). For all these reasons specific to the statutory text and structure, CSBS cannot sustain its *expressio unius* argument.

2. CSBS Errs in Relying on Statutes Other Than the National Bank Act

CSBS errs in its attempts to extract meaning from the provisions of non-National Bank Act statutes addressing "bank" or "banking" for interpretation of the National Bank Act. As a matter of statutory interpretation, these arguments are meritless because it is well settled that the meaning of the same term, let alone similar terms, across different statutes may vary "to meet the purposes of the law." *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213, 218-20 (2001) (ambiguities in identical statutory terms should not be resolved identically regardless of their surroundings; instead, deference is due to agency's interpretations); *see also Yates v. U.S.*, 135 S. Ct. 1074, 1082 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the

same statute.") (collecting cases); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (also rejecting the presumption of uniform usage of statutory terms).

Contrary to CSBS's suggestion, there is no aspect of the BHCA that defines the term "business of banking" as it appears in the general chartering authority of the National Bank Act in Section 27(a). The provisions defining the term "bank" found in the BHCA at 12 U.S.C. § 1841(c)(1) have the purpose of identifying which entities will cause their controlling organization to become subject to regulation as "bank holding companies." Accordingly, that definition serves a legislative purpose very different from the chartering provisions of the National Bank Act and provides no meaning as to the functions necessary to qualify as the "business of banking" in Section 27.

B. The Judicial Authority Cited by CSBS Is Not Entitled to Weight

CSBS errs in relying on two subsequently superseded district court cases in 1979 and 1985 for the proposition that the OCC lacks authority to charter a limited-purpose national bank. In *Nat'l State Bank of Elizabeth, N.J. v. Smith*, No. 76-1479 (D.N.J. 1977), the OCC issued a charter to a national bank limited to the business of a commercial bank trust department and related activities. *Nat'l State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 227 (3d Cir. 1979). The district court concluded that the charter was "contrary to law and invalid," though the reasoning supporting that conclusion is unreported. *Id.* at 228. After the district court decision, and during the appeal, Congress amended 12 U.S.C. § 27(a) to recognize trust banks, retroactively and going forward. *Id.* at 231. On appeal, the Third Circuit reversed the district court, applying the terms of the newly amended Section 27(a), declining to address the correctness of the district court decision when entered, and opining that the legislation had "validated the Comptroller's action." 591 F.2d at 231-32. Accordingly, this district court

decision ceased to have any force and effect in 1979, did not receive an endorsement on the merits from the Third Circuit, and is unentitled to weight in this Court.

In *Indep. Bankers Ass'n of Am. v. Conover*, 1985 U.S. Dist. Lexis 22529 (M.D. Fla. 1985) ("*Conover*"), banks and trade associations challenged the OCC's authority under Section 27(a) to charter "nonbank banks," banks limited so that they would either not accept demand deposits or make commercial loans, or both, so as to avoid the definition of "bank" in the BHCA and attendant restrictions on interstate operations. *Id.* at *2. In awarding the plaintiffs a preliminary injunction against final approval of a nonbank bank charter, the court disapprovingly characterized nonbank banks as taking advantage of a statutory definition to structure themselves so as to "escape regulation" under the BHCA, *id.* at *3, and in determining that the plaintiffs had a likelihood of success on the merits, the court looked to the "historical understanding in law and custom" of the term "business of banking." *Id*. at *23.

Conover is not good law. First, the ruling in *Conover* was an interim preliminary injunction order that was subsequently vacated when the case was dismissed before final judgment. *See* Docket, Entry No. 137 (Sept. 11, 1987) (attached hereto as Exhibit H). Moreover, the analysis in *Conover* is in substantial conflict with the later decision of the D.C. Circuit in *ICBA v. FRB,* discussed above, as to the OCC's authority to issue a limited purpose charter, and in conflict with the expansive test for "business of banking" established in *NationsBank,* as discussed above. Additionally, a Supreme Court decision the year following *Conover* discounted the "intentional avoidance of regulation" justification partly relied upon in *Conover* to issue an injunction. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361 (1986) (rejecting Federal Reserve Board's argument that its expansive regulation was justified to prevent exploitation of statutory loopholes). Because the district court

opinion never reached final judgment, because it is in conflict with a later decision by the D.C. Circuit, and because parts of its rationale were superseded by legislation and by the Supreme Court decisions in *NationsBank* and *Dimension*, the *Conover* opinion is not entitled to weight in this Court.

C. Neither the Legislative History of the National Bank Act nor Historical Understanding Contradicts the OCC's Interpretation

CSBS invokes "industry custom" and historical practice in a futile attempt to establish that the OCC is not authorized to charter a bank that does not take deposits. History untethered from the National Bank Act, however, cannot establish a plain meaning for the term "business of banking" or render the OCC's interpretation unreasonable for *Chevron* purposes. In any event, the historical understanding of banking and, more saliently, legislation nearly contemporaneous with the National Bank Act do not support CSBS's position. Although the National Bank Act contains no definition of "bank" or "business of banking," Congress passed legislation in 1866 that did define the term "bank" for the purposes of amendments to an 1864 tax statute. *See* Internal Revenue Act of 1866, ch. 184, 14 Stat. 98 (1866). For the purposes of application of a tax on bank capital, Congress legislated that "bank" would mean:

> Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker. . . .

Id. at 115. This definition recognizing various forms of non-deposit taking entities as a "bank" refutes CSBS assertion that the Congress of the 1860s understood deposit-taking to be a

necessary function of either a bank generally or of a national bank chartered pursuant to Section 27.

Six years later, the Supreme Court had occasion to consider the scope of a statutory exception to another tax provision applicable to banks contained in the Internal Revenue Act of 1866 in *Oulton v. German Sav. & Loan Soc.*, 84 U.S. 109 (1872) (Clifford, J.). In support of its decision that a savings and loan was a "bank" within the meaning of the statute, the Court stated that an institution is a bank "in the strictest commercial sense" if it engages in only *one* of the three functions of deposit taking, discounting, or circulation. *Id.* at 118-19. ("Banks in the commercial sense are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution . . . . Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank . . . .").

The cases cited by CSBS for historical understanding, Compl. ¶ 32, do not consider, let alone answer, the question of whether a bank must accept deposits or perform any other particular core function to be chartered as a national bank or to be otherwise considered a bank in a more general sense. *See Mercantile Nat'l Bank v. Mayor of New York*, 121 U.S. 138, 156 (1887) (discussing various aspects of the business of banking and their relation to the term "moneyed capital" in tax statute); *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326 (1963) (delineating relevant product market in banking antitrust cases).

D. Neither Section 5.20(e)(1) nor Any Charter Issued Under Section 5.20(e)(1) in the Future Would Violate the Supremacy Clause or the Tenth Amendment

In the 153-year history of the national bank system, it has been repeatedly established that the Supremacy Clause operates in concert with the National Bank Act to displace state laws or state causes of action that conflict with federal law or that prevent or significantly interfere with national bank powers. *See, e.g., Barnett Bank of Marion Cty. v. Nelson,* 517 U.S. 25 (1996); *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). As a federal regulation, Section 5.20(e)(1) preempts contrary state law. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996); *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). Under these lines of authority, a fintech chartered as a national bank under Section 5.20(e)(1) would be entitled to the protections of the National Bank Act against state interference.

> It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Bank Act. So long as he does not authorize activities that run afoul of federal laws governing the activities of national banks, therefore, the Comptroller has the power to preempt inconsistent state law.

CSBS v. Conover, 710 F.2d 878, 885 (D.C. Cir. 1983).

The Tenth Amendment is not implicated when the Constitution assigns authority to the federal government. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." *Id.* Accordingly, the Tenth Amendment has no application to either Section 5.20(e)(1), or to the proposed special purpose charter.

CONCLUSION

For the reasons stated above, the OCC asks the Court to dismiss the Complaint on all counts for lack of jurisdiction and, in the alternative, for failure to state a claim upon which relief may be granted.

Date: August 2, 2017

Respectfully submitted,

/*s*/Douglas B. Jordan

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CERTIFICATE OF SERVICE

In accordance with LCvR 5.3, I certify that on August 2, 2017, a true and correct copy of the foregoing *Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim* was served on all counsel of record through the Court's CM/ECF system.

Respectfully submitted,

/s/Douglas B. Jordan

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EXHIBIT A

REMARKS

By

KEITH A. NOREIKA
ACTING COMPTROLLER OF THE CURRENCY

Before the

EXCHEQUER CLUB

Washington, D.C.
July 19, 2017

Good afternoon. Thank you for having me here at the Exchequer Club. It is a privilege to address this group as Acting Comptroller of the Currency. Since its formation in 1960, the Exchequer Club has welcomed Comptrollers, Treasury Secretaries, members of Congress, and Chairs of the Federal Reserve, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission. This audience is comfortable with the detail and nuance of financial regulation as well as the occasional financial acronym or reference to a specific statute. So, I feel right at home, sharing my thoughts on the Office of the Comptroller of the Currency's (OCC) initiatives to support responsible innovation.

Before diving into that topic, I want to let you know how honored I am to serve as Acting Comptroller until the Senate confirms the 31st Comptroller. I have worked with many of you over the years, and you know my commitment to the federal banking system. I believe the federal banking system is, and should be, a source of strength for the nation and its economy. When running well, it is an engine capable of powering tremendous growth and economic prosperity for consumers, businesses, and communities across the country. As bank supervisors, part of our job is to find that balance where supervision ensures safety, soundness, and compliance while not creating unnecessary regulatory burden or creating an environment so risk

averse that banks fail to meet the financial and credit needs of their customers. To borrow a phrase from another Acting Comptroller, we need banks to be safe *and* sound, and to be sound, banks must function in ways that satisfy their intended purposes.

You never know how long you will serve in an acting role, but when I arrived at the OCC, I shared three priorities with employees. I thought it would be helpful to share those with you as well. First, I intend to support the men and women of the OCC, who are deeply dedicated to the agency's statutory mission and work—sometimes thanklessly—day in and day out to ensure the federal banking system operates in a safe and sound manner, provides fair access, treats customers fairly, and complies with applicable laws and regulations. I accepted the opportunity to serve as Acting Comptroller because I view the bank supervisors and staff at the OCC as second to none.

Next, we need to minimize unnecessary regulatory burden and promote economic growth. It has been 10 years since the start of the financial crisis and seven years since Congress enacted Dodd-Frank. Now is a good time to take stock of the rules implemented and ensure the nation has the right sense of balance and coherence in regulating financial institutions so that they maintain their strength while invigorating the economy. Regulation does not work when it stifles investment and makes it harder for banks to serve their customers. To this end, I have discussed opportunities with Treasury and, in my testimony before the Senate Banking Committee last month, I offered some thoughts on specific legislative reforms we could pursue.[1] In other areas, we are exploring what we can do through regulation and supervision, independently and through coordination with other agencies.

[1] See Written Testimony of Acting Comptroller Keith A. Noreika. June 22, 2017 (https://www.occ.gov/news-issuances/news-releases/2017/nr-occ-2017-71b.pdf).

Third, I *will* champion the value of the national charter and the federal banking system. I believe that the nation's banking needs are best served by a robust, vibrant *dual* banking system. That requires a strong federal banking system as well as a diverse system of state banks. I will seek opportunities to amend regulations and recommend changes to legislation to promote the health and vitality of the federal banking system. We all need the federal banking system to be more inclusive, to accommodate new banks, and to adapt to the changing needs of the marketplace, customers, and communities. We have all complained too long about the dearth of *de novo* institutions as we have watched the industry consolidate. Now, we need to remove unnecessary barriers to becoming banks.

I am very optimistic about the future of the federal banking system and the OCC. One of the reasons for my optimism is the main topic of my remarks today—the innovation we are witnessing throughout the industry and what the OCC is doing to support that innovation within the federal banking system.

Since the agency launched its innovation effort in the summer of 2015,[2] it has published practical guiding principles,[3] held a public forum that was such a hot ticket I couldn't even get a seat,[4] and established a framework to support responsible innovation in the federal banking system.[5] To implement that framework, the agency established an Office of Innovation that has been up and running since January. Its primary purpose is to make certain that institutions with

[2] See Remarks by Comptroller of the Currency Thomas J. Curry before the Federal Home Loan Bank of Chicago. August 7, 2015 (https://www.occ.gov/news-issuances/speeches/2015/pub-speech-2015-111.pdf).

[3] See *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*. March 2016 (https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf).

[4] See https://www.occ.gov/topics/responsible-innovation/innovation-forum-videos.html.

[5] See *Recommendations and Decisions for Implementing a Responsible Innovation Framework*. October 2016 (https://www.occ.gov/topics/responsible-innovation/comments/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf).

federal charters have a regulatory framework that is receptive to responsible innovation and the supervision that supports it. The office, headed by Chief Innovation Officer Beth Knickerbocker, serves as a clearinghouse for innovation-related matters and a central point of contact for OCC staff, banks, nonbank companies, and other industry stakeholders. It collaborates with OCC business lines and other regulators regarding innovation and facilitates-related activities. In May, the team's first office hours in San Francisco were "sold out," and banks exploring potential innovations, companies seeking to work with banks, and more than a few companies interested in opportunities to become national banks, met to discuss innovation-related issues and express their views.[6] The office will hold additional office hours in New York next week. The office has already become a valuable resource for national banks and thrifts, and its utility will only increase over time.

And that brings me to a subject I have been asked about frequently since becoming Acting Comptroller, "What are your thoughts on granting national bank charters to financial technology companies?" The New York Department of Financial Services helped put that question at the top of *my* list just a week into my tenure by naming me as a defendant in its lawsuit challenging the OCC's authority to grant special purpose national bank charters to fintech companies.

Since the OCC is still litigating that lawsuit and a similar suit by the Conference of State Bank Supervisors (CSBS), I have to be careful about going into any kind of detail. So, let me answer the question by sharing my views on the *idea* of granting national bank charters to fintech companies that are engaged in the business of banking and requiring them to meet the high standards for receiving a charter.

[6] See NR 2017-42, "OCC Announces One-on-One Industry Meetings as Part of Office of Innovation Office Hours." April 13, 2017 (https://www.occ.gov/news-issuances/news-releases/2017/nr-occ-2017-42.html).

Quite simply, I think it is a good idea that deserves the thorough analysis and the careful consideration we are giving it. The OCC after all was created to administer a system of federal banks and that authority clearly includes granting charters to companies engaged in the business of banking. Over the decades, the business of banking has evolved, just as companies have adapted and changed. We should be careful to avoid defining banking too narrowly or in a stagnant way that prevents the system from evolving or taking proper and responsible advantage of advances in technology and commerce.

As the United States Court of Appeals for the Ninth Circuit noted 40 years ago, when it comes to construing what it means to be engaged in the "business of banking" under the National Bank Act, "[W]hatever the scope of such powers may be, we believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking."[7]

On principle, companies that offer banking products and services *should* be allowed to apply for national bank charters so that they can pursue their businesses on a national scale if they choose, *and* if they meet the criteria and standards for doing so. Providing a path for these companies to become national banks is pro-growth and in some ways can reduce regulatory burden for those companies. National charters should be *one* choice that companies interested in banking should have. That option exists alongside other choices that include becoming a state bank or operating as a state-licensed financial service provider, or pursuing some partnership or business combination with existing banks.

[7] See M M Leasing Corp. v. Seattle First National Bank, 563 F. 2d 1377, 1383 (1977). See also Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co. 513 U.S. 251, 258 n.2 (1995)("We expressly hold that the 'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated.").

I also believe that if you provide banking products and services, *acting like a bank*, you ought to be regulated and supervised like a bank. It is only fair, but today, that is not happening. Hundreds of fintechs presently compete against banks without the rigorous oversight and requirements facing national banks and federal savings associations. People who think that granting national bank charters to fintechs creates a disadvantage for *banks* have it backwards. The status quo disadvantages banks in many ways. While charters would provide great value to the companies that receive them, the supervision that accompanies becoming a national bank would help level the playing field in meaningful ways.

In the agency's December paper discussing the issues associated with chartering fintech companies,[8] in the response to comments on that paper,[9] and again in the draft supplement to its *Licensing Manual*,[10] the OCC made clear that fintech companies that receive a federal charter would be regulated and supervised like similarly situated national banks. That supervision and regulation includes regular examination, capital and liquidity standards, and *where appropriate*, reflects an expectation regarding financial inclusion. With the lessons of the financial crisis in mind, let me say that the OCC's approach to innovation has the virtue of bringing technology-oriented financial companies that provide banking services out of the shadows and into a well-established supervisory and regulatory regime that will promote their safety and soundness and allow the federal banking system and its customers to benefit from their inclusion.

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[8] See *Exploring Special Purpose National Bank Charters for Fintech Companies*. December 2016 (https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf).

[9] See *OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies*. March 2017 (https://www.occ.gov/topics/responsible-innovation/summary-explanatory-statement-fintech-charters.pdf).

[10] See *Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies*. March 2017 (https://www.occ.gov/topics/responsible-innovation/index-innovation.html).

Some opposition to granting national bank charters on consumer protection grounds ignores important changes in consumer protection and preemption over the last decade. Congress expanded federal protections for consumers through Title X of the Dodd-Frank Act.[11] The Dodd-Frank Act also clarified the scope of the OCC's application of federal preemption by expressly providing that the standard in the *Barnett Bank* case governs the applicability of state consumer financial laws to national banks. State laws that address anti-discrimination, fair lending, the right to collect debts, taxation, zoning, crime, and torts continue to apply to national banks and accordingly would apply to fintech companies that become national banks. At the same time, as the many lawyers in this room know well, there are also other laws that apply specifically to national banks that contain extensive protections for consumers. One example is the Federal Trade Commission Act, which outlaws unfair or deceptive acts or practices.[12] In addition, the OCC has adopted the position that many state laws that prohibit unfair or deceptive practices apply to national banks and federal savings associations.[13] These are important statutes and regulatory requirements that mitigate the consumer protection worries used to defend the status quo.

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[11] The Dodd–Frank Act prohibits "abusive" acts or practices as well. Dodd-Frank, section 1031, codified at 12 USC 5531. The Dodd-Frank Act also generally preserves any state law that affords consumers greater protection than Title X of the Act, including with respect to unfair, deceptive, or abusive acts or practices. The Dodd-Frank Act, section 1041(a)(2), codified at 12 USC 5551(a)(2). Title X, section 1011(a), codified at 12 USC 5491(a), created the Consumer Financial Protection Bureau.

[12] See 15 USC 45(a)(1) and 15 USC 45(n). See also "FTC Policy Statement on Unfairness," Federal Trade Commission (December 17, 1980); "FTC Policy Statement on Deception," Federal Trade Commission (October 14, 1983).

[13] 7 See 12 USC 1818(b). OCC regulations regarding non-real estate and real estate lending, as well as the OCC's enforceable "Guidelines for Residential Mortgage Lending Practices," expressly reference the FTC Act standards. See 12 CFR 7.4008(c); 12 CFR 34.3(c); 12 CFR 30, appendix C. Further, OCC guidance also directly addresses unfair or deceptive acts or practices with respect to national banks. See OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002); OCC Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (February 21, 2003); OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (February 21, 2003); OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013); OCC Bulletin 2014-37, "Risk Management Guidance: Consumer Debt Sales" (August 4, 2014); and "Interagency Guidance Regarding Unfair or Deceptive Credit Practices" (August 22, 2014).

One consumer protection argument that I want to answer involves the notion that by granting national charters the OCC will somehow let unfair and deceptive lending practices creep into the federal banking system. The argument gets both history and the present state of financial services regulation wrong.

Let's set the record straight. For many years, well before Dodd-Frank, the OCC fought to eliminate unfair and deceptive lending practices in the federal banking system. By taking landmark precedential enforcement actions, the OCC made it clear that such unfair practices have no place in the federal banking system.[14] That fight takes constant vigilance, and OCC examiners and enforcement attorneys work closely with their counterparts at other agencies to prevent such practices from occurring and to correct them when they do. As a result, for example, where large-scale, short-term, consumer lending *abuse* occurs today, it does so through state-licensed and state-regulated companies, not national banks or federal savings associations.[15]

The fear that such abuse would grow unchecked because new sorts of national banks may export interest rates from state to state is also unfounded. National banks and federal savings associations have long had the ability to export rates,[16] without such feared practices taking root. In addition, Congress acted in 1980 to grant state banks the *same* power as national banks to export the usury laws in their home state.[17] Chartering additional companies as national banks or state banks will not necessarily result in the feared harm that has been suggested. Why? Because

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[14] See https://www.occ.gov/topics/consumer-protection/payday-lending/index-payday-lending.html.

[15] See http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/04/americans-want-payday-loan-reform-support-lower-cost-bank-loans and http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

[16] See 12 USC 85.

[17] See 12 U.S.C. 1831d(a) and FDIC Advisory Opinion FDIC-93-27 (https://www.fdic.gov/regulations/laws/rules/4000-8160.html).

banks at the state and national level are among the most highly regulated and closely supervised institutions in the world. All regulators understand that institutions cannot be safe and sound for long if they take unfair advantage of their customers.

The other question is "Does the OCC have the *authority* to grant national bank charters to financial technology companies that don't take deposits?" A potential spoiler here to our upcoming litigation filings, but the answer to that question is a rather simple "yes." We believe that we have the authority to do this in appropriate circumstances. The OCC clarified eligibility for receiving a special purpose national bank charter in 2003 in a regulation, 12 CFR 5.20(e)(1).[18] Suffice it to say, the agency is developing its litigation response and plans to defend this authority vigorously.

That said, at this point, the OCC has not determined whether it will actually accept or act upon applications from nondepository fintech companies for special purpose national bank charters that rely on *this* regulation. And, to be clear, we have not received, nor are we evaluating, any such applications from nondepository fintech companies. The OCC will continue to hold discussions with interested companies while we evaluate our options. These meetings have been very informative and provide insight into the financial landscape and the companies providing traditional banking services as they continue to evolve.

Of course, companies can continue to seek a national bank charter using other authority that the OCC has to charter full-service national banks and federal saving associations, as well as other long-established special purpose national banks, such as trust banks, banker's banks, and other so-called CEBA credit card banks. There is no dispute the OCC has the authority to charter these entities. In fact, the states in their current lawsuits concede as much in their arguments.

[18] See 12 CFR 5.20 (e)(1)(i) (https://www.gpo.gov/fdsys/granule/CFR-2010-title12-vol1/CFR-2010-title12-vol1-sec5-20).

Accordingly, we may well take them up on their invitation to use these authorities in the fintech-chartering context. Many fintech business models may fit well into these long-established categories of special purpose national bank charters that do *not* rely on the contested provision of regulation, section 5.20.

Chartering innovative *de novo* institutions through these other statutory authorities would enhance the federal banking system, increase choice, promote economic growth, and improve services to consumers, businesses, and communities. It would also support the original goal of ensuring the federal banking system can evolve to meet the changing needs of the marketplace and its customers. Companies interested in exploring chartering options should review the *Comptroller's Licensing Manual* "Charters" booklet[19] and contact the OCC's Office of Innovation for an initial discussion. So, while the OCC has no imminent or concrete plans to use section 5.20 to charter an uninsured special purpose fintech national bank, clearly other, statutory chartering options exist for the OCC and many fintech business models to achieve the same result.

In sum, the agency, and my predecessor, Tom Curry, deserve significant credit for changing the conversation about financial innovation and fintech. It is progress when our agency's consideration of *its* options spurs actions by others to explore ways innovation and fintech can make banking better and improve services to customers. While the OCC exercises its authorities and responsibilities in thoughtful and responsible ways, I am encouraged to see state and other federal agencies doing the same. I welcome the efforts by states to explore cross-state licensing opportunities and registration, while enhancing supervision of these companies as our industry rapidly changes. The more choices companies have to prosper and responsibly fulfill

[19] See *Comptroller's Licensing Manual*, "Charters." September 2016 (https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf).

their public purpose, the better off we all are. We should take every opportunity to reduce unnecessary regulatory burden, promote economic growth, and eliminate barriers to becoming part of our banking system, so long as we ensure that the system operates in a safe and sound manner, provides fair access, treats customers fairly, and complies with applicable laws and regulations.

Before closing, I again want to thank the Exchequer Club for having me here today. It is good to see so many familiar faces and share my thoughts on this important topic. I appreciate your hospitality and have tested your attention spans long enough. I would be happy to answer a few questions as time permits.

EXHIBIT B

Office of the
Comptroller of the Currency

COMPTROLLER'S LICENSING MANUAL

Charters

September 2016

Contents

Introduction

This booklet of the *Comptroller's Licensing Manual* supports the Office of the Comptroller of the Currency's (OCC) supervisory activity with respect to the granting of charters to national banks and federal savings associations (collectively, banks).[1] Before establishing a national bank or a federal savings association (FSA), each organizing group must apply to, and obtain approval from, the OCC. New banks may be chartered for full-service or special purpose operations, such as trust banks, credit card banks, bankers' banks, community development (CD) banks, cash management banks, and other banks that limit their activities.

Each organizer and proposed director is responsible for understanding the chartering process and the role of a bank director. Each organizer and proposed director should review this booklet to become familiar with the chartering process.

National banks and FSAs are chartered under different legal authorities. As such, laws, regulations and rulings applying to each charter are sometimes different, although many laws and requirements apply to both charter types. The application process for both charters is similar, but differences in the process or factors the OCC considers when reviewing charter applications for the two charter types are highlighted in this booklet, as appropriate. National banking associations are owned by shareholders who own stock issued by the national bank. An FSA may also be organized as a stock entity (stock FSA) or may have a mutual form of organization (mutual FSA), in which the equity interest in the FSA is attributed to the FSA's members (members generally include depositors, but also may include borrowers).

Each bank is different and may present unique issues. The OCC's supervisory activity includes a licensing component, through which the OCC ensures that the corporate structure of banks is established and maintained in accordance with principles of safety and soundness and consistent with applicable laws and regulations. Accordingly, the OCC applies the guidance in this booklet consistent with the supervisory goals for each bank. The booklet

- describes OCC policies and procedures used in the charter application process, along with detailed guidance and instructions.
- discusses the factors that the OCC considers in deciding a proposed bank's application.
- describes the application process, including the prefiling process, filing and review of the application, the decision, and the organization phase of the new bank.
- provides information about the ongoing supervision of a federally chartered bank and issues applicable to a special purpose bank.

This booklet consists of an introduction, a key policies section outlining specific factors for chartering banks, a section on the application process, and a procedures section. A glossary

[1] This booklet also covers special purpose banks such as trust banks, credit card banks, and community development (CD) banks, which may be subject to specific regulations or guidance, as described in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*. For information on national trust banks and FSA trust banks, refer to OCC Bulletin 2007-21, "Supervision of National Trust Banks, Revised Guidance: Capital and Liquidity" (as of June 7, 2012, this guidance also applies to FSAs).

of terms used in the booklet is provided as well as a reference section with statutory and regulatory citations and other useful materials. References are also made to other booklets of the *Comptroller's Licensing Manual* and the *Comptroller's Handbook*. Following the integration of the OCC and the Office of Thrift Supervision (OTS) in July 2011, the OTS licensing handbooks were rescinded. *The Comptroller's Licensing Manual* and the *Comptroller's Handbook* booklets are undergoing revision to incorporate guidance for both national banks and FSAs, but that process has not yet been completed. Applicants should contact OCC licensing staff for guidance as needed.

Throughout the electronic edition of this booklet are hyperlinks to sample documents on our public website, such as the Interagency Charter and Federal Deposit Insurance Application (interagency application), and other information that an applicant may find useful.

Throughout this booklet, national banks and FSAs are collectively referred to as banks or federally chartered banks, unless it is necessary to distinguish between the two types of charter.

Key Policies

The OCC grants approval of charter applications in two steps: preliminary conditional approval and final approval. Preliminary conditional approval is granted if the factors the OCC considers in reviewing charter applications are favorable; this approval permits the organizers to proceed with organizing the bank. Granting preliminary conditional approval provides the organizers of the bank with assurances that the application has passed the first phase of OCC review before additional funds are expended to raise capital, hire officers and employees, and complete the organization of the bank.

The OCC defines the organization phase as the period between the preliminary conditional approval and the bank opening. Refer to the "Organization Phase" section of this booklet. During the organization phase, the organizing bank's officers and directors hire management and staff, continue or begin to raise capital, prepare bank premises, and develop policies and procedures to guide the bank's operations.

Receipt of final approval from the OCC means the OCC has issued a charter for the bank, and the bank can begin to conduct banking business. By this point, the organizers must have completed all key phases of organizing the bank as determined by the OCC and received any other necessary regulatory approvals, including Federal Deposit Insurance Corporation (FDIC) deposit insurance, if applicable.

Capital must be raised[2] within 12 months of the OCC's preliminary conditional approval or the approval expires, unless the OCC grants an extension. If the preliminary approval expires, then all the cash collected on any subscriptions for the bank's stock must be returned.[3] Under certain circumstances, capital can be raised before preliminary conditional approval but after the proposed bank becomes a legal entity. Refer to the "Raising Capital" section of this booklet.

The bank must open within 18 months of the OCC's preliminary conditional approval or the approval expires, unless the OCC grants an extension.[4] The bank may not conduct banking business or engage in fiduciary or other activities until the OCC grants final approval and issues a charter.[5]

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[2] Organizers seeking to charter a mutual FSA should consult with the appropriate OCC Licensing office regarding capital raising efforts. Formations of mutual FSAs involve different challenges when raising capital compared with stock charters because mutual FSAs do not issue stock.

[3] Refer to 12 CFR 5.20(i)(5)(iv).

[4] Refer to 12 CFR 5.20(i)(5)(iv).

[5] Refer to 12 CFR 5.20(i)(5)(ii)(B).

In determining whether to approve an application to establish a national bank or FSA, the OCC is guided by the goal of maintaining a safe and sound banking system. The OCC approves proposals to establish banks that have a reasonable chance of success, will provide fair access to financial services by helping to meet the credit needs of its entire community (if the bank will extend credit), will ensure compliance with laws and regulations, will promote fair treatment of customers including efficiency and better service, and foster healthy competition. OCC approval does not assure that operating a bank is without risk to the organizers or the investors. In reaching its decision, the OCC considers[6] whether the proposed bank

- has organizers who are familiar with applicable federal banking laws and regulations.
- has competent management, including a board of directors, with the ability and experience relevant to the type of products and services to be provided.
- provides for sufficient capital in relation to the proposed business plan.
- can reasonably be expected to achieve and maintain profitability.
- will be operated in a safe and sound manner.
- does not have a title that misrepresents the nature of the institution or the types of services it offers.
- poses acceptable risk to the Federal Deposit Insurance Fund, if applicable.
- demonstrates that its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act, the National Bank Act, and the Home Owners' Loan Act (HOLA) (12 USC 1464), as applicable.

In addition, the OCC considers a proposed bank's plans for meeting the credit needs of its community, including low- and moderate-income (LMI) neighborhoods, consistent with the safe and sound operation of the bank as required by the Community Reinvestment Act (CRA).[7]

The OCC considers the following additional factors[8] in reviewing an application to charter an FSA, as required by HOLA:

- A charter for an FSA may be granted only to persons of good character and responsibility.
- In the judgment of the OCC, a necessity exists for such an institution in the community to be served.
- There is a reasonable probability of the FSA's usefulness and success.

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[6] Refer to 12 CFR 5.20(e) and (f), which outline factors the OCC considers in reviewing a charter application.

[7] CRA requires the OCC to take into account a proposed insured bank's description of how it will meet its CRA objectives. Refer to 12 USC 2903(a)(2) and 12 CFR 5.20(e)(2). This requirement does not apply to proposed special purpose banks that will not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incidental to their specialized operations. These special purpose banks include banker's banks, as defined in 12 USC 24(Seventh), and banks that engage in one or more of the following activities: providing cash management controlled disbursement services or serving as correspondent banks, trust companies, or clearing agents. Refer to 12 CFR 25.11(c)(3), 195.11(c)(2).

[8] Refer to 12 CFR 5.20(e)(1)(ii).

- The FSA can be established without undue injury to properly conducted existing local thrift and home financing institutions.

Further, the OCC considers whether a proposed FSA will be operated as a qualified thrift lender under 12 USC 1467a(m), and that lending and investment activities will be within the HOLA limits, or the bank otherwise qualifies under this section.

The OCC will also take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places, pursuant to the requirements of the National Historic Preservation Act.[9] Further, the OCC will consider the effect the proposal will have on the quality of the human environment, including changes in air and/or water quality, noise levels, energy consumption, congestion of population, solid waste disposal, or environmental integrity of private land within the meaning of the National Environmental Policy Act.[10]

The OCC may deny an application, as specified in 12 CFR 5.13(b), based on any of the following factors:

- Significant supervisory, CRA (if applicable), or compliance concerns exist with respect to the proposed business plan.
- Approval of the filing is inconsistent with applicable laws, regulations, or OCC policy.
- The applicant failed to provide information requested by the OCC that is necessary for the OCC to make an informed decision.

Each charter application must include accurate statements and fully developed plans, and it must demonstrate that the organizers (and any sponsoring companies) are aware of and understand the laws, regulations, and safe and sound banking practices that would apply to the bank's operation.[11]

The OCC encourages each organizing group interested in establishing a bank to contact the OCC for information about the process and guidance about specific issues unique to the group's proposal. The OCC normally requires all of the organizers of a bank and the proposed chief executive officer (CEO) to attend a prefiling meeting before filing the application.

Certain aspects of a bank's business plan may require additional filings with the OCC, or additional information in the charter application. For example, if the organizers propose for the bank to exercise fiduciary powers, the charter application should include all relevant information normally filed with an application for fiduciary powers. Similarly, if the new

[9] Refer to 54 USC 300101 et seq.

[10] Refer to 42 USC 4321, et seq.

[11] Refer to 12 CFR 5.20(h)(6).

bank proposes branch locations, separate branch applications are required, with separate requirements for public notice. Organizers should contact the OCC for guidance concerning additional filings that may be required.

The organizing group should file an interagency application for deposit insurance with the FDIC when it submits its charter application to the OCC, if the proposed bank will offer insured deposits. All FSAs must be FDIC-insured.[12]

A bank holding company (BHC) or savings and loan holding company (SLHC), or a company that would become a BHC or SLHC because of its ownership of a proposed bank, must obtain approval from the Board of Governors of the Federal Reserve System (Federal Reserve Board) to acquire a newly established bank before the OCC will grant final approval.[13]

Organizing Group's Role and Responsibilities

A strong organizing group generally includes persons with diverse business and financial interests and community involvement. The business plan and other information supplied in the application must demonstrate an organizing group's collective ability to establish and operate a successful bank in the economic and competitive conditions of the market the bank will serve. A poor business plan reflects adversely on the organizing group's ability, and the OCC may deny such applications.

The organizing group must be composed of five or more persons.[14] Normally, all of the organizers serve as the bank's initial board of directors.

The organizers should

- ensure that the group consists of persons with diverse business and financial interests and community involvement and includes persons with some relevant banking or financial services experience.
- have a personal history that reflects responsibility, honesty, and integrity.
- exhibit substantial personal and financial commitment to the proposed bank relative to their individual and collective financial strength.
- select a capable CEO and, early in the organization process, other executive officers who have the necessary experience to successfully implement the proposed business plan and enhance the proposed bank's likelihood of success.
- develop a business plan that

[12] Refer to 12 CFR 5.20(e)(3).

[13] There are exceptions to this requirement under the Bank Holding Company Act for certain national trust banks or national credit card banks. These exceptions are discussed in the "Special Purpose Banks" section of this booklet.

[14] Refer to 12 CFR 5.20(d)(7), and, for national banks, 12 USC 21.

  - demonstrates the group's collective ability to establish and operate a successful bank in the economic and competitive conditions of the market to be served.
  - articulates the risks of the proposed operation and the policies, processes, personnel, and control systems that the bank will use to monitor and control those risks.
- understand their role in the successful implementation of the business plan.
- design executive officer and other compensation proposals that are consistent with the OCC's guidelines. Refer to the "Insider Compensation" section of this booklet.

The OCC requires each group to appoint a contact person to serve as the primary liaison between the OCC and the organizers. The contact person must be a member of the organizing group and a proposed director of the new bank.[15]

Sponsoring Organizations

A new bank may be affiliated with another organization, also called a sponsor, rather than choosing to operate independently. A sponsor usually is an existing corporation or holding company, including a BHC or SLHC. If the new bank is affiliated with an existing corporation or holding company, the OCC may consider the existing organization to be the sponsor of the new bank. The OCC looks closely at the proposed relationships between the bank and other organization(s) within the sponsor to determine whether to permit the affiliation.

The OCC does not consider as a sponsor a new BHC, SLHC, or other holding company established at the same time as a new bank. Such a new parent company generally does not offer significant financial and managerial resources to support the bank's operations. In addition, a new holding company generally has few activities separate from those of the bank.

A sponsor may also be a group of individuals who are currently affiliated with other depository institutions, or individuals who, in the OCC's view, are otherwise collectively experienced in banking and have demonstrated the ability to work together.

A representative of the sponsor or sponsors may serve as the contact person with the OCC.

Sponsor's Role

When a new bank proposal has a sponsor, the OCC may consider the financial and managerial resources of the sponsor and the sponsor's record of performance, rather than the financial and managerial resources of the organizing group. The OCC reviews, for consistency and compatibility with the proposed bank's business plan, a sponsor's record of performance, overall philosophy, capital, management, profitability, and plans, such as its strategic plan.

[15] Refer to 12 CFR 5.20(i)(3). There is an exception for banks that are sponsored by a qualifying holding company. See the "Sponsoring Organizations" section of this booklet.

When the sponsor has adequate financial resources, the OCC may approve an application, even in a market in which economic conditions are marginal or competitive conditions are intense. In such cases, the OCC may require the bank to execute a written agreement with its holding company that provides for capital maintenance and liquidity support from the holding company. Refer to the "Standard or Special Conditions" section of this booklet. Conversely, the OCC may deny a sponsored new bank's application if the condition of the parent company or any affiliate is subject to supervisory concern or otherwise detracts from the application.

With the OCC's prior approval, a sponsor may eliminate certain information from, or provide abbreviated information with, the charter application. To reduce the application burden of a proposal involving an insured bank, the OCC encourages the sponsor to file the same interagency application with both the OCC and the FDIC.

Each sponsor of a proposed bank must demonstrate in the application that any proposed holding company will meet all applicable requirements, including, among others, limitations on holding company activities, under federal and state law.

Conflicts of Interest

Conflicts may arise between a bank and its sponsoring entity in maintaining sufficient corporate separation between the organizations. To enhance corporate separation, the sponsor should evaluate the bank's activities and operations closely and address the following issues in the charter application:

- The need for bank directors to act primarily in the best interest of the bank rather than the bank's sponsor and to exercise objective judgment in carrying out their duties, independent of undue influence from sponsor management and affiliates. This independence is especially critical when the bank directors are considering
  - employment of bank management and employees dedicated to supporting the bank's operations.
  - maintenance of separate books and records for the bank, the sponsor, and other bank affiliates.
  - implementation of bank board-approved internal and external audit programs, internal controls and risk management policies, and other policies and procedures necessary to ensure safe, sound, and legal bank operations.
- Evaluation of the extent to which the bank needs to retain core operations and staff to conduct its business, as opposed to being essentially a dormant bank. Refer to the "Glossary" section of this booklet.
- Adoption of third-party relationship[16] policies that may include affiliated entities functioning as service providers for the bank.

[16] Refer to OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance."

Affiliate Transactions

The discussion that follows addresses only a few of the most common affiliate[17] issues that may arise in connection with new bank charters. For further detail on affiliate transactions, see the "Related Organizations" booklet of the *Comptroller's Handbook* or the "Other Activities" section 730 of the OTS Examination Handbook.

A bank that has a sponsor or other affiliate must be aware of the laws governing affiliate transactions. Sections 23A and 23B of the Federal Reserve Act, 12 USC 371c and 371c-1, respectively, are designed to protect a bank from transactions with its affiliates that are disadvantageous or abusive to the bank. The Federal Reserve Board implemented sections 23A and 23B through Regulation W, 12 CFR 223. Newly formed banks and their affiliates must comply with the provisions of this rule as well as with the statutes.[18]

Most subsidiaries of banks are not considered affiliates of the bank for purposes of sections 23A and 23B as implemented by Regulation W. Subsidiaries treated as affiliates include insured depository institutions, financial subsidiaries, and subsidiaries (including uninsured depository institutions) that are also controlled by one or more affiliates of the bank that are not themselves depository institutions.[19] In addition, as previously noted, the OCC and the Federal Reserve Board can determine that an otherwise exempt subsidiary should be treated as an affiliate. For more information on the treatment of subsidiaries of banks under Regulation W, refer to the "Investment in Subsidiaries and Equities" booklet of the *Comptroller's Licensing Manual*.

Section 23A, as implemented by Regulation W, controls risk to banks by

- limiting covered transactions with any single affiliate to no more than 10 percent of the bank's capital and surplus, and limiting aggregate transactions with all affiliates to no more than 20 percent of capital and surplus. Covered transactions include
  - a bank's extensions of credit to, or guarantees on behalf of, its affiliates or purchases of assets from its affiliates.
  - purchases of, or investments in, securities issued by affiliates.
  - acceptance of securities or debt obligations issued by an affiliate as collateral for a loan.
  - transactions with an affiliate that involve the borrowing or lending of securities, or derivative transactions with an affiliate, that cause a bank to have credit exposure to the affiliate.
- requiring that all transactions between a bank and its affiliates be made on terms consistent with safe and sound banking practices.

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[17] The term affiliate includes, among other things, any company that controls a bank and any company that is controlled by the same person or company as controls the bank.

[18] Sections 23A and 23B apply to FSAs to the same extent as Federal Reserve System member banks, pursuant to 12 USC 1468(a).

[19] Refer to 12 CFR 223.2(b)(1).

- prohibiting the purchase of low-quality assets from the bank's affiliates.
- requiring that all credit transactions (including guarantees and extensions of credit to an affiliate) be secured by a statutorily defined amount of collateral. A full or partial exemption from these restrictions may be available for certain types of transactions. (For example, see section 23A(d) and 12 CFR 223.41 and 223.42.)

Section 23B of the Federal Reserve Act, as implemented by Regulation W, requires a bank to engage in certain transactions with its nonbank and uninsured bank affiliates only on terms and under circumstances that are substantially the same or at least as favorable to the bank as those prevailing at the time for comparable transactions with unaffiliated companies. This requirement generally means that the bank must conduct transactions with these affiliates on an arm's-length basis. Thus, for example, pricing or transaction valuation must usually reflect fair market value. Section 23B applies this restriction to any covered transaction, as defined by section 23A, and to other specified transactions, such as a bank's sale of securities or other assets to an affiliate and the payment of money or the furnishing of services to an affiliate. Section 23B, however, does not prohibit banks from receiving goods or services from affiliates at below market prices. In addition, transactions between a bank and an insured bank affiliate are generally exempt from section 23B. As is the case under section 23A, transactions between a bank and an uninsured bank affiliate are generally not exempt from section 23B.

FSAs are subject to the provisions of sections 23A and 23B, with two additional restrictions. First, an FSA may not make a loan to an affiliate unless that affiliate is engaged only in activities that are permissible for BHCs under section 4(c) of the Bank Holding Company Act (BHCA). Second, an FSA may not purchase or invest in securities of an affiliate, except for shares of a subsidiary. Refer to 12 USC 1468(a).

Regulation W sets forth exemptions from certain restrictions of sections 23A and 23B. Exemptions that may be of importance to sponsors of new banks include the "sister bank" exemption and the exemption for newly formed banks. The sister bank exemption exempts many covered transactions between a bank and an insured bank affiliate from the quantitative limits and collateral requirements of section 23A. Under Regulation W, however, covered transactions between a bank and an affiliated uninsured bank, such as a trust company, are not eligible for the sister bank exemption.

The exemption for newly formed banks allows such banks to purchase assets from an affiliate without regard to the restrictions of either section 23A or 23B. To qualify for these exemptions, the appropriate federal banking agency (the OCC, for federally chartered banks) must approve the asset purchase in writing in connection with its review of the formation of the bank. Refer to sections 223.42(i) and 223.52(a)(1). If a sponsor plans to rely on these exemptions, it should provide details of any proposed asset purchases in the business plan.

Parallel-Owned Banking Organizations

In a parallel-owned banking organization, at least one U.S. bank and at least one foreign bank are independently chartered but are controlled either directly or indirectly by the same

individual, family, group of individuals, or a company or other entity who are closely associated in their business dealings or who otherwise act in concert. If a de novo bank is affiliated with a foreign bank through common control by individuals, these persons are considered members of the establishing party of the de novo bank. Processing a charter application that creates a parallel-owned banking organization generally is more complex than processing a typical charter application. This difference reflects the OCC's need to understand the following:

- How the overall strategy and management of the parallel-owned banking organization affect the de novo bank.
- How the activities of the foreign bank are supervised.
- How home-country supervisors view the condition and operations of foreign affiliates.
- How affiliates might affect the de novo bank.

These matters of supervisory interest add to the concerns addressed in the OCC's standard analysis of the background and financial information of the individual(s) filing the charter application.

Concerns about the bank arising from a potential parallel-owned banking organization typically result in expanded application requirements. The degree to which the OCC expands requirements varies, reflecting the specific structure of the proposed transaction and resulting organization. The OCC may request commitments or representations to facilitate the supervision of parallel-owned banking organizations. Refer to the appendix to the "Change in Bank Control" booklet of the *Comptroller's Licensing Manual* for specific examples. Also, see the interagency statement[20] on parallel banking.

To apply legal restrictions on a proposed bank's transactions with its affiliates within a parallel-owned banking organization, the 25 percent control threshold in sections 23A and 23B and Regulation W is relevant. Members of a parallel-owned banking organization that are affiliates cannot take advantage of the sister bank exemption because that exemption requires ownership by a holding company.

Because of the complexity of proposals that would establish a parallel-owned banking organization and the case-by-case nature of their processing, potential applicants are strongly encouraged to meet with Licensing staff before submitting an application.

Management and Directors' Banking Experience

The OCC requires all organizing groups and senior management teams to demonstrate sufficient relevant banking experience to operate a bank successfully. The OCC grants a charter only to organizers who have proposed a management team, including both the proposed managers and directors that the OCC considers competent. Competent management teams are usually characterized by

[20] Joint Agency Statement on Parallel-Owned Banking Organizations, April 23, 2002.

- high-caliber executive officers with the relevant experience necessary to implement the proposed business plan and to exercise corrective action in response to changing internal and external factors.
- successful business and community leaders, including some with prior banking experience, who effectively oversee the management of the bank's activities in their capacity as directors.

If a proposed directorate has limited banking experience or community involvement, the OCC expects the organizing group to recommend a stronger team of executive officers.

Directors

The affairs of each bank must be managed by directors who, initially, are elected by the shareholders (or in the case of a mutual FSA, named by the organizers [21]) at a meeting held before the new bank is authorized to commence business and, afterward, at meetings to be held at least annually, on a day specified in the bank's bylaws.

The board plays a pivotal role in the effective governance of its bank. The board is accountable to shareholders, regulators, and other stakeholders. The board is responsible for overseeing management, providing organizational leadership, and establishing core corporate values. The board should create a corporate and risk governance framework to facilitate oversight and helps set the bank's strategic direction, risk culture, and risk appetite. The board also oversees senior management, including the development, recruiting, succession planning, and compensation of senior managers.

The board should have a clear understanding of its roles and responsibilities. It should collectively have the skills and qualifications, committee structure, communication and reporting systems, and processes necessary to provide effective oversight. The board should be willing and able to act independently and provide a credible challenge to management's decisions and recommendations. The board also should have an appropriate level of commitment and engagement to carry out its duties.

The corporate and risk governance framework should provide for independent assessments about the quality, accuracy, and effectiveness of the bank's risk management functions, financial reporting, and compliance with laws and regulations. Most often performed by the bank's audit function, independent assurances are essential to the board's effective oversight of management.

The board's role in the governance of the bank is clearly distinct from management's role. The board is responsible for the overall direction and oversight of the bank—but is not responsible for managing the bank day-to-day. The board should oversee and hold management accountable for meeting strategic objectives within the bank's risk appetite. Both the board and management should ensure that the bank is operating in a safe and sound manner and is complying with laws and regulations.

[21] An FSA with a mutual ownership form has no stock issued and therefore no shareholders. The initial slate of directors is generally named by the organizers of a mutual FSA.

Directors should have sufficient experience, competence, willingness, and ability to be active in overseeing the safety and soundness of the bank's affairs. Appendix A of this booklet, "Directors' Duties and Responsibilities, Qualifications, and Other Issues," provides a broader discussion.

Board composition should facilitate effective oversight. The ideal board is well diversified and composed of individuals with a mix of knowledge and expertise in line with the bank's size, strategy, risk profile, and complexity. Although the qualifications of individual directors will vary, the directors should provide the collective expertise, experience, and perspectives necessary for effectively overseeing the bank. Boards of larger, more complex banks should include directors who have the ability to understand the organizational complexities and the risks inherent in the bank's businesses. Individual directors also should lend expertise to the board's risk oversight and compliance responsibilities. In addition, the board and its directors must meet the statutory and regulatory requirements governing size, composition, and other aspects. Refer to appendix A of this booklet for a list of these requirements.

To promote director independence, the board should ensure an appropriate mix of "inside" and "outside" directors. Inside directors are bank officers or other bank employees. Outside directors are not bank employees. Directors are viewed as independent if they are free of any family relationships or any material business or professional relationships (other than stock ownership and directorship itself) with the bank or its management. Independent directors bring experiences from their fields of expertise. These experiences provide perspective and objectivity because independent directors oversee bank operations and evaluate management recommendations. This mix of inside and outside directors promotes arms-length oversight. A board that is subject to excessive management influence may not be able to effectively fulfill its fiduciary and oversight responsibilities.

In addition, the OCC may consider the following factors in its evaluation of the proposed board's banking experience and qualifications:

- Combined business expertise.
- Collective understanding of the financial industry and the regulatory framework under which the bank will operate.
- Willingness to put the interests of the financial institution ahead of personal interest.
- Understanding of and willingness to avoid conflicts of interest.
- Knowledge of the community to be served.
- Desire to commit an appropriate amount of time in carrying out the responsibilities of a director or organizer and an awareness of the importance of being an active participant in overseeing management.
- Personal and financial integrity (bankruptcies and previous arrests may reflect poorly on an individual's character).
- Individual experiences in highly regulated industries, for example, insurance or stock brokerage.

Other items the OCC may consider about the organizing group include:

- Plans to establish and maintain an appropriate board and committee structure.
- Establishment of a compensation structure designed to attract and retain qualified management. Such structures should not be designed to reward unduly risky or unsafe practices, such as incentives based only on growth.
- Efforts to obtain directors with recent banking or financial services experience.
- Commitments or representations by the organizing group to obtain director education.

Director education and orientation are available from a variety of sources, including the proposed bank's management, bank consultants, and seminars or "colleges" for new directors offered by local and national industry associations. In addition, the OCC periodically hosts director workshops to highlight regulatory changes and emerging industry trends.

To conclude that an organizing group has a satisfactory commitment to director education, the OCC considers whether the following are present:

- A specific plan with time frames.
- Initial training before the bank opening that focuses on the duties and responsibilities of new bank directors. This training should include the importance of an effective, independent risk-monitoring program to assist the board in its oversight of the bank's risk management system. Training should also address the significance of Bank Secrecy Act/Anti-Money Laundering (BSA/AML) regulatory requirements and the consequences of noncompliance.
- Plans for additional training during the first year of the bank's operations, tailored to the directors' needs relative to the bank's proposed business plan.
- Ongoing education about new risks, products, and services.

Selection of the CEO

Selection of a qualified CEO is a critical decision affecting the success of the new bank. The proposed CEO should

- be involved actively in developing the proposed business plan, since the CEO will be responsible for implementing the proposed plan successfully once the bank opens.
- have strong leadership skills and successful experience managing a bank or serving as a bank officer in a similar financial institution or financial services company in areas relevant to the proposed bank's marketing strategy and needs.
- possess skills that complement those of the directors and other proposed members of the executive officer team.

Selection of a CEO whom the OCC finds unqualified for the position, whose prior banking or financial services experience is unsatisfactory, or who otherwise is unacceptable reflects negatively on the organizers and normally results in disapproval or revocation of preliminary conditional approval. Decisions about a proposed CEO are based on a person's suitability for that position with a specific new bank and are not intended to determine that person's eligibility for other jobs.

Each organizing group must disclose its proposed CEO to the OCC at the time the group files the charter application. If the proposed CEO wants to have his or her name withheld from the public until the OCC grants preliminary conditional approval, the organizers should

- include a request for confidential treatment with the materials submitted in the charter application.
- provide support for their request that disclosure would constitute an unwarranted invasion of personal privacy under exemption 6 of the Freedom of Information Act (FOIA) or result in substantial competitive harm to the organizers or the proposed CEO under exemption 4 of FOIA.
- list in the application the criteria that were used in the selection process.
- provide a detailed description of the person's background, experience, and qualifications in the public portion of the application that is sufficiently specific to permit matching the application information with the person once his or her identity is disclosed.
- discuss the proposed terms of employment for the CEO, including compensation and benefits.

The organizing group should submit documentation of its investigation of the proposed CEO's background and qualifications (refer to appendix A, "Management Review Guidelines," in the "Background Investigations" booklet of the *Comptroller's Licensing Manual*).

Executive Officers

The organizers, board of directors, and the CEO are responsible for hiring and retaining executive officers with skills and qualifications appropriate to the size of the institution, its corporate structure, and the nature, scope, and risk of its activities. The organizers must evaluate each proposed executive officer.

The OCC expects that when the application is filed, the CEO will be identified in the filing, with a presentation of the organizers' analysis of his or her qualifications. Other executive officers may be similarly identified in the application; however, if officer positions are unfilled, the OCC expects that job descriptions of the remaining senior executive officer positions will be thorough and allow the OCC to analyze the necessary qualifications.

Executive officers are responsible for managing and supervising the day-to-day activities of the bank. They should be able to identify and manage the material risks associated with the bank's activities and provide appropriate and accurate reports to the board of directors of the bank's condition and risk profile. Each proposed executive officer should therefore exhibit strong, relevant experience for the specific position for which he or she is proposed. While the lack of previous experience in a specific position may not disqualify a person for the position, the proposed officer should be able to demonstrate that he or she has the knowledge, skills, and abilities required to execute the duties of the position effectively.

The organizing group should include the following information in its application for each executive officer candidate:

- A job description outlining responsibilities for each officer's position.
- A detailed outline of each candidate's banking or other relevant experience.
- An assessment of each candidate's qualifications for the position and his or her ability to implement the business plan. Refer to appendix A, "Management Review Guidelines," in the "Background Investigations" booklet of the *Comptroller's Licensing Manual*.

The applicant's projected time frames should include adequate time for the OCC to complete its review of each executive officer's qualifications. The organizers must receive a non-objection determination on the CEO and on other senior executive officers before opening the bank. To avoid undue expense, the organizers should make no final commitments of employment to any officer before the OCC's review.

The OCC assesses the strength of the executive officers by considering the

- extent and quality of the proposed candidate's experience.
- candidate's skills for the position, including his or her level of knowledge of the businesses and activities that the candidate will manage, the attendant risks, and appropriate risk management functions.
- complexity of the proposed bank's business plan.

If, after appropriate investigation and consideration of a proposed executive officer, the OCC objects to that person, he or she cannot assume that position in the bank. Objection to a proposed executive officer does not mean that the person may not be suitable for a different position in the same bank or a similar position in another bank. It means only that the OCC does not consider the person acceptable for the particular position for which he or she was proposed in the new bank.

The OCC considers the qualifications of all proposed executive officers in its determination that the bank is ready to open for business.

Insider Policy

The OCC requires each bank to adopt a written insider[22] policy addressing its code of conduct and conflicts of interest. This policy must detail business practices the board of directors deems acceptable. The OCC requires this policy in writing for each bank, regardless of the bank's complexity or the degree of sophistication of its systems.

The board of directors must take the lead in protecting the bank from conflicts of interest. One way a board of directors can fulfill that role is by adopting and enforcing clear insider policies. These policies would govern conduct and transactions between the bank and its

[22] Insider is defined as a proposed organizer, director, principal shareholder, or executive officer of a proposed bank. For purposes of determining applicability of and compliance with 12 USC 375(a) and 375(b) as implemented by Regulation O, the term "insider" is defined at 12 CFR 215.2(h) and means an executive officer, director, or principal shareholder, and includes any related interest of such a person.

directors and principal shareholders and their related interests, as well as with the bank's officers and employees.

Transactions With Insiders

Bank insiders have positions of responsibility and leadership in the community and should avoid even the appearance of conflicts of interest.

A bank may engage in safe and sound business and personal transactions with its insiders, consistent with law and regulation.[23] Transactions between a bank and its insiders can address legitimate banking needs and serve the interests of both parties. The challenge is to separate legitimate insider financial relationships from those that are, or could become, abusive, imprudent, or preferential.

Any financial or other business arrangement, direct or indirect, between the organizing group or other insiders and the bank must be made on nonpreferential terms. The bank may receive preferential treatment from the insider, but the insider may not charge the bank a higher rate or require more favorable terms than those provided to non-insiders in comparable transactions. Additional restrictions and requirements apply to loans made to executive officers. Banking statutes and regulations also impose a number of reporting and record-keeping requirements. Refer to the "Insider Activities" booklet of the *Comptroller's Handbook*.

Insider Personal and Financial Commitments

The OCC expects all organizers and directors to exhibit substantial personal and financial commitment to a new bank. Personal commitment includes contributions of time and expertise to the bank's organization. Refer to appendix A.

Personal wealth is not a prerequisite to becoming an organizer or director of a bank. Purchases of shares of bank stock, individually and in the aggregate, should, however, reflect a financial commitment to the success of the bank that is reasonable in relation to the individual and collective financial strength of the organizers. Financial commitment includes contributions of initial funding and stock subscriptions relative to each person's individual financial capacity. For a mutual FSA, the OCC expects that the organizers fund initial capital deposits to reflect a similar financial commitment. Further, organizers should act prudently on all financial and other aspects of the proposal.

Organizers should not bill excessive charges to the bank for professional and consulting services or unduly rely on these fees as a main source of income. Normally, the bank should not compensate organizers for marketing or aiding in stock solicitation. Directors of new banks should not be dependent on bank dividends, fees, or other bank-related compensation to satisfy financial obligations. Directors are often the primary source of additional capital for a bank that is not affiliated with an established sponsoring organization. Accordingly, the

[23] Refer to 12 CFR 215 and 12 USC 1828(z).

directors should be able to supply capital, or have a realistic plan to enable the bank to obtain capital, if needed.

All insiders, including executive officers, should make substantial personal commitments to the organizing bank. Principal shareholders should demonstrate financial commitment through their stock purchases. Directors and principal shareholders also may provide support for the new bank by moving personal and business banking relationships to the bank that help the bank achieve success.

Insider Compensation

A bank insider's compensation can include salaries, bonuses, fees, benefits, or other goods and services. The organizing group should include in its interagency application a description of all forms of insider compensation, including stock-based compensation plans.

Organizers should establish executive compensation plans that are in the best interest of the bank and commensurate with the services the executives propose to offer. A new bank may include a stock benefit or compensation plan (stock benefit plan), including stock options, stock warrants, and similar stock-based compensation, in its overall compensation for organizers, directors, and officers, provided that it structures the plans appropriately. Refer to appendix B, "Stock Benefit Plans."

An FSA must also ensure that employment contracts with its officers (and other employees) are entered into in accordance with the requirements of 12 CFR 163.39. This rule requires that all employment contracts be in writing and approved by the board, and that they contain certain specified provisions. An FSA may not enter into a contract with its officers (or other employees) if such a contract would constitute an unsafe or unsound practice; for example, if the contract could lead to material financial loss or damage to the FSA or could interfere materially with the directors' exercise of their duty or discretion (provided by law, charter, bylaw, or regulation) as to restricting the ability of the board to take any needed action regarding the employment or termination of an officer or employee of the FSA.[24]

Section 956 of the Dodd–Frank Wall Street Reform and Consumer Protection Act requires the OCC and other federal agencies to jointly prescribe regulations or guidelines with respect to incentive-based compensation practices at national banks and FSAs. Specifically, the act requires that the OCC prohibit any types of incentive-based compensation arrangements, or any feature of any such arrangements, that (1) encourage inappropriate risks by a bank by providing an executive officer, employee, director, or principal shareholder of the bank with excessive compensation, fees, or benefits; or (2) could lead to material financial loss to the bank. Under the act, a bank also must disclose to the OCC the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides excessive compensation, fees, or benefits or could lead to material financial loss to the institution.

[24] While national banks are not subject to a similar explicit regulatory requirement, as a prudent practice, a national bank should not enter into an unsafe or unsound employment contract.

Regulatory Review

The OCC evaluates each proposed bank's total executive compensation package, including its stock benefit plan, to determine if the package is reasonable considering each person's contribution of time, expertise, and financial commitment. Refer to appendix B for a discussion of stock benefit plans. The OCC assesses the amount and basis of any cash or stock payments an organizer may receive as a return for funds placed at risk or for services rendered. In addition, the OCC considers the number and percentage of additional stock warrants or options that the organizers propose relative to the number of shares the bank will issue when it opens. The OCC's conclusions about the acceptability of the proposed insider compensation package have a bearing on the OCC's overall assessment of the charter application.

The OCC also reviews proposed insider compensation plans for each newly organized parent holding company for consistency with the OCC's criteria set forth in this booklet and for compliance with applicable laws and regulations. The organizers should provide documentation to support the reasonableness of the holding company compensation package, including the methodology used to value any stock options (such as a stock option pricing model or discounted cash flow analyses and relevant comparable data). The OCC has no preference about which method the organizing group uses for its valuation of stock options.

An established company that sponsors a new bank may have existing compensation plans in which the proposed bank's management and board participate. The OCC reviews such plans closely to determine whether the plan, in combination with other forms of compensation, is reasonable and provides management and the board with appropriate incentives to promote the safe and sound operation of the bank.

The FDIC reviews compensation plans in its assessment of each deposit insurance application. The OCC and the FDIC apply similar standards to their separate evaluations of compensation plans and stock benefit plans, including stock options, stock warrants, and other similar stock-based compensation plans. If the organizers would like the OCC and the FDIC to review proposals that may not conform to the stock benefit plan guidelines provided in this booklet and the applicable FDIC policies for such stock benefit plans, they should provide information and a justification to support the deviation.

In some circumstances, the exercise of rights granted by a stock benefit plan trigger a filing to the OCC under the Change in Bank Control Act (CBCA) (12 USC 1817(j)) or the OCC's implementing regulation, 12 CFR 5.50. The OCC's review of stock benefit plans in connection with a charter application does not satisfy the prior notice requirements under the CBCA. For CBCA purposes, options that are immediately exercisable at the option of the owner or holder are treated as the underlying security, even if they are not exercised.[25]

Generally, a material change to the new bank's overall compensation package after the application is filed is a "significant change," which requires a prior non-objection by the

[25] Refer to 12 CFR 5.50(d)(14)(ii).

OCC before the bank may open. In some cases, the organizers develop a stock benefit plan for directors or officers after filing the application. The OCC also may consider this development a "significant change." Refer to the "Significant Changes" section of this booklet.

Unacceptable Forms of Compensation

The OCC generally considers unacceptable any new bank compensation proposal that allows insiders to

- purchase stock at an original issue price lower than that paid by other investors.
- purchase or acquire a separate class of bank or holding company stock at a price lower than that offered other subscribers or with greater voting rights.
- receive a cash payment based on the market value of the bank's stock.
- receive funds from the bank's capital stock or surplus accounts.
- obtain more than one option or warrant for each share of stock subscribed for Type 2 plans at the time of the bank's opening. Refer to the "Primary Types" section of appendix B, "Stock Benefit Plans."
- receive stock options or warrants issued to a holder other than the name of the bank insider, such as a partnership, corporate entity, spouse, or other family member.
- exercise "cashless" stock options, such as stock appreciation rights or phantom shares.

These compensation arrangements cause concerns about the bank's ability to raise additional capital, allow control without a proportionate financial investment, and make it difficult for other shareholders to remove directors if they manage the bank in an unsafe or unsound manner.

Excessive Compensation

Each bank is required to maintain safeguards to prevent the payment of compensation that is excessive or could lead to material financial loss to the bank. Excessive compensation is an unsafe or unsound practice and is prohibited by regulatory safety and soundness standards. The commitment to pay, or payment of, unacceptable or excessive compensation also reflects negatively on the organizing group's charter proposal.[26]

The OCC considers compensation excessive when amounts paid are unreasonable or disproportionate to the services actually performed by any person for a bank. The OCC may request additional information from the organizing group to support the compensation, or may require the organizers to change or eliminate the form or amount of compensation, before it authorizes the bank to open for business.

After the bank opens, if the OCC determines that compensation has become excessive, the board is responsible for taking corrective action and seeking restitution. The "Interagency Guidelines Establishing Standards for Safety and Soundness" address excessive

[26] Refer to OCC Bulletin 2010-24, "Interagency Guidance on Sound Incentive Compensation Policies."

compensation and list the factors the OCC considers to evaluate compensation packages. Refer to 12 CFR 30, appendix A.

Accounting Considerations and Shareholder Disclosures

Organizers and boards must assure that each component of a bank's compensation package is accounted for properly and that public and periodic regulatory reports (such as Consolidated Reports of Condition and Income [call reports]) and securities filings under 12 CFR 16 are accurate. In addition, organizers and boards should refer to the Internal Revenue Code for guidance about shareholder approval and disclosure. Under 12 CFR 16, organizers of a bank must disclose and describe fully insider compensation, including stock benefit plans, to all prospective stock subscribers in the registration statement or private placement document, regardless of whether shareholder approval is required for the stock benefit plans.

Organizers' Business Plan

Organizers of a proposed bank must submit a business plan that adequately addresses regulatory and policy considerations presented in this booklet and set forth in 12 CFR 5.20(e) and (f)(2). The organizing group's business plan, including its financial projections, analysis of risk, and planned risk management systems and controls, is critical to the OCC's decision of whether to grant approval to the group's charter proposal.

Business Plan Requirements

The interagency application includes Business Plan Guidelines listing the OCC's required plan components. The business plan should be an integral part of the management and oversight of a de novo bank and should establish the bank's goals and objectives. The business plan is a written summary of how the bank will organize its resources to meet its goals and how it will measure progress.

The business plan should

- be comprehensive and reflect in-depth planning by the organizers and management.
- cover the greater of three years or the period until the bank is expected to achieve stable profitability.
- provide detailed proposed actions to accomplish the primary functions of the bank.
- realistically forecast market demand, the customer base, competition, and economic conditions.
- contain sufficient information to give realistic assessments of risk related to economic and competitive conditions in the market the bank will serve.
- be based on assumptions consistent with all other information presented in the application.

The organizing group demonstrates in the business plan its management and planning abilities by assuming reasonable risks and by developing comprehensive alternative business strategies to address various best-case and worst-case scenarios. The organizers should

describe clearly their assessment of risks inherent in the products and services of the bank and the design of related risk management controls and management information systems. Refer to the "Risk Assessment System" and "Risk Management" sections of appendix C, "Supervision and Oversight Highlights."

The organizers should integrate an alternative business strategy into their business and strategic plans and bank policies, and discuss the alternative business strategy in the charter application. Through the alternative business strategy, the organizers demonstrate that they can manage potential scenarios prudently, efficiently, and effectively when the asset or deposit mixes, interest rates, operating expenses, marketing costs, or growth rates differ significantly from the original plan. This alternative plan should include realistic plans for how the board would access additional capital should it be needed. Refer to appendix C of this booklet and the "Bank Supervision Process" booklet of the *Comptroller's Handbook*, which includes a thorough discussion of each type of risk.

Organizers for a special purpose bank should tailor the contents of their business plan as appropriate. The OCC also expects these business plans to articulate clearly a comprehensive alternative business strategy if original plans do not materialize. Refer to the "Special Purpose Proposals" section in this booklet. The organizers should not omit or delete sections of the business plan without prior consultation with OCC staff. In addition to the financial information required by the interagency application and business plan, the OCC requires each application from a sponsoring organization to provide consolidated financial projections using the interagency format and designated time periods, as applicable.

Avoiding Potential Problems

Management and the board should have similar goals for the bank and similar plans about how the goals will be achieved. Management and the board should be committed to the proposed business plan and agree on the amount of risk that the bank is willing to take. They can identify and work out differences of opinion and potential problems before the bank opens through

- careful development of policies and procedures for functional areas of the bank, including systems and controls that will be used to manage and control attendant risks.
- preparation of financial projections.

In addition, organizers should be prepared to handle difficulties in hiring qualified personnel. They also should be able to project and control compensation and overhead expenses and to factor those expenses into their evaluations of capital adequacy and earnings.

OCC Evaluation of Proposal

The OCC evaluates the organizing group and its business plan at the same time. The OCC must be able to determine that the bank has a reasonable chance for success, will operate in a safe and sound manner, and will have adequate capital to support the proposed risk profile.

An organizing group and its business plan must be stronger in markets where economic conditions are marginal or competition is intense.[27] The OCC's judgment concerning one may affect its evaluation of the other. The OCC may offset perceived deficiencies in one factor by strengths in one or more other factors. Deficiencies in some factors, however, such as unrealistic earnings prospects or inadequate risk management systems, have a negative influence on the OCC's evaluation of other factors, such as capital adequacy. Some deficiencies may be serious enough to result in denial of an application. The OCC considers inadequacies in a business plan to reflect negatively on the organizing group's ability to operate a successful bank.

The OCC assesses how well an organizing group has evaluated potential risks in its preparation of the charter application and how well it integrates risk management into its bank operations. Refer to the "Risk Assessment System" and "Risk Management" sections in appendix C. The OCC considers safety and soundness issues and compliance with applicable laws and regulations in its evaluation of the business plan. The OCC has adopted interagency safety and soundness standards for insured banks, which are found in the appendixes to 12 CFR 30. These standards, which provide valuable guidance for all banks, including uninsured banks, cover operations, management, compensation, safeguarding of customer information, and residential mortgage lending practices. Additional guidance on prudent risk management practices can be found in the various booklets of the *Comptroller's Handbook*.

The OCC conditionally approves an application to ensure that appropriate supervisory safeguards are in place when a bank opens for business. Alternatively, the OCC denies an application if it is not satisfied that the organizers have met these requirements. The OCC generally does not grant final approval for a bank to open unless and until the organizers have addressed adequately all substantive risk management concerns.

During a financial crisis or an economic downturn, de novo banks are more likely to fail or experience significant problems compared with established financial institutions. The causes for this are varied, but it could take several years for a de novo bank to achieve stability. To address the elevated risks present until a bank achieves this stability, the OCC imposes approval conditions and safety and soundness requirements during the first three years of the de novo bank's operations to help to reduce risk to the Federal Deposit Insurance Fund and to promote the success of de novo federal charters.

The approval to form a de novo bank includes enforceable supervisory conditions that address the following:

- Maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan, but a tier 1 leverage ratio of no less than 8.0 percent throughout the first three years of operations or until the bank is expected to maintain stable profitability.
- A requirement to obtain a written determination of non-objection from the OCC before engaging in any significant deviation from the approved business plan. Refer to the "Significant Deviations After Opening" section in this booklet.

[27] Refer to 12 CFR 5.20(f)(3).

- A requirement to obtain a written determination of non-objection from the OCC for the hiring of any executive officer or any changes to the board of directors after opening.

After the bank has been open and operating for three years, the OCC evaluates whether the above conditions should be removed or modified based on the financial condition of the bank and its prospects for sustained stability.

Capital Considerations

Organizers' Responsibilities

The organizers must propose and raise capital for the bank's operations. Throughout the chartering process, the organizers must be aware of the OCC's regulatory capital requirements.

The organizing group is responsible for proposing an appropriate level of capital based on

- a thorough assessment of the proposed business plan and the risks inherent in that plan.
- management's skills, experience, and ability relative to those required to execute the plan successfully.
- the degree of competition in the marketplace.
- prevailing economic conditions in the proposed market.

Policy and Legal Issues

Because charter proposals present varying degrees of complexity, the OCC does not have a single minimum level of capital for all federally chartered bank applications. Instead, consistent with the OCC's philosophy for supervising all banks on the basis of risk, the OCC evaluates sufficiency of the proposed capital level in light of the risks present for the specific proposal.

The OCC expects projected capital for a new bank to remain at or above the "well capitalized" level as defined in 12 CFR 6.4(b)(1), but a tier 1 leverage ratio of no less than 8.0 percent for the first three years of operations or until the bank is expected to maintain stable profitability. The OCC may determine that higher amounts of capital than those the organizers proposed are warranted based on local market conditions or the proposed business plan. When granting preliminary conditional approval, the OCC imposes a supervisory condition outlining a capital condition appropriate for the particular bank. After three years of operation, the OCC evaluates whether the financial stability of the bank is such that the condition should be removed, modified, or continued.

Generally, the OCC requires higher levels of capital to support the operations of more complex bank proposals if the business plan presents higher risk factors. A complex charter proposal, for example, might offer a nontraditional or narrow range of products, propose an unproven business strategy resulting in uncertain financial projections, or operate in a highly competitive market. Conversely, a charter application for a community bank that would offer

traditional products and services, operate within a small geographic area lacking intense competition, and have a management team implementing a proven business strategy would be noncomplex and, generally, would not require higher capital.

As appropriate, the OCC focuses on the consolidated company risk profile when reviewing an application filed by a sponsoring organization. The OCC's risk assessment also may include significant affiliated entities when the OCC considers it appropriate.

The FDIC has capital requirements for obtaining federal deposit insurance. Applicants should contact the FDIC to determine the FDIC's requirements if the bank will be FDIC insured.

Key Capital Considerations

Organizers must address key considerations in supporting the proposed capital level, including the following:

- On- and off-balance-sheet composition, including credit risk, concentration risks, market risks, and risks associated with any nontraditional products, services, or operating characteristics.
- Plans and prospects for growth, including management's past experience in managing growth.
- Stability or volatility of sources of funds.
- Access to capital sources.
- If sponsored by a holding company, the sponsor's track record when implementing plans and confronting emerging risks or needs.

Raising Capital

The organizing group and founders (refer to the "Glossary" section of this booklet) must lead the bank's efforts to raise capital in the marketplace by raising capital that is sufficient to

- pay for all organization costs.
- enable the bank to compete effectively in the market area.
- support the proposed bank's business plan until the bank can achieve and sustain profitable operations.
- address uncertainties in the marketplace.

When the organizing group files its application with the OCC, it should describe how it plans to raise capital. Before soliciting and selling stock of the proposed bank, the organizers must accomplish all of the following:

- Submit a completed application, including a business plan.
- Receive the OCC's determination that the application is complete. This determination is based on the review conducted by OCC Licensing staff using the Charter Application Checklist and does not mean the OCC has evaluated the application's merits.

- Receive a letter from the OCC's legal staff stating that the registration statement has been declared "effective," if the bank has filed a registration statement with the OCC under 12 CFR 16. For all capital that a proposed bank obtains through a public offering, the proposed bank must use an offering circular that complies with the OCC's applicable securities offering regulations. When a proposed bank obtains capital through a private placement, the proposed bank must comply with the applicable requirements for a nonpublic offering.
- Receive a letter from the Securities and Exchange Commission (SEC) stating that the registration statement has been declared "effective," if the proposed holding company has filed a registration statement with the SEC.
- Sell all securities of a particular class offered in connection with the organization of a new bank at the same price.[28]
- Designate an unrelated insured depository institution as escrow agent of the stock subscription funds and ensure sufficient liability coverage by either the bank or escrow agent.

Even if the group raises all of its capital during the OCC's review of the application, the OCC makes no assurances that it will grant preliminary conditional approval. Material changes may occur during the bank's organization that could require amendments to the bank's disclosures and rescission offers to stock subscribers. An organizing group must complete raising capital within 12 months of the OCC's preliminary conditional approval or the approval expires.[29] Failure to raise capital within 12 months generally indicates that the market is not supportive of the proposed bank.

Offerings

All organizing banks issuing securities must comply with 12 CFR 16 by filing a registration statement or by relying on a filing exemption. A bank seeking to sell or offer its securities must comply with both the applicable federal securities laws, including anti-fraud provisions, and OCC regulations. These requirements apply when organizers capitalize a newly chartered bank or when shareholders raise additional capital to support the bank's growth.

Organizers should consult with securities counsel in preparing 12 CFR 16 filings and refer to guidance and sample forms provided in the regulation. Amended registration statements also must comply with 12 CFR 16.

The sale of holding company stock may require filing documents and registering them with the Securities and Exchange Commission (SEC). Organizers should discuss securities law issues with their legal counsel and appropriate OCC legal staff as part of the application process.

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[28] Refer to 12 CFR 5.20(i)(5)(iii).

[29] Organizers seeking to charter a mutual FSA should consult with the appropriate OCC Licensing office regarding capital raising efforts. Formations of mutual FSAs involve different challenges when raising capital compared with stock charters.

Brokers, Underwriters, and Other Consultants

Some organizing groups rely on third parties to raise capital. These third parties include brokers, underwriters, consultants, and marketing firms. Engaging third parties may be part of the original business plan or represent a significant change in the original business plan, particularly if the organizing group has trouble raising capital. When banks raise capital through a third party, the market test (refer to the "Glossary" section of this booklet) may be a less reliable indicator of market acceptance, especially if a significant portion of the stock is subscribed from outside the local market.

If the organizers use a third party, the charter proposal must still demonstrate that the target market will support the proposed bank, particularly if local stock subscriptions are limited. Local stock subscriptions include subscriptions from organizers who reside in, or otherwise have a meaningful presence in, the target market. [30]

Funds Collected by an Organizing Bank

Subscriptions received under a registration statement could end up exceeding the stated maximum number of shares offered. In this case, the organizers can accept the excess subscriptions if the registration statement is first amended to provide for a larger offering. The amendment must occur prior to the expiration of the original offering period.

To raise additional capital after the initial offering closes, the bank or holding company must prepare a new registration statement or rely on an applicable exemption under the relevant securities laws.[31]

Once opened, the bank must issue shares in accordance with 12 CFR 5.45 or 5.46. Refer to the "Capital and Dividends" booklet of the *Comptroller's Licensing Manual*.

Capital surplus generally is created when stock is sold. All money invested in the bank must be distributed between the bank's common stock and capital surplus accounts consistent with generally accepted accounting principles (GAAP), specifically the Financial Accounting Standards Board's Accounting Standards Codification (ASC) 505-10, "Equity." Also, consistent with GAAP, direct costs associated with the sale of stock must be deducted from the related proceeds and the net amount recorded in the capital accounts (American Institute of Certified Public Accountants Technical Questions and Answers, Section 4110).

[30] Traditional full-service banks typically propose to serve a local geographic market, and the source of capital is usually from investors in that market. However, special purpose banks, internet banks, or banks that propose to serve larger or national markets may have investors who do not live near the bank's main office.

[31] If the bank proposes to issue additional common stock, it may need to amend its charter or articles of association to increase the number of shares authorized.

Body Corporate—Legal Entity

A national bank's organizing group may begin to solicit capital after becoming a body corporate, filing a completed application with the OCC, and having a registration statement declared effective by the OCC. Refer to the "Glossary" section of this booklet. After filing the national bank's articles of association and organization certificate with the OCC, a national bank becomes a body corporate or legal entity as of the date the organizers sign the organization certificate and adopt the articles of association (12 USC 24). After becoming a body corporate, the organizing group elects a board of directors and may begin entering into contracts and performing all necessary actions to form the national bank. The national bank may not open for business until it receives final OCC approval.

An FSA's organizing group may begin to solicit capital after becoming a legal entity, filing a completed application with the OCC, and having a registration statement declared effective by the OCC. Refer to the "Glossary" section of this booklet. After filing the FSA's proposed charter and bylaws with the OCC, the FSA becomes a legal entity. After becoming a legal entity, the organizing group appoints a board of directors and may begin entering into contracts and performing all necessary actions to form the FSA. The FSA, however, may not open for business until it receives final OCC approval.

Capital Structure

Generally, banks have only one class of common stock. National banks may not create classes of common stock with different or no voting rights. An FSA may have only one class of common stock. Federal banking law provides that common shareholders are entitled to one vote per share in all matters.[32] The law also allows the shareholders to choose whether to provide for cumulative voting when electing the bank's directors by authorizing it in the articles of association or charter. If a national bank proposes to issue more than one class of common stock, the bank must consider legal, supervisory, and policy issues. A national bank should consult with the OCC before issuing more than one class of common stock. To be included as common equity tier 1 capital, the common stock must meet the relevant requirements in 12 CFR 3.20.

A national bank or FSA may be organized as a Subchapter S corporation. A Subchapter S corporation generally has a limited number of shareholders as determined in 26 USC 1361. All members of a family may, however, elect to be treated as one shareholder to determine the total number of shareholders of an S corporation.

Preferred Stock

The OCC has no general prohibition against the inclusion of preferred stock in the initial capital structure of a new bank. All relevant terms and conditions should be set forth in the application. Preferred stock may qualify as additional tier 1 capital or tier 2 capital, subject to meeting the relevant eligibility requirements in 12 CFR 3.20.

[32] Refer to 12 USC 61 and 12 CFR 5.22(e).

Debt-Based Capitalization

While equity is the most traditional and acceptable form of capital, the OCC may consider debt-based capitalization of a new bank under certain circumstances. Business and financial plans must demonstrate, however, that the associated debt service requirements are not detrimental to the safety and soundness of the bank. Subordinated debt may qualify as tier 2 capital, subject to meeting the relevant eligibility requirements in 12 CFR 3.20.

Assessment of Community Credit Needs

In the charter application, the organizing group must submit a description of how the bank will meet its CRA[33] objectives. The application form requires the applicant to describe the proposed bank's plans for serving the proposed bank's assessment area or areas. The organizing group must evaluate the banking needs of the community, including its consumer, business, nonprofit, and government sectors. Refer to appendix D, "Community Reinvestment Act Highlights," for more information about responsibility under the CRA, the CRA assessment area, and performance standards. Also, see the "Community Reinvestment Act Examination Procedures" booklet in the *Consumer Compliance* series of the *Comptroller's Handbook* or section 1500 of the OTS Examination Handbook for an expanded discussion of this topic.

Compliance Issues

The OCC also considers compliance with laws and regulations in its review of charter applications. Issues often arise related to compliance with the following:

- Fair lending statutes
- BSA requirements and other AML regulations
- Economic sanction laws administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC)
- Privacy
- Advertising

For expanded discussions of these topics, refer to appendix E of this booklet, "Compliance Highlights," the Federal Financial Institutions Examination Council's *FFIEC Bank Secrecy Act/Anti-Money Laundering Examination Manual* (*FFIEC BSA/AML Examination Manual*), and related *Comptroller's Handbook* booklets.

[33] Refer to 12 CFR 5.20(e)(2) (for national banks and FSAs); 12 CFR 25.29(b) (for national banks) and 12 CFR 195.29(b) (for FSAs). As previously noted, this requirement does not apply to uninsured banks or proposed special purpose banks that will not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incidental to their specialized operations (12 CFR 25.11(c)(3), 195.11(c)(2)).

Electronic Banking (E-Banking) Considerations

Novel questions and issues may arise in the application process about the use of the Internet and other alternative channels for delivery of banking products and services in nontraditional ways, or if electronic channels are the bank's primary delivery method. The OCC approves proposals to establish banks that will use an electronic delivery channel when the bank reasonably may be expected to operate in a safe and sound manner.

The IT-related risks and controls are similar for the various e-banking and alternative delivery channels but may vary from the risks associated with traditional banking operations. Risks associated with liquidity, third-party relationships, cybersecurity, interconnectivity, and e-banking support services are discussed in the "E-Banking" and "Information Security" booklets of the *FFIEC Information Technology Examination Handbook* (*FFIEC IT Examination Handbook*).

A bank's business plan that is heavily reliant on e-banking and other alternative delivery channels for attracting and retaining deposits, making and securitizing loans, or delivering other services may underestimate the necessary marketing and operating expenses. Consequently, this may increase the bank's risk, especially liquidity risk. The bank should discuss in its business plan how it expects to manage such increased liquidity risk. Refer to the "Bank Supervision Process" booklet of the *Comptroller's Handbook* for a discussion of liquidity risk. Likewise, excessive reliance on deposits generated by Internet solicitations can raise special concerns. Also refer to the "Liquidity" booklet of the *Comptroller's Handbook*.

Application Process

The OCC encourages organizers to review its website for more detailed information about the application process, including relevant charter policies and procedures. The website contains decision statements on previous OCC charter decisions and provides information on the policy matters that the OCC considers before making a decision on an application. The website also contains opinions and legal interpretations addressing a variety of permissible activities and the manner in which the activities may be established and conducted.

The OCC encourages each organizing or investor group, before filing an application, to contact the Director for District Licensing at the appropriate OCC district office to discuss its proposal. Each group should include requests for confidential treatment under FOIA with each submission of materials for which it seeks confidentiality. Refer to the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual* for further discussion about confidential treatment.

Exploratory Calls or Meetings

The organizing group's contact person may call the OCC Licensing staff at the appropriate district office at any time to ask for further information or assistance. As the organizing group develops key ideas, the contact person may request an exploratory conference call or meeting to ask questions, clarify concerns, and become acquainted with the regulatory environment. The district Licensing staff coordinates an initial meeting or conference call for the contact person and other key people associated with the proposal to discuss issues with appropriate OCC staff.

Prefiling Meeting

The OCC normally requires a prefiling meeting with the organizers of a proposed bank before the organizers file a charter application. Organizers should be familiar with the OCC's chartering policy and procedural requirements before the prefiling meeting. The prefiling meeting normally is held in the OCC district office where the application will be filed, but may be held at another location at the request of the applicant.[34]

Before this meeting, the organizers should submit briefing materials to the OCC that include

- a brief description of the proposal, including a listing of planned activities.
- biographical information on each member of the organizing group.
- identification of the CEO.
- a summary of insider transactions.
- the proposed amount of capital and subscription method.

[34] Refer to 12 CFR 5.20(i)(1).

The OCC rarely waives the prefiling meeting for applications that are accorded standard review. Refer to the "Types of Filings" section of this booklet. The OCC expects all organizers of the proposed new bank to attend this meeting.

At the prefiling meeting, or in informal discussions, the Licensing staff reviews with the organizing group the OCC's chartering policy and procedures. Licensing staff also discuss supervisory perspectives that may affect the proposal and the requirements for filing a charter application and organizing a bank. The topics discussed include

- the attributes of the proposed bank charter.
- the composition of the board of directors and the banking and business experience of its members.
- the management team and its banking experience.
- submission requirements, including confidentiality requests.
- the business plan.

FDIC staff also may participate in the prefiling meeting to discuss pertinent procedures and requirements for obtaining deposit insurance, if the bank will be FDIC insured. Refer to the FDIC's deposit insurance policy statement, available from its Communications Office, Public Information Center, 3501 North Fairfax Drive, Room E-1005, Arlington, VA 22226, by e-mail at publicinfo@fdic.gov, or from its website. If a holding company is involved in the proposal, Federal Reserve Bank staff may also participate.

Filing the Application

After the prefiling meeting, the organizing group files an interagency application, including a business plan and the appropriate Interagency Biographical and Financial Report on all identified insiders. Each applicant must

- prepare accurately and completely the charter application submitted to enable the OCC to reach an informed decision.
- sign a certification stipulating that the charter application and all supporting materials contain no material misrepresentations or omissions.
- determine compliance with all applicable statutes and regulations.
- seek advice from its own legal counsel, as appropriate.

Each proposed organizer must sign and date the OCC certification in the interagency application.

The OCC will not accept an application for filing unless the organizers identify the CEO. Refer to the "Selection of the CEO" section of this booklet for guidance about requesting confidential treatment.

The contact person should advise the OCC promptly whenever significant changes occur from the bank's original plan after the application is filed. Refer to the "Significant Changes" section of this booklet.

Biographical and Financial Reports

The OCC normally requires each proposed organizer, director, executive officer, or controlling shareholder (insider) to submit the Interagency Biographical and Financial Report. On a case-by-case basis, the OCC may waive the requirement for insiders to complete the financial report portion if a sponsoring organization provides the new bank's financial strength. Refer to the "Types of Filings" section of this booklet.

Sponsors must submit a Corporate Background and Financial Report and the following or similar financial information, as applicable:

- Federal Reserve Board Y-6 filings for the last three years.
- SEC Form 10K filings for the last three years.
- An annual report for the most recent fiscal period.

In the case of a bankers' bank (refer to the "Glossary" section of this booklet), the participating depository institutions and depository institution holding companies are the organizers. Each participating bank must submit its call reports as of June 30 and December 31 for the last three years and the annual report for the most recent fiscal period. In addition, each depository institution holding company must complete a Corporate Background and Financial Report and submit financial data similar to that required from participating banks.
The OCC typically conducts routine background checks on proposed insiders. In addition to submitting the Interagency Biographical and Financial Report, organizers, directors, executive officers, and controlling shareholders should also complete and file with the application an IRS Tax Check Waiver, fingerprint cards, and a general background check consent form. Refer to the "Background Investigations" booklet of the *Comptroller's Licensing Manual* for more information.

Bank Identifying Information

The name of a proposed national bank must include the word "national." There is no requirement for the name of an FSA other than that an FSA or a national bank shall not adopt a title that misrepresents the nature of the institution or the services it offers.

If the exact location of the proposed bank is unknown at the time the application is filed, the organizers must provide a "vicinity of" location. The amount of detail needed to identify the location is based on the size of the community. For instance, if the new charter will be located in a heavily populated area, the location should be specific to within 1,000 feet. If the desired location is rural, identification of an area within a one-mile radius could be acceptable, if no public confusion would result. If the mailing and street addresses differ, organizers should provide both.

Publication Requirements and Comment Periods

Each organizing group must publish a notice of its charter application in a general circulation newspaper in the community in which the proposed bank will be located as close to the date of filing as practicable. Refer to 12 CFR 5.8. If the application is an interstate filing (one that is filed by a BHC located[35] in a different state than the proposed charter, or an SLHC with a home state different than the proposed charter[36]), the OCC may extend the 30-day public comment period to allow sufficient time for all interested parties to comment. Refer to the "Public Notice and Comments" booklet of the *Comptroller's Licensing Manual*.

Types of Filings

The OCC has two types of guidelines for the OCC's review of charter filings: standard review and expedited review.

Standard Review

Most organizing groups and many sponsors must file their charter applications using the OCC's standard submission guidelines outlined in the interagency application. These applications are subject to a 30-day comment period. A well-researched and well-prepared application helps the OCC make a timely decision. The OCC seeks to make a decision within 120 days after receipt or as soon as possible thereafter. Charter proposals that receive standard review are not approved automatically.

Expedited Review

An application to establish a full-service federally chartered bank sponsored by a BHC or SLHC, whose lead depository institution is an eligible bank or eligible depository institution (refer to the "Glossary" section of this booklet), is deemed to receive preliminary conditional approval on the 15th day after the close of the public comment period, or the 45th day after receipt of the application, whichever is later, unless

- the OCC notifies the applicant before that date that the filing is not eligible for expedited review or the expedited review process is extended under 12 CFR 5.13(a)(2); or
- the OCC determines that the proposed bank will offer banking services that are materially different than those offered by the lead depository institution.

The applicant must provide identifying information about the lead depository institution for an application to qualify for expedited review. If one or more institutions are approximately the same size, the applicant must furnish additional information to support identification of the selected institution as the lead depository institution. Such information should include

[35] A BHC is located in the state in which the total deposits of all of its banking subsidiaries was the largest on the later of July 1, 1966, or the date on which it became a BHC under the BHCA.

[36] An SLHC's home state is the state in which the amount of total deposits of all insured depository institution subsidiaries of such company was the greatest on the date on which the company became an SLHC.

- full legal names, locations (city and state of each main office), and OCC charter or FDIC certificate numbers for the institutions.
- total assets for each institution as reported in the most recent call report and the date of that report.
- total assets for each institution as reported in the reports of condition as of the date one year earlier than the most recent report.

Contracts and Other Arrangements

As part of its application, each organizing group must submit a description of any contract, transaction, professional fees, or any other type of business relationship involving the institution, the holding company, its affiliates, and any insider (refer to the "Glossary" section of this booklet). The OCC reviews each insider contract to be sure that it is made on nonpreferential terms. If the contract involves an insider, the OCC requires the submission of at least one independent appraisal of the contract or other arrangement that includes

- a description of the assets, property, or service.
- the terms of the contract, including responsibilities, liability, rights for audits and reviews, and termination requirements.
- evidence showing that the contract is fair, reasonable, and comparable to similar arrangements that could have been made with unrelated parties.

The organizing group generally must disclose each insider contract or arrangement to proposed or current shareholders. Refer to the "Insider Activities" booklet of the *Comptroller's Handbook*. The organizing group should maintain copies of the disclosures in the bank's files and provide them to shareholders on request. Typical contracts or other arrangements include the following:

- The sale or other transfer of any organizer's stock in the proposed bank, including a voting trust or other voting agreement.
- An organizer acting as representative of, or on behalf of, the proposed bank or any person associated with the proposed bank.
- The payment or receipt of any money or item of value as compensation for services rendered or property transferred in organizing the proposed bank. This may include the purchase or lease of banking premises, furniture, equipment, fixtures, or supplies; consultant or legal fees; preparation of a registration statement or nonpublic offering; or sale of stock.

Regardless of insider involvement, as a matter of prudent business practice every contract or other arrangement should include provisions addressing obligations of, and options available to, the parties if the OCC (1) experiences delays in processing the application; (2) denies the application; (3) revokes its preliminary conditional approval letter; or (4) objects to a person serving in any proposed capacity. Such contract or arrangement includes real estate or employment commitments.

A proposed bank may not pay any organizational fee contingent or dependent on an OCC action or decision.[37] Such action is grounds for denial of the application or revocation of preliminary conditional approval.

Use of Third-Party Service Providers

A bank may rely on, or outsource to, third parties for a variety of services or functions, some of which may be critical to the bank. Before selecting each third party, the bank should determine that outsourcing is in accordance with the bank's business and strategic plans and perform due diligence on the third party.[38] The bank should have a written contract or service level agreement with each third party that clearly addresses the duties and responsibilities of the third party and the bank. To limit risk if the application is not approved, organizers should enter into contracts contingent on preliminary conditional approval of their application.

The organizing group should include in its application details about functions or services the bank will outsource and those it will perform internally. For those functions that will be outsourced, the organizers should include the name of each third party under consideration along with its related background information, number of years in business, financial condition (statements), and a copy of the contract. Organizers should also describe the due diligence conducted on each third party. This description should assess the third party's operation, evaluate the total cost, and outline how the bank will conduct ongoing monitoring of the third party.

A bank is responsible for the security of its customer and bank records. When third parties are used, the bank also is expected to ensure that the third party secures those records properly. A bank's use of a third party does not diminish the responsibility of the bank's board and senior management to ensure that the activity is performed safely and soundly and in compliance with applicable laws.

When circumstances warrant, the OCC may use its authority to examine the functions or operations performed by a third party on the bank's behalf.[39] Such examinations may evaluate safety and soundness risks, the financial and operational viability of the third party to fulfill its contractual obligations, and compliance with applicable laws and regulations. For additional guidance, see the OCC issuances listed under "Third-Party Relationships" in the "References" section of this booklet.

Before the bank is granted final approval and allowed to open, it must develop a third-party risk management program, as applicable. The OCC reviews this program during the preopening examination (POE). Refer to the "Preopening Examination" section of this booklet.

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[37] Refer to 12 CFR 5.20(g)(4)(ii).

[38] Refer to OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance."

[39] Refer to 12 USC 1464(d)(7) and 1867(c).

Deposit Insurance and Filing With the FDIC

The OCC generally requires FDIC deposit insurance for all bank charters, except for certain special purpose bank charters such as national trust bank charters. Refer to the "Trust Banks or Trust Companies" section of this booklet. All FSAs must be FDIC insured. The FDIC's Statement of Policy for Applications for Deposit Insurance discusses the criteria the FDIC considers when evaluating deposit insurance applications. These criteria are similar to those of the OCC. The OCC and the FDIC encourage simultaneous submission of the interagency application to each agency to expedite processing.

To the extent possible, the OCC and the FDIC coordinate their application investigations to minimize the burden to the applicant and to eliminate duplicative regulatory efforts. For example, the FDIC may rely on OCC background investigations and may conduct its field investigation concurrently with OCC staff.

The FDIC may take final action on its deposit insurance application before the OCC decides its application. Likewise, the OCC may grant preliminary approval of the charter application before actions of other agencies on related applications, such as FDIC action on the deposit insurance application or Federal Reserve Board action on a BHC or SLHC proposal.

Duplicate Charter Filings With Other Regulators

If an organizing group or persons representing the same interest file substantially similar state and federal charter applications, the OCC generally considers the federal bank application abandoned. The OCC may consider an exception if the organizing group requests one and unusual circumstances exist.

Additional Information

The OCC may require additional information at any time to reach an informed judgment about the application. The OCC requests clarifications or additional information through the contact person. Those requests generally do not reflect negatively on the organizing group. Conversely, the OCC may deny the proposal if the additional information the organizers provide is insufficient to determine the bank's prospects for success. Numerous requests by the OCC for additional or clarifying information is indicative of failure on the part of the organizers, directors, and senior management to demonstrate their knowledge of the operations of a financial institution and may be viewed negatively by the OCC.

Amendments

Organizers may file amendments to the application during the review process. The OCC may conclude, however, that the submission of numerous or significant amendments during the review period has rendered the original application obsolete. In such cases, the OCC may deem the original application to be withdrawn or deny it. The organizers may then file a new application.

Review of the Application

The OCC begins to process each application upon receipt. The OCC reviews and analyzes the proposal, completes background and field investigations, and resolves any unusual issues.

Background Investigations

The OCC conducts background checks to assess each insider's competence, experience, integrity, and financial ability. The OCC determines independently the accuracy and completeness of information submitted for each person. The OCC must reach a decision not to object to each insider serving in the proposed position. The "Background Investigations" booklet of the *Comptroller's Licensing Manual* provides more information about this review process, the authority of the OCC to object to a filer, and actions that the OCC may take if the materials submitted contain a misrepresentation or omission that could be misleading.

Field Investigations

The OCC generally conducts a field investigation when evaluating a charter application. During this investigation, OCC staff may interview the organizers, officers, and controlling shareholders to evaluate the proposal's prospects for success and to verify facts and projections. The field investigation is an important component in the review process for any proposed federally chartered bank. The findings from the field investigation are major factors in the OCC's overall analysis and review of the application; however, the field investigation is only one of the components evaluated before making a decision. The OCC conducts a field investigation for every charter sponsored by an independent group and for most BHC- or SLHC-sponsored charter applications. Generally, the field investigation is intended to develop background information and determine whether

- the organizing group is capable of successfully implementing the business plan.
- executive officers are knowledgeable and can execute the proposed business plan in a safe and sound manner.
- the financial projections are realistic for the proposed market.
- the organizers have made any major changes to the business plan that were not reported previously to the OCC.

The OCC tailors the scope of each investigation to the complexity of the application, with input from the supervisory office and other OCC divisions. OCC bank examiners (examiners) with appropriate expertise conduct the investigation. The OCC normally schedules an investigation as soon as practical. When possible, the OCC coordinates its investigation with that of FDIC staff if the bank will be insured to minimize burden on the applicant.

During the investigation, OCC staff members review relevant material, interview insiders and other identified persons, and explore matters related to the proposed bank's operations. The investigation team typically discusses certain aspects of the proposal with organizers, principal shareholders, and management.

Additionally, to assess market needs and support within the community, the team may meet with community groups, local government officials, and financial (bank and FSA) and nonbank competitors.

The examiners meet with the organizing group and management at the conclusion of the investigation to recap the investigation and its importance to the charter decision process, discuss any significant issues, and communicate the investigation findings in general terms. The results of the field investigation are only some of the factors the OCC considers in its review.

Decision

The OCC generally attempts to decide a charter application within 120 days of receipt (or sooner if the filing qualifies for expedited review). Therefore, the OCC expects that at the time an organizing group submits an application, the CEO has been identified and the filing is complete and accurate with a business plan that is well thought out and fully supported. The OCC does not approve applications that fail to provide the necessary information for the OCC to fully evaluate the proposal. The application is expected to stand on its own at the time of filing, with only general clarification from the organizing group concerning members of the organizing group, the CEO, and/or the business plan. An application with significant and material deficiencies does not reflect well on the organizing group, and it is not the OCC's role to offer alternative solutions for the organizers to obtain preliminary approval. The OCC will inform the group of significant deficiencies before acting on the application.

Following review of the application and the field investigation, the OCC determines whether the proposed bank charter has a reasonable chance of success, will be operated in a safe and sound manner, and meets other applicable criteria. It then decides whether to grant preliminary conditional approval or deny the application. The OCC notifies the contact person and interested parties of its decision in writing. Refer to the "Public Notice and Comments" booklet of the *Comptroller's Licensing Manual*.

Preliminary conditional approval (1) indicates the OCC's permission to proceed with the organization of the bank according to the plan set forth in the application; (2) specifies standard requirements and enforceable supervisory conditions, including minimum policies and procedures; and (3) may identify special requirements unique to the application for the proposed bank. In addition, the OCC requires the organizers to raise capital within 12 months of the OCC's preliminary conditional approval and to open within 18 months from that date, unless extended by the OCC.

A preliminary conditional approval decision is not an assurance that the OCC will grant final approval for a new bank charter. The organizing group must satisfy standard and special requirements, as well as certain procedural requirements, before the OCC grants final approval. In addition, the OCC may impose special conditions that remain in place after the bank opens.

Standard and Special Requirements of Approval

When the OCC grants preliminary conditional approval to a charter proposal, it imposes standard requirements on the proposal. These requirements include finalizing appropriate policies and procedures for the bank, complying with certain capital raising requirements, and engaging audit staff.

The OCC may place additional special requirements on new bank charters with certain characteristics, such as special purpose banks. The OCC may also impose special requirements tailored to the specific individual proposal. For example, while each organizing group proposes to raise the minimum level of capital, net of organization costs, specified in its application, the OCC may require a group to raise an amount higher than originally proposed. Other special requirements may include

- submitting for review and prior approval a complete description of the bank's information systems and operations architecture and related control plans.
- implementing a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank and the nature and scope of its activities.

The organizing group generally must satisfy standard and special requirements before the bank opens.

Standard and Special Conditions of Approval

Unlike standard or special requirements, conditions are considered "conditions imposed in writing" within the meaning of 12 USC 1818.[40] The OCC places two types of conditions on new bank charters. Some standard conditions apply to all new bank charters. Refer to the "OCC Evaluation of Proposal" section of this booklet. Others are special conditions tailored to specific proposals, such as the following:

- Maintaining a specified minimum capital floor (for example, no less than $5 million, or other appropriate amount).
- Maintaining a certain percentage of tier 1 capital (leverage ratio) for a specified period after the bank opens, which might be different than the standard condition to maintain no less than an 8 percent leverage ratio.
- Executing a written agreement between the proposed bank and its holding company that provides for capital maintenance, liquidity support, or other assurances to the bank, if and when necessary.
- Entering into an operating agreement with the OCC shortly after opening to address any safeguards the OCC considers prudent regarding the bank's operations, growth, capital, liquidity, or other factors. An operating agreement is enforceable under 12 USC 1818.

[40] A condition imposed in writing is one that is enforceable under 12 USC 1818. At a minimum, the OCC will cite and include in its examination report a violation of a Regulatory Condition Imposed in Writing. A violation of this condition can provide the basis for the assessment of civil money penalties or other enforcement actions.

- Developing a contingency business plan agreement between the proposed bank and the OCC setting forth certain actions that the bank will take if it does not achieve original business plan results. The agreement could include, but need not be limited to, obtaining additional capital; developing and implementing a corrective action plan or new satisfactory business plan to remedy plan shortfalls or failures; or developing and implementing a contingency plan to sell, merge, or liquidate the bank at no cost to the Deposit Insurance Fund.
- Requiring all final third-party relationship contracts to stipulate that the performance of services provided by the third party to the bank are subject to the OCC's examination and regulatory authority.

In most cases, the OCC requires these conditions to be met by the time the bank opens, and the conditions remain in place until removed or modified by the OCC.

The OCC includes the following language in each preliminary conditional approval letter:

> This preliminary conditional approval and the activities and communications by OCC employees in connection with the filing do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or an officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. Our approval is based on the bank's representations, submissions, and information available to the OCC as of this date. The OCC may modify, suspend or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which this decision pertains. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

Organization Phase

The organization phase for a bank covers the period between the time the OCC grants preliminary conditional approval and the day the bank opens for business. During the organization phase, the organizing group must satisfy the standard and special requirements, and most standard and special conditions imposed, before the OCC will grant final charter approval. In addition, the organizers hire the remainder of the bank's management team, establish the bank's premises at the proposed site, complete capital raising activities, develop policies and procedures, test the IT architecture, and establish management information and control systems.

Establishing Bank Premises

The organizing group must decide to lease or purchase bank premises consistent with statutory and regulatory requirements. Refer to the "Investment in Bank Premises" booklet. The organizing group finances the initial construction or acquisition of bank premises. The OCC reviews lease or purchase agreements for reasonableness and disallows any that are not

made in the bank's best interest. Regulatory limits on investments in bank premises are provided in 12 USC 371d and 12 CFR 5.37.

Construction of the bank facility must comply with the minimum security standards in 12 USC 1882 and 12 CFR 21 or 12 CFR 168. Once the bank is open, the bank's security officer files an annual report with the board of directors certifying that the bank complies with the stated security standards. Refer to 12 CFR 21.4 or 168.4.

Internal and External Audits

The OCC requires each bank to adopt an internal audit system appropriate to its size, nature, and scope of activities. Some new banks may elect to adopt a system that incorporates independent reviews instead of dedicated audit staff. Refer to the "Internal and External Audits" booklet of the *Comptroller's Handbook* [41]. An effective audit program includes an evaluation of the quality of internal controls, including the reliability of financial information, safeguarding of assets, and the detection of errors and irregularities.

Banks that offer fiduciary services are subject to specific audit requirements for the trust area and requirements for an independent trust audit committee (12 CFR 9.9, 150.440-150.480). For further discussion of fiduciary audits, refer to booklets in the *Asset Management* series of the *Comptroller's Handbook*.

As a condition of preliminary approval of a newly chartered bank, the OCC normally requires the bank to have an annual independent external audit for a period of three years after it opens. The FDIC generally imposes a similar requirement on insured banks. The external audit must be of sufficient scope to enable the auditor to render an opinion on the financial statements of the bank or consolidated holding company.

The first audit should occur no later than 12 months after the bank opens for business and should audit the bank's operations from the formation of a body corporate or legal entity.

The OCC may grant exemptions from this external audit requirement to a new bank subsidiary of a BHC or SLHC when all of the following requirements are met:

- The new bank's financial statements are included in the audited consolidated financial statements of the parent holding company.
- The sponsoring company is an existing holding company that has operated for three years or more under Federal Reserve Board supervision and does not have any institutions subject to special supervisory concerns.
- Adequate internal audit coverage will be maintained at the bank level. At a minimum, the internal audit program must evaluate the quality of internal controls, including the

[41] As of the date of issuance of this booklet, the "Internal and External Audits" booklet applies only to national banks. A revised audits booklet addressing both national banks and FSAs will be issued at a future date. The current edition of the audits booklet, however, provides valuable guidance for FSAs.

reliability of financial information, safeguarding of assets, and the detection of errors and irregularities.

The OCC and the FDIC, as applicable, coordinate determinations about external audit exemptions consistent with the "Interagency Policy Statement on External Auditing Programs of Banks and Savings Associations." This statement focuses on banks holding less than $500 million in total assets. If the OCC grants an exemption, it includes that determination in its preliminary conditional approval letter. If any of the requirements listed above are not met during the first three years of the bank's operation, the OCC may withdraw the exemption at its discretion.

Management of new banks should be aware of the general limitations contained in the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley). Sarbanes–Oxley prohibits an accounting firm from acting as an external auditor of a public company during the same period that the firm provides internal audit outsourcing services. This prohibition applies to companies with securities registered with the SEC or a federal banking agency. Accordingly, national banks that are subject to the requirements of the Securities Exchange Act disclosure rules described at 12 CFR 11 and 16 would be covered by separate audit requirements.

Fidelity and Other Insurance

The bank's board of directors is responsible for the adequacy of the fidelity bond and other insurance needs. The board should research and document in meeting minutes its assessment of the bank's fidelity insurance and excess coverage needs.

Before a national bank opens for business, its board must assess the four factors listed in 12 CFR 7.2013 and obtain adequate fidelity bond coverage. The four factors are the

- internal auditing safeguards employed.
- number of employees.
- amount of deposit liabilities.
- amount of cash and securities normally held by the bank.

Boards of FSAs should consider similar factors to determine adequate insurance.

The OCC will not grant final approval of the charter until the bank has selected a permanent fidelity insurance carrier. The OCC must receive assurances from the bank that permanent insurance coverage will be in place on or before the bank's proposed opening date.

The bank also may acquire liability insurance to mitigate any loss it might incur for inadequate or faulty systems. Some insurance companies offer specialty policies to businesses that assume the risk of legal liability, including errors and omissions. Errors and omissions policies usually cover lawsuits from negligence and performance failure of a product or service.

Start-Up Costs, Including Organization Costs

Start-up costs (refer to the "Glossary" section of this booklet), including organization costs, of a bank must be funded by the organizers and founders through their own funds or borrowings. Refer to the "Repayment of Start-up and Organization Costs to Organizers" section of this booklet.

At the first shareholders' or members' meeting, shareholders or members review documentation for start-up costs, including organization costs, and commitments; evaluate their reasonableness; and authorize them as appropriate. Therefore, all start-up costs should be adequately documented and fully disclosed to the proposed shareholders or members. Any public or private offerings of securities and proxy materials must properly disclose all fees and start-up costs to prospective shareholders.

For a new bank, pre-opening expenses (such as salaries and employee benefits, rent, depreciation, supplies, directors' fees, training, travel, postage, and telephone) and organization costs (the direct costs incurred to incorporate and charter the bank) are considered start-up costs. These costs cannot be capitalized but must be expensed as incurred.

On the other hand, costs of acquiring or constructing premises and fixed assets and getting them ready for their intended use are expenses that should be capitalized rather than treated as start-up costs. However, the costs of using such assets during the start-up period (such as depreciation) are considered start-up costs.

The start-up costs of forming a bank are sometimes paid by the organizing group (or founders or a sponsoring organization) without reimbursement from the bank. This may occur because the organizing group (or founders or sponsoring organization) want to contribute these funds; this contribution is considered a "forgiveness of payment." Accordingly, the bank must record these start-up costs as expenses of the bank, with a corresponding entry to surplus to reflect the capital contribution. This includes services provided by the sponsoring organization, such as legal or accounting expertise. In this case, the sponsoring organization should account for the cost of services, including salaries, and the bank should record them as start-up costs.

If the shareholders or the OCC disallow reimbursement of certain costs, the organizers, founders, or holding company are responsible for paying the expenses. The bank should treat such unreimbursed costs as capital contributions by the organizers, founders, or holding company. Accordingly, the bank must record these unreimbursed organization costs as expenses of the bank, with a corresponding entry to surplus to reflect the capital contribution.

Similarly, the organization costs of forming a holding company and the costs of other holding company start-up activities are sometimes paid by the de novo bank. Because these are the holding company's costs, they should not be reported as expenses of the bank. Accordingly, any unreimbursed costs paid by the bank on behalf of the holding company or organizers or founders should be reported as a return of capital at the bank level. This

treatment as a return of capital is required whether or not the holding company formation is successful.

Under certain circumstances, the actual amount of start-up costs for the bank that are reimbursable may substantially exceed the amount projected when the application was filed initially. In such cases, the OCC may require that the organizing group raise additional capital to offset such unplanned or unanticipated expenses.

The bank should report start-up costs incurred from the bank's inception (including the period before receiving its charter) through the date it commences operations on the income statement during the calendar year that the bank begins operations. Detailed instructions for the definition of organization costs and the inclusion of these costs in the bank's report of income are included in the "Start-up Activities" glossary entry of the call report. This guidance conforms to ASC 720-15, "Other Expenses—Start-up Costs." Also refer to the OCC's Bank Accounting Advisory Series, Topic 9C, Question 2.

Significant Changes

Proposed changes throughout the organizational phase before the bank opens for business may materially alter the underlying factors on which the OCC based its decision on the application.

Those changes may have a positive or negative effect on the application. The OCC evaluates each significant change to the original charter proposal to determine the overall impact on the proposal and decide whether to

- allow organization of the bank to continue.
- impose additional conditions on the approval.
- revoke preliminary conditional approval.

In some cases, the OCC may consider the change so materially different from the original application that the OCC considers the application abandoned. In such cases, the OCC requires the organizers to submit a new application.

Notifying the OCC of Significant Changes

Licensing staff maintain contact with the contact person throughout the organization phase and monitor any deviation from the business plan to identify significant changes. Organizers must notify the OCC promptly of significant changes when they occur or are proposed. Matters subject to this notification include, but are not limited to, changes in the following:

- Organizing group's cohesiveness or its composition, including the addition or loss of organizers, directors, or principal shareholders.
- CEO or other members of the proposed management team.
- Biographical or financial information of the CEO, organizers, directors or principal shareholders that is different from what they previously disclosed to the OCC.

- Ownership distribution. Refer to the "Ownership and Capital Raising Efforts" section of this booklet.
- Manner in which the organizers raise capital, if different than what is described in the charter application. Refer to the "Ownership and Capital Raising Efforts" section of this booklet.
- Development of, or a change in the terms to, a stock benefit plan.
- Business plan, including changes to proposed products, services, activities, growth plans, marketing plans, risk profile (such as more aggressive underwriting criteria or adding a fiduciary operation to a commercial bank's operations), or risk management controls.
- Location of the main/home or branch offices.

Ownership and Capital Raising Efforts

The OCC reviews the shareholders' list before or during a POE to confirm that the organizers' and directors' subscriptions are consistent with their original stock purchase commitments. The OCC also reviews stock subscriptions for potential control issues as specified under 12 USC 1817(j) and 12 CFR 5.50. The OCC verifies that the organizing group's effort to raise capital is consistent with the plans described in the application. Failure to raise capital, as described, is an example of a deviation that can occur late in the chartering process. For example, organizers may make last-minute material capital contributions, or a holding company may purchase stock in a bank that originally planned to raise capital from individual investors in the local community.

Licensing staff consider whether a deviation from described capital raising efforts constitutes a sale of the charter because of a material change in ownership. In some cases when the deviation strengthens a proposal without altering other aspects, such as implementation of the business plan, the OCC may decide not to require submission of a new application.

Repayment of Start-up and Organization Costs to Organizers

Organizers and founders may not be reimbursed out of escrowed capital funds for personal loans or advances of funds made to the bank organizing effort until after the escrowed capital funds are deposited in the bank, the shareholders authorize repayment, and the OCC authorizes release of the escrowed capital funds. When it opens for business, the bank can repay organizers or founders in cash. Alternatively, the organizing group may request prior OCC approval so that an organizer or founder can receive stock, or a combination of stock and cash. The OCC expects that:

- The organizers provide information to demonstrate that any transaction, contract, professional fees, or any other type of business relationship involving the institution, the holding company, and its affiliates (if applicable)
  - is made in the normal course of business,
  - is made on substantially the same terms as those prevailing at the time for comparable transactions with non-insiders, and
  - does not present more than the normal risk of such a transaction or present other unfavorable features.

- The organizers document and properly disclose in any public or private offering of securities and proxy materials the expenses incurred by the organizing group for potential investors to evaluate the appropriateness and reasonableness of the expenses.
- The stock is issued at no less than par value.

Preopening Examination

The POE is the last major step of the chartering process. Organizers submit a request to the OCC to schedule this examination at least 60 calendar days before the proposed opening date. Examiners visit the bank at least 14 calendar days before the proposed opening date to determine whether the board of directors and management are prepared to commence operations.

The examination may be broad in scope and include an evaluation of the bank's final plans to identify, measure, monitor, and control all relevant risks. Refer to appendix C for information about the categories of risk and risk assessment. After the POE, the examiners meet with the board of directors and management to discuss examination findings.

The OCC may decide on a case-by-case basis to waive or perform an abbreviated POE for an organizing bank sponsored by an existing BHC or SLHC or other sponsoring company. The OCC bases its decision primarily on the OCC's prior knowledge of, and experience with, the sponsor and the sponsor's policies and procedures. If no POE is performed, the OCC requests that each BHC or SLHC sponsor organizing a bank certify that the necessary procedures have been performed to complete the bank's organization and file applicable corporate documents with the OCC.

Expiration or Revocation of Preliminary Conditional Approval

A bank must raise initial capital, net of organizational and preopening expenses, to meet or exceed the amount stated in the preliminary conditional approval letter. If the capital for the new bank is not raised within 12 months of the preliminary conditional approval, the organizing group fails to meet the market test (refer to the "Glossary" section of this booklet) and preliminary conditional approval expires unless the OCC grants an extension.

If the organizers raise capital within the deadline, they must open the bank no later than 18 months from the date the OCC granted preliminary conditional approval.

The OCC's preliminary conditional approval also expires for failure to open the bank within 18 months.

Extensions

The OCC normally does not grant extensions of time for either deadline. Under extenuating circumstances, the organizing group may request an extension of the time following approval from the Licensing staff in the appropriate office. The organizing group must provide sufficient information with its request to prove that the reason for the delay is beyond its

control (for example, weather delays, or delays in obtaining zoning or building permit authorizations to build a facility).

Revocation

The OCC revokes preliminary conditional approval if

- the OCC discovers material violations of law, misrepresentations, or any fraudulent activity by the organizers, directors, or officers.
- the OCC learns of any information that gives it sufficient cause to
  - change its evaluation of the proposed new bank's prospect for success (such as significant changes in proposed senior management, status of ownership or directors, deterioration of an affiliate institution, or a change in capitalization or deposit insurance status).
  - question that the bank will be operated in a safe and sound manner.

Notification

The OCC conveys reasons in writing for why it denied an application or withdrew preliminary conditional approval. The organizing group, directors, and founders alone are responsible for all expenses incurred for a withdrawn, expired, or disapproved application, including costs for returning funds to subscribers.

Final Approval

The OCC determines whether a bank is authorized to open. A bank may begin the business of banking or engage in fiduciary activities only when the OCC grants final approval. The OCC may delay opening if one or more of the following occur:

- During the POE, the examiners identify deficiencies that the directors must correct before opening. Such deficiencies may include systems or bank premises that are not ready to support bank operations.
- The directors have not selected a fidelity insurance carrier, or the fidelity insurance coverage will not be in effect when the bank opens.
- The OCC determines through other means that a significant change has occurred or that the organizing bank is not prepared to open. Significant deviations or changes that the OCC has not approved during the organization phase may be grounds for delaying issuance of the charter or revoking its preliminary conditional approval.
- The OCC determines that the organizers have not adequately addressed all substantive risk management concerns identified in the chartering process or POE.

Until final approval is granted, the OCC has the right to alter, suspend, or revoke preliminary conditional approval should the OCC deem that any interim development warrants such action.

Post-Opening Considerations

The OCC continuously supervises federally chartered banks through on-site supervisory activity and periodic off-site monitoring. Refer to the "Large Bank Supervision" and "Community Bank Supervision" booklets of the *Comptroller's Handbook*. Those activities help determine the condition of individual banks and the overall stability of the federal banking system. Also refer to appendix C in this booklet.

Significant Deviations After Opening

A bank's significant deviations (refer to the "Glossary" section of this booklet) or changes from its proposed business plan after opening for business may alter materially the underlying factors on which the decision to grant final approval of the charter application was based. Those deviations may have a positive or negative effect on the bank. The OCC makes its decision on a charter application conditional on the new bank not changing its operations significantly without the OCC's review and non-objection after opening. After the bank has been operating for three years, the OCC evaluates the stability and future prospects of the bank and may remove or continue the condition at that time.

After a bank opens for business, management and the board may discover that the bank is achieving slower or more rapid growth than anticipated. Management and the board also may determine that the bank is not able to generate quality loans, attract a significant volume of deposits, or generate the necessary volume of accounts or transactions. There also may be concerns about poor risk management practices. Management and the board should investigate thoroughly the underlying reason(s) for each item before taking action.

Examiners evaluate proposed significant deviations to determine if they are prudent. Refer to appendix F for specific guidance on identifying and evaluating significant deviations, communication requirements, and related procedures.

Expansion or Contraction of Assets or Activities

Apart from the significant deviation requirements, bank management wishing to expand or contract the bank's primary business may need to file with the OCC before implementing the proposed change. Refer to this subject in the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual* for specific details.

The OCC has a long-standing practice of discouraging a bank from removing substantially all of the assets and liabilities of the bank, creating a dormant bank. Refer to the "Glossary" section of this booklet. The OCC has serious supervisory concerns about such actions, including how the management or the board may use a dormant charter; the nature of the services and products that might later be initiated; and increased operations and concentration risk. For a detailed discussion, refer to the "General Policies and Procedures" booklet of the *Comptroller's Licensing Manual*.

Change in Control

Unless a transaction is subject to the Bank Merger Act (12 USC 1828(c)) or other statutory exemptions, the OCC applies the definitions and standards in the CBCA and the OCC's implementing regulations (12 USC 1817(j) and 12 CFR 5.50, respectively) to determine whether a change in ownership interest constitutes a change in control. Such changes include transactions that may result in control following the exercise of warrants or options by insiders under stock benefit plans.

If the OCC finds that a change in control would result from a change in ownership, the OCC requires the new owner(s) to file a change in control notice, generally before the proposed transaction. The OCC then decides whether to disapprove the proposed change. No person (refer to the "Glossary" section of this booklet) may take any action that would result in a change in control of the bank without prior OCC review, as provided in the CBCA, unless the transaction is subject to approval under certain other statutes. Refer to the "Change in Bank Control" booklet of the *Comptroller's Licensing Manual*.

OCC Review of Management

The OCC must review and not object to the hiring of any officer or the appointment or election of any director for two years from the date the bank commences business, unless this period is extended by the OCC.[42] The OCC may extend the period beyond two years if the OCC deems a longer period appropriate, particularly during the bank's de novo phase. During this time, each person proposed as an officer or director must provide the appropriate OCC supervisory office with the required Interagency Biographical and Financial Reports. The OCC provides a written decision about each person submitted for review.

Special Purpose Proposals

A national bank or FSA is generally authorized by its articles of association or charter to exercise all express and implied powers of the respective charter. Special purpose banks, however, may offer only a small number of products, target a limited customer base, incorporate nontraditional elements, or have narrowly targeted business plans. Depending on the type of business, the OCC may require a bank to specify the nature of its business in its articles of association or charter, and not to deviate from that business without OCC approval.

Special purpose banks must meet the same statutory and regulatory requirements as other banks, unless applicable laws or regulations provide otherwise. All institutions must comply with BSA and OFAC requirements.

In addition, organizers of special purpose banks are expected to adhere to established charter policies and procedures that are set forth in 12 CFR 5 and this booklet. Special purpose bank charter applications normally must provide the information required by the OCC's standard

[42] Refer to 12 CFR 5.20(g)(2).

review process. However, organizers should tailor the contents of the application to be consistent with the special purpose business line of the proposed charter.

Depending on the nature of the proposed activities, the OCC's review of a special purpose proposal may require additional scrutiny.

Special purpose bank proposals to date include those banks whose operations are limited to certain activities, such as credit card operations, fiduciary activities, community development, or cash management activities. Proposals for bankers' banks also fall into this category. The OCC will consider other special purpose bank proposals, provided the application meets the evaluative decision factors common to all bank charter applications.

Credit Card Banks

Credit card banks are institutions whose primary business line is the issuance of credit cards, the generation of credit card receivables, and activities incidental to that line of business. Some credit card banks may have other lines of business but they are not generally material to the bank.

A holding company or individual shareholders may control an insured bank that engages exclusively or predominantly in credit card activities. This bank may legally offer additional banking services, but generally the board has adopted a business plan focusing on credit cards and related products and services. These banks are generally "banks" under the BHCA or "savings associations" under HOLA, so a company that owns one is a BHC subject to the activity and geographic limitations of the BHCA, or an SLHC subject to the activity limitations of the Savings and Loan Holding Company Act.[43] Companies that own these credit card banks generally are subject to supervision and oversight by the Federal Reserve Board.

Some credit card national banks, however, are not "banks" as that term is defined under the BHCA if they meet certain requirements under law. The Competitive Equality Banking Act of 1987 (CEBA) created the BHCA exemption for these national banks (CEBA credit card banks). There is no similar exception for FSAs under the Savings and Loan Holding Company Act. The company that owns a national credit card bank that complies with the specific exceptions noted in the CEBA does not become a BHC solely by virtue of owning the bank, so the parent company is not subject to the activity and geographic limitations that generally apply to BHCs under the BHCA. Thus, nonbank holding companies, commercial entities, or banks that wish to have a subsidiary credit card bank usually own these CEBA credit card banks. However, a BHC that wants to operate a credit card bank in a state in which it would not be able to establish a de novo BHCA bank also could own a CEBA credit card bank in that state. This type of bank must meet all of the requirements for the credit card bank exemption created by the CEBA amendment to the BHCA (12 USC 1841(c)(2)(F)).

[43] Refer to 12 USC 1467a, "Regulation of Holding Companies," which is part of HOLA.

The bank

- must engage only in credit card activities.
- may not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties.
- may not accept any savings or time deposits of less than $100,000, unless they are used as collateral for secured credit card loans.
- may maintain only one office that accepts deposits.
- may not engage in the business of making commercial loans.

Those limitations must appear in the national bank's articles of association.

Although commercial entities may have proven experience in managing a credit card operation, the OCC expects a senior management team that can demonstrate sufficient relevant experience necessary to operate as a credit card bank in a regulatory environment.

A CEBA credit card bank proposal is processed as a special purpose charter application. Proposals with any of the following features are subject to greater scrutiny:

- Issuance of cards with closed-end credit features.
- The absence of a parent organization with an investment grade rating of A or higher by Moody's or Standard and Poor's.
- Issuance of cards to LMI customers with a higher credit risk profile, higher default probabilities, or collateral issues; or charging large upfront fees or higher than usual annual percentage rates (collectively, subprime lending issues).
- E-banking and Internet primary operations.

Each applicant should evaluate thoroughly and discuss potential issues with appropriate OCC staff before filing. Third-party relationship issues may significantly increase a bank's risk profile, notably strategic, reputation, compliance, and transaction risks. Refer to the "Third-Party Relationships" section in this booklet. Because those issues are sometimes complex, an applicant also may wish to consult its regulatory counsel.

A credit card bank must maintain its status as an insured depository institution within the meaning of 12 USC 1813(c)(2) and, if a national bank, apply for membership in the Federal Reserve System. If the FDIC initiates or takes any action to terminate the bank's status as an insured depository institution, the OCC reserves the right to impose additional conditions on the bank.

A credit card bank also must comply with BSA/AML and OFAC requirements, and with the CRA. For CRA purposes, however, it may seek designation as a limited purpose bank under 12 CFR 25.25 or 12 CFR 195.25.

Many credit card bank proposals raise affiliate transactions issues under sections 23A (12 USC 371c) and 23B (12 USC 371c–1) of the Federal Reserve Act and the implementing regulation, Regulation W, 12 CFR 223. The most common issues relate to the following:

- Initial capitalization of a newly chartered credit card bank.
- Transfers of assets between the credit card bank and its affiliates.
- The possibility that credit extended by a proprietary credit card bank to its cardholders may be treated as a loan to an affiliate, if customers use their credit cards to purchase goods and services from bank affiliates.

Regulation W contains an exemption from the restrictions of sections 23A and 23B that permits a newly formed bank to purchase assets from an affiliate, thus eliminating many of the issues pertaining to providing initial capitalization of any new bank, including a credit card bank.

Under section 23A's attribution rule, an extension of credit by a member bank to a nonaffiliated entity is treated as an extension of credit to an affiliate if the proceeds are transferred to, or used for the benefit of, an affiliate of the bank. These transactions thus become covered transactions. Accordingly, if a credit cardholder purchases goods or services from an affiliate of the member bank that issued the credit card, then the extension of credit to the cardholder may be attributed to the affiliate because the affiliate receives the benefit of the loan proceeds.

Regulation W contains complex rules regarding the treatment of credit cards under the attribution rule. The regulation provides an exemption from the attribution rule if the extension of credit is made through a "general purpose credit card." This is a credit card issued by a member bank that is widely accepted by merchants that are not affiliates of the bank and that satisfies a test set forth in the regulation. Specifically, the value of goods and services purchased with the card from affiliates of the bank must be less than 25 percent of the total value of all goods and services purchased with the card. Compliance with the test may be demonstrated in several ways. Organizers of a CEBA credit card bank with a sponsoring company should consult the regulation for details. If a card fails this test, all card transactions with affiliates are subject to the attribution rule.

Issuers of credit cards that cannot qualify as general purpose credit cards may still avoid the collateralization and other requirements for covered transactions by making use of the exemption provided in Regulation W for an intraday extension of credit. This is defined as an extension of credit to an affiliate that the bank expects to be repaid, sold, or terminated, or to qualify for a complete exemption under Regulation W, by the end of the U.S. business day. CEBA credit card banks commonly qualify for this exemption by selling their receivables to an affiliate or other entity at the end of each business day. Organizers of a CEBA credit card bank with a sponsoring company should consult the regulation concerning requirements to qualify for the intraday exemption.

Because credit card banks have different risks from traditional full service banks, the OCC may impose, as appropriate, enforceable conditions that provide safeguards for the bank. Such conditions may include requiring written agreements between the bank and its parent, or between the OCC, the bank, and its parent, to assure that the parent provides capital and liquidity support to the bank when needed. Refer to the "Additional Considerations" subsection in the following "Trust Banks or Trust Companies" section, which discusses

operating agreements, capital and liquidity maintenance agreements, and capital assurance and liquidity support agreements that the OCC may impose for credit card banks as well as trust banks.

Trust Banks or Trust Companies

The OCC may grant approval for a bank that will limit its operations to those of a fiduciary, meaning the bank will act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in other fiduciary capacities and related activities. Banks that choose to so limit their services are referred to as trust banks or trust companies (collectively, trust banks). The OCC generally requires FDIC deposit insurance for all bank charters, except for certain national trust bank charters. All FSAs, including those that limit their activities to trust activities, must have FDIC insurance.

An organizing group or sponsor seeking to charter a trust bank should review this booklet as well as the "Fiduciary Powers" booklet of the *Comptroller's Licensing Manual*. For a national trust bank, the OCC requires that the bank's articles of association limit the bank to the operations of a trust bank and activities related to such operations. Similarly, the OCC generally requires that the charter of an FSA that engages exclusively in trust activities limit the bank to the exercise of fiduciary powers.

A national trust bank typically is not a bank for purposes of the BHCA, and so a company that owns a national trust bank and no other bank is not a BHC. Similarly, a company that controls an FSA that engages exclusively in trust activities (and does not control any other savings association in which activities are not limited exclusively to trust activities) is not an SLHC for purposes of HOLA. Therefore, a company other than a BHC or SLHC may own a trust bank.

There are two ways for a national trust bank not to be a bank under the BHCA. First, a national trust bank does not meet the general definition of a bank under 12 USC 1841(c)(1) if the trust bank (1) is not insured and (2) does not accept demand deposits and make commercial loans. Second, even if a trust bank is insured and otherwise would meet the definition of a bank, a trust bank is not considered a bank for purposes of the BHCA if it meets certain conditions (12 USC 1841(c)(2)(D)). These conditions are as follows:

- The institution must function solely in a trust or fiduciary capacity.
- All or substantially all of the trust bank deposits are in trust funds and are received in a bona fide fiduciary capacity.
- No trust bank deposits insured by the FDIC are offered or marketed by or through an affiliate.
- The trust bank does not make commercial loans or accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others.
- The trust bank may not obtain payment or payment-related services from any Federal Reserve Bank.
- The trust bank may not exercise Federal Reserve Bank discount or borrowing privileges.

For a trust-only FSA, the exemption under HOLA excludes from the definition of an SLHC a company that controls a savings association that functions solely in a trust or fiduciary capacity as described in 12 USC 1841(c)(2)(D).[44]

A bank's transactions with an uninsured trust bank owned directly by the same parent company do not qualify for certain exemptions from sections 23A and 23B that are available to a bank engaging in the same transactions with an insured bank affiliate. Thus, transactions between the bank and its uninsured trust bank affiliate generally must comply with all relevant requirements of sections 23A and 23B.

On the other hand, an uninsured trust bank that is wholly owned by a bank is not treated as an affiliate of the parent bank for purposes of sections 23A or 23B. Thus, from the perspective of the parent bank, transactions between the parent bank and the subsidiary uninsured trust bank are not subject to sections 23A and 23B. From the perspective of the uninsured trust bank, sections 23A and 23B apply to covered transactions with the bank parent, but the sister bank exemption or another exemption may be available.

Organizers of a trust bank should complete the Interagency Charter and Federal Deposit Insurance Application in addition to reviewing the Fiduciary Powers Application. While a separate application for fiduciary powers is not required to organize a special purpose charter for a national bank or FSA limited to fiduciary or trust activities, the OCC reviews the fiduciary powers as part of its review of the charter application. Therefore, the application should include all of the information requested in the charter application, as well as the information outlined in the Fiduciary Powers Application.

Capital and Liquidity Requirements

Trust banks are required by statute (12 USC 92a and 1464(n)) to have capital no less than that required by state law for companies offering similar services in the state in which the bank will be located.

Trust banks also are subject to the minimum leverage and risk-based capital ratios based on balance sheet assets defined in 12 CFR 3. These ratios are not, however, optimal measures of capital adequacy for trust banks because off-balance-sheet asset management activities are not captured in the capital ratio calculations. Accordingly, there ordinarily would be a higher level of capital than the ratios defined in 12 CFR 3. Trust banks also need to consider appropriate levels of liquidity. The OCC expects organizers for trust bank charters to provide a detailed analysis supporting their proposed capital and liquidity levels.

Organizers of a trust bank should refer to OCC Bulletin 2007-21, "Supervision of National Trust Banks: Revised Guidance: Capital and Liquidity," for further guidance on OCC expectations of trust bank directors and management to ensure that adequate capital and liquidity are maintained. In addition, organizers should refer to recent trust charter approvals available in Interpretations and Actions on the OCC's website to gain insight into the OCC's capital and liquidity expectations for trust bank charters.

[44] Refer to section 10(a)(1)(D)(ii) of HOLA (12 USC 1467a(a)(1)(D)(ii)).

After considering the organizers' proposed capital and liquidity levels and reviewing the bank's proposed business, the OCC imposes a minimum level of capital and liquidity the bank must maintain. In some cases, particularly if the trust bank is not part of a BHC or SLHC, the OCC may require that substantial portions of the required minimum capital and liquidity be composed of high-quality liquid assets.[45]

Additional Considerations

Trust banks are highly specialized and present a variety of risks that are not typically found in commercial and consumer banking operations. Based on the OCC's assessment of risk, management's qualifications, the ability of the bank to raise capital after commencing operations, proposed relationships with affiliates, and the ability of the parent company to be a source of strength for the trust bank, the OCC may impose a number of requirements and conditions enforceable under 12 USC 1818.

In some cases, particularly when the trust bank is not part of a BHC or SLHC or is not otherwise affiliated with an insured depository institution, the OCC may require that the requirements and conditions be in the form of written agreements between the OCC, the bank, and the bank's parent. These agreements generally include one or more of the following:

- An operating agreement between the trust bank and the OCC establishing minimum requirements for the operation of the trust bank. The agreement's provisions typically include
  - minimum capital and liquidity requirements.
  - a requirement to adopt and adhere to a business plan and not significantly deviate from it without prior OCC review.
  - provisions addressing corporate governance and internal controls, operations, and relationships with affiliates.
  - provisions setting out the obligation of the parent company to provide financial support.
  - a requirement that the trust bank monitor its financial condition and the parent company's condition and report to the OCC any material adverse changes. (The OCC also assesses compliance through the supervisory process.)
  - provisions addressing risk management, third-party relationships, and business continuation contingency plans.

[45] For example, the OCC may require that a substantial portion, such as 50 to 75 percent, of the capital minimum must be maintained in high-quality liquid assets, or the OCC may require that the bank maintain high-quality liquid assets sufficient to cover a minimum of 180 days of operating expenses. Assets eligible to meet these requirements typically are cash or cash equivalents, deposits at insured depository institutions, U.S. government obligations with a short remaining maturity, and similar readily marketable assets. The assets must not be pledged as security and must be free of any lien or other encumbrance.

  - provisions for early resolution steps requiring a sale, merger, or liquidation of the bank without loss or cost to the Deposit Insurance Fund or OCC[46] if the bank's condition deteriorates.

- A capital and liquidity support agreement (CSA) between the OCC, the bank, and the parent company when the OCC has jurisdiction over the parent company (i.e., the parent company is not a BHC or SLHC). This agreement requires the parent company to inject funds for the trust bank to maintain minimum capital or liquidity. The agreement may also include provisions for ongoing monitoring of the financial condition of the bank, the parent company, and other affiliates.

- A capital assurance and liquidity maintenance agreement (CALMA) between the trust bank and its parent company. This agreement also requires the parent company to inject funds for the trust bank to maintain minimum capital or liquidity.

The operating agreement and the CSA are written agreements under 12 USC 1818 and are enforceable by the OCC under 12 USC 1818. The CALMA is a contractual commitment between the bank and its parent company. Compliance with the agreements is assessed on a regular basis through the OCC's supervisory process.

Many trust banks are parts of much larger organizations, and the relationships with the larger organizations may impose unique risks, including those associated with BSA/AML. For operational efficiency, many trust banks use services provided by both affiliates and nonaffiliates. The OCC understands that third-party services are expected to remain integral to trust bank operations, but the OCC may impose conditions within the safeguard documents to minimize the risks related to these services. Service provider relationships should include initial and ongoing due diligence and should be monitored in a manner consistent with OCC third-party relationship requirements. Refer to "OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance". Central to the governance of these relationships are service-level agreements entered into by all parties. Services provided by unaffiliated third parties continue to be subject to the same regulatory requirements, including BSA/AML, as affiliate service providers.

While their parent companies may not be BHCs or SLHCs, trust banks are subject to OCC supervision. Therefore, the governance structure, including the ability to identify and manage risk and to meet client service requirements, should be consistent with those of other nationally chartered banks and FSAs.

Community Development Banks

A community development (CD) bank is a depository institution with a stated mission to primarily benefit the underserved communities in which it is chartered to conduct business. A CD bank pursues this specialized mission by primarily providing financial services to LMI

[46] If an insured federally chartered bank is placed into receivership under applicable laws, the FDIC is appointed receiver. If the federal charter is not insured, the OCC would act as receiver and incur any costs under that role.

individuals or areas, or by primarily benefiting other areas targeted for redevelopment by a governmental entity, including LMI census tracts, designated disaster areas, or distressed or underserved nonmetropolitan middle-income geographies.

A de novo CD bank applicant's proposed business plan should outline the proposed business focus. Often, this means the bank's plans serve both its primary CD-focus market as well as a broader market to lay a foundation for its future operations. Diversified asset and liability portfolios, product selection, funding sources, and target markets help to sustain a bank through market fluctuations.

In addition, for a CD bank organized as a national bank or FSA, the OCC generally requires the bank's articles of association or charter to indicate the express intent to lend, invest, and provide services primarily to LMI individuals or areas or areas targeted for redevelopment by a governmental entity in which the bank is chartered to conduct business. Typically, this means that the CD bank's activities will support one or more of the following activities:

- Affordable housing, community services, or permanent jobs for LMI individuals.
- Equity or debt financing for small businesses, including minority- and women-owned small businesses.
- Economic development and area revitalization or stabilization.
- Other activities, services, or facilities that primarily promote the public welfare, such as financial education and other technical assistance for LMI and unbanked individuals, small businesses, and nonprofit organizations.

The CD bank charter makes the bank eligible for investment by national banks pursuant to the public welfare investment authority of 12 USC 24(Eleventh) and 12 CFR 24, and banks seeking to make an investment in a CD bank should follow the regulation's procedures. Alternatively, a national bank may make a noncontrolling investment in a CD bank under 12 USC 24(Seventh) and 12 CFR 5.36. Depending on the circumstances, FSAs may invest in CD banks pursuant to 12 CFR 5.58, 12 CFR 5.59(f)(8), or 12 CFR 160.36.

Investor institutions may assist a CD bank in a number of other ways, including providing an "officer-on-loan" for temporary training assistance; consulting and training on operations; and establishing two-way referral/correspondent relationships on loan business. Representatives of investor banks may also serve on an advisory board or as an honorary director of a CD bank, provided that the CD bank's total assets are less than $100 million. An investor bank may also seek OCC permission to grant a waiver from the Depository Institutions Management Interlocks Act[47] to allow representatives of the investor bank to serve on the board of an unaffiliated CD bank.

CD banks are evaluated under the same CRA criteria as all other community banks. Holding a CD charter is not a guarantee of an "outstanding" CRA rating. Organizers, management, and directors should recognize that, because of the unique risks associated with a CD bank's niche market, the institution may need to pursue its CD mission by gradually ramping up its

[47] Refer to 12 USC 3201 et seq.

CD activities while concentrating on the fundamentals of safety and soundness, prudent growth, and profitability during its early years. As a result, a CD bank's CRA performance may not be as strong in its early years as in later years, as its business and marketing plan develops.

The OCC provides technical assistance to organizers of each CD bank to assist in addressing unique features associated with each application. An OCC team of licensing, supervision, legal, and community affairs staff is available to meet with organizers to provide information and feedback on issues related to a de novo bank's proposed business plan and CD focus. OCC staff will respond to the group's questions and communicate options to assist in accomplishing the organizers' objectives.

The OCC will review a draft application and encourages organizers to fully explore any unique aspects of their proposals before submitting a draft for review. The OCC's technical assistance with the bank's proposal ends, however, when the charter application is filed. OCC technical assistance does not include providing instructions and direction to the bank organizers on developing a business plan, creating the group's strategies, or preparing the proposal or application.

For guidance regarding requirements for national banks with a CD focus, refer to the OCC memo to "Prospective Community Development Bank Organizing Groups." For additional resources for national banks and FSAs, please see the OCC's Community Development Financial Institution and CD Bank Resource Directory on OCC.gov.

Cash Management Banks

A cash management bank normally is affiliated through a BHC or SLHC structure with other banks that engage in a full array of commercial activities. A cash management bank provides certain financial services to its large corporate customers. In the cash management bank, all accounts are swept into money market mutual funds or repurchase agreements of the cash management bank at the end of each day as each customer clears its accounts daily to zero. Fees for services typically are charged to each customer based on the number of services used and the number of items processed. Cash management banks incur high operational risks.

Some cash management banks are chartered as de novo institutions. Some, however, are created by stripping down the operations of an existing bank to those of a cash management bank following a purchase and assumption transaction. In the latter case, refer to the requirements discussed in the "Expansion or Contraction of Assets or Activities" section of the "General Policies and Procedures" booklet.

A key consideration when a bank alters its operation in this manner is the appropriate level of capital. The holding company may wish to reallocate its capital and reduce capital in the cash management bank. Refer to the "Capital and Dividends" booklet. Normally, the OCC expects capital at the cash management bank to be maintained at the "well-capitalized" level as defined in 12 CFR 6.4(b)(1).

The CRA does not apply to a special purpose bank that does not engage in commercial or retail banking services by granting credit to the public in the ordinary course of business, including banks engaged only in providing cash management controlled disbursement services to the public. A cash management bank must comply with BSA/AML and OFAC requirements.

Bankers' Banks

A group organizing a bankers' bank (refer to the "Glossary" section of this booklet) may request that the OCC waive compliance with certain regulations based on the bank's operations. Requests for such waivers should accompany the application and must be supported by adequate justification and legal analysis. The OCC reviews each waiver request by a bankers' bank and decides whether it is justified. However, the OCC cannot waive statutory requirements that apply specifically to a bankers' bank.

Banks investing in a bankers' bank may own no more than 5 percent of any class of its voting securities. In addition, a federally chartered bank's total investment in the stock of one or more bankers' banks is limited to 10 percent of the investing bank's unimpaired capital and surplus. Stock in a bankers' bank may be sold only to depository institutions or their holding companies.

The CRA does not apply to special purpose banks, including bankers' banks that do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incidental to their specialized operations. A bankers' bank must comply with BSA/AML and OFAC requirements.

Nontraditional Focus Proposals

Nontraditional focus proposals often raise issues that require heightened review by the OCC.

Supervisory Risks

Certain supervisory risks, such as credit risks, are increased in a narrow focus bank due to its concentration in a single or very limited number of business activities. The OCC may discourage the filing of or deny a charter proposal that would focus primarily or exclusively on activities or services that carry a high degree of risk without appropriate controls or are determined to be predatory in nature.

The OCC requires any proposal for a narrow focus bank to have well-defined business strategies (including contingency plans, sound funding sources, and projected capital commensurate with the risks) and specialized management. The OCC reviews each business plan for a narrow focus proposal to ensure that the organizers adequately address the following risks:

Concentrations: Narrow focus banks, by their very nature, are not as diversified as traditional banks, and a bank's business plan should address how the bank will mitigate any

concentration risk. Diversified asset and liability portfolios, product selection, funding sources, higher minimum capital levels, and target markets help make the bank less vulnerable to a downturn that could significantly affect its income, liquidity, or asset quality.

Funding and liquidity: The organizers should clarify in the business plan how the bank's sources of funding are reasonably diverse, how the bank intends to maintain adequate liquidity, and how credit-sensitive funding risks will be managed.

Access to capital: The business plan should identify sufficient capital to address uncertainties and provide a clear ability to raise capital, if needed. Initial capital should be sufficient, at a minimum, to support the bank's operations and absorb anticipated losses until profitability is achieved, while maintaining capital at an appropriate level to support safe and sound operations. If the bank fails to achieve its projected levels of profitability, the OCC expects the directors to take steps to restore capital to an adequate level. Depending on the risk profile of a narrow focus bank's business plan, the OCC may require higher capital levels.

Compliance risk management: The organizers should outline their proposed plan for maintaining compliance with the AML requirements established under the BSA and the economic sanctions laws administered by OFAC. The plan should also address the management of risks associated with possible money laundering and terrorist financing, commensurate with the level and nature of these risks presented by the bank's business activities, product and service offerings, and target markets. This plan should address the AML compliance program and customer identification requirements of the BSA. Refer to the *FFIEC BSA/AML Examination Manual* for specific information.

Customer authentication and security: The application of a bank using the Internet as a significant means of product delivery must address authentication and security issues. The bank's method of customer authentication and fraud detection is critical because of the lack of personal contact with bank customers. Internet banking platforms allow bank customers to access information and systems directly, including those that enable funds transfers between banks (such as automated clearing houses, SWIFT, Fed Wire, and CHIPS). Also, pursuant to the BSA, banks must report and record customer transactions that exceed certain thresholds. In an Internet environment, a bank may need to modify its systems for monitoring customer transactions. Refer to the E-Banking booklet of the *FFIEC IT Examination Handbook* for specific information.

Strategic planning: Narrow focus banks often target a limited customer base and may need robust contingency plans for redirecting efforts if the business plan proves unsuccessful. Organizers should define clearly in the business plan their targeted audience (for example, by identifying products and geographic areas) and the strategic alternatives. In developing the strategic plan, the organizers should keep potential conflicts of interest in mind. Refer to the "Conflicts of Interest" section of this booklet.

CRA Policy Considerations

The CRA generally does not apply to uninsured banks and certain special purpose insured banks that do not perform commercial or retail services by granting credit to the public in the ordinary course of business, other than as incidental to their specialized operations. These banks include bankers' banks and banks that engage only in activities such as providing cash management controlled disbursement services or serving as correspondent banks, trust banks, or clearing agents.[48]

Some other banks may seek designation as a limited purpose or wholesale bank.[49] A limited purpose bank offers only a narrow product line, such as credit card or motor vehicle loans, to a regional or broader market. A wholesale bank is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers.

The organizers must submit a request, in writing, with the charter application to be designated as a limited purpose or wholesale bank. Since limited purpose and wholesale banks are subject to evaluation under the CD test, the organizers should submit a targeted discussion of the bank's CRA plan as part of the charter application.

Capital Considerations

The OCC requires proposed banks with higher risk profiles to have higher capital reserves than banks that present lower risk. The OCC normally does not approve tiered capital injections during the first three years of the business plan unless the bank has an established parent company to serve as a source of capital strength. Therefore, the business plan generally must indicate that all necessary capital for the three-year plan will be available on opening.

[48] Refer to 12 CFR 25.11(c)(3) and 12 CFR 195.11(c)(2).

[49] Refer to 12 CFR 25.12(n) and (x) and 12 CFR 25.25(b) for national banks or 12 CFR 195.12(n) and (x) and 12 CFR 195.25(b) for FSAs.

Procedures: Prefiling

Exploratory Inquiry, Conference Call, or Meeting

1. Request an exploratory conference call or meeting with the OCC through the contact person to clarify any questions or concerns. If available, mail or fax a copy of any written documents that describe the proposal to the appropriate Director for District Licensing for review before the call or meeting. Allow adequate time for OCC staff to review the material.

2. Request information about the chartering process from the Licensing staff in the appropriate district office if this information has not been requested previously. If information was previously requested, skip to step 3.

Prefiling Meeting

3. Request that a prefiling meeting be scheduled.

4. Provide the following:

   - Information about how the group came together and the factors that led to the decision to file.
   - Information about the organizers' qualifications, both individually and collectively.
   - An overview of the proposal, including a discussion of the business plan and the market with particular emphasis on any unique aspects or novel policy or legal issues.
   - [For a bankers' bank] If necessary, provide a written request and justification for waiver of certain legal requirements.

Procedures: Application Process

Filing the Application and Publication

Organizers

1. Submit a complete application, including the Interagency Biographical and Financial Reports, to the Director for District Licensing in the appropriate district office or to Headquarters Licensing. If applicable, file additional applications for fiduciary powers, branches, subsidiaries, etc.

2. Publish a notice on the date of filing or as soon as practical before or after the date of filing. Refer to the "Public Notice and Comments" booklet.

3. Respond to any OCC requests for clarification or additional information.

OCC Field Investigation

Licensing Staff

4. Requests a field investigation from the appropriate supervisory office and solicits its input to determine the scope of the investigation.

5. Provides OCC bank examiners documents to assist them in determining the scope of and conducting the field investigation.

OCC Bank Examiner

6. Contacts the contact person to arrange for the investigation.

7. Coordinates the investigation with the FDIC if applicable and when possible.

8. Reviews documents, interviews insiders and other identified persons, and explores matters related to the proposed bank's operations consistent with the scope tailored for the proposed bank by Licensing staff with input from other OCC staff.

9. Meets with the organizing group and proposed management to summarize the field investigation and its importance, discusses any significant issues, and communicates the investigation findings without offering a preliminary opinion about the likely decision on the charter application.

10. Prepares investigation findings, submits the report for supervisory office approval, and forwards the completed report to Licensing staff.

Public Comments and Hearings

11. If the public or interested persons request copies of the application, Licensing staff follows the information request procedures in the "General Policies and Procedures" booklet.

12. If public comments are filed or a hearing or meeting is requested, Licensing staff refers parties to the "Public Notice and Comments" booklet for guidance and procedures.

13. The OCC determines whether the public comments are material.

Decision

Organizers

14. Assuming the OCC grants preliminary conditional approval, proceed to organize the bank. Refer to the organization phase procedures in this booklet.

Procedures: Capitalizing the Bank

These procedures do not apply to banks that will be owned and capitalized by a BHC or SLHC. These banks should contact the appropriate Federal Reserve Bank regarding capital issues. Banks capitalized through a holding company should provide such information in their application.

These procedures do not apply to de novo mutual FSAs, since mutual charters do not issue stock. Organizers seeking to charter a mutual FSA should consult with the appropriate OCC Licensing office regarding capital raising efforts.

Organizing Directors

1. Take appropriate action to capitalize the bank and comply with the requirements of 12 CFR 16. Submit one original and three copies of the securities registration statement and offering materials for a proposed public offering (registration statement), or a private placement memorandum (PPM) for a proposed nonpublic offering, along with a completed application.

2. [Not applicable for holding company stock solicitation efforts.] Perform the following stock solicitation actions:

   - Designate an unrelated insured depository institution as escrow agent of stock subscription funds according to 12 CFR 16.31. Send a copy of the depository agreement to the OCC.
   - The OCC expects that escrow funds are invested in a manner to minimize any potential principal loss and provide needed liquidity. Acceptable vehicles include short-term U.S. Government securities, mutual funds that invest exclusively in short-term U.S. Government securities, or an insured deposit account at a financial institution which the organizers have concluded has satisfactory financial strength. The OCC generally requires that the escrow agreement provides that the subscription funds may not be released to the organizers without written authorization from the OCC, which generally is granted approximately three business days before the bank commences business. If the bank does not open for business or the OCC's approval of the charter expires, the escrow agreement should provide, upon the written authorization of the OCC that the subscription funds be returned to the investors.
   - Authorize the solicitation of stock subscriptions, including setting the price at which the bank's stock will be sold.
   - Authorize the preparation and filing of a registration statement and offering materials for a proposed public offering, or a PPM for a proposed nonpublic offering, with the appropriate OCC Licensing office. Refer to 12 CFR 16.15 for required information.

Contact Person

3. Forwards to the OCC the original and three copies of the registration statement and offering materials for a proposed public offering or the PPM for a proposed nonpublic offering.

4. Submits amendments to the application, any registration statement, preliminary offering materials, or preliminary PPM for review by the OCC.

OCC District Counsel

5. Generally, in connection with the charter application for the organization of the bank, the applicant provides either a registration statement, preliminary prospectus, and related offering materials for a proposed public stock offering, or a preliminary PPM and related offering materials for a proposed nonpublic stock offering, which must comply with the applicable OCC securities offering regulations. Depending on when the materials are submitted and the status of any revised materials submitted in response to any OCC staff comments or observations, OCC staff continues to review the preliminary public offering materials or preliminary PPM and provide additional comments or observations, as appropriate. When a revised registration statement and preliminary public stock offering materials are submitted with a request for effectiveness, OCC staff makes a determination whether to issue a letter declaring the registration statement and public offering materials effective. After a revised preliminary PPM is submitted with information as to the proposed start date, end date, any possible extensions, and the final termination date, OCC staff indicate whether there are any further comments or observations.

Organizing Directors

6. Before soliciting stock, verify the following:

   - The OCC has reviewed the registration statement and declared it to be effective for the proposed public offering.
   - The escrow agent or the legal entity/body corporate has sufficient liability coverage.

7. For a public offering, solicit stock by providing each prospective shareholder with the effective offering materials, the subscription agreement, and any other information required under 12 CFR 16. For a nonpublic offering, provide the PPM and subscription agreement after all OCC staff comments or observations have been addressed and there are no further comments.

8. Instruct each prospective subscriber, verbally and through the registration statement prospectus, or PPM, as appropriate, to send all subscription funds directly to the escrow agent identified in the subscription letter and subscription agreement. As needed, deposit any funds inadvertently collected by the organizers with the escrow agent. The OCC generally objects to escrow arrangements in which the escrow agent is not independent of the organizers or organizing directors.

Escrow Agent

9. Invests escrow funds received from subscribers directly in U.S. government securities, such as bills, bonds, and notes, in a mutual fund consisting solely of those securities, or in an insured deposit account at a financial institution which the organizers have concluded has satisfactory financial strength. (Repurchase agreements are not considered direct deposits and cannot be used as escrow funds.)

Organizing Directors

10. If the stock is fully subscribed during the offering period, go to step 17.

11. If the organizing group believes that the bank may be unable to sell the minimum amount of securities before the expiration of the original offering period, and the registration statement and offering materials disclose a possible extension of the original offering period, the organizing group may file a prospectus supplement with the OCC to extend the offering period, provided that the proposed extension does not go beyond the maximum period disclosed in the registration statement and offering materials. The prospectus supplement should be submitted before the expiration of the original offering period, in sufficient time for the OCC to review the supplement. If the OCC declares the prospectus supplement effective before the end of the original offering period, the bank may proceed with the offering. If: (i) the original registration statement and offering materials did not disclose a possible extension to the original offering period; (ii) the original materials provided for an extension, but the organizers wish to extend the offering beyond the extended date; or (iii) a prospectus supplement submitted as described above was not declared effective before the expiration of the original offering period; then, in order to proceed with the offering, the organizers must file a post-effective amendment to the registration statement, which must be declared effective by the OCC. If a post-effective amendment to the registration statement is required, the organizers generally are required to offer rescission rights to the existing subscribers.

OCC Legal Staff

12. For a public offering, reviews the revised prospectus supplement or post-effective amendment, identifies and attempts to resolve any issues or concerns, declares any required post-effective amendment effective, and notifies the contact person. For a nonpublic offering, reviews and provides comments or observations on the PPM and any needed supplements, including any supplements for an extension of the offering period.

13. Reviews the terms of any proposed capital instruments to ensure compliance with eligibility requirements in 12 CFR 3.20.

Organizing Directors

14. For a public offering, if the extension is approved using a prospectus supplement, deliver a copy of the prospectus supplement to all existing subscribers and add the prospectus

supplement to the prospectus before the continuation of any offers or sales. For a nonpublic offering, provide the PPM supplement for any approved extension of the offering period.

15. For a public offering, if the extension requires a post-effective amendment to be filed, once the amendment is declared effective, deliver a copy of the post-effective amendment to all existing subscribers and incorporate it into the offering materials.

16. Continue with subscription efforts.

17. Prepare and retain at the bank a shareholders' list that conforms to the requirements of 12 USC 63 for national banks, or 12 CFR 152.11 for stock FSAs.

Escrow Agent

18. Sends the certification letter for capital funds to the CEO.

CEO

19. Sends a copy of the certification letter for capital funds from the escrow agent to the OCC.

OCC Licensing Staff

20. Notifies the escrow agent to release funds.

Escrow Agent

21. After receiving authorization from the OCC to disburse the funds, takes one of the following actions:

    - Returns funds to subscribers, unless all prerequisites for release to the bank have occurred.
    - Releases funds to the bank (approximately two to three business days before the scheduled opening date).

Procedures: Organization Phase

Organizing the Bank

Organizers

1. Within 30 days after receiving preliminary conditional approval, take the following actions:

   - Establish the process for maintaining minutes of all meetings of the organizers and organizing the board at the bank's corporate headquarters.
   - At the first meeting of organizers or by unanimous written consent
     - execute the articles of association and organization certificate for a national bank, or a charter and bylaws for an FSA, and submit an original of each to the appropriate district office for processing by Licensing staff (if this was not done earlier).
     - fix the number of organizing directors to serve until the first meeting of the shareholders or members.
     - elect as organizing directors the persons who have been cleared by the OCC.
     - review and document in the minutes the OCC's preliminary conditional approval letter and all other correspondence from the OCC.
     - designate the organizing chairperson, secretary, or CEO as the person to initiate and receive all future correspondence from the OCC. If this person is different than the contact person during the pre-decision phase of the application, advise the OCC of the new designee.

2. Advise the Licensing staff of significant changes at any time during the organization phase.

Organizing Directors

3. Hold the organizing board's first meeting. Reflect in the minutes the discussion of each of the following items:

   - If not previously executed and filed with the charter application, execute Joint Oath of Bank Directors. Execute an Individual Oath of Bank Director, if necessary. The oath for FSA directors can be found as an appendix to the charter application form.
   - Authorize, at a minimum, the organizing chairperson and the organizing secretary to the board to sign checks and other documents.
   - Adopt a corporate seal [national banks only].
   - For a national bank, adopt a stock certificate form containing all information required by 12 USC 52.[50] The par value of the stock should not appear on the face of the certificate, since par value is subject to change throughout the life of the bank.

[50] For an FSA, the OCC reviews and approves the form of securities. Refer to 12 USC 1463(h)(2).

- Adopt bylaws for a national bank or bylaws for an FSA.
- Authorize the purchase of adequate insurance, including fidelity bond insurance.
- Approve the specific location of the bank's office(s) and advise the OCC of any change in location from the location(s) identified in the charter application. The OCC may construe a change in location as a "significant change" and, if the organization is permitted to proceed, amend and republish the proposed bank's updated business plan, if needed.
- Approve organization costs consistent with the OCC's organization costs guidance. Attach to the minutes a copy of approved organization costs.
- Adopt a written insider policy that conforms to the guidelines in the "Insider Activities" booklet of the *Comptroller's Handbook*.
- Adopt appropriate written policies pertaining to other areas of bank operations.
- Establish an internal control system to ensure ongoing compliance with the currency reporting and record-keeping requirements of the BSA.

Establishing Management and Site

Several of the following steps may be modified or streamlined for established BHCs or SLHCs that are accorded expedited review.

4. Meet at least monthly as a group with the CEO and others, as needed, to oversee the organization of the bank.

5. Select remaining management officials and other insiders, including but not limited to a cashier or chief financial officer, a compliance officer, and a security officer. Submit to the OCC materials on each proposed management official, including the Interagency Biographical and Financial Reports. Also submit appropriate biographical and financial information on newly identified directors and principal shareholders (refer to the "Background Investigations" booklet), sending appropriate documentation to Licensing staff for prior review.

6. Thoroughly investigate the background and qualifications of each proposed executive officer, using criteria no less stringent than those detailed in the Management Review Guidelines in the "Background Investigations" booklet. Submit to the OCC a summary of the directors' investigative findings.

7. [For bankers' banks only] Submit to the OCC financial reports on newly identified banks that would like to participate in the bankers' bank. The reports should be consistent with those submitted by the organizing banks.

Organizing Directors

8. Review and document in the minutes of the board the following:

    - Any transactions with insiders. Include the following information for each transaction:

  - Name and address of the owner of the property or provider of the service.
  - Relationship to the bank.
  - Asset or service to be acquired.
  - Date the current owner acquired the property, if applicable.
  - Cost of the property to the current owner or estimate of the cost of services, if applicable.
  - An independent appraisal of any property acquired or an independent evaluation of lease terms.
  - Any other relevant information that demonstrates the proposed transaction is fair, reasonable, and comparable with similar arrangements that could have been made with unrelated parties.
  - A board resolution approving the specific details in advance of the transaction.
- If the site of the bank's building will have an adverse effect on a historical property as identified by the state's Historic Preservation Office, pursue receipt of a letter from the state that eliminates or resolves the concern. Refer to the National Historic Preservation Act discussion in the "General Policies and Procedures" booklet.
- The lease or purchase agreement for all bank premises.

Meeting of Shareholders/Members and Directors

9. The organizers mail the Notice of First Shareholders' Meeting and Proxy Statement to shareholders at least 10 calendar days before the scheduled shareholders' meeting for a national bank, and 20 calendar days before the first shareholders' or members' meeting for an FSA. Submit a copy of each document to the Licensing staff.

Shareholders/Members

10. Conduct business that properly may arise and document those activities, including the following actions, in the minutes of the first shareholders' or members' meeting, as applicable:

    - Fix the number of directors.
    - Elect to the board of directors those persons approved by the OCC and identified in the proxy materials for the meeting.
    - Approve an itemized list of organization costs that should be attached to the minutes, as well as additional expenses, accrued but not paid, that will be paid or reimbursed from capital funds.
    - Ratify the articles of association, organization certificate (national banks) or charter and bylaws (FSAs), and all official acts of the organizers, organizing directors, and officers since the organization of the national bank or FSA.

Directors

11. Hold the organization meeting. Document the following accomplishments, at a minimum, in the minutes of the first meeting of directors:

- Complete a Waiver of Notice of the Organizing Board's First Meeting.
- Execute the Oath of Bank Director or Joint Oath of Bank Directors.
- Elect the chairman, secretary, and other officers of the board and appoint the president, CEO, cashier, and other executives.
- Certify and execute the Capital Stock Payment Certificate.
- Ratify the bylaws.
- Elect standing committees as set out in the bylaws.
- Select a depository bank.
- Authorize the CEO (or another person) to maintain contact with the FDIC about the status of the bank's deposit insurance application, if the bank will be insured.

Organizing Bank Operations

CEO

12. Establishes the operating, risk management, and control systems needed to conduct banking business.

13. Advises the OCC if there has been a change in location (for example, a specific location instead of a "vicinity of" location), since the OCC granted preliminary conditional approval to the application.

Preopening Examination

CEO

14. At least 60 calendar days before the proposed opening date, submits an Organization Completed letter to Licensing staff and requests the POE, indicating readiness for opening.

OCC Bank Examiner

15. Contacts the CEO to arrange for the POE.

16. Coordinates with other units and the FDIC, if needed.

17. Conducts the POE. Determines whether all substantive issues, including risk management concerns, have been addressed adequately. Discusses POE findings with Licensing staff.

18. Meets with management and the board of directors at the conclusion of the visit to inform them of the POE findings, but does not convey a recommendation about the final approval for the bank's opening.

19. Prepares the POE report.

Continuing to Organize Bank Operations

CEO

20. Requests from the Federal Reserve Bank application forms for membership [national banks only].

21. Submits application forms for membership to the appropriate Federal Reserve Bank at least four weeks before the projected opening date [national banks only].

Chartering and Commencing Business

CEO

22. Takes the following actions, as needed:

- Resolves outstanding matters and advises Licensing staff members.
- Continues with opening preparations, including
  - confirming receipt of final deposit insurance approval from the FDIC, if the bank will be insured.
  - confirming receipt of bank membership in the Federal Reserve System, if applicable [national banks only].
  - notifying the OCC and other federal regulators of any opening date delay, if appropriate.
  - requesting the certification letter for capital funds from the escrow agent.

Contact Person

23. Confirms the bank's opening date with the OCC one business day before opening. The OCC issues a letter authorizing the bank to open on a specific date.

CEO

24. On the opening day,

- notifies Licensing staff members that the bank has opened.
- issues stock certificates to the stockholders.
- pays or capitalizes organizing expenses, including bank premises, that are approved by the shareholders or members, consistent with GAAP, and not objected to by the OCC.

Appendix A: Directors' Duties and Responsibilities, Qualifications, and Other Issues

The OCC expects each director to be familiar with the statutory responsibilities associated with that position. The board of directors of a bank may not delegate responsibility for its duties, but may entrust the day-to-day bank operations to bank management. Directors can refer to OCC publications specifically addressing director responsibilities. Refer to *The Director's Book: The Role of Directors of National Banks and Federal Savings Associations* and the "Corporate and Risk Governance" booklet of the *Comptroller's Handbook*.

Duties and Responsibilities of Directors

A federally chartered bank, like other corporate organizations, has shareholders (or, for a mutual FSA, members) who elect a board of directors. Whether a financial institution is a stock or mutual form of ownership, the bank's board plays a pivotal role in the effective governance of its bank. The board is accountable to shareholders, regulators, and other stakeholders. The board is responsible for overseeing management, providing organizational leadership, and establishing core corporate values. The board should create a corporate and risk governance framework to facilitate oversight and should help set the bank's strategic direction, risk culture, and risk appetite. The board also oversees the talent management processes for senior management, which include development, recruiting, succession planning, and compensation.

Directors' activities are governed by common law fiduciary legal principles, which impose two duties—the duty of care and the duty of loyalty.

The duty of care requires that directors act in good faith, with the level of care that ordinary prudent persons would exercise in similar circumstances and in a manner that the directors reasonably believe is in the bank's best interests. The duty of care requires directors to acquire sufficient knowledge of the material facts related to proposed activities or transactions, thoroughly examine all information available to them, and actively participate in decision making.

The duty of loyalty requires that directors exercise their powers in the best interests of the bank and its shareholders rather than in the directors' own self-interest or in the interests of any other person. Directors taking action on particular activities or transactions must be objective, meaning the directors must consider the activities or transactions on their merits, free from any extraneous influences. The duty of loyalty primarily relates to conflicts of interest, confidentiality, and corporate opportunity. Directors of FSAs are also subject to specific conflict of interest and corporate opportunity regulations.[51]

Each director should personally ensure that his or her conduct reflects the level of care and loyalty required of a bank director. A bank director—like the director of any corporate

[51] Refer to 12 CFR 163.200, "Conflicts of Interest" and 12 CFR 163.201, "Corporate Opportunity."

entity—may be held personally liable in lawsuits for losses resulting from his or her breach of fiduciary duties. Shareholders or members (either individually or on behalf of the bank), depositors, or creditors who allege injury by a director's failure to fulfill these duties may bring these suits. In addition, the OCC may take enforcement action, including assessment of civil money penalties, against a director for breach of fiduciary duty. The OCC may assess director liability individually because the nature of any breach of fiduciary duty can vary for each director.

Although a board of directors does not guarantee the bank's success, it must oversee and hold accountable bank management to ensure that the bank conducts business in a safe and sound manner and complies with laws and regulations. The board must keep informed about the bank's operating environment; hire and retain competent management; and understand the bank's material risks and ensure that the bank has a risk management structure and process suitable for the bank's size and activities. The board also must oversee the bank's business performance and as applicable, ensure that the bank serves the community's credit needs. Problems arising from failures in any of those areas represent the board's failure to exercise properly its oversight responsibilities and can result in individual liability if a director has not acted as a reasonably prudent director would act in similar circumstances.

Banks must take reasonable and prudent steps to guard against money laundering and terrorist financing and to identify and manage any risks related to such activities. The board is responsible for approving the BSA/AML compliance program and for overseeing the structure and management of the organization's BSA/AML compliance function. The BSA/AML compliance program must be written, commensurate with the bank's BSA/AML risk profile, approved by the board, and noted in the board minutes. Banks must also establish and maintain procedures reasonably designed to ensure and monitor their compliance with the BSA and its implementing regulations. This requires banks to establish, at a minimum, a compliance program that includes[52]

- a system of internal controls to ensure ongoing compliance.
- independent testing for compliance.
- a qualified individual or individuals responsible for managing BSA compliance (BSA compliance officer).
- training for appropriate personnel.
- a customer identification program.[53]

For more information, refer to the *FFIEC BSA/AML Examination Manual*.

Management works for the board of directors; the board of directors does not work for management. The long-term health of a bank depends on a strong, independent, and attentive board. The board should evaluate its effectiveness periodically and determine whether it is taking steps necessary to fulfill its responsibilities. The board also should conduct orientation

[52] Refer to 12 CFR 21.21, "Procedures for Monitoring Bank Secrecy Act Compliance."

[53] Refer to 12 CFR 21.21 (c)(2), "Contents of Compliance Program."

programs for new directors. Ongoing education programs that describe emerging industry trends and regulatory developments, opportunities, and risks also are often helpful.

When searching for new bank directors, banks should seek persons who will exercise independent judgment and actively participate in decision making. The principal qualities of an effective bank director include strength of character, an inquiring and independent mind, practical wisdom, and sound judgment.

In summary, the qualifications of a candidate seeking to become a member of the board of directors of a bank include the following:

- Basic knowledge of the banking industry, financial regulatory system, and laws and regulations that govern the bank's operation.
- Background, knowledge, and experience in business or another discipline to facilitate bank oversight, and knowledge of the communities served by the bank.
- Acceptance of fiduciary duties and obligations, including a firm commitment to put the bank's interests ahead of personal interests and to avoid conflicts of interests.
- Firm commitment to regularly attend and be prepared for all board and committee meetings.
- Willingness and ability to exercise independent judgment and provide credible challenge to management's decisions and recommendations.

The primary responsibilities of the board of directors of a bank include the following:

- Providing effective oversight. Board oversight is critical to maintain the bank's operations in a safe and sound manner, oversee compliance with laws and regulations, supervise major banking activities, and govern senior management.
- Establishing an appropriate corporate culture. Corporate culture refers to the norms and values that drive behaviors within an organization. This starts with the board, which is responsible for setting the tone at the top and overseeing management's role in fostering and maintaining a sound corporate and risk culture. Shared values, expectations, and objectives established by the board and senior management promote a sound corporate culture.
- Complying with fiduciary duties and the law. As noted above, directors' activities are governed by fiduciary legal principles, which impose the duties of care and loyalty.
- Hiring and retaining competent management with the skills, integrity, knowledge, and experience appropriate to the nature and scope of their responsibilities. A profitable and sound bank is largely the result of talented and capable management.
- Overseeing the compensation and benefits program. The board should determine that compensation practices for its executive officers and employees are safe and sound, are consistent with prudent compensation practices, and comply with laws and regulations governing compensation practices.
- Maintaining appropriate affiliate and holding company relationships. The bank's board should ensure that relationships between the bank and its holding company, its affiliates, and its subsidiaries do not pose safety and soundness issues for the bank and are appropriately managed.

- Establishing and maintaining an appropriate board structure. The board should establish committees that have the responsibility of overseeing significant functions or activities within the bank. The appropriate governance and committee structure depends on the bank's needs and is a key board decision. As the complexity and risk profile of the bank's products and services increase, additional committees may be necessary for the board to provide effective oversight.
- Performing board self-assessments. A meaningful self-assessment evaluates the board's effectiveness and functionality, board committee operations, and directors' skills and expertise. All boards should periodically undertake some form of self-assessment.
- Overseeing financial performance and risk reporting. Sound financial performance is a key indicator of the bank's success. The board should determine the types of reports required to help with its oversight and decision-making responsibilities.
- Serving community credit needs. Each bank that lends has a responsibility to help meet the credit needs of its communities, consistent with safe and sound lending practices, and has an obligation to ensure fair access and equal treatment to all bank customers. The CRA is intended to prevent redlining and to encourage insured banks to help meet the credit needs of all segments of their communities, including LMI neighborhoods.

Director Qualifications

National Banks

Each national bank director must meet the qualification requirements found in 12 USC 72, unless a residency or citizenship waiver request is submitted to and approved by the OCC. Refer to the "Director Waivers" booklet of the *Comptroller's Licensing Manual*. Specifically, each national bank director must

- hold a minimum $1,000 par value or fair market value of stock in his or her own right in the bank or an equivalent interest in the company that controls the national bank.
- be a citizen of the United States throughout his or her term of service (the OCC may waive this requirement for a minority of the total number of directors).

At least a majority of the directors of a national bank must have resided in the state, territory, or district in which the bank is located (that is, in which the bank has its main office or branches), or within 100 miles of the bank's main office location, for at least one year immediately preceding election as directors, unless the OCC grants a residency waiver. The directors must continue to meet this requirement unless the OCC grants a residency waiver.

FSAs

A director of an FSA need not be a stockholder of the association unless the bylaws so require. However, each director of a federal mutual savings association must be a member of the association.

An FSA's board of directors is not subject to citizenship and residency requirements. The composition of the board, however, is subject to the following requirements of 12 CFR 163.33:

- A majority of the directors must not be salaried officers or employees of the savings association or of any subsidiary.
- Not more than two of the directors may be members of the same immediate family.
- Not more than one director may be an attorney with a particular law firm.

Election of Directors

National Banks

A national bank's shareholders elect the directors at the annual shareholders' meeting. The number of directors of each national bank is authorized by its bylaws and limited to not less than five directors and ordinarily no more than 25, but the OCC may waive the 25-member limit.

Once national bank directors meet the 12 USC 72 qualification requirements (or these are waived by the OCC in accordance with the statute), they take the oath of office before a notary or other official authorized by state law.

Under 12 USC 71, national bank directors may hold office for a period of not more than three years and until their successors have been elected and qualified. Directors may serve staggered terms if authorized by the bank's bylaws.

The president (but not the CEO) of a national bank is required to be a member of the board. The board may elect a director other than the president to chair the board.

FSAs

An FSA's shareholders and a federal mutual savings association's members elect directors at the annual meeting of shareholders or members. For both types of FSAs, the number of directors is authorized by its bylaws and limited to not less than five and ordinarily no more than 15, unless otherwise approved by the OCC under 12 CFR 5.21 or 5.22.

For mutual or stock FSAs, directors may be elected for periods of one to three years and until their successors are elected and qualified. For mutual FSAs, if a staggered board is chosen, provision shall be made for the election of approximately one-third or one-half of the board each year, as appropriate. For stock FSAs, if a staggered board is chosen, the directors should be divided into two or three classes as nearly equal in number as possible, and one class must be elected by ballot annually.

Unlike a national bank director, the president of an FSA is not required to be a board member, unless required by the bylaws.

Vacancies on the Board

Directors remaining on the board appoint a replacement if a vacancy occurs. The replacement must meet the applicable director qualification requirements. The newly appointed director serves until the next annual election of directors by the bank's shareholders or members.

Depository Institution Management Interlocks Act

The Depository Institution Management Interlocks Act (Interlocks Act) generally prohibits an official of a bank or depository institution holding company from simultaneously serving as a management official of an unaffiliated depository institution or depository institution holding company in situations in which the management interlock likely would have an anticompetitive effect.

There are certain exemptions from these interlock prohibitions. Some management interlocks are exempted by statute and some qualify for exemption under the OCC's regulations without filing an application. Other interlocks may be exempted if the OCC approves a specific application. The OCC may exempt a prohibited management interlock if it determines that dual service would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns.

OCC regulations provide for two broad categories of permissible exemptions: the small market share exemption and the general exemption. The small market share exemption applies to depository organizations with limited control of an area's deposits. This exemption does not require an application or prior OCC approval. Under the general exemption, the OCC may, through the application process, exempt a management official's service that the Interlocks Act otherwise would prohibit.

The OCC's regulations provide that in certain instances in which a general exemption is sought, the agency applies a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition. Under the OCC's regulation governing the general exemption, 12 CFR 26.6(b), these instances include a depository institution seeking to add a management official when it

- serves primarily LMI areas.
- is controlled or managed by members of a minority group or women.
- has been chartered for less than two years.
- is deemed to be in "troubled condition" by the OCC.

Organizers interested in establishing a management interlock should review the OCC's Management Official Interlocks regulation before submitting a request for an interlock exemption. Organizers should include their request with their charter application. Refer to the "Management Interlocks" booklet of the *Comptroller's Licensing Manual* for more information.

Potential Liability

Directors and officers may be named as defendants in lawsuits that challenge their business decisions or activities or allege a breach of fiduciary duty. Directors and officers, however, may obtain some protection against judgments and legal and other costs through indemnification agreements.

National Banks

A national bank may make or agree to make indemnification payments to an institution-affiliated party, as defined at 12 USC 1813(u), for damages and expenses, including the advancement of expenses and legal fees. This may occur in cases involving an administrative proceeding or civil action initiated by a federal banking agency only if such payments are reasonable and in accordance with 12 USC 1828(k) and the OCC's and FDIC's implementing regulations, 12 CFR 7.2014 and 12 CFR 359, respectively. For administrative proceedings or civil actions not initiated by a federal banking agency, such payments must be made in accordance with

- the law of the state in which the main office of the bank is located.
- the law of the state in which the bank's holding company is incorporated.
- the relevant provisions of the Model Business Corporation Act (1984, as amended 1994, and as amended thereafter), or Delaware General Corporation Law, Delaware Code Annotated Title 8 (1991, as amended 1994, and as amended thereafter).

Payments also must be consistent with safe and sound banking practices.

While a national bank is not required to obtain OCC non-objection for indemnification payments, the OCC may review any payment made by the bank to evaluate whether it is consistent with safe and sound banking practices, standards adopted by the bank in its bylaws, and applicable laws and regulations.

FSAs

For actions not initiated by a federal banking agency, an FSA is required to indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of the association for

- any amount for which that person becomes liable under a judgment and
- reasonable costs and expenses.

Such indemnification applies only if final judgment on the merits is in his or her favor.

An FSA is permitted to indemnify any such person for the amounts described above in the case of settlement, final judgment against the persons, or final judgment in his or her favor other than on the merits, if a majority of the disinterested directors determine that the individual was acting in good faith within the scope of his or her employment or authority as

he or she could reasonably have perceived it under the circumstances and for a purpose he or she could reasonably have believed under the circumstances was in the best interests of the association or its members.

In either of the situations described in the previous paragraph, however, no indemnification shall be made unless the FSA gives the supervisory office at least 60 days' notice of its intention to make such indemnification pursuant to 12 CFR 145.121(c). No such indemnification shall be made if the OCC advises the association in writing within the notice period of its objection to the payment.

No FSA shall indemnify any person covered by 12 CFR 145.121, other than in accordance with 12 CFR 145.121. However, an association that had a bylaw in effect relating to indemnification of its personnel before the 1969 implementation date of the indemnification regulation is governed solely by that bylaw.

Appendix B: Stock Benefit Plans

Bank organizers should structure any proposed stock benefit plan to encourage the participants' continued involvement in the bank. The plan also should serve as an incentive for the successful, long-term operation of the bank.

Stock benefit plans should contain no feature that would

- encourage speculative or high-risk activities.
- serve as an obstacle or otherwise impede the sale of additional stock to the general public.
- be structured to convey control of a bank or otherwise provide preferential treatment to the bank's insiders.

Primary Types

In general, two primary types of stock benefit plans exist:

- Type 1 plans grant options or warrants to directors and active executive officers to reward future performance.
- Type 2 plans grant options or warrants to organizers and founders as compensation for
  - financial risk undertaken to fund the formation or organization of a bank (seed money).
  - noncash contribution of assets (such as land for a banking facility). Refer to the "Capital and Dividends" booklet of the *Comptroller's Licensing Manual*.
  - the guarantee of a loan to finance a bank's organization.
  - professional services (for example, legal, accounting, or underwriting services) rendered to facilitate the establishment of the bank.

Type 1 Plans

Banks typically use type 1 plans to reward executive officers and directors for future performance. Accordingly, the continuing involvement of these persons to support successful operations of the bank after it opens is required for participation in type 1 plans. The plan need not grant stock options to all executive officers or directors of the new bank, but the organizing group should provide support for the number of options made available to each plan participant.

In some new banks, CEOs and other key officers may receive stock options at the bank opening similar to "signing bonuses," which are intended to compensate them for financial risks they assume in joining a new bank's management team. Financial risks to senior executive officers can be twofold. First, they often leave positions in established institutions that they may have held for extended periods. Second, these officers may find themselves subsequently unemployed for an extended period of time or need to take lesser positions in another institution if the new positions do not work out and they leave after a relatively short tenure. Stock option plans that fail to conform to OCC policy raise significant issues and

receive intense scrutiny. In addition, the OCC considers this form of compensation in its evaluation of overall compensation.

Type 2 Plans

Organizers and founders may participate in type 2 plans. Type 2 plans provide vehicles for organizing groups to reimburse organizers and founders for financial risk assumed during the organization phase, such as providing seed money, contributing organization funds or noncash assets, or guaranteeing a loan. An organizer or founder could elect to receive as compensation either cash or stock, or any combination of the two.

The number of shares received is determined by dividing the amount to be reimbursed by the value of each share. Organizers and founders may not receive stock options for additional stock subscribed that would exceed the amount for which they are being reimbursed. If stock options or warrants are received in exchange for an organizer's or founder's guarantee of a loan, each person's options or warrants should not exceed his or her pro rata amount of the loan guarantee or the amount drawn, if less than the guaranteed amount of the loan.

Professional services normally are paid for in cash. Professional service providers, however, may participate in Type 2 plans if the service provider lowers the cash payment for the service rendered to the organization as a result of plan participation.

If an organizer or founder who is also a service provider is fully reimbursed in cash for all professional services, he or she can participate in a type 2 plan only if stock compensation is elected for reimbursement of seed money, organization funds, contributions of noncash assets, or a loan guarantee.

Type 1 and Type 2 Plan Requirements

Type 1 and 2 stock benefit plans generally must include the following:

- A limited duration of rights (maximum of 10 years).
- An exercise, or strike, price of stock rights, which should be no less than the fair market value of the stock at the time that the rights are granted.
- A clause that allows the OCC to direct the bank to require plan participants to "exercise or forfeit" their stock rights if one of the following occurs:
  - Capital falls below regulatory minimums as set forth in 12 CFR 3, or a higher requirement as the OCC may determine.
  - The existence of outstanding warrants impairs the bank's ability to raise capital.

Additional Type 1 Requirements

Type 1 stock benefit plans generally must include the following additional requirements:

- A maximum of one option or warrant for each share subscribed or purchased in the initial offering (in other words, a "one-for-one" stock option or warrant plan).
- Vesting requirements that encourage the participant to remain involved in the bank's operations (for example, vesting approximately equal percentages each year over the initial three years of operations).
- Restrictions on the transferability of the options or warrants, except transfer to a holder's estate in the event of death or permanent disability.
- Rights on termination of a relationship as an officer or director of the bank.

Acceleration and Vesting of Earned and Unearned Options or Warrants

If the stock options or warrants have a vesting period in excess of three years, the OCC permits acceleration and vesting of earned and unearned options or warrants if

- the stock benefit plan required a three-year minimum vesting period, and
- the three-year period has elapsed.

The OCC permits immediate acceleration and vesting without regard to the previous criteria if an executive officer or director becomes permanently disabled or dies. The OCC requires an executive officer or director to forfeit unvested options or warrants under all other circumstances.

Exercise After Termination

An executive officer or director who ceases to be an active participant in the bank's operations generally must exercise or forfeit options or warrants within 90 calendar days after separation from or termination by the bank. In the event of permanent disability or death, the stock option holder or the person's estate should exercise options or warrants within 12 months or forfeit the options.

Additional Type 2 Requirements

Type 2 stock benefit plans, unlike type 1 plans, do not require vesting, transferability restrictions, or continued association with the national bank. Type 2 stock compensation plans generally must meet the following additional plan requirements:

- A maximum of one option or warrant per share subscribed for the contribution of organization funds, noncash assets, or guaranty of a loan for the new bank.
- A maximum of one option or warrant per share subscribed for the payment of professional services.

Management and Employee Stock Benefit Plans

In addition to Type 1 and Type 2 plans, the bank's board of directors may authorize a prospective management stock benefit plan (also called a stock incentive plan) for its

executive officers, or an employee stock option plan for its employees. In this context, the definition of executive officer is not confined to that included in Regulation O. Any insider who participates in a management stock incentive plan also is considered an executive officer. Directors may participate in the plan as a method of payment for their services to the bank. In many cases, participation may be tied to specific individual or bank performance criteria.

Management and employee stock benefit plans should encourage the continued involvement of the participants and serve as an incentive for the successful, long-term operation of the bank. In addition, such plans should

- be viewed as part of a person's total compensation.
- be reasonable, relative to the service provided.
- include compliance with appropriate other laws, including applicable federal and state tax laws.

Management and employee stock benefit plans, like other stock benefit plans, should not encourage speculative or high-risk activities or serve as an obstacle to, or otherwise impede, the sale of additional stock to the general public.

The exercise of rights granted by a stock benefit plan may trigger a filing to the OCC under the CBCA (12 USC 1817(j)) or the OCC's implementing regulation, 12 CFR 5.50. For CBCA purposes, options that are immediately exercisable at the option of the owner or holder are treated as the underlying security, even if they are not exercised.[54]

Accounting for Employee Stock Options

A bank should account for employee stock compensation in accordance with GAAP. Charter applicants should consider the effect of ASC 718, "Compensation – Stock Compensation," in developing stock benefit plans and financial projections. ASC 718 requires entities to recognize compensation expense in an amount equal to the fair value of the share-based payments. This compensation will generally be recognized over the period that the employee must provide services to the entity.

[54] Refer to 12 CFR 5.50(d)(14)(ii).

Appendix C: Supervision and Oversight Highlights

The OCC strives to deliver to all banks the highest possible quality of supervision. Supervisory efforts are directed toward identifying material problems, or emerging problems, in individual banks or the banking system, and toward ensuring that such problems are corrected appropriately. Because banking is essentially a business of managing risk, supervision is centered on the accurate evaluation and management of risks. The OCC applies that philosophy in all supervision activities it conducts, which include safety and soundness, compliance, IT, and asset management activities.

Clear and meaningful communication between the OCC and the banks it supervises is a vital component of high-quality supervision. To that end, the OCC publishes on its website examination procedures and guidance about evolving issues so that bankers are apprised of OCC examination and supervision activities. Further, the OCC believes that bankers, not regulators, should manage their banks; as a result, it expects banks to establish and follow appropriate risk management practices.

The Evaluation Process

The OCC determines the frequency of its on-site examinations (the supervisory cycle) based on the bank's size, complexity, risk profile, and condition. Full-scope on-site examinations normally are conducted either annually or up to every 18 months (12 CFR 4.6), but examination activities may be spread throughout the supervisory cycle.

Examiners meet with bank management and the bank's board of directors throughout the supervisory cycle to obtain information or discuss issues. At the completion of the cycle, the examiners prepare a report and conduct a meeting with the bank's board of directors to discuss the results. Those meetings allow participants to discuss the objectives of the OCC's supervision; strategic issues that may be confronting the bank; any major concerns, risks, or issues that may need to be addressed; and other matters of mutual interest. Directors review and sign the report of examination (ROE).

An environment in which examiners and board members openly and honestly communicate benefits a bank. OCC examiners and professional staff have experience with a broad range of banking activities and can provide independent, objective information on safe and sound banking principles and compliance with laws and regulations.

Risk Assessment System

The OCC recognizes that banking is a business of taking risk to earn profits. The OCC expects banks to manage and control risk levels appropriately. Banking risks also should be evaluated in terms of their significance. These assessments should be ongoing.

The OCC's primary supervisory objective is to assess each bank's ability to identify, measure, monitor, and control risks through its risk management systems. The OCC does this

through its risk assessment system (RAS), which enables the OCC to measure and assess existing and emerging risks in banks, regardless of their size and complexity.[55] The OCC has defined eight categories of risk for bank supervisory purposes. Those categories are credit, interest rate, liquidity, price, operational, compliance, strategic, and reputation. The organizers should become familiar with these eight risk categories as they apply to the charter proposal. They are discussed thoroughly in the "Bank Supervision Process" booklet of the *Comptroller's Handbook*.

From a supervisory perspective, risk is the potential that events will have an adverse effect on a bank's current or projected financial condition[56] and resilience.[57] The presence of risk is not necessarily reason for supervisory concern. To put risks in perspective, the OCC determines whether the risks a bank undertakes or plans to undertake are warranted. Generally, risks are warranted when they can be identified, understood, measured, monitored, and controlled, and are within the bank's capacity to readily withstand in the event of adverse performance.

Risk Management

Because market conditions and company structures vary, no single risk management system works for all banks. Each institution should develop its own risk management program tailored to its needs and circumstances. The sophistication of the risk management system should be proportional to the size, complexity, and geographic diversity of each bank. All sound risk management systems, however, have several common fundamentals. For example, bank staff responsible for implementing sound risk management systems performs those duties independent of the bank's risk-taking activities. Regardless of the risk management program's design, each program should include the following:

Risk identification: Proper risk identification focuses on recognizing and understanding existing risks or risks that may arise from new business initiatives, including risks that originate from nonbank subsidiaries and affiliates, third-party relationships, and external market forces or regulatory or statutory changes. Risk identification should be a continuous process and occur at both the transaction and portfolio levels.

Risk measurement: Accurate and timely measurement of risks is a critical component of effective risk management systems. A bank that does not have a risk measurement system has limited ability to control or monitor risk levels. Further, more sophisticated measurement tools are needed as the complexity of the risk increases. A bank should periodically test to make sure that the measurement tools are accurate. Sound risk measurement systems assess the risks of both individual transactions and portfolios.

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[55] A full discussion of the RAS can be found in the "Community Bank Supervision" and "Large Bank Supervision" booklets of the *Comptroller's Handbook*.

[56] Financial condition includes impacts from diminished capital and liquidity. Capital in this context includes potential impacts from losses, reduced earnings, and market value of equity.

[57] Resilience recognizes the bank's ability to withstand periods of stress.

Risk monitoring: Banks should monitor risk levels to ensure timely review of risk positions and exceptions. Monitoring reports should be timely, accurate, and relevant, and should be distributed to appropriate individuals to ensure action, when needed.

Risk control: The bank should establish and communicate risk limits through policies, standards, and procedures that define responsibility and authority. These limits should serve as a means to control exposures to the various risks associated with the bank's activities. The limits should be tools that management can adjust when conditions or risk appetite changes. Banks should also have a process to authorize and document exceptions or changes to risk limits when warranted.

Effective risk management requires an informed board of directors. The board must guide the bank's strategic direction, risk appetite, and core values. Setting an appropriate tone at the top is critical to establishing a sound risk culture. In carrying out these responsibilities, the board should approve policies that set operational standards and risk limits. Well-designed monitoring systems allow the board to hold management accountable for operating within established standards and limits.

Capable management and the appropriate level of qualified staff also are critical to effective risk management. Bank management is responsible for the implementation, integrity, and maintenance of risk management systems. Management also should keep the directors adequately informed. Management is expected to

- keep directors adequately informed about risk-taking activities.
- implement the bank's strategic plan.
- establish and adhere to written policies consistent with the bank's risk appetite and compatible strategic goals.
- ensure that strategic direction, risk appetite, and core values are effectively communicated and adhered to throughout the organization.
- oversee the development and maintenance of management information systems to ensure that information is timely, accurate, and relevant.

When the OCC assesses risk management systems, it considers policies, processes, personnel, and control systems. Deficiencies in one or more of these components constitute deficient risk management. All of those components are important, but the sophistication of each should be proportionate to the complexity, size, and geographic diversity of the bank. Noncomplex banks normally have less formalized policies, processes, and control systems in place than do larger, more complex banks. Those components are defined as follows:

Policies are statements of actions adopted by a bank to pursue certain objectives. Policies guide decisions and often set standards (on risk limits, for example) and should be consistent with the bank's underlying mission, risk appetite, and core values. Policies should be reviewed periodically for effectiveness and approved by the board of directors or designated board committee.

Processes are the procedures, programs, and practices that impose order on the bank's pursuit of its objectives. Processes define how activities are carried out and help manage risk. Effective processes are consistent with the underlying policies and are governed by appropriate checks and balances (such as internal controls).

Personnel are the bank's staff and managers who execute or oversee processes. Personnel should be qualified and competent, have clearly defined responsibilities, and be held accountable for their actions. They should understand the bank's mission, risk appetite, core values, policies, and processes. Banks should design compensation programs to attract and retain qualified personnel, align with bank strategy, and appropriately balance risk-taking and reward.

Control systems are the functions (such as internal and external audits and quality assurance) and information systems that bank managers use to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel. Control functions should have clear reporting lines, sufficient resources, and appropriate access and authority. Management information systems should provide timely, accurate, and relevant feedback.

RAS and the CAMELS Rating System

The OCC's RAS provides a consistent means of measuring risk and determining when examiners should expand the examination scope or require action by bank management to address concerns before they compromise the bank's safety or soundness. After each bank opens for business, examiners use the RAS assessments to communicate and document judgments regarding the quantity of risk, quality of risk management, level of supervisory concern (measured by aggregate risk), and direction of risk for each of the eight aforementioned risk categories.

Additionally, all financial institutions are evaluated and rated under the following:

- FFIEC's Uniform Financial Institutions Rating System (more commonly referred to as CAMELS, or capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk).
- Uniform Rating System for Information Technology (URSIT).
- Uniform Interagency Consumer Compliance Rating System.
- Uniform Interagency Trust Rating System, if applicable.

Each component within each rating system is rated on a scale of 1 to 5, with 1 being the most favorable rating.

A composite or overall rating ranging from 1 to 5 also is assigned under each of these rating systems. A rating of 1 indicates the strongest performance and risk management practices relative to the institution's size, complexity, and risk profile. Those institutions present the lowest level of supervisory concern. Conversely, a 5-rated institution demonstrates critically

deficient performance, inadequate risk management practices, and the highest level of supervisory concern.

The RAS and the CAMELS rating system are used together during the supervisory process to evaluate a bank's financial condition and resilience. The RAS provides both a current (aggregate risk) and prospective (direction of risk) view of the bank's risk profile that examiners incorporate when assigning regulatory ratings. The CAMELS rating system, which includes forward-looking elements, references the primary risk categories that examiners consider within each component area, as well as the quality of risk management practices. CAMELS component ratings reflect the level of supervisory concern posed by the related RAS ratings.

Enhanced Supervision

All de novo institutions receive enhanced supervision, which includes the following:

- Periodic monitoring—the OCC performs at least quarterly reviews of the de novo bank's performance to assess progress in achieving its business plan projections and compliance with supervisory conditions.
- Interim examinations—the OCC performs an on-site interim examination within the first six months and thereafter between full-scope exams. Interim examinations include assessing compliance with the supervisory conditions in the approval, measuring progress in achieving the business plan objectives, assessing the sufficiency of risk management processes, and following up on any corrective actions required in prior examinations or periodic monitoring. As the bank approaches stability, the interim examination may become more streamlined and targeted toward areas of highest risk.
- Full-scope examinations—the OCC performs the initial full-scope examination within the de novo bank's first 12 months of operations. The bank is subject to a 12-month examination cycle until it is no longer designated a de novo institution.

Review of De Novo Status and Supervisory Conditions

The de novo designation and supervisory conditions remain in place for as long as the OCC deems necessary, but in no case less than three years. For most de novo banks, some combination of supervisory conditions and enhanced supervision is warranted until the bank has achieved financial stability. De novo status is not removed until the bank achieves stability with regard to each of the following:

- Earnings—the bank has achieved profitability consistent with its business plan for at least four consecutive quarters, and reasonably achievable projections indicate that profitability is sustainable.
- Core business operations—internal controls and risk management processes have proven effective, have been assessed through audits and regulatory examinations, and are sufficiently robust to support projected growth.

- Management—the senior management team and board of directors have been in place for sufficient time to demonstrate their effectiveness, and examiners have concluded management and the board have the capacity to execute the approved business plan.
- Business and capital plans—the bank has operated consistently with its most recently approved business plan for a sufficient period of time to demonstrate that the plan is viable and sustainable. The bank's capital planning processes are sufficiently robust and include contingency plans that identify viable sources of additional capital.

Certain supervisory conditions, such as regulatory capital minimums, may warrant continuation for some period after de novo status has been removed. In addition, it may be appropriate to extend the requirement for a supervisory non-objection for significant deviations to the business plan.

Specialty Area Ratings

As noted above, the OCC also reviews and assigns ratings to specialized functions and areas not specifically addressed in the CAMELS ratings, including consumer compliance, fiduciary asset management, and IT. Refer to the "Bank Supervision Process" booklet of the *Comptroller's Handbook*. These supervisory programs are risk based and generally integrated into the CAMELS reviews. Examiners with greater knowledge of the specialized area typically conduct the reviews of areas and activities that are deemed high risk.

Assessment of BSA/AML Programs

In all banks, the board of directors and management are required to monitor compliance with BSA/AML and OFAC laws and regulations. 12 USC 1818(s)(2)(A) requires the OCC to include a review of the BSA compliance program at each examination it conducts of an insured depository institution, including a review of the bank's compliance with OFAC legislation. The scope of review in all banks includes the minimum procedures in the "Core Examination Overview" and "Procedures" sections of the *FFIEC BSA/AML Examination Manual*, plus any additional core or expanded procedures the examiner-in-charge deems appropriate. Risk-based transaction testing is also performed at each review. Findings are considered in a safety and soundness context as part of the management component of a bank's CAMELS ratings. Serious deficiencies in a bank's BSA/AML compliance create a presumption that the bank's management rating will be adversely affected because risk management practices are less than satisfactory. While BSA/AML/OFAC compliance is not a defined RAS category, examiners assess the quantity of risk and quality of risk management using the matrix in appendix A of the "Community Bank Supervision" booklet of the *Comptroller's Handbook*. These assessments are then considered when determining the bank's overall compliance risk (and other risks, as appropriate).

Assessment of Compliance

Under the Interagency Consumer Compliance Rating System established by the FFIEC, the OCC adopted a risk-based consumer compliance examination approach to promote strong

compliance risk management practices and consumer protection. Risk-based consumer compliance supervision evaluates whether an institution's compliance management system effectively manages the compliance risk inherent in the products and services offered to its customers. Under risk-based supervision, examiners tailor supervisory activities to the size, complexity, and risk profile of each institution, and assign a consumer compliance rating. Ratings are given on a scale of 1 through 5 in increasing order of supervisory concern. Thus, a 1 represents the highest rating and consequently the lowest level of supervisory concern, while a 5 represents the lowest, most critically deficient level of performance and therefore the highest degree of supervisory concern.

Assessment of CRA Performance

The CRA requires the OCC and other federal regulators to provide written public evaluations of insured banks' records of CRA performance under the applicable assessment standards. The four ratings that may be assigned for a CRA evaluation are "outstanding," "satisfactory," "needs to improve," and "substantial noncompliance."

The first CRA evaluation of a de novo bank is generally conducted within 24–36 months after opening. Subsequent CRA evaluations are ordinarily performed on a three-, four-, or five-year cycle, depending on bank size and overall CRA rating.

Assessment of Information Technology Operations

The OCC and the other FFIEC regulatory agencies use URSIT to uniformly assess financial institution and service provider risks introduced by IT. URSIT consists of a composite rating and four component ratings. The composite rating uses a 1–5 scale reflecting the significance of technology-related risks. The higher the composite rating, the greater the risk. The OCC assigns the URSIT composite rating to all national banks and FSAs.

The component areas assessed under the URSIT rating correspond to the functional activities and related areas of risk that support IT services and processes. The functional components include

- adequacy of risk management practices.
- management of IT resources.
- ability to ensure integrity, confidentiality, and availability of automated information.
- degree of supervisory concern posed by the bank.

Examiners assign a composite-only rating to all national banks, FSAs, trust banks, credit card banks, and other special purpose banks. Examiners assign component ratings in the examination of technology service providers.

Assessment of Asset Management Activities

The core assessment for on-site asset management examinations is structured according to the Uniform Interagency Trust Rating System. Each bank is assigned a component rating based on an evaluation and rating of five essential components of an institution's fiduciary activities. Those components are

- capability of management.
- adequacy of operations, controls, and audits.
- quality and level of earnings.
- compliance with governing instruments, sound fiduciary principles, and applicable laws and regulations (including those regarding self-dealing and conflicts of interest).
- management of fiduciary assets.

Composite and component ratings are assigned based on a scale of 1 to 5. As with other examination areas, a 1 rating indicates the strongest performance and risk management practices and the least degree of supervisory concern. A 5 is the lowest rating and indicates the weakest performance and risk management practices, and therefore the highest degree of supervisory concern. Evaluation of the composite and component ratings considers the size and sophistication, the nature and complexity, and the risk profile of the bank's fiduciary activities.

Enforcement Actions

The OCC can respond in several ways to violations of laws, rules, or regulations or unsafe or unsound practices or conditions. The ROE is one of a number of tools the OCC uses to communicate to its supervised banks. The OCC may take enforcement actions against banks and their officers and directors or parties affiliated with banks. Actions against shareholders are rare, unless the shareholders are involved directly in bank management or in an illegal, unsafe, or unsound activity with the bank. "Enforcement actions" is a collective term that refers to a range of supervisory actions used to correct problems, concerns, weaknesses, or deficiencies noted in a bank. Enforcement actions can also be based on a bank's violation of laws, rules, regulations, or conditions imposed in writing. These actions range from informal written commitments, such as commitment letters, memorandums of understanding, and approved safety and soundness plans, to formal enforcement actions, such as formal written agreements, consent orders, cease and desist orders, temporary cease and desist orders, capital directives, prompt corrective action directives, and safety and soundness orders. The OCC uses formal and informal enforcement actions to carry out its supervisory responsibilities. Examiners recommend these actions when an examination identifies safety or soundness or compliance problems in a bank.

The ROE identifies and communicates the OCC's assessment of a bank's condition; describes its problems, areas of concern or weaknesses, and the primary cause of each; and sets out a blueprint for addressing problems and preventing them from worsening. The ROE does not detail every remedial measure necessary to address identified problems; rather, it provides clear guidance to the bank on what is expected. The board of directors and bank

senior management are expected to take appropriate and timely corrective actions in response to the OCC's communication. The actions a bank takes or agrees to take to correct identified problems are important factors in determining whether the OCC takes enforcement action and the severity of that action.

Appendix D: Community Reinvestment Act Highlights

Responsibility Under the CRA[58]

Each insured bank has a responsibility under the CRA to help meet the credit needs of its entire community, consistent with the safe and sound operations of the bank. The charter application should demonstrate how the proposed bank would respond to those needs. The OCC's CRA regulations (12 CFR 25 and 195) establish the framework and criteria by which the OCC assesses a bank's record of helping meet the credit needs of its community.

CRA Assessment Area

The CRA regulations require each bank to delineate at least one assessment area. A retail bank's assessment area or areas generally must consist of one or more metropolitan statistical area or areas or one or more contiguous political subdivisions, such as counties, cities, or towns. The assessment area must include the geographies[59] in which the bank has its main office, branches, and deposit-taking automated teller machines, if any, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans.[60] A bank may adjust the boundaries of its assessment area[61] to include only the portion of a political subdivision that it reasonably can be expected to serve.

Each bank's assessment area(s)

- must consist only of whole geographies.
- may not reflect illegal discrimination or redlining.
- may not arbitrarily exclude LMI geographies, taking into account the bank's size and financial condition.
- may not extend substantially beyond a consolidated metropolitan statistical area boundary or beyond a state boundary unless the assessment area is located in a multistate metropolitan statistical area.[62]

[58] As previously noted, the CRA does not apply to uninsured banks or special purpose banks that will not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incidental to their specialized operations (12 CFR 25.11(c)(3), 195.11(c)(2)).

[59] "Geography" is defined in the CRA regulations to mean a census tract or block numbering area delineated by the U.S. Census Bureau in the most recent decennial census (12 CFR 25.12(l), 196.12(k)).

[60] Refer to 12 CFR 25.41(c) and 195.41(c).

[61] Refer to 12 CFR 25.41(d) and 195.41(d).

[62] Refer to 12 CFR 25.41(e) and 195.41(e).

Performance Standards

The CRA regulations provide the methods by which the OCC evaluates a bank's record of helping to meet the credit needs of its assessment area(s). Different evaluation methods are employed based on the bank's size and business strategy. A description of the evaluation methods follows.

Small Banks That Are Not Intermediate Small Banks

These are banks that as of December 31 of either of the prior two calendar years had assets of less than the annually established threshold for small banks (visit www.occ.gov for current threshold). The OCC evaluates the CRA performance of a small bank that is not an intermediate small bank through the small bank lending test. This test focuses primarily on lending and lending-related activities in the bank's assessment area(s). The test includes an evaluation of the bank's

- loan-to-deposit ratio.
- percentage of loans and other lending-related activities located in the bank's assessment area(s).
- the record of lending to and engaging in other lending-related activities for borrowers of different income levels and businesses and farms of different sizes.
- geographic distribution of loans.
- record of taking action, if warranted, in response to written complaints about its performance in helping to meet credit needs in its assessment area(s).

Intermediate Small Banks

These are banks with assets of at least the annually established threshold for intermediate small banks as of December 31 of both of the prior two calendar years and less than the threshold established for large banks as of December 31 of either of the prior two calendar years (visit www.occ.gov for current thresholds). The overall CRA rating for an intermediate small bank is based both on the rating from the small bank lending test, described in the preceding paragraph, and the rating from a CD test that is applicable to intermediate small banks only. The CD test evaluates the number and amount of CD loans, the number and amount of qualified investments, and the provision of CD services, as well as the bank's responsiveness through such activities to CD lending, investment, and service needs. The bank's responsiveness to CD needs in its assessment area(s) is evaluated in the context of the bank's capacity and business strategy and the CD opportunities in the assessment area(s).

The CRA regulation allows both small and intermediate small banks the option to be examined as a large bank under the lending, investment, and service tests (as described in the following paragraph), provided the bank collects, maintains, and reports the data required by the CRA regulations. The asset threshold dollar figures for both small and intermediate small banks are adjusted annually based on the year-to-year change in the average of the consumer price index for urban wage earners and clerical workers, not seasonally adjusted, for each 12–month period ending in November, with rounding to the nearest million. The asset

threshold adjustments are published in the *Federal Register*. For further details regarding the definition of small and intermediate small banks, refer to OCC Bulletin 2005-28, "Community Reinvestment Act: Final Rule," and OCC Bulletin 2016-1, "Community Reinvestment Act Regulations: Revision of Small and Intermediate Small Bank and Savings Association Asset Thresholds."

Large Banks

Banks that do not meet the definition of a small bank or intermediate small bank typically are evaluated under the lending, investment, and service tests, which focus on the banks' performance in the following areas:

- Lending: Home mortgage, small business, small farm, CD, and consumer lending, with a primary focus on the bank's assessment area(s).
- Investments: Qualified investments that benefit the bank's assessment area(s) or a broader statewide or regional area that includes the assessment area(s).
- Services: Retail banking services, alternative delivery systems, and CD services.

Limited Purpose or Wholesale Banks

The CD test is available to insured banks that the OCC has designated limited purpose or wholesale banks. Refer to the "Glossary" section of this booklet. This test evaluates the bank's CD lending, qualified investments, and CD services, first in the bank's assessment area(s) or the broader statewide or regional area that includes its assessment area(s), and then, if the bank has adequately addressed credit needs in that area, nationwide.

Strategic Plan

The strategic plan evaluation method is available to all banks without regard to size or business strategy. A bank electing this evaluation method seeks informal and formal public comment during the development of its plan. The plan, which is submitted to the OCC for approval, may have a term of up to five years. It must include annual interim measurable goals for helping to meet the credit needs of the bank's assessment area(s) through various lending, investment, and service activities. Although a plan must address all three types of activities, emphasis may be placed on one or more of the activities, depending on the bank's capacity and constraints, product offerings, and business strategy. If the bank meets the goals specified in the plan for satisfactory performance, the bank is rated satisfactory. (The bank also may include goals that represent outstanding performance.)

The strategic plan option provides a more flexible alternative to a bank concerned that the requirements of the other tests are too rigid for the nature of its operations. Some banks open under the small bank test or the lending, investment, and service tests, but plan to develop a strategic plan after a period of transactional history.

Appendix E: Compliance Highlights

This appendix highlights some of the concerns that the OCC frequently identifies about fair lending statutes, BSA/AML provisions, privacy, and advertising. More detailed information about compliance with these and other consumer compliance issues is available in pertinent booklets in the *Comptroller's Handbook* and the *FFIEC BSA/AML Examination Manual*.

Fair Lending Statutes

The federal fair lending statutes are the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act. The ECOA prohibits discrimination in any part of a credit transaction. The ECOA applies to any extension of credit, including extensions of credit to persons, small businesses, corporations, partnerships, and trusts. The Fair Housing Act applies to residential real estate-related transactions. Both of these acts prohibit discrimination based on race, color, religion, sex, or national origin. The ECOA also prohibits discrimination based on age, marital status, receipt of public assistance, or the exercise of a right under the Consumer Credit Protection Act. The Fair Housing Act also prohibits discrimination based on disability or familial status. Generally, discrimination in a credit transaction against persons because they are (or are not) members of a group previously categorized violates the ECOA and, if the transaction is related to residential real estate, violates the Fair Housing Act.

BSA/AML Provisions

The BSA and its implementing regulations established reporting and recordkeeping requirements for banks, other financial institutions, and private individuals. Reports and records required under these provisions may be used in criminal, tax, and regulatory proceedings.[63] Congress enacted the BSA to attempt to safeguard financial institutions from being used as intermediaries for the movement of criminally derived funds to conceal the true source, ownership, or use of the funds (that is, money laundering). Although attempts to launder money through a legitimate financial institution can come from many different sources, certain kinds of businesses, transactions, and geographic locations may be more vulnerable to potential criminal activity than others.

Banks must take reasonable and prudent steps to guard against money laundering and terrorist financing and to identify and manage any risks related to such activities. All banks must establish and maintain procedures reasonably designed to ensure and monitor their compliance with the BSA and its implementing regulations. This requires banks to establish a compliance program that includes, at a minimum

- a system of internal controls to ensure ongoing compliance.
- independent testing of BSA/AML compliance.

[63] Refer to 12 USC 1951-1959, 12 USC 1818(s), 12 USC 1829b, 12 CFR 21.11, 12 CFR 21.21, 12 CFR 163.180, 31 CFR 1000-1009, and 31 CFR 5311.

- a qualified individual or individuals responsible for managing BSA compliance (BSA compliance officer).
- training for appropriate personnel.

The BSA/AML compliance program must be written, approved by the board of directors, and noted in the board minutes. A bank must have a BSA/AML compliance program commensurate with its respective BSA/AML risk profile. In addition, a customer identification program must be included as part of the BSA/AML compliance program.

Banks must be aware of various criminal statutes prohibiting money laundering and structuring of deposits to evade the BSA reporting requirements. (Refer to 18 USC 1956, 1957 and 31 USC 5324.)

Federal regulations require each bank and BHC and their subsidiaries to file a Suspicious Activities Report (SAR) with respect to the following:

- Criminal violations involving insider abuse in any amount.
- Criminal violations aggregating $5,000 or more when a suspect can be identified.
- Criminal violations aggregating $25,000 or more regardless of a potential suspect.
- Transactions conducted or attempted by, at, or through the bank (or an affiliate) and aggregating $5,000 or more, if the bank or affiliate knows, suspects, or has reason to suspect that the transaction
  - may involve potential money laundering or other illegal activity (e.g., terrorism financing).
  - is designed to evade the BSA or its implementing regulations.
  - has no business or apparent lawful purpose or is not the type of transaction that the particular customer would normally be expected to engage in, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

The SAR reporting requirements are provided in 12 CFR 21.11 and 163.180.

Economic sanctions laws administered by OFAC require that banks

- block accounts and other property of specified countries, entities, and individuals.
- prohibit or reject unlicensed trade and financial transactions with specified countries, entities, and individuals.
- comply with recordkeeping and reporting requirements.

Refer to the *FFIEC BSA/AML Examination Manual* for additional information.

Verification

The OCC expects banks to exercise appropriate caution and due diligence when opening accounts. All banks must implement effective processes to ensure that they adequately verify

the identity of new customers at account opening and to authenticate existing customers when they initiate transactions.

The customer verification process involves requesting various customer information items, including name, address, phone number, Social Security number, and driver's license information. Banks should independently verify the accuracy of this information.

A bank's internal systems and controls should include appropriate procedures to verify customer information as part of the account opening process and to monitor for fraud and suspicious activity after an account has been opened. The bank should monitor the verification and account authorization procedures continually to ensure a rigorous process for identifying, measuring, and managing the risk exposures. This process should include a regular audit function to test the controls and ensure they continue to meet the defined control objectives.

These procedures for access control also are essential for preventing fraud, money laundering, and other abuses. To limit the risk of money laundering, some banks may define the types of businesses or customer they accept, consistent with their risk profile and business operations. Banks should have policies and procedures for assessing the risks posed by individual customers on a case-by-case basis and implement controls to manage the relationships commensurate with these risks. The choice to open, close or maintain an account is a decision for each bank, made on a case-by-case basis, after appropriate assessment of the risk posed by the customer or account, and the controls necessary to manage risks presented by that customer.

Safeguarding Customer Information

Information is one of a bank's most important assets. As mandated by section 501 of Gramm–Leach–Bliley Act of 1999 (GLBA), a bank must establish appropriate processes to safeguard customer information. Such safeguards must

- ensure the security and confidentiality of customer records and information.
- protect against any anticipated threats or hazards to the security or integrity of such records.
- protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer.

The bank must implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank and the nature and scope of its activities. Refer to OCC Bulletin 2001-35, "Examination Procedures to Evaluate Compliance with the Guidelines to Safeguard Customer Information" and OCC Bulletin 2001-8, "Guidelines Establishing Standards for Safeguarding Customer Information." Also refer to the *FFIEC IT Examination Handbook* "Information Security" booklet. While the referenced OCC bulletins were issued for national banks, they contain valuable guidance that organizers and management of FSAs should consider when implementing policies and procedures in this area.

Privacy

Banks are subject to a number of federal statutes and regulations that govern the disclosure of consumer information. The most comprehensive of these provisions is Title V of the GLBA, which requires banks and other financial institutions to provide consumers of their financial products or services with privacy notices and an opportunity to opt out of certain information sharing with nonaffiliated third parties. Banks also are subject to the Fair Credit Reporting Act (FCRA), which governs the use and disclosure of consumer reporting information. Additionally, banks should be aware of the Electronic Fund Transfer Act, the Right to Financial Privacy Act, the Children's Online Privacy Protection Act, and the Federal Trade Commission Act (FTC Act).

Gramm–Leach–Bliley Act Privacy Provisions

The GLBA enacted privacy-related provisions applicable to financial institutions. In 2000, the federal banking regulatory agencies promulgated final rules to implement these provisions. In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act granted rulemaking authority to the Consumer Financial Protection Bureau for most of the privacy-related provisions of the GLBA applicable to financial institutions. In 2011, the bureau recodified in Regulation P the regulations that were previously issued by the federal banking regulatory agencies (12 CFR 1016).

In general, the regulations require banks to provide their customers with notices that accurately describe their privacy policies and practices, including their policies for the disclosure of nonpublic personal information[64] to their affiliates and to nonaffiliated third parties. The notices must be provided at the time the customer relationship is established and annually thereafter. Notices must be clear and conspicuous and provided so that each intended recipient reasonably could be expected to receive actual notice. The notices must be in writing or may be delivered electronically if the consumer agrees.

Subject to specified exceptions that permit banks to share information in the ordinary course of business, banks may not disclose nonpublic personal information about consumers to any nonaffiliated third party, unless consumers are given a reasonable opportunity to direct that their information not be shared (opt out). Thus, before a bank may disclose nonpublic personal information about a consumer (even if that person is not a customer of the bank) to a nonaffiliated third party, the bank must provide the consumer with an initial privacy notice and an opt-out notice (which may be included in the privacy notice).

The GLBA regulations also provide that a bank generally may not disclose an account number or similar form of access number or code for a credit card account, deposit account,

[64] Generally, this means any information that is provided by a consumer to a bank to obtain a financial product or service; that results from a transaction between a bank and a consumer involving a financial product or service; or that is otherwise obtained by a bank in connection with providing a financial product or service to a consumer. If a bank obtains information about consumers from a publicly available source, that information is not protected (that is, subject to notice and opt out) unless the information is disclosed as part of a list, description, or other grouping of a bank's customers.

or transaction account of a consumer to any nonaffiliated third party for use in marketing. The bank may, however, disclose its customer account numbers to third-party agents or servicers to market the bank's own products or services, provided the bank does not authorize the third party to initiate charges to customer accounts. The regulations also limit the redisclosure and reuse of nonpublic personal information obtained from other nonaffiliated financial institutions.

Fair Credit Reporting Act Information Sharing Provisions

The FCRA sets standards for the collection, communication, and use of information bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The communication of this type of information may be a "consumer report" subject to the FCRA's requirements. However, the FCRA specifically excepts from the definition of consumer report (1) the disclosure of a bank's own transaction and experience information to any third party and (2) the disclosure of consumer reporting information to a bank's affiliates if the bank first notifies its consumers that it intends to share such information and allows them to opt out of this information sharing (affiliate information sharing).

A bank generally is not subject to the FCRA's requirements that apply to consumer reporting agencies[65] if the bank communicates information only in a manner consistent with the two exceptions described previously. The bank may, however, be subject to other FCRA requirements (for example, as a user of credit reports).

Banks' information disclosures may be subject to both the GLBA and the FCRA. Therefore, banks must understand the differences between the GLBA and the FCRA provisions to reduce compliance risks in this area. The statutes differ in the scope of their coverage and their requirements for a bank's treatment of consumer information. As a result, what may be a permissible disclosure under one statute may be prohibited or subject to different conditions under the other statute. Because compliance with one statute does not ensure compliance with the other, banks are strongly advised to evaluate the requirements of both laws in connection with their disclosures of consumer information. (For a more detailed discussion, see OCC Bulletin 2000-25, "Privacy Laws and Regulations: Summary of Requirements.")

Other Privacy Provisions

Banks and their subsidiaries should be aware of the following federal laws that may affect their consumer financial information practices:

[65] These requirements relate to furnishing consumer reports only for permissible purposes, maintaining high standards for ensuring the accuracy of information in consumer reports, resolving consumer disputes, and other matters.

- The Electronic Fund Transfer Act and Regulation E require that banks make certain disclosures when a consumer contracts for an electronic transfer service or before the first electronic fund transfer is made involving the consumer's account.
- The Right to Financial Privacy Act prohibits a bank from disclosing a customer's financial record to the federal government, except in limited circumstances, such as pursuant to the customer's authorization, an administrative subpoena or summons, a search warrant, a judicial subpoena, or a formal written request for a legitimate law enforcement inquiry, or to a supervisory agency for its supervisory, regulatory, or monetary functions.
- The Children's Online Privacy Protection Act establishes requirements applicable to the collection, use, or disclosure of personal information about children that is collected through the Internet or another online service. Banks are subject to the act if they operate a website or online service (or portion thereof) directed to children, or have actual knowledge that they are collecting or maintaining personal information from a child online.
- The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, and provides a basis for government enforcement actions against deception resulting from misleading statements concerning a company's privacy practices or policies, or failures to abide by a stated policy.

Advertising

Advertisements on websites must meet the advertising requirements of Regulation B (ECOA), Regulation M (Consumer Leasing Act), Regulation Z (Truth in Lending Act), Regulation DD (Truth in Savings Act), and the FTC Act.[66]

Banks must be aware of the regulatory requirements for the prominence of certain disclosures in their advertisements. Banks also must consider the requirements of Regulations M and Z that permit creditors and lessors to provide required advertising disclosures on more than one page, if certain conditions are met. Banks should monitor carefully amendments to these regulations to ensure compliance with multipage advertising requirements in the context of electronic advertisements. Banks must comply with the triggering term requirements of Regulations M, Z, and DD, ensuring that the terms are disclosed appropriately and are set forth clearly and conspicuously.

[66] There are no FTC Act regulations addressing electronic advertisements. However, non-electronic advertisements, such as print advertisements, may not be unfair or deceptive.

Appendix F: Significant Deviations After Opening

The OCC requires that, for at least the first three years of operation, each de novo bank provide prior notice and obtain a non-objection letter from the appropriate OCC supervisory office before making a significant deviation from the business plan submitted with the proposed bank's charter application. This is a condition imposed in writing within the meaning of 12 USC 1818. After three years of operation, the OCC evaluates the condition and financial stability of the de novo bank to determine if this condition should be removed or retained.

Purpose

Generally, the OCC uses this significant deviation condition to address heightened supervisory risk that exists during the first several years of a new bank's operations, or that exists in unusual cases after a conversion, merger, or other filing. This condition is a standard condition imposed in connection with all new bank charter approvals.

New banks are particularly vulnerable to internal and external risks until they achieve a certain level of stability and profitability, clearly justifying the imposition of the significant deviation condition. The condition provides the OCC with the opportunity to evaluate any enhanced risks presented before the bank initiates a significant change to its business plan or operations.

Identification

A significant deviation or change for the purposes of this condition is defined as a material variance from the bank's business plan or operations, or introduction of any new product, service, or activity or change in market that was not part of the approved business plan, that occurs after the proposed bank has opened for business. Significant deviations may include, but are not limited to, deviations in the bank's

- projected growth, such as planning significant growth in a product or service.
- strategy or philosophy, such as significantly reducing the emphasis on its targeted niche (e.g., small business lending) in favor of significantly expanding another area (e.g., funding large commercial real estate projects).
- lines of business, such as initiating a new program for subprime lending, automobile lending, credit cards, or transactional services that elevate the bank's risk profile.
- funding sources, such as shifting from core deposits to brokered deposits.
- scope of activities, such as entering new, untested markets.
- stock benefit plans, including the introduction of plans that were not previously reviewed during the chartering process by the OCC.
- relationships with a parent company or affiliate, such as a shift to significant reliance on a parent or affiliate as a funding source or provider of back-office support.

Changes in bank control or management are not considered significant deviations for purposes of this condition because existing laws and regulations[67] provide other means for prior notification and an opportunity for OCC objection.

Deviations in financial performance alone are not significant deviations under this condition. The OCC still may, however, consider the underlying reason(s) for a deviation in financial performance a significant deviation. For example, a bank could deviate from its pro forma balance sheet or budget because of significant growth caused by a new product that was not disclosed in the business plan or initial plan of operations. This is an example of a significant deviation that requires prior written notification to, and a written determination of non-objection from, the supervisory office. On the other hand, if the bank's strategies are consistent with its business plan, but the bank simply experiences significantly more growth than planned, that growth may or may not qualify as a significant deviation for this condition depending on the type of growth.

Nevertheless, examiners evaluate the supervisory risk that deviations from projected financial performance may pose to the bank and what, if any, supervisory response is appropriate under the circumstances. For example, an examiner could determine that the bank's risk management systems are no longer adequate given the magnitude of the unplanned growth, and that deficient systems are a matter requiring attention by the board.

Evaluation

Upon receipt of a prior notice, the supervisory office evaluates the proposed deviation to the bank's business plan or operations. The evaluation should determine whether the deviation significantly elevates the bank's risk profile. The OCC assesses risk by its potential impact on a bank's earnings and capital. The OCC recognizes that some deviations are necessary or prudent. For example, a deviation from the business plan may be necessary to meet changes in local market conditions.

Examiners determine whether the risks that a bank undertakes, or proposes to undertake, are properly managed. Generally, risks are warranted if they are identified, understood, measured, monitored, controlled, and within the bank's capacity to withstand any financially adverse results such a risk could cause. If examiners determine that risks are unwarranted, they communicate to the bank's management and directors that a need exists to mitigate or eliminate the excessive risks. Appropriate actions may include reducing exposures, increasing capital, or strengthening risk management processes. Refer to the "Bank Supervision Process" booklet of the *Comptroller's Handbook* for more detailed discussions of risks and risk management systems.

[67] The CBCA in 12 USC 1817(j) and the OCC's implementing regulation in 12 CFR 5.50 generally require prior notification of a change in bank control. As a condition of the charter approval, the OCC retains the right to object to and preclude the hiring of any officer, or the appointment or election of any director, for a three-year period from the date the bank commences business, or longer as appropriate (12 CFR 5.20(g)(2)).

Examiners, bank management, and directors may find it beneficial to consult their district's Licensing staff when reviewing adherence to, or evaluating significant deviations from, a bank's business plan.

Supervisory Actions and Communications

If the evaluation of a proposed significant deviation results in little or no supervisory concern, the supervisory office sends a non-objection letter to the bank. To mitigate concerns, the supervisory office may determine that it is prudent to condition its determination of non-objection. In these cases, the non-objection letter identifies the conditions as ones "imposed in writing by the agency in connection with the granting of any application or other request." The OCC is required to publish documents containing enforceable conditions. Accordingly, the supervisory office must submit a copy of all conditional non-objection letters to OCC Headquarters Licensing for publication in the monthly list of Interpretations and Actions.

If the evaluation discloses supervisory concerns with a proposed deviation, the supervisory office sends an objection letter detailing the reasons for this determination. If, despite the issuance of an objection letter, a bank subsequently engages in actions that reflect a significant deviation to, or change from, its business plan, additional supervisory or enforcement action will be considered, consistent with the OCC's enforcement policy (*Policies and Procedures Manual* 5310-3 (REV)).

If a significant deviation from the bank's business plan is disclosed during a supervisory activity (examination or periodic monitoring), and the bank has failed to obtain prior written determination of non-objection, the resulting supervisory action will reflect the degree of supervisory concern with the deviation. At a minimum, the OCC will cite a violation of the Regulatory Condition Imposed in Writing (RCIW) (in other words, the significant deviation condition—12 USC 1818). A violation of an RCIW can provide the basis for the assessment of civil money penalties or other enforcement actions. The OCC communicates all supervisory actions to the bank in writing.

Glossary

Affiliate: This term includes (but is not limited to) any company that controls a bank and any company that is controlled by the same person or company that controls the bank (12 USC 371c as implemented by Regulation W, 12 CFR 223).

Bank holding company (BHC): An entity controlling a national bank must be approved by the Federal Reserve Board as a BHC if the controlled bank is covered by the definition of a bank found in the Bank Holding Company Act (BHCA) (12 USC 1841(c)). Certain limited purpose banks, such as Competitive Equality Banking Act credit card banks and trust banks, are not defined as banks under the BHCA.

Bankers' bank: A bank owned exclusively, except for directors' qualifying shares, by other depository institutions or depository institution holding companies. Bankers' bank activities are limited to providing

- services to or for other depository institutions, their holding companies, or the officers, directors, and employees of such institutions.
- correspondent banking services at the request of other depository institutions or their holding companies.

Body corporate: After filing the articles of association and organization certificate, a national bank becomes a body corporate or legal entity as of the date the organizers sign the organization certificate and adopt the articles of association.

Business continuity plan: A plan addressing all critical services and operations provided by internal departments and external sources. The planning process reviews the various departments, units, or functions and assesses each area's importance for the viability of the organization and provision of customer services. Plans are developed to cover restoring critical areas if they are affected by physical disasters (such as fires or flooding); environmental disasters (such as hurricanes or tornados); or other disasters (such as power or telecommunication failure).

Completed application: An application is completed when the items specified in the charter application checklist are satisfied. The checklist is an internal OCC form used to confirm whether an application contains information responsive to required elements in the filing. Completion of the checklist does not mean the OCC has evaluated the information or made a decision on the application.

Contact person: Also called a spokesperson, the contact person is an organizer and proposed director of a proposed bank who is designated by the organizing group to represent the group in all contacts with the OCC. In certain circumstances (excluding independent charters), the contact person instead may be a representative of

- a holding company sponsor.

- persons currently affiliated with other depository institutions.
- persons who, in the OCC's view, otherwise are collectively experienced in banking and have demonstrated the ability to work together effectively.

Control: Separate definitions of control exist in the Bank Holding Company Act at 12 USC 1841, the Savings and Loan Holding Company Act at 12 USC 1467a, the Change in Bank Control Act at 12 USC 1817(j), and the affiliate transactions provisions of the Federal Reserve Act at 12 USC 371c (and the regulations implementing each of these statutory definitions).

De novo BHC or SLHC: A bank holding company or savings and loan holding company that has been in existence less than three years, including one that is in the process of formation.

Director: A member of the board of directors of a bank. Collectively, the directors have a critical role in the successful operation of the bank. They are ultimately responsible for the conduct of the bank's affairs, and the health of the bank depends on their being strong, independent, and attentive. They also are accountable to the bank's shareholders, depositors, and regulators, and the communities served by the bank. For purposes of determining applicability of and compliance with 12 USC 375b as implemented by Regulation O, the term "director" is defined at 12 CFR 215.2(d) and means any director of the company or bank, whether or not receiving compensation. The term also includes certain advisory directors.

Disaster recovery plan: Part of the business continuity plan. A disaster recovery plan includes measures to protect the bank in the event of physical disasters and other disruptions to operations; backup considerations related to hardware, software, applications, documentation, procedures, data files, and telecommunication; and insurance policies, considering the type of computer equipment and software and the size of the information systems facilities within the organization.

Dormant bank: A bank that is no longer engaged in banking activities other than on a de minimis basis. This definition includes, for example, a bank that has significantly reduced its activities and services or that has contracted out significant portions of its operations to third-party service providers, other than in the ordinary course of the bank's ongoing business.

E-banking: The automated delivery of new and traditional banking products and services directly to consumers through electronic, interactive communication channels. E-banking includes the systems that enable bank customers to access accounts, transact business, or obtain information on financial products and services through a public or private network, including the Internet.

Effective registration statement: A registration statement that meets the requirements set forth in 12 CFR 16.15 for the solicitation of stock to capitalize a new bank, and that has been authorized by the OCC for use in offering for sale and selling stock in the new bank.

Eligible bank or eligible savings association: As defined in 12 CFR 5.3(g), a bank that

- has a composite CAMELS (capital, asset quality, management, earnings, liquidity, and sensitivity to market risk) rating of 1 or 2.
- has a consumer compliance rating of 1 or 2.
- has a satisfactory or better Community Reinvestment Act rating. (This factor does not apply to an uninsured bank, an uninsured federal branch, or a special purpose bank covered by 12 CFR 25.11(c)(3).)
- is well capitalized as defined in 12 CFR 6.4(b)(1).
- is not subject to a cease and desist order, consent order, formal written agreement, or prompt corrective action directive; or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the bank still may be treated as an "eligible bank."

Eligible depository institution: A national bank, FSA, state bank, or state savings association that meets the criteria for an "eligible bank" under 12 CFR 5.3(g) and is FDIC-insured.

Established company: A company that has been operating for more than three years and will become a parent of a national bank or FSA when the bank opens for business, regardless of whether the company will also become a BHC or SLHC.

Executive officer: An executive officer of a bank is a person who participates in or has the authority to participate in (other than in the capacity of a director) major policymaking functions of the bank, whether or not the person has an official title, is designated as an assistant, or serves without compensation. Executive officer positions normally include the chairman of the board, president, every vice president, cashier, secretary, treasurer, chief investment officer, and any other person the OCC identifies as having significant influence over major policymaking decisions.

Existing BHC or SLHC: A company that has received Federal Reserve System approval to become a bank holding company or savings and loan holding company and has been operating as such for at least three years before filing its application to organize a new bank.

Experienced in banking: New banks may be sponsored by strong existing companies or groups of individuals experienced in banking, which provide exceptional backing to a new bank proposal and make the OCC's review of the application more efficient. For a group of individuals to be considered a sponsor of a new bank, the majority of the group's members should be experienced in banking, meaning they have five or more years of recent significant involvement in policymaking as directors or executive officers in the same institution or in affiliated federally insured institutions that the OCC deems to have performed satisfactorily.

Federal savings association (FSA): An FSA or federal savings bank chartered pursuant to section 5 of HOLA (12 USC 1464). An FSA may take one of two ownership forms. The FSA may be a stock FSA, where stock is issued to shareholders. Alternatively, the FSA may have a mutual ownership form, where no stock is issued.

Feasibility analysis: The process of determining the likelihood that a proposal will fulfill specified objectives.

Final approval: The OCC action of issuing a charter certificate and authorizing a national bank or FSA to open for business.

Financial subsidiary: Any company controlled by one or more insured depository institutions as further outlined in 12 USC 24 regarding national banks. It is not a subsidiary that engages solely in activities that a national bank may engage in directly (in other words, an operating subsidiary) or a subsidiary that is specifically authorized by the express terms of a federal statute other than 12 USC 24a, such as a bank service company. A financial subsidiary may engage in specified activities that are financial in nature or incidental to financial activities if the national bank and the subsidiary meet certain requirements and comply with stated safeguards. For purposes of Regulation W (12 CFR 223), a financial subsidiary does not include a company that is only a financial subsidiary solely because it engages in the sale of insurance as agent or broker in a manner that is not permitted for a national bank.

Founders: Individuals who provide funding for organization costs but are not otherwise involved in the organization or ongoing operation of the bank, except as shareholders. Founders may also assist in marketing the bank.

Holding company: Any company that controls or proposes to control a bank regardless of whether the company is a BHC under 12 USC 1841(a)(1) or an SLHC under 12 USC 1467a.

Insider: A proposed organizer, director, principal shareholder, or executive officer of a proposed bank. For purposes of determining applicability of and compliance with 12 USC 375(a) and 375(b) as implemented by Regulation O, the term "insider" is defined at 12 CFR 215.2(h) and means an executive officer, director, or principal shareholder, and includes any related interest of such a person.

Insider contract: Any financial or other business, voting, or ownership agreement, arrangement, or transaction, direct or indirect, oral or written, between any insider and the proposed bank.

Internet banking: A system that enables bank customers to access accounts and general information on bank products and services through a personal computer, mobile telephone, or other electronic device. (Also see **e-banking**.)

Internet service provider: An entity that provides access or service related to the Internet, generally for a fee.

Lead depository institution: The largest depository institution controlled by a BHC or SLHC, based on a comparison of the total assets controlled by each depository institution as reported in its call report required to be filed for the immediately preceding four calendar quarters.

Limited purpose bank: For CRA purposes, a bank that offers only a narrow product line (such as credit card, trust, and cash management services, or a banker's bank) to a regional or broader market and for which a designation as a limited purpose bank is in effect. A bank may request the OCC to designate it as a limited purpose bank for CRA purposes as provided in 12 CFR 25.25(b) or 12 CFR 195.25(b).

Low- and moderate-income (LMI) area: A low-income area is one where individual income is less than 50 percent of the area median individual income, or where median family income is less than 50 percent of the area median family income. A moderate-income area is one where individual income is at least 50 percent and less than 80 percent of the area median individual income, or median family income is at least 50 percent and less than 80 percent of the area median family income. An area (or geography) is defined as a census tract delineated by the U.S. Census Bureau in the most recent decennial census.

Market test: A test of an organizing group's ability to raise the required capital stated in its business plan, and in the manner described, within 12 months of preliminary conditional approval.

Narrow focus bank: A bank that offers limited services or anticipates serving a narrowly defined market niche. For example, a narrow focus bank may offer a lending portfolio that targets a restricted customer base; predominately lend to businesses through the Small Business Administration program; focus on credit card products; offer only trust services, etc. Narrow focus banks generally lack diversification in their lines of business.

National bank: An insured or uninsured national banking association chartered by the OCC.

Officer: Executive officers as well as subordinate management officials appointed by the bank's board of directors or through authority properly delegated by the board of directors.

Organization costs: The direct costs incurred to incorporate and charter a bank, these are a subset of start-up costs. Such direct costs include, but are not limited to, professional fees (such as legal, accounting, and consulting), printing costs related directly to the chartering or incorporation process, filing fees paid to chartering authorities, and the cost of economic impact studies. Organization costs incurred by newly chartered banks should not be capitalized.

Organization phase: The period between the time the OCC grants preliminary conditional approval to the application and the day the bank opens for business.

Organizers: The persons who file and sign a charter application. The OCC may approve additional organizers and organizing directors throughout the charter process, subject to review and non-objection. Refer to the "Background Investigations" booklet of the *Comptroller's Licensing Manual*.

Organizing group: Five or more persons acting on their own behalf, or serving as representatives of a sponsoring holding company, who apply to the OCC for a bank charter.

Person: As defined in this booklet, "person" has the same meaning as set forth in the CBCA and the OCC's implementing regulation (12 USC 1817(j) and 12 CFR 5.50, respectively). In the context of affiliate transactions, "person" has the meaning set forth in 12 CFR 223.3(bb) of Regulation W.

Preliminary conditional approval: A decision by the OCC permitting an organizing group to proceed with the organization of a proposed bank. Preliminary conditional approval generally is subject to certain requirements and conditions that an applicant must satisfy before the OCC grants final approval, and is also subject to special conditions that remain in place after the bank opens for business.

Preopening expenses: Expenses, such as salaries, employee benefits, rent, depreciation, supplies, directors' fees, training, travel, postage, and telephone, that are not considered organization costs and should not be capitalized. In addition, allocated internal costs, such as management salaries, should not be capitalized as organization costs.

Principal shareholder: A person or entity, other than an insured bank, who directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the proposed bank, consistent with the definition in 12 USC 375b as implemented by Regulation O (12 CFR 215.2(m)).

Related interest: A related interest of a principal shareholder, executive officer, or director (person) includes (1) a company that is controlled by that person or (2) a political or campaign committee that is controlled by that person or that will benefit that person through funds or services. All of these terms are further defined by 12 CFR 215.2.

Savings and loan holding company (SLHC): A company controlling a savings association, including an FSA, must be approved by the Federal Reserve Board as an SLHC unless an exception is available. The term SLHC does not include a company that controls a savings association that functions solely in a trust or fiduciary capacity (1467a(a)(1)(D)(ii)(II)).

Significant deviation: A material variance from a bank's business plan or operations that occurs after the proposed bank has opened for business.

Spokesperson: See contact person.

Start-up costs: Defined broadly, the costs associated with the one-time activity related to opening a new facility, introducing a new product or service, conducting business in a new territory, conducting business with a new class of customer, or commencing a new operation. Start-up activities related to organizing a new entity, such as a bank, are referred to as organization costs. For a new bank, preopening expenses (such as salaries and employee benefits, rent, depreciation, supplies, director's fees, training, travel, postage, and telephone) are considered start-up costs.

Subsidiary of a holding company: A new bank is a subsidiary of a holding company if 25 percent or more of its voting stock will be owned or controlled by a holding company, or if the Federal Reserve Board (or the OCC, as appropriate) determines that a holding company otherwise has the power to elect a majority of the bank's directors or to control the bank in any other manner.

Troubled condition: When a bank has a composite rating of 4 or 5; or is subject to a cease and desist order, a consent order, or a formal written agreement (unless otherwise informed in writing by the OCC); or is informed in writing by the OCC that as a result of an examination it has been so designated.

Wholesale bank: For CRA purposes, a bank that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which designation as a wholesale bank is in effect. A bank may request the OCC to designate it as a wholesale bank for CRA purposes as provided in 12 CFR 25.25(b) or 195.25(b).

References

In this section, "NB" denotes that the referenced law, regulation, or issuance applies to national banks, and "FSA" denotes that the reference applies to federal savings associations.

Advertising

Law	12 USC 371c-1 (NB and FSA)
	12 USC 1468(a) (FSA)
Regulation	12 CFR 163.27 (FSA)
	12 CFR 213, 226, 1013, 1026, 1030 (NB and FSA)

Affiliates, Transactions with

Law	12 USC 371c, 371c-1 (NB and FSA)
	12 USC 1467(d), 1468 (FSA)
Regulation	12 CFR 163.41 (FSA)
	12 CFR 223 (NB and FSA)

Articles of Association and Charter

Law	12 USC 21, 21a (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.21, 5.22 (FSA)
Lost stock certificates	
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2018 (NB)
Preemptive rights	
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2021 (NB)
Shareholder or member meetings	
Law	12 USC 71, 75 (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2001, 7.2003 (NB)
Vacancies in board	
Law	2 USC 74 (NB)
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2007 (NB)

Audit, Internal and External

Law	12 USC 1463 (FSA)
	12 USC 1831m, 15 USC 78j-1 (NB and FSA)
Regulation	12 CFR 11 (NB)
	12 CFR 162 (FSA)
	12 CFR 30, 363, 17 CFR 210 (NB and FSA)

OCC Bulletin 2003-12, "Interagency Policy Statement on Internal Audit and Internal Audit Outsourcing" (March 17, 2003) (NB and FSA)
Comptroller's Handbook, "Internal and External Audits" (NB and FSA)

Authorization to Commence Business

Law	12 USC 26, 27 (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.20 (NB and FSA)

Background Investigations

Regulation	12 CFR 5.7, 28 CFR 16.34, 50.12 (NB and FSA)

Bank Holding Company Act

Law	12 USC 1841-1850
Regulation	12 CFR 225

Bank Premises, Investment in

Law	12 USC 29, 371d (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.37 (NB and FSA)
	12 CFR 7.100 (NB)

Bank Protection Act

Law	12 USC 1882, 1884 (NB and FSA)
Regulation	12 CFR 21.1-4 (NB)
	12 CFR 168 (FSA)

Bank Secrecy Act

Law	31 USC 5311-5328 (NB and FSA)
Regulation	12 CFR 21.21 (NB and FSA)
	12 CFR 163.180 (FSA)
	31 CFR 1010, 1020 (NB and FSA)

Bank Service Company Act and FSA Subsidiary Organizations and Pass-Through Investments

Law	12 USC 1464 (FSA)
	12 USC 1861-1867 (NB and FSA)
Regulation	12 CFR 5.34, 5.36, 5.39 (NB)
	12 CFR 5.38, 5.58, 5.59 (FSA)
	12 CFR 5.35 (NB and FSA)

Bank Stock Loans

Law	12 USC 83 (NB)
	12 USC 1464 (FSA)
	12 USC 1828(v) (NB and FSA)
Regulation	12 CFR 7.2019 (NB)
	12 CFR 160 (FSA)

Bankers' Bank

Law	12 USC 24(7), 27(b) (NB)
	12 USC 1464(c)(4)(E) (FSA)
Regulation	12 CFR 5.20 (NB and FSA)

Branches

Law	12 USC 36 (NB)
	12 USC 1464(m), 1464(r) (FSA)
Regulation	12 CFR 5.30, 12 CFR 7.1003-7.1005, 7.4003-7.4005 (NB)
	12 CFR 5.31 (FSA)

Bylaws

Law	12 USC 24(6) (NB)
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2000 (NB)
Cashier	
Regulation	12 CFR 7.2015 (NB)
Lost stock certificates	
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2018 (NB)
Quorum of directors	
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2009 (NB)
Shareholder meetings	
Law	12 USC 71, 75 (NB)
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2001, 7.2003 (NB)
Stock certificate signatures	
Law	12 USC 52 (NB)
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2017 (NB)

Capital Requirements

Law	12 USC 51c (NB)
	12 USC 1464 (FSA)
	12 USC 3907 (NB and FSA)
Regulation	12 CFR 3, 6 (NB and FSA)

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Capital Stock

Law	12 USC 51a, 51b, 51c, 52, 55 (NB)
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2016, 7.2017, 7.2018, 7.2023 (NB)

Capital Stock and Capital Required to Commence Business

Law	12 USC 53 (NB)
Regulation	12 CFR 5.20 (NB and FSA)
	12 CFR 5.21, 5.22 (FSA)

Capital Structure Change or Substantial Asset Change

Law	12 USC 56, 57, 59 (NB)
Regulation	12 CFR 5.45, 5.55 (FSA)
	12 CFR 5.46, 12 CFR 7.2020 (NB)
	12 CFR 5.53 (NB and FSA)

CEBA Credit Card Bank

Law	12 USC 1841(c)(2)(F) (NB)

Certificate and Authority to Commence Business

Law	12 USC 22, 23, 26, 27 (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.20 (NB and FSA)
Filing and preservation	
Law	12 USC 23 (NB)

Change in Control

Law	12 USC 1817(j) (NB and FSA)
Regulation	12 CFR 5.50 (NB and FSA)

Change in Directors and Senior Executive Officers

Law	12 USC 1831i (NB and FSA)
Regulation	12 CFR 5.51 (NB and FSA)

Chartering Banks

Law	12 USC 21, 22, 23, 26, 27, 92a, 222 (NB)
	12 USC 1464 (FSA)
	12 USC 1815, 1816, and 2903 (NB and FSA)
Regulation	12 CFR 5.20 (NB and FSA)
	12 CFR 5.21, 5.22 (FSA)

Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments

Law	12 USC 24(11) (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 24 (NB)
	12 CFR 5.59 (FSA)
	12 CFR 160.36 (FSA)

Community Reinvestment Act

Law	12 USC 2901-2908 (NB and FSA)
Regulation	12 CFR 25 (NB)
	12 CFR 195 (FSA)

Compensation Plans

Law	12 USC 1828(k) (NB and FSA)
Regulation	12 CFR 7.2011 (NB)
	12 CFR 160.130 (FSA)
	12 CFR 30, 359 (NB and FSA)

Consumer Credit Protection Act

Law	15 USC 1601-1693r (NB and FSA)

Convicted Individuals

Law	12 USC 1829 (NB and FSA)

Corporate Governance Procedures

Law	15 USC 78j-1, 78m (k) (NB and FSA)
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2000-7.2024 (NB)

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Corporate Powers and Investment Securities

Law	12 USC 24 (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 1 (NB)
	12 CFR 160 (FSA)

Cumulative Voting

Law	12 USC 61 (NB)
Regulation	12 CFR 5.22 (FSA)
	12 CFR 7.2006 (NB)

Depository Institution Management Interlocks

Law	12 USC 3201-3208, 12 USC 5364 (NB and FSA)
Regulation	12 CFR 26 (NB and FSA)

Directors

Board composition	
Regulation	12 CFR 163.33 (FSA)
Citizenship requirement	
Law	12 USC 72 (NB)
Convicted of a crime	
Law	12 USC 1829 (NB and FSA)
Delegation of duties	
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2010 (NB)
Election	
Law	12 USC 61, 71, 75 (NB)
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 7.2003, 7.2006 (NB)
Extensions of credit to	
Law	12 USC 375b, 15 USC 78m(k) (NB and FSA)
	12 USC 1468(b) (FSA)
Regulation	12 CFR 31 (NB)
	12 CFR 215 (NB and FSA)
Honorary	
Regulation	12 CFR 7.2004 (NB)
Liability	
Law	12 USC 93, 503 (NB)
	12 USC 1818 (NB and FSA)
Number of	
Law	12 USC 71, 71a (NB)
Regulation	12 CFR 5.21, 5.22 (FSA)
Oath of	
Law	12 USC 73 (NB)
Regulation	12 CFR 7.2008 (NB)
Payment of interest to	
Law	12 USC 376 (NB)
President, as	
Law	12 USC 76 (NB)
Regulation	7.2012 (NB)
Proxy, as	
Regulation	12 CFR 7.2002 (NB)
	12 CFR 169.3 (FSA)
Purchases from and sales by	
Law	12 USC 1828(z) (NB and FSA)

Qualifications of
Law 12 USC 72 (NB)
Regulation 12 CFR 163.22 (FSA)
12 CFR 7.2005 (NB)
12 CFR 5.20 (NB and FSA)

Quorum of
Regulation 12 CFR 5.21, 5.22 (FSA)
12 CFR 7.2009 (NB)

Residency
Law 12 USC 72 (NB)

Responsibilities
Regulation 12 CFR 5.21, 5.22 (FSA)
12 CFR 7.2010 (NB)

Vacancy in
Law 12 USC 74 (NB)
Regulation 12 CFR 5.21, 5.22 (FSA)
12 CFR 7.2007 (NB)

Electronic Banking
Regulation 12 CFR 7.5000- 7.5010 (NB)
12 CFR 155 (FSA)

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Electronic Fund Transfer Act
Law 15 USC 1693-1693r (NB and FSA)
Regulation 12 CFR 205 (NB and FSA)

Comptroller's Handbook, "Electronic Fund Transfer Act" (NB and FSA)

Employee Retirement Income Security Act of 1974
Law 29 USC 1001 et seq. (NB and FSA)

Employment Contracts for FSAs
Regulation 12 CFR 163.39 (FSA)

Examination of National Banks and FSAs
Law 12 USC 481, 484 (NB)
12 USC 1463, 1464(d), 1467, 1468b (FSA)
Regulation 12 CFR 7.4000 (NB)
12 CFR 163.170 (FSA)

Executive Officers

Cashier
Law 12 USC 24 (5), 26, 51a, 52, 57, 62, 92a(g), 161 (NB)
Regulation 12 CFR 7.2015 (NB)

Extensions of credit to

Law	12 USC 375a, 375b, 15 USC 78m(k) (NB and FSA) 12 USC 1468(b) (FSA)
Regulation	12 CFR 31 (NB) 12 CFR 215 (NB and FSA)

Liability

Law	12 USC 93, 504 (NB) 12 USC 1818 (NB and FSA)

Payment of interest to

Law	12 USC 376 (NB)

Fair Credit Reporting Act

Law	15 USC 1681-1681x (NB and FSA)

OCC Advisory Letter 99-3, "Fair Credit Reporting Act" (March 29, 1999) (NB and FSA)
Comptroller's Handbook, "Fair Credit Reporting Act" (NB and FSA)

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Law	42 USC 3601 et seq. (NB and FSA)
Regulation	24 CFR 100-110 (NB and FSA)

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FDIC Insurance

Law	12 USC 1815, 1816 (NB and FSA)
Regulation	12 CFR 303.20-25, 327, 328 (NB and FSA)

FDIC Statement of Policy on Applications for Deposit Insurance
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Federal Reserve System Membership

Law	12 USC 222, 282, 466, 501a (NB)
Regulation	12 CFR 209 (NB)

Federal Trade Commission Act

Law	15 USC 45 (NB and FSA)

OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002) (NB and FSA)
OCC Bulletin 2014-42, "Interagency Guidance Regarding Unfair or Deceptive Credit Practices" (August 22, 2014) (NB and FSA)

Fees

Regulation	12 CFR 8.8 (NB and FSA)

Fidelity Insurance

Law	12 USC 1828(e) (NB and FSA)
Regulation	12 CFR 7.2013 (NB)

Fiduciary Activities

Law	12 USC 92a (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 9 (NB)
	12 CFR 150 (FSA)

Fraudulent Statements

Law	18 USC 1001 (NB and FSA)

Golden Parachute Payments

Law	12 USC 1828(k) (NB and FSA)
Regulation	12 CFR 359 (NB and FSA)

Gramm–Leach–Bliley Act

Law	12 USC 24a (NB)
	15 USC 6801 et seq. (NB and FSA)
Regulation	12 CFR 5.39 (NB)
	12 CFR 30 App. B, 12 CFR 1016 (NB and FSA)

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Law	12 USC 95 (NB)
Regulation	12 CFR 7.3000 (NB)

OCC Bulletin 2012-28, "Supervisory Guidance on Natural Disasters and Other Emergency Conditions" (September 2012) (NB and FSA)

Indemnification of Directors, Officers, and Employees

Law	12 USC 1828(k) (NB and FSA)
Regulation	12 CFR 7.2014 (NB)
	12 CFR 145.121 (FSA)
	12 CFR 359 (NB and FSA)

Information Security

Law	15 USC 6801, 6805(b) (NB and FSA)
Regulation	12 CFR 30 (NB and FSA)
	12 CFR 155 (FSA)

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Insider Activities

Law	12 USC 375b, 1828(z) (NB and FSA)
	12 USC 376 (NB)
	12 USC 1468(b) (FSA)
Regulation	12 CFR 31(NB)
	12 CFR 163.200, 163.201 (FSA)
	12 CFR 215 (NB and FSA)

Comptroller's Handbook, "Insider Activities" (NB and FSA)

Insurance, Sale of

Law	12 USC 92 (NB)
	12 USC 1831x (NB and FSA)
Regulation	12 CFR 14 (NB and FSA)

Interbank Deposits

Law	12 USC 463 (NB)
	12 USC 1972 (NB and FSA)

Interest

Receiving

Law	12 USC 85, 86 (NB)
Regulation	12 CFR 7.4001 (NB)

Lending Limits

Law	12 USC 84 (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 32 (NB and FSA)

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Law	12 USC 30 (NB)
Regulation	12 CFR 5.21, 5.22 (FSA)
	12 CFR 5.40 (NB and FSA)

Lotteries

Law	12 USC 25a (NB)
	12 USC 1463 (FSA)

Minority-Owned Banks
OCC Policy Statement on Minority National Banks and Federal Savings Associations (June 7, 2013) (NB and FSA)

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Law	12 USC 1467a (FSA)
Regulation	12 CFR 239 (FSA)

National Environmental Policy Act

Law	42 USC 4321-4347 (NB and FSA)
Regulation	40 CFR 1500 et seq. (NB and FSA)

National Historic Preservation Act

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Regulation	36 CFR 800 (NB and FSA)

Organization Costs

Regulation	12 CFR 5.20 (NB and FSA)

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Organization of National Banks and FSAs

Law	12 USC 21-23 (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.20 (NB and FSA)

Place of Business

Law	12 USC 22, 81 (NB)

Privacy

Law	15 USC 6801 et seq. (NB and FSA)
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Law	12 USC 24(11) (NB)
	12 USC 1464 (FSA)
Regulation	12 CFR 5.59 (FSA)
	12 CFR 24 (NB)

Publication of Application

Regulation	12 CFR 5.8, 5.10 (NB and FSA)

Real Estate Lending

Law	12 USC 371 (NB)
	1464(c) (FSA)
Regulation	12 CFR 34 (NB and FSA)
	12 CFR 30, App A (NB and FSA)
	12 CFR 160 (FSA)

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Record Keeping and Confirmation Requirements for Securities Transactions

Law	12 USC 24, 92a, 93a (NB)
Regulation	12 CFR 12 (NB)

Reserve Requirements

Law	12 USC 461, 464, 465, 466 (NB)
Regulation	12 CFR 204 (NB and FSA)

S Corporation

Law	26 USC 1361 (NB and FSA)

Safety and Soundness Standards

Law	12 USC 1831p-1 (NB and FSA)
Regulation	12 CFR 30 (NB and FSA)

Sarbanes–Oxley Act of 2002

Law	15 USC 78m(k) (NB and FSA)

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Savings and Loan Holding Companies

Law	12 USC 1467a (FSA)
Regulation	12 CFR 238 (FSA)

Securities Offering Disclosure Rules and Offers of and Sales of Securities at an Office of an FSA

Law	12 USC 1, 93 (NB) 12 USC 1463, 1464 (FSA)
Regulation	12 CFR 16 (NB) 12 CFR 163.76 (FSA)

Security Devices and Procedures

Law	12 USC 1882, 1884 (NB and FSA)
Regulation	12 CFR 21 (NB) 12 CFR 168 (FSA)

Shareholders' List

Law	12 USC 62 (NB)
Regulation	12 CFR 5.22 (FSA)

Shareholders' Meetings

Regulation	12 CFR 5.22 (FSA) 12 CFR 7.2001 (NB)

Suspicious Activity Reports

Law	31 USC 5318(g) (NB and FSA)
Regulation	12 CFR 21.11 (NB) 12 CFR 163.180 (FSA)

Theft, Embezzlement, or Misapplication

Law	18 USC 656 (NB and FSA)
Regulation	12 CFR 21 (NB) 12 CFR 168 (FSA)

Third-Party Relationships

Law	12 USC 1831g, 1867(c) (NB and FSA) 12 USC 1464 (FSA)

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Title

Law	12 USC 22, 30, 35 (NB) 12 USC 1464 (FSA)
Regulation	12 CFR 5.20, 5.42 (NB and FSA) 12 CFR 5.21, 5.22 (FSA)

Trust Banks and FSAs with Fiduciary Powers

Law	12 USC 27, 92a, 1841(c)(2)(D) (NB)
	12 USC 1464, 1467a(a)(1)(D) (FSA)
Regulation	12 CFR 5.26, 223 (NB and FSA)
	12 CFR 9 (NB)
	12 CFR 150 (FSA)

Vendors

See Third-Party Relationships

Voting Trusts

Regulation	12 CFR 5.50 (NB and FSA)
	12 CFR 7.2022 (NB)

EXHIBIT C

Remarks by

Thomas J. Curry
Comptroller of the Currency

Before the
Federal Home Loan Bank of Chicago

Chicago, Illinois
August 7, 2015

Good morning. It's a pleasure to be here with you today, and to have this opportunity to join a discussion that's oriented toward the future of the financial services industry. With so much of the financial services business in flux today, the conference title, "Leading toward the Future; Ideas and Insights for a New Era," could not be more appropriate. With respect to financial technology, or "fintech," as it's generally known, it sometimes seems that the real question is not so much what lies ahead as how to better understand and leverage the innovation in front of us now.

Mobile payment services like Apple Pay and Google Wallet could change the face of retail payments, particularly at the point of sale, while virtual currencies have the potential to transform the way we think about money. New online services offer the prospect of a banking relationship that exists only on a smart phone or home computer, and peer-to-peer lending has the potential of upending a bank's traditional role as an intermediary. Automated systems compete with traditional financial advisors, and crowdfunding sites are entering the business of raising equity capital for new and existing companies.

Some of these products represent only incremental changes that don't present major regulatory concerns, but others signify real points of departures that will require a significant

amount of scrutiny to ensure that they can be offered safely and soundly, consistent with applicable laws and regulations, and in a way that ensures adequate consumer protections.

Those cautions are important. Recall how the financial crisis was fueled in large part by such "innovations" as option Adjustable Rate Mortgages, Structured Investment Vehicles, and a variety of increasingly complex securities that represented interests in subprime mortgages. Those very risky activities created huge losses for financial institutions and their customers, and ultimately threatened the entire financial system. So new products and services have to be evaluated with an eye toward risk management.

However, while our views of innovative products and services are informed by the experience of the financial crisis, we can't let that memory blind us to the importance of continued innovation in the financial marketplace. New approaches that meet the needs of an evolving marketplace are the lifeblood of our nation's economy, and it's our job as a regulator to support and even encourage innovation that helps bank customers. In fact, that's a hallmark of the national bank charter – its ability to adapt to the changing needs of bank customers.

What I want to talk about today is how innovation can benefit the financial system, the vital role banks will continue to play in that innovation, and what we are doing at the OCC to better understand both the benefits and the risks of innovative products and services identified by banks.

The banking industry has always taken the lead in financial innovation, particularly in the area of technology. ATM networks make it possible to have your money delivered to you anywhere in the world and home banking has streamlined the process of paying bills, transferring funds, and managing money. Deposits are made by smart phone, and checks are

scanned and returned at the point of sale. Those are all impressive examples of innovations that have benefitted bank customers.

But it is also noteworthy that a large share of the innovation we're seeing in the area of financial technology is developing outside of the regulated banking industry. There are a number of reasons why that's so, but the one that's of most concern to me is the perception that it's too difficult to get new ideas through the regulatory approval process.

At the OCC, we've launched a new initiative to address that perception – and any reality that might lie behind it. What we want to do is develop a framework to evaluate new and innovative financial products and services.

We have a team with representatives from across the agency – policy experts, examiners, lawyers, and others – considering this question. We're still early in the process, so I can't tell you exactly where we'll end up. It's possible we'll ultimately conclude that we need a small office dedicated to innovation, just as some banks have developed innovation centers. At a minimum, though, we'll want to be sure that we have the capacity to identify and understand new trends and new technology, as well as the emerging needs of financial services customers so that we will be in a position to quickly evaluate those products that require regulatory approval and identify any risks associated with them.

Let me add that the kind of innovation I have in mind isn't solely the domain of the private sector nor is it solely a matter of technology. Indeed, I would argue that it is exemplified by a program started by the Federal Home Loan Bank of Chicago to help small originators take advantage of government guarantees and insurance.

In a field where scale matters, the business of originating mortgages can be challenging for small institutions that deal in low volumes. As a result, some community banks and thrifts are struggling with the question of whether they can stay in that business.

That's a shame. Mortgage lending is an important product that many consumers will want at some point in their lives, and no lender wants to turn away an established customer who's on the verge of becoming a homeowner. Government insured or guaranteed programs offer a solution, but financial institutions that want to sell those loans through Ginnie Mae, as most will, need sufficient volume to form loan pools efficiently.

That's where the Chicago home loan bank's new program—the Mortgage Partnership Finance Government MBS program—kicks in. The program allows lenders to deliver government-guaranteed or government-insured home loans to the Chicago Federal Home Loan Bank, which in turn will act as the Ginnie Mae mortgage-backed security issuer. This approach eliminates the costs and barriers that community banks would otherwise face in becoming Ginnie Mae issuers themselves, and it will be particularly attractive for low-volume mortgage lenders.

By taking on this role, the Chicago FHLB provides liquidity, a reliable secondary market conduit, and operational support to participating banks. This program can put community lenders in a better position to offer competitive mortgage products, and it confers a number of advantages on participating institutions, including competitive pricing and the certainty of funding on closing day.

In my mind, this is an example of a financial win-win made possible by creativity and innovation. It confers obvious advantages on small institutions that want to remain competitive in an important product line, and it helps ordinary people achieve the American dream of

homeownership. It also exemplifies the creative spirit that has long made the American financial system such a powerful engine of economic growth.

At the OCC, we're also focused on finding new and innovative ways to help community banks and thrifts serve their customers and reduce their cost of doing business. An example is the paper we published recently on collaboration. The thought behind it is that smaller institutions can join together to trim costs or serve customers and markets that might otherwise lie beyond their reach.

For example, community banks can exchange ideas and information, share back office operations or jointly purchase materials or services. In one case, a group of banks pooled their resources to finance community development activities through multi-bank community development corporations, loan pools, and loan consortia. In another, several smaller institutions formed an alliance through a loan participation agreement to bid on larger loan projects in competition with larger financial institutions.

As a regulator, I'm glad we were able to highlight some of the innovation that we're seeing in the community bank space and add some of our own thoughts to that. But I want to emphasize that most of the paper was to encourage community banks to continue to innovate in the area of collaboration.

As the industry continues to innovate, it's important that regulators strike the right balance between encouraging responsible innovation and managing risk. Virtual currency, like Bitcoin provides a good example.

There is considerable interest in the technology that Bitcoin and other virtual currencies use to keep track of ownership and prevent double spending, and that technology could lead to less expensive ways for banks to settle transactions. There is also at least some interest among

traditional banks, as well as the new online-only financial institutions, in facilitating Bitcoin transactions of one type or another.

That's not objectionable in and of itself, but one of the attractions of virtual currency is anonymity, and so we need to be sure that federal banks and thrifts that participate are adhering to requirements of laws aimed at deterring money laundering and terrorist financing. Again, this is basic risk management, and it's no different from the diligence we expect from traditional account management.

The same applies to the new types of services that have been lumped together under the heading of "neobanks," which are internet-only institutions that offer bank-like services. We are already seeing some interest among federal banks and thrifts in these new products and services, and some of the banks we supervise are already exploring partnerships with existing neobanks.

What's interesting to me about these new institutions is how nimble they are. One developed a way of allowing customers to turn their debit cards on and off with the press of a button on their smart phone. That has obvious advantages if you think you might have lost your card, but aren't certain enough to be ready to cancel it, and it could also serve as a safety feature for bank customers worried that their personal financial information might have been stolen in any one of the recent hacks.

My hope is that some of that creativity might also be used to solve other types of problems, such as meeting the needs of underserved communities. For all of our efforts over the years to ensure equal access to credit, there are still communities with limited access to the types of financial services that people need to improve their lives. I'm talking about the availability of small business credit, consumer loans, and even basic transaction accounts.

Today, we are starting to see a number of examples of fintech products that make it a bit easier for lower-income individuals to save, borrow, and manage bills.

One example is income smoothing. A project undertaken by the Center for Financial Services Innovation and New York University's Financial Access Initiative found that income sufficiency is less of a problem for low-income households than the timing mismatch between income and expenses. This is especially true for hourly workers, and at least one fintech company has developed a product that uses an algorithm to calculate an "average" paycheck for its customers. Amounts over that average automatically go into a savings account that the company manages, and shortages are made up by money taken from savings or through interest-free advances if there is no savings available. Customers pay $3 per week for the service.

A related problem involves the difficulty that many people, particularly lower-income individuals, have in building savings. Several financial technology companies have products to help. One such company tailored a savings app that connects to the customer's checking account, analyzes spending patterns, and then regularly transfers a small amount of money into a savings account that it controls.

I could go on, but I think those examples illustrate the promise of financial technology in addressing the problems of the economically disadvantaged. And there are many more products aimed at serving the middle-class, affluent and the business community. Our task, as a regulator, is to be sure we have a robust process in place to understand and evaluate new approaches to permit and encourage responsible innovation that has benefits for consumers and businesses, while ensuring appropriate risk management and compliance with laws and regulations.

That means understanding the technology and the issues that arise from it, as well as the very different perspectives that characterize the traditional banking industry and those that underlie the new fintech companies that are offering banking services.

That difference was highlighted in a vivid way in a recent package of articles in The Economist magazine. In one article, Marc Andreessen, the well-known tech investor, cited the example of a loan officer talking across the desk to a prospective client and said that "to software people, that looks like voodoo." On the other hand, a second article noted that the data mining methods fintech companies use to evaluate borrowers might look like "sorcery" to traditional bankers.

It's hard to see how that gap ever gets bridged. For my part, I do see considerable merit in the traditional bank model, where bankers who know the businesses and families they serve are willing to lend money and stand by borrowers in good times and bad because they know the character of those customers. That's an important piece of the American economic fabric. However, it's not the only approach to financial services, and it's important that regulators view new ideas with an open mind and not dismiss them as either sorcery or voodoo.

I think everyone in the regulated financial community – banks and supervisors alike – recognizes that the industry is undergoing a transformation, driven by technology, in the way it does business. I'm betting that much of that transformation will take place inside the traditional banking system, and I want the OCC to be ready to deal with it.

After all, the national bank charter – created in the early days of the Lincoln administration – has always adapted to meet changes in the marketplace, and we are working today to make sure it always will.

EXHIBIT D

Remarks

By

Thomas J. Curry
Comptroller of the Currency

Regarding

Special Purpose National Bank Charters for Fintech Companies

Georgetown University Law Center

December 2, 2016

It's an honor to be here at Georgetown University this morning. Today I will discuss the OCC's thinking about making a special purpose national bank charter available to financial technology companies that provide banking products and services. I want to thank Dean Treanor, Dr. Chris Brummer, and everyone here at Georgetown University Law Center for hosting us. I know how much effort goes into events like these, and I appreciate everyone who helped put this event together. Georgetown Law and the Institute of International Economic Law have long promoted thoughtful exploration of topics crucial to good government, making it the perfect place for today's conversation.

Over the past year, no topic in banking and finance has drawn more interest than innovative financial technology, and for good reason. The number of fintech companies in the United States and United Kingdom has ballooned to more than 4,000, and in just five years investment in this sector has grown from $1.8 billion to $24 billion worldwide.

But, there is more going on than just technological advances. Customer needs and expectations also are changing in dramatic ways. More than 85 million young adults in America are entering the financial world with the majority of their financial lives still ahead. They want

technologies and services that provide better, faster, more accessible products and services, and they are willing to switch providers or use multiple providers to get what they want. These consumers expect to be able to transact basic banking and financial business anywhere, anytime, from the palm of their hands.

What excites me most about the changes occurring in financial services is the great potential to expand financial inclusion, reach unbanked and underserved populations, make products and services safer and more efficient, and accelerate their delivery. To live up to that potential, innovators must demonstrate real responsibility—whether innovating within or outside the federal banking system.

At the Office of the Comptroller of the Currency, we are making certain that all institutions with federal charters have a regulatory framework that is receptive to responsible innovation along with the supervision that supports it. Since last year, we have conducted extensive research and discussions with technology companies, banks, community and consumer groups, academics, and other regulators. We articulated clear principles to guide the development of a framework for responsible innovation,[1] sought public comment,[2] and held a public forum in June to discuss the issues surrounding responsible innovation.[3]

Recognizing the need for a non-supervisory forum for banks and fintechs to interact with the OCC, in October, I established an Office of Innovation,[4] which is now headed by acting

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[1] See "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective." March 2016 (https://occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf).

[2] See https://occ.gov/topics/bank-operations/innovation/innovation-comments.html.

[3] See https://occ.gov/topics/bank-operations/innovation/innovation-forum-videos.html.

[4] See News Releases 2016-35, "OCC Issues Responsible Innovation Framework." October 26, 2016 (https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-135.html).

Chief Innovation Officer, Beth Knickerbocker. Once it is fully staffed, the office will be the central point of contact and clearinghouse for requests and information related to innovation. Its staff will conduct outreach and provide technical assistance, and will hold office hours in cities with significant interest in financial innovation to make candid regulatory advice more accessible and to facilitate open conversations. Its staff will promote training among agency employees to improve our capabilities and understanding of these important issues, and lead our collaboration with other regulators, foreign and domestic. We plan to have the new office up and running in the first quarter of 2017. Establishing this office and our framework are important parts of our responsible innovation efforts. I know these efforts will make a significant difference for the federal banking system, and I look forward to sharing our progress.

Our next step, which I am announcing here today, is that the OCC *will* move forward with chartering financial technology companies that offer bank products and services and meet our high standards and chartering requirements. We have published a paper today discussing several important issues associated with the approval of a national bank charter, and we are seeking stakeholder comment to help inform our path forward. Your comments will help us ensure that the agency's chartering decisions promote the safety and soundness of the federal banking system, increase financial inclusion, and protect consumers from abuse. I hope the professors and legal minds studying here will take the opportunity to read the paper and provide your thoughts.

We have decided to move forward and to make available special purpose national charters to fintech companies for a few basic reasons. First and foremost, we believe doing so is in the public interest. Fintech companies hold great potential to expand financial inclusion, empower consumers, and help families and businesses take more control of their financial

matters. Fintechs, while not without some risks, also can potentially deliver these products and services in a safer and more efficient manner. Preferences and needs of consumers, communities, and business are changing. And chartering companies that are finding new and better ways of satisfying those needs is another step toward supporting responsible innovation that is good for consumers, good for the federal banking system, and good for the country.

Second, we believe that companies that offer banking products and services should have the *choice* to become *national* banks if they wish to do so. Merely making a charter available, does not create a *requirement* to seek one. Nor does it displace the other choices a fintech company may have—for example, seeking a state bank charter in a state that makes one available or to continue operating outside the banking system. A company's choice to pursue a national charter should be driven by the company's business model and strategy on how best to serve their intended customers. The ability to choose a federal charter or state charter exists today for banks, and that choice is essential to the dual banking system just as it was in 1863 when the OCC was chartered. Preventing this class of companies from having that same option hurts the nation's dual banking system and could make the federal banking system less capable of adapting to the evolving business and customer needs of tomorrow. Providing a national charter to those responsible innovators who seek one and meet our high standards can help promote economic growth across the country and recognizes that technology-based products and services are the future of banking and the economy.

Third, having a clear process, criteria, and standards for fintechs to become national banks ensures regulators and companies openly vet risks and that the institutions that receive charters have a reasonable chance of success, appropriate risk management, effective consumer protection, and strong capital and liquidity. Through the chartering process, the OCC can fully

explore how the proposed bank's policies, procedures, and practices are designed to protect individuals and small business customers. Many fintechs will choose to partner with existing banks or provide services to banks and other financial companies, but some will seek to become a bank. In those cases, it will be much better for the health of the federal banking system and everyone who relies on these institutions, if these companies enter the system through a clearly marked front gate, rather than in some back door, where risks may not be as thoughtfully assessed and managed.

The OCC has the authority to grant special purpose national bank charters to fintech firms that conduct at least one of three core banking activities—receiving deposits, paying checks, or lending money. But, that authority is not to be taken lightly, which is why I have asked staff to develop and implement a formal agency policy for evaluating applications for fintech charters. The policy, informed by the comments we receive on our white paper, will articulate specific criteria for approval as well as issues that we should consider and conditions that should be met *before* granting such charters. Such policy helps ensure that we evaluate future fintech applications in a thoughtful and transparent manner and that we have necessary guard rails in place to ensure approvals consider safety and soundness, financial inclusion, consumer protection, community reinvestment, and corporate responsibility. Today's paper specifically asks for comment on what types of activities and expectations the OCC should require for entities seeking a special purpose national bank charter that demonstrates their commitment to financial inclusion that supports fair access to financial services and fair treatment of customers.

In addition to sharing our reasons for moving forward on fintech charters, I want to spend a little time discussing concerns some have already expressed. Issues fall in two equally

important categories—consumer protection and financial inclusion, and regulatory fairness and supervisory rigor.

Individuals and businesses should have access to useful and affordable financial products and services that meet their needs, and that are provided in a fair and responsible manner, no matter the source of those products and services. I understand and share the concerns about the applicability of laws meant to protect consumers, expand financial inclusion, and promote community reinvestment. For instance, there are certain laws, including the Community Reinvestment Act, that only apply to deposit-taking institutions insured by the FDIC. Consequently, thousands of fintech companies that provide bank-like services today and are not insured by the FDIC are not encouraged to meet the credit needs of the communities they serve through the application of CRA. *On the other hand*, the OCC has the unique ability to *impose* requirements in some or all of these areas through the chartering process to require companies seeking national charters to support financial inclusion in meaningful ways, as appropriate for the business model and activity of a particular company.

As a former state regulator, I also understand worries about the application of state law to national banks. That concern is not exacerbated by granting special purpose charters. State law applies to special purpose national banks in the same way and to the same extent as traditional national banks. Examples of state laws that generally apply to national banks include laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, foreclosure, and torts. In addition, any other law that only *incidentally* affects national banks' federally authorized powers to lend, take deposits, and engage in other federally authorized activities also still apply. The OCC has taken the position that state laws aimed at unfair or deceptive treatment of

customers also *apply* to national banks. The state laws that typically do not apply are those that impose licensing requirements on a company in order to engage in certain types of business.

The second issue we've heard relates to regulatory fairness and supervisory rigor. The worry here is that by providing a special purpose national bank charter we are somehow tipping the balance of competition by allowing special purpose banks to compete with full-service banks without assuming any of the responsibility.

But, the reality today is that the 4,000 fintech companies out there are already competing with national *and* state banks, without regard to any of the national bank responsibilities and under a patchwork of supervision. Granting national charters to the companies who desire and warrant one doesn't weaken the competitive position of existing banks or the dual banking system. In some ways, it levels the playing field because statutes that by their terms apply to national banks would apply to *all* special purpose national banks, even uninsured ones. This would include, for example, statutes and regulations on legal lending limits and limits on real estate holdings. And as far as providing "lighter touch" supervision, I have made it clear that if the OCC grants a national charter in this area, the institution will be examined regularly and held to the high standards the OCC has established for all federally chartered institutions.

These are important issues we must carefully consider as we implement our decision to entertain charter applications from fintech companies. I look forward to hearing from many of our stakeholders through their comments on our paper. I know folks will not be shy about providing their thoughts.

In closing, I want to thank all of the lawyers, licensing and policy experts, and examiners on our team for their work in putting these thoughts to paper and helping us move forward today

in this important, new direction. I especially want to acknowledge Karen Solomon, our Deputy Chief Counsel, for her leadership in this effort. I hope everyone appreciates the transparent and deliberate manner we have followed in considering this decision and all of our work on responsible innovation. We recognize that our decision will affect the federal banking system for many years to come, and I believe that effect will be a positive one. Dean Treanor, thank you again, and thanks to everyone here at Georgetown for inviting me here to share this announcement. I deeply appreciate your interest in this subject and look forward to the rest of our conversation.

EXHIBIT E

Office of the Comptroller of the Currency

Exploring Special Purpose National Bank Charters for Fintech Companies

Office of the Comptroller of the Currency
Washington, D.C.

December 2016

Preface by the Comptroller of the Currency

When President Abraham Lincoln signed the law creating the national banking system and the Office of the Comptroller of the Currency (OCC), the very notion of establishing a national bank charter was itself innovative. Our country's leaders provided the Comptroller with the authority to grant a national charter because they recognized the public value of a robust, unified, and nationwide system of banks.

The national banking system became a source of strength for the nation and our economy. National banks and, later, federal savings associations became anchors of their communities and the predominant providers of financial services for consumers and businesses. The system flourished because it enabled and encouraged national banks and federal savings associations to adapt to the changing needs of their customers and the market.

More than 150 years later, we have a diversified and evolving financial services industry. New technology makes financial products and services more accessible, easier to use, and much more tailored to individual consumer needs. At the same time, consumer preferences and demands are evolving, driven by important demographic changes: for example, the entry of 85 million millennials into the financial marketplace in the United States. Responding to those market forces are thousands of technology-driven nonbank companies offering a new approach to products and services. Five years ago these services either were available only from traditional banks or not available at all. Initially, many of these nonbank providers of financial services viewed themselves as competitors of banks. Now, some financial technology—or fintech—companies are considering whether to become banks.

These industry developments raise fundamental policy questions. Is the nation better served when banking products are provided by institutions subject to ongoing supervision and examination? Should a nonbank company that offers banking-related products have a path to become a bank? And, what conditions should apply if a nonbank company becomes a national bank?

I challenged staff at the OCC to explore these important questions when I asked them to examine the agency's authority to grant special purpose national bank charters to fintech companies and the conditions under which we might do so. This paper summarizes that work, describes the OCC's legal authority to grant a special purpose charter, and articulates what the OCC considers to be necessary conditions if the OCC is to exercise that authority. It makes clear that if we decide to grant a national charter to a particular fintech company, that institution will be held to the same high standards of safety and soundness, fair access, and fair treatment of customers that all federally chartered institutions must meet.

Public comment will help inform our consideration of these issues. We welcome your feedback on all of the issues raised in this paper and on the specific questions included at the end.

Introduction

The OCC's chartering authority includes the authority to charter special purpose national banks. In fact, many special purpose national banks are operating today—primarily trust banks and credit card banks. A question raised by technological advances in financial services and evolving customer preferences is whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company. For a number of reasons, the OCC believes it may be in the public interest to do so.

First, applying a bank regulatory framework to fintech companies will help ensure that these companies operate in a safe and sound manner so that they can effectively serve the needs of customers, businesses, and communities, just as banks do that operate under full-service charters. Second, applying the OCC's uniform supervision over national banks, including fintech companies, will help promote consistency in the application of law and regulation across the country and ensure that consumers are treated fairly. Third, providing a path for fintech companies to become national banks can make the federal banking system stronger. The OCC's oversight not only would help ensure that these companies operate in a safe and sound manner, it would also encourage them to explore new ways to promote fair access and financial inclusion and innovate responsibly. Fintech companies vary widely in their business models and product offerings. Some are marketplace lenders providing loans to consumers and small businesses, others offer payment-related services, others engage in digital currencies and distributed ledger technology, and still others provide financial planning and wealth management products and services.

If the OCC decides to grant a charter to a particular fintech company, the institution would be held to the same rigorous standards of safety and soundness, fair access, and fair treatment of customers that apply to all national banks and federal savings associations. The OCC acknowledges, however, that to approve a fintech charter the agency may need to account for differences in business models and the applicability of certain laws. For example, a fintech company with a special purpose national charter that does not take deposits, and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC), would not be subject to laws that apply only to insured depository institutions.

Where a law does not apply directly, the OCC may, nonetheless, work with a fintech company to achieve the goals of a particular statute or regulation through the OCC's authority to impose conditions on its approval of a charter, taking into account any relevant differences between a full-service bank and special purpose bank. In this way, the OCC could advance important policy objectives, such as enhancing the ways in which financial services are provided in the 21st century, while ensuring that new fintech banks operate in a safe and sound manner, support their communities, promote financial inclusion, and protect customers.

This paper explores these and other issues related to the OCC's consideration of charter applications from fintech companies. The OCC welcomes comments about how it can foster responsible innovation in the chartering process while continuing to provide the robust oversight that its mandate requires.

Background

The OCC's responsible innovation work to date

In August 2015, the OCC began an initiative to better understand innovation occurring in the financial services industry and to develop a framework supporting responsible innovation. To gain a broad perspective, the OCC conducted extensive research and had discussions with fintech companies, banks, community and consumer groups, academics, and other regulators. This work led to the publication of a white paper in March 2016 that outlined clear principles to guide the development of a framework to support responsible innovation in the federal banking system.[1] In October 2016, the OCC announced plans to implement its framework for responsible innovation, including the establishment of an Office of Innovation to serve as the central point of contact and clearinghouse for requests and information related to innovation.[2] The office also will conduct outreach and provide technical assistance and other resources for banks and nonbanks on regulatory expectations and principles.

Chartering authority

The OCC has authority to grant charters for national banks and federal savings associations under the National Bank Act and the Home Owners' Loan Act, respectively.[3] That authority includes granting charters for special purpose national banks. A special purpose national bank may limit its activities to fiduciary activities or to any other activities within the business of banking. A special purpose national bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking functions: receiving deposits, paying checks, or lending money.[4]

Special purpose national bank charters have been in use for some time. The most common types of these charters are trust banks (national banks limited to the activities of a trust company) and credit card banks (national banks limited to a credit card business).[5] Though the focus of this paper is on fintech companies in particular, 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

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[1] "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective" can be found at https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf.

[2] "Recommendations and Decisions for Implementing a Responsible Innovation Framework" can be found at https://www.occ.gov/topics/bank-operations/innovation/recommendations-decisions-for-implementing-a-responsible-innovation-framework.pdf.

[3] See 12 USC 1 et seq. and 1461 et seq. The OCC also has authority, under the International Banking Act, 12 USC 3102, to license a foreign bank to operate a federal branch or agency in the United States.

[4] See 12 CFR 5.20(e)(1). This paper focuses on the national bank charter, because it has more flexibility than the federal savings association charter. Federal savings associations are subject to asset and investment limitations and are required to have deposit insurance. See 12 CFR 160.30 and 5.20(e)(3).

[5] The OCC also has chartered other special purpose national banks including bankers' banks, community development banks, and cash management banks.

fiduciary activities or in activities that include receiving deposits, paying checks, or lending money. As the next section describes, the OCC has the legal authority to construe these activities to include bank-permissible, technology-based innovations in financial services.

Features and attributes of a national bank charter

Corporate structure

A national bank charter is a federal form of corporate organization that authorizes a bank to conduct business on a nationwide basis and subjects the bank to uniform standards and rigorous federal oversight. All national banks, including special purpose national banks, are organized under, and governed by, the National Bank Act. The corporate organization and structure provisions of the National Bank Act (e.g., classes of shares, voting rights, number of directors, and term of office) govern the corporate structure of a special purpose national bank.

Bank-permissible activities

A special purpose national bank may engage only in activities that are permissible for national banks. Bank-permissible activities are identified in statutes, in the OCC's regulations, and in legal opinions and corporate decisions that the OCC regularly publishes.[6] The OCC and the courts that have considered the scope of bank-permissible activities also recognize that the business of banking develops over time as the economy and business methods evolve.[7]

Consistent with legal precedent, the OCC views the National Bank Act as sufficiently adaptable to permit national banks—full-service or special purpose—to engage in new activities as part of the business of banking or to engage in traditional activities in new ways.[8] For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically are the modern equivalent of paying checks. The OCC would consider on a case-by-case basis the permissibility of a new activity that a company seeking a special purpose charter wishes to conduct.

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[6] See OCC Interpretations and Actions at https://www.occ.gov/topics/licensing/interpretations-and-actions/index-interpretations-and-actions.html.

[7] See generally NationsBank of North Carolina, N.A. v. Variable Life Annuity Co., 513 U.S. 251 (1995); M&M Leasing Corp. v. Seattle First National Bank, 563 F.2d 1377 (9th Cir. 1977), cert. denied, 436 U.S. 987 (1978); OCC Conditional Approval No. 267 (January 12, 1998) (certification authority and repository and key escrow are part of the business of banking); OCC Interpretive Letter No. 494 (December 20, 1989) (allowing national banks to purchase and sell financial futures for their own account).

[8] See, e.g., 12 CFR 7.5002 (OCC regulation authorizing national banks to use electronic means to conduct activities they are otherwise authorized to conduct, subject to appropriate safety and soundness and compliance standards and conditions).

Rules and standards applicable to a special purpose national bank

In general, a special purpose national bank is subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks. Statutes that by their terms apply to national banks apply to all special purpose national banks, even uninsured national banks. These laws include, for example, statutes and regulations on legal lending limits and limits on real estate holdings.[9]

Other laws that apply to special purpose banks include the Bank Secrecy Act (BSA), other anti-money laundering (AML) laws, and the economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). In addition, special purpose national banks generally are subject to the prohibitions on engaging in unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act and unfair, deceptive, or abusive acts or practices under section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The OCC's chartering regulation and licensing policies and procedures also would apply to a special purpose national bank. The established charter policies and procedures are set forth in 12 CFR Part 5 and the "Charters" booklet of the *Comptroller's Licensing Manual* and are discussed in the Chartering process section below.[10]

A special purpose national bank also has the same status and attributes under federal law as a full-service national bank.[11] State law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank. Limits on state visitorial authority also apply in the same way. A special purpose national bank would look to the relevant statutes (including the preemption provisions added to the National Bank Act by Dodd-Frank), regulations (including the OCC's preemption regulations), and federal judicial precedent to determine if or how state law applies. For example, under these statutes, rules, and precedents, state laws would not apply if they would require a national bank to be licensed in order to engage in certain types of activity or business. Examples of state laws that *would* generally apply to national banks include state laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, and torts. In addition, any other state laws that only incidentally affect national banks' exercise of their federally authorized powers to lend, take deposits, and engage in other federally authorized activities are not preempted. Moreover, the OCC has taken the position that state laws aimed at unfair or deceptive treatment of customers apply to national banks.[12]

Many other federal statutes apply to any bank, financial institution, or other type of entity based on the activities in which the entity engages. For example, banks that engage in residential real

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[9] See 12 USC 84 and 12 CFR 32 (lending limits) and 12 USC 29 and 12 CFR 7.1000 (limits on holding real estate).

[10] See 12 CFR Part 5 and the "Charters" booklet of the *Comptroller's Licensing Manual* (September 2016), https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf.

[11] A special purpose national bank has the same charter as a full-service national bank. It limits its activities through the bank's articles of association or through OCC-imposed conditions for approving the charter.

[12] The OCC looks to the substantive content of the state statute and not its title or characterization to determine whether it falls within this category.

estate lending must comply with the Truth in Lending Act, Real Estate Settlement Procedures Act, Home Mortgage Disclosure Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Housing Act, Servicemembers Civil Relief Act, and Military Lending Act.

Some statutes, however, apply to a national bank only if it is FDIC-insured and, therefore, would not apply to an uninsured special purpose national bank. For example, certain provisions in the Federal Deposit Insurance Act (FDIA), such as section 1831p-1 (safety and soundness standards) and section 1829b (retention of records), only apply to insured depository institutions.[13] In addition, if a national bank is not insured, the provisions in the FDIA governing the receivership of insured depository institutions would not apply. The OCC recently issued a proposed rule that would address this regulatory gap by establishing a framework for the receivership of an uninsured national bank under the receivership provisions in the National Bank Act.[14] The proposed rule primarily focuses on uninsured national trust banks, but specifically contemplates application to other special purpose national banks. The Community Reinvestment Act (CRA) is an example of another law that only applies to insured institutions.[15]

As discussed in the Chartering process section below, the OCC could impose requirements on an uninsured special purpose 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.[16]

Coordination among regulators

The OCC is the primary prudential regulator and supervisor of national banks. Depending on the structure of the bank and the activities it conducts, other regulators will have oversight roles as well. A fintech company considering a special purpose national bank charter likely would need to engage with other regulators in addition to the OCC. The OCC traditionally coordinates with other banking regulators on charter-related activities and would continue to coordinate and communicate where appropriate with other regulators in the case of an application by a fintech company for a special purpose national bank charter.

Federal Reserve: With rare exceptions, all national banks, including insured and uninsured trust banks and other special purpose national banks, are required to be members of the Federal

[13] While certain provisions of the FDIA do not apply to uninsured national banks, the OCC can address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices under its other supervisory and enforcement authorities. The FDIA's principal enforcement section, 12 U.S.C. 1818, generally would apply to any national banking association, including an uninsured national bank. See 12 USC 1818(b)(5).

[14] The proposed rule was published in the Federal Register at 81 Fed. Reg. 62835 (September 13, 2016) and is available at https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-110a.pdf.

[15] 12 USC 2901 et seq. See also 12 CFR Part 25 (OCC CRA regulations).

[16] Such conditions are conditions imposed in writing by the OCC in connection with any action on any application, notice, or other request under 12 USC 1818(b)(1). As such they are enforceable under 12 CFR 1818.

Reserve System.[17] National banks become member banks by subscribing for the stock of the appropriate Federal Reserve Bank.[18] Since most special purpose national banks would be member banks, the statutes and regulations that apply to member banks also would apply to them.[19] These statutes and regulations are administered by the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Federal Reserve Banks.

In addition, the Federal Reserve Board administers and interprets the scope and requirements of the Bank Holding Company Act (BHCA). If a fintech company interested in operating as a special purpose national bank has or plans to have a holding company that would be the sole or controlling owner of the bank (and investors would, in turn, own shares in the holding company), the BHCA could apply. A national bank is a "bank" for purposes of the BHCA if (A) it is either (i) an FDIC-insured bank or (ii) a bank that both accepts demand deposits and engages in the business of making commercial loans and (B) it does not qualify for any of the exceptions from the definition of "bank" in the BHCA.[20]

Federal Deposit Insurance Corporation: A fintech company that proposes to accept deposits other than trust funds would be required to apply to, and receive approval from, the FDIC. Generally, a bank must be engaged in the business of receiving deposits other than trust funds for the FDIC to consider granting deposit insurance.[21] For example, some national trust banks engage only in fiduciary and related activities and do not engage in the business of receiving deposits other than trust funds. As a result, they are not FDIC-insured.[22] If the OCC chartered another type of special purpose national bank that did not receive deposits other than trust funds, such as a fintech company, that new bank also would not be eligible for FDIC insurance.

Consumer Financial Protection Bureau: A special purpose national bank that engages in an activity that is regulated under a federal consumer financial law, as defined by Dodd-Frank, may also be subject to oversight by the Consumer Financial Protection Bureau (CFPB). A special purpose national bank that is an insured depository institution generally would be supervised by either the CFPB or the OCC for purposes of all federal consumer financial laws based on its

[17] See 12 USC 222. National banks located in territories and insular possessions of the United States are not required to be member banks. See 12 USC 466.

[18] See 12 USC 282; 12 CFR 209.2(b).

[19] For example, the Federal Reserve Act imposes quantitative and qualitative restrictions on a member bank's transactions with its affiliates. 12 USC 371c, 371c-1. These restrictions are implemented by the Federal Reserve Board. See 12 CFR Part 223.

[20] See 12 USC 1841.

[21] See 12 USC 1815(a). The FDIC's regulations provide that an institution is engaged in the business of receiving deposits other than trust funds if it maintains one or more non-trust deposit accounts in the minimum aggregate amount of $500,000. 12 CFR 303.14(a).

[22] There are several FDIC-insured trust banks. Currently, four national trust banks have FDIC insurance.

asset size.[23] Under Dodd-Frank, the CFPB would supervise an uninsured special purpose national bank engaged in certain activities for compliance with federal consumer financial law.[24]

Baseline supervisory expectations

All national banks are required to meet high supervisory standards. Consistent with the OCC's mission, these standards include safety and soundness requirements, as well as requirements to provide fair access to financial services, treat customers fairly, and comply with all applicable laws and regulations. The OCC tailors these standards based on the bank's size, complexity, and risks. As a national bank, a special purpose national bank also would be expected to meet these high standards, tailored to its size, complexity, and risks.

The OCC has identified the following baseline supervisory expectations for any entity seeking a national charter. These baseline expectations stress the importance of a detailed business plan, governance, capital, liquidity, compliance risk management, financial inclusion, and recovery and resolution planning. As with other applicants seeking a national bank charter, applicants for a special purpose charter are strongly encouraged, prior to filing an application, to meet with the OCC to discuss these baseline expectations in detail and how the expectations (and any others arising from the particular proposal) apply to their proposed bank. Those meetings enable the OCC to work with the applicant to develop and tailor supervisory standards to each applicant based on the applicant's circumstances including its size, business model, complexity and risk profile.

Robust, well-developed business plan

A well-developed business plan is a key component of any charter proposal.[25] The OCC expects a company seeking any type of national bank charter to clearly articulate why it is seeking a national bank charter and provide significant detail about the proposed bank's activities. The business plan is a written summary of how the proposed bank will organize its resources to meet its goals and objectives and how it will measure progress. As such, the business plan should be comprehensive, reflecting in-depth planning by the organizers, Board of Directors, and management.

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[23] 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. See 12 CFR 5515. 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. See 12 USC 5516, 5581(c)(1)(B).

[24] See 12 USC 5514. Section 5514(a) defines the "scope of coverage" for the CFPB's supervisory authority over nondepository covered persons, which does not include all activities governed by a federal consumer financial law. Instead, the "scope of coverage" set forth in subsection (a) includes specified activities (e.g., offering or providing: origination, brokerage, or servicing of consumer mortgage loans; payday loans; or private education loans) as well as a means for the CFPB to expand the coverage through specified actions (e.g., a rulemaking to designate "larger market participants"). 12 USC 5514(a).

[25] See the "Charters" booklet of the *Comptroller's Licensing Manual* for more information on business plan requirements.

The plan should clearly define the market the proposed bank plans to serve and the products and services it will provide.[26] In addition, it should realistically forecast market demand, economic conditions, competition, and the proposed bank's customer base. The plan also must demonstrate a realistic assessment of risk, describing management's assessment of all risks inherent in the proposed products and services, including risks relating to BSA/AML requirements, consumer protection, fair lending requirements, and the design of related risk management controls and management information systems. Additionally, the plan should describe the experience and expertise of proposed management, including the Board, to manage the proposed bank.

The business plan should cover a minimum of three years and provide a full description of proposed actions to accomplish the primary functions of the proposed bank. The description should provide enough detail to demonstrate that the proposed bank has a reasonable chance for success, will operate in a safe and sound manner, and will have adequate capital to support its risk profile. The OCC expects a proposed bank's business plan to outline the plans for initial and future capital contributions, as well as to provide specific information on how the proposed bank intends to maintain and monitor appropriate capital levels. The plan should also identify external sources available to bolster capital levels, if needed. Additionally, the business plan should include comprehensive alternative business strategies to address various best-case and worst-case scenarios (e.g., financial performance, revenue growth, market share). The business plan also should include the organizing group's knowledge of and plans for serving the community, if applicable.

Governance structure

The OCC expects the governance structure for any proposed special purpose national bank to be commensurate with the risk and complexity of its proposed products, services, and activities, as it is for other national banks. The OCC sets high standards for governance and for risk management systems that identify, monitor, manage, and control risk in national banks. The OCC expects national banks to have the expertise, financial acumen, and risk management framework to promote safety and soundness oversight. The Board of Directors must have a prominent role in the overall governance structure by participating on key committees and guiding the risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

Capital

The OCC's evaluation of a bank's capital is important, not only to assess the strength of an individual bank, but also to evaluate the safety and soundness of the entire federal banking system. Bank capital, among other things, helps to ensure public confidence in the stability of individual banks and the banking system; supports the volume, type, and character of the business conducted; and provides for the possibility of unexpected loss.

Minimum and ongoing capital levels need to be commensurate with the risk and complexity of the proposed activities (including on- and off-balance sheet activities). The OCC's evaluation of capital adequacy (initial and ongoing) consider the risks and complexities of the proposed

[26] For example, the business plan for a proposed bank that will engage in payments activities should address how the bank proposes to access various payment systems.

products, services, and operating characteristics, taking into account both quantitative and qualitative factors. Key qualitative elements that influence the determination of capital adequacy include the scope and nature of the bank's proposed activities, quality of management, funds management, ownership, operating procedures and controls, asset quality, earnings and their retention, risk diversification, and strategic planning. In addition to assessing the quality and source of capital, the OCC also considers on- and-off balance sheet composition, credit risk, concentration, and market risks.

Special purpose national bank charter applicants whose business activities may be off-balance sheet would be subject to the OCC's minimum regulatory capital requirements, but the minimum capital levels required may not adequately reflect the risks associated with off-balance sheet activities.[27] To account for this gap, applicants are expected to propose a minimum level of capital that the proposed bank would meet or exceed at all times. For example, national trust banks typically have few assets on the balance sheet, usually composed of cash on deposit with an insured depository institution, investment securities, premises and equipment, and intangible assets. Because these banks do not make loans or rely on deposit funding, the OCC typically requires them to hold a specific minimum amount of capital, which often exceeds the capital requirements for other types of banks. Similarly, the OCC would consider adapting capital requirements applicable to a fintech applicant for a special purpose national bank charter as necessary to adequately reflect its risks and to the extent consistent with applicable law.

Liquidity

The OCC's evaluation of liquidity focuses on a bank's capacity to readily and efficiently meet expected and unexpected cash flows and collateral needs at a reasonable cost, without adversely affecting either daily operations or the financial condition of the bank. As with capital, minimum and ongoing liquidity (both operating and contingent obligations) for a special purpose national bank need to be commensurate with the risk and complexity of the proposed activities. In assessing the liquidity position of a proposed bank, the OCC considers a proposed bank's access to funds as well as its cost of funding. Some key areas of consideration include projected funding sources, needs, and costs; net cash flow and liquid asset positions; projected borrowing capacity; highly liquid asset and collateral positions (including the eligibility and marketability of such assets under a variety of market environments); requirements for unfunded commitments; and the adequacy of contingency funding plans. All aspects of liquidity should address the impact to earnings and capital, and incorporate planned and unplanned balance sheet changes, as well as varying interest rate scenarios, time horizons, and market conditions.[28]

[27] The OCC's capital requirements are set forth at 12 CFR Part 3.

[28] See the "Liquidity" booklet of the *Comptroller's Handbook* for more information. https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/liquidity.pdf.

Compliance risk management

The OCC expects all national banks to manage compliance risks effectively. A strong compliance infrastructure contributes to a national bank's safe and sound operation, as well as the provision of fair access to financial services, fair treatment of customers, and compliance with applicable laws.

An applicant seeking a special purpose national bank charter, like any applicant for a national bank charter, is expected to demonstrate a culture of compliance that includes a top-down, enterprise-wide commitment to understanding and adhering to applicable laws and regulations and to operating consistently with OCC supervisory guidance. In addition, the applicant would need appropriate systems and programs to identify, assess, manage and monitor the compliance process (e.g., policies and procedures, practices, training, internal controls, and audit), and a commitment to maintain adequate compliance resources.

Appropriate compliance risk management includes a well-developed compliance management system that is commensurate with the risks to the proposed bank and includes:

- a compliance program designed to ensure and monitor compliance with the requirements imposed by the BSA, other AML statutes, and related regulations, as well as OFAC economic sanctions obligations; and
- a consumer compliance program designed to ensure fair treatment of customers and fair access to financial services, as well as compliance with Section 5 of the Federal Trade Commission Act, the unfair, deceptive, or abusive acts or practices prohibitions of Dodd-Frank, and all other applicable consumer financial protection laws and regulations.

The OCC expects any applicant seeking a special purpose national bank charter to provide a sufficient description of the proposed bank's activities for the OCC to fully understand the BSA/AML and compliance risks the proposed bank faces, how it intends to assess, manage, and monitor these risks, and how it would comply with relevant laws, regulations, and requirements.

As with any national bank, the compliance risk management system appropriate for a specific bank should consider the nature of the company's business, its size, and the diversity and complexity of the risks associated with its operations. While this general standard is consistent across all national banks, applying the standard to a fintech company's business model could raise novel considerations. The OCC would consider and address in its evaluation of a fintech charter application whether and how innovative elements of a business model may affect the proposed bank's compliance risk profile.

Financial inclusion

The OCC's statutory mission includes ensuring that national banks treat customers fairly and provide fair access to financial services.[29] This part of the OCC's mission is directly related to

[29] See 12 USC 1.

financial inclusion.[30] For insured depository institutions, this mission is advanced, in part, through the CRA framework, under which the OCC assesses an institution's record of helping meet the credit needs of its entire community, including low- and moderate-income neighborhoods, individuals, and underserved geographic areas. Special purpose national banks that are not insured depository institutions, however, are not subject to the CRA.[31]

Distinct from any direct CRA obligation, the OCC is guided by certain principles in determining whether to approve a charter application to establish a national bank. These principles include "encouraging" the national bank "to provide fair access to financial services by helping to meet the credit needs of its entire community" and "promoting fair treatment of customers including efficiency and better service."[32] The OCC expects an applicant seeking a special purpose national bank charter that engages in lending activities to demonstrate a commitment to financial inclusion that supports fair access to financial services and fair treatment of customers. The nature of the commitment would depend on the entity's business model and the types of loan products or services it intends to provide.

The OCC's chartering regulation generally requires an applicant for a national bank charter to submit a business plan that demonstrates how the proposed bank plans to respond to the needs of the community, consistent with the safe and sound operation of the bank.[33] Although this element of the business plan is not mandatory for all special purpose banks, the OCC expects a special purpose bank engaged in lending to explain its commitment to financial inclusion in its business plan. In developing the financial inclusion component of its business plan, a proposed special purpose bank engaged in lending should consider the following elements:

- an identification of, and method for defining, the relevant market, customer base, or community;
- a description of the nature of the products or services the company intends to offer (consistent with its business plan), the marketing and outreach plans, and the intended delivery mechanisms for these products or services;
- an explanation of how such products and services, marketing plans, and delivery mechanisms would promote financial inclusion (e.g., provide access to underserved consumers or small businesses); and

[30] The problem of financially unserved and underserved sectors of society is a global issue. The World Bank has described "financial inclusion" to mean that "individuals and businesses have access to useful and affordable financial products and services that meet their needs—transactions, payments, savings, credit and insurance—delivered in a responsible and sustainable way." See the World Bank Financial Inclusion Overview page at http://www.worldbank.org/en/topic/financialinclusion/overview. Separately, recent final guidance from the Basel Committee on Banking Supervision addresses financial inclusion, focusing on unserved and underserved customers. See Guidance on the application of the Core Principles for Effective Banking Supervision to the regulation and supervision of institutions relevant to financial inclusion (September 2016) at http://www.bis.org/bcbs/publ/d383.pdf.

[31] See 12 USC 2902 (defining "regulated financial institution" to mean an "insured depository institution"). See also 12 CFR 25.12 (defining "bank" as a national bank with federally insured deposits).

[32] See 12 CFR 5.20(f)(1)(ii) and (iv).

[33] See 12 CFR 5.20(h)(5).

- 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. For example, the OCC may ask an applicant that plans to extend credit to provide the terms on which it plans to lend, including a description of the protections it plans to provide to individuals and small business borrowers.

As with other elements of the applicant's business plan, the OCC may require a company to obtain approval, or no-objection, from the OCC if it departs materially from its financial inclusion plans.

Recovery and exit strategies; resolution plan and authority

As noted above, the OCC expects a proposed bank's business plan to include alternative business and recovery strategies to address various best-case and worst-case scenarios. Simply put, the OCC expects business plans to articulate specific financial or other risk triggers that would prompt the Board and management's determination to unwind the operation in an organized manner. These strategies must provide a comprehensive framework for evaluating the financial effects of severe stress that may affect an entity and options to remain viable under such stress. The business plan must address material changes in the institution's size, risk profile, activities, complexity, and external threats, and be integrated into the entity's overall risk governance framework. Plans must be specific to that entity, aligned with the entity's other plans, and coordinated with any applicable parent or affiliate planning. A plan should include triggers alerting the entity to the risk or presence of severe stress, a wide range of credible options an entity could take to restore its financial strength and viability, and escalation and notification procedures. While the objective of these business and recovery strategies is to remain a viable entity, the OCC may also require a company to have a clear exit strategy.

Chartering process

The OCC's standard process for reviewing and making decisions about charter applications would apply to applications from fintech companies for a special purpose national bank charter. Charter applications are reviewed and processed through the OCC's Licensing Department. The "Charters" booklet of the *Comptroller's Licensing Manual*[34] contains detailed information about that process, which consists of four stages:

- The prefiling stage, in which potential applicants engage with the OCC in formal and informal meetings to discuss their proposal, the chartering process, and application requirements. At this stage, applicants also prepare a complete application, including a business plan.
- The filing stage, in which the organizers submit the application. Organizers also must publish notice of the charter application as soon as possible before or after the date of the filing.
- The review and evaluation stage, in which the OCC conducts background and field investigations, and reviews and analyzes the application to determine whether the proposed bank: has a reasonable chance of success; will be operated in a safe and sound manner; will

[34] See the "Charters" booklet of the *Comptroller's Licensing Manual*.

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 decision stage, which includes three phases:
    - The preliminary conditional approval phase, when the OCC decides whether to grant preliminary conditional approval;
    - The organization phase, when the bank raises capital, prepares for opening, and the OCC conducts a preopening examination; and
    - The final approval phase, when the OCC decides whether the bank has met the requirements and conditions for opening.

The OCC imposes a number of standard requirements on a bank when it grants preliminary conditional approval, such as the establishment of appropriate policies and procedures and the adoption of an internal audit system appropriate to the size, nature, and scope of the bank's activities. The OCC may impose additional conditions for a variety of reasons, including for example to ensure the newly chartered bank does not change its business model from that proposed in the application without prior OCC approval; to mandate higher capital and liquidity requirements; or to require the bank to have a resolution plan to sell itself or wind down if necessary. In addition, in the case of an uninsured bank, the OCC may impose requirements by way of conditions similar to those that apply by statute to an insured bank, to the extent appropriate given the business model and risk profile of a particular applicant. The OCC likely would impose additional conditions in connection with granting a special purpose national bank charter requested by a fintech company based on the fintech company's business model and risk profile.[35]

The OCC recognizes it also may need to tailor some requirements that apply to a full-service national bank to address the business model of a special purpose national bank. The OCC has experience in adapting legal requirements to different types of business models. For example, as noted above, the OCC has modified capital requirements for certain trust banks.[36] Similarly, the OCC would consider adapting requirements applicable to a fintech applicant for a special purpose national bank charter to the extent consistent with applicable law.

The OCC recommends that potential applicants carefully review the OCC chartering regulation and the "Charters" booklet of the *Comptroller's Licensing Manual* for a full description of the charter application process and requirements. The OCC also strongly urges groups or individuals interested in a special purpose national bank charter to engage with the OCC well in advance of filing an application to ensure they understand the requirements. In addition, interested parties

[35] An applicant may be required, as a condition of approval, to enter into an "operating agreement" with the OCC containing the substantive charter conditions. The special purpose charters section of the "Charters" booklet of the *Comptroller's Licensing Manual* has additional information on operating agreements and other documents used for some special purpose national trust banks.

[36] The OCC is funded through assessments and fees charged to the institutions it supervises. See 12 USC 16. Consistent with this authorization, the OCC has modified the assessments it charges an independent trust bank or a credit card bank to account for the scope and activities of the entity and the amount and type of assets that the entity holds. The OCC would determine assessments for a fintech special purpose national bank to account for similar factors.

are advised to consult the *Comptroller's Handbook* for additional information on how the OCC supervises and examines national banks.[37] The Office of Innovation also can be an important resource to fintech companies interested in exploring the possibility of a special purpose national bank charter. Contact information for the Licensing Department and the Office of Innovation may be found on the OCC's website.

Request for comment

As the OCC considers the granting of special purpose national bank charters to fintech companies, it seeks feedback on all aspects of this paper. The OCC also solicits responses to the following questions. Respondents should provide written comments by January 15, 2017 (45 days from this paper's publication). Submissions should be sent to specialpurposecharter@occ.treas.gov.

1. What are the public policy benefits of approving fintech companies to operate under a national bank charter? What are the risks?

2. What elements should the OCC consider in establishing the capital and liquidity requirements for an uninsured special purpose national bank that limits the type of assets it holds?

3. What information should a special purpose national bank provide to the OCC to demonstrate its commitment to financial inclusion to individuals, businesses and communities? For instance, what new or alternative means (e.g., products, services) might a special purpose national bank establish in furtherance of its support for financial inclusion? How could an uninsured special purpose bank that uses innovative methods to develop or deliver financial products or services in a virtual or physical community demonstrate its commitment to financial inclusion?

4. Should the OCC seek a financial inclusion commitment from an uninsured special purpose national bank that would not engage in lending, and if so, how could such a bank demonstrate a commitment to financial inclusion?

5. How could a special purpose national bank that is not engaged in providing banking services to the public support financial inclusion?

6. Should the OCC use its chartering authority as an opportunity to address the gaps in protections afforded individuals versus small business borrowers, and if so, how?

7. What are potential challenges in executing or adapting a fintech business model to meet regulatory expectations, and what specific conditions governing the activities of special purpose national banks should the OCC consider?

[37] *The Comptroller's Handbook* is a collection of booklets that contain the concepts and procedures established by the OCC for the examination of banks. It is available at www.occ.gov.

8. What actions should the OCC take to ensure special purpose national banks operate in a safe and sound manner and in the public interest?

9. Would a fintech special purpose national bank have any competitive advantages over full-service banks the OCC should address? Are there risks to full-service banks from fintech companies that do not have bank charters?

10. Are there particular products or services offered by fintech companies, such as digital currencies, that may require different approaches to supervision to mitigate risk for both the institution and the broader financial system?

11. How can the OCC enhance its coordination and communication with other regulators that have jurisdiction over a proposed special purpose national bank, its parent company, or its activities?

12. Certain risks may be increased in a special purpose national bank because of its concentration in a limited number of business activities. How can the OCC ensure that a special purpose national bank sufficiently mitigates these risks?

13. What additional information, materials, and technical assistance from the OCC would a prospective fintech applicant find useful in the application process?

EXHIBIT F

Office of the Comptroller of the Currency

OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies

Office of the Comptroller of the Currency
Washington, D.C.

March 2017

Introduction

The Office of the Comptroller of the Currency (OCC) has considered whether it is in the public interest to entertain applications for a special purpose national bank (SPNB) charter from financial technology (fintech) companies that engage in banking activities and meet the standards applicable to national banks. The OCC has carefully considered the issues outlined in and the comments received on the OCC's paper *Exploring Special Purpose National Bank Charters for Fintech Companies* (SPNB Paper). This summary of comments and explanatory statement addresses key issues raised by commenters and explains the OCC's decision to issue for public comment a draft supplement to the *Comptroller's Licensing Manual* (Supplement) providing guidance to any fintech company that may wish to file a charter application.

The OCC will accept comments on the Supplement through close of business April 14, 2017. Comments should be submitted to specialpurposecharter@occ.treas.gov.

OCC Support for Responsible Innovation

The OCC has long supported innovation in the national banking system. Federally chartered institutions have continually sought new approaches to meet the needs of customers and an evolving marketplace. It has been and remains the OCC's role to encourage and support institutions' efforts to engage in responsible innovation to meet the needs of consumers, businesses, and communities. The OCC's decision to issue the draft Supplement is consistent with that support. It is also one component of an initiative that began in 2015, when Comptroller of the Currency Thomas J. Curry announced[1] the agency's efforts to better understand innovation occurring in the financial services industry and to develop a framework to support responsible innovation in the federal banking system. To gain a broad perspective, the OCC conducted extensive research and held numerous discussions with fintech companies, banks, community and consumer groups, academics, and other regulators. This work led to the publication of a paper, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective,*[2] outlining principles to guide the OCC's development of a responsible innovation framework. A wide range of stakeholders provided comments on that paper, including some who suggested the OCC consider issuing federal charters to fintech companies. Charter discussions continued at the OCC's June 2016 Forum on Responsible Innovation. Since then, there has been significant and growing interest in federal bank charters for fintech companies.

Work also has continued on the development of the OCC's framework to support responsible innovation. In October 2016, the OCC established a stand-alone Office of Innovation (Office) to serve as a clearinghouse for innovation-related matters and a central point of contact for OCC staff, banks, and nonbanks. The Office conducts outreach to a variety of financial services stakeholders and provides technical assistance and other resources for banks and nonbanks on

[1] Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Federal Home Loan Bank of Chicago, August 7, 2015.

[2] OCC, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, March 2016.

the OCC's expectations and guiding principles regarding responsible innovation. The Office also promotes awareness of industry developments among OCC staff and other regulators.

SPNB Paper and SPNB Licensing Manual Draft Supplement

In December 2016, Comptroller Curry announced that the OCC would move forward with considering applications from fintech companies to become SPNBs. The OCC published and requested public comment on the SPNB Paper describing the issues associated with offering national bank charters to fintech companies.[3] The paper described the OCC's legal authority to grant a national bank charter to companies with limited purposes and articulated what the OCC considers the requirements for obtaining a charter. In particular, the paper made clear that if the OCC grants a national charter to a particular fintech company, the agency will hold that institution to the same high standards of safety and soundness, fair access, and fair treatment of customers that all federally chartered institutions must meet.

The Comptroller also asked staff to develop the draft Supplement to provide guidance for evaluating fintech charter applications and to ensure that the agency considers safety and soundness, risk management, financial inclusion, and compliance with applicable consumer protection and other laws and regulations were it to entertain applications from fintech companies. The draft Supplement, informed by the comments received on the SPNB Paper, explains how the OCC would evaluate applications from fintech companies and the conditions for approving such charters. The OCC welcomes additional comments on the draft Supplement.

While the term "special purpose national bank" is used elsewhere in the OCC's rules and policies to refer to a number of types of special purpose national banks, for purposes of the draft Supplement and this statement, "SPNB" means a national bank that engages in a limited range of banking activities, including one of the core banking functions, but does not take deposits and is not insured by the Federal Deposit Insurance Corporation (FDIC). The draft Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter an SPNB and does not apply to other types of special purpose banks described in the current *Comptroller's Licensing Manual*.[4]

OCC Responses to Comments on SPNB Paper

The OCC received more than 100 comment letters on the SPNB Paper. After considering those comments, the OCC states that in evaluating applications from fintech companies for an SPNB charter, the agency would be guided by certain threshold principles that inform the draft Supplement:

- The OCC will not allow the inappropriate commingling of banking and commerce.

[3] OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (PDF), December 2, 2016.

[4] For example, the draft Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

- The OCC will not allow products with predatory features nor will it allow unfair or deceptive acts or practices.

- There will be no "light-touch" supervision of companies that have an SPNB charter. Any fintech companies granted such charters will be held to the same high standards that all federally chartered banks must meet.

Aligned with those principles, the OCC believes that making SPNB charters available to qualified fintech companies would be in the public interest. An SPNB charter provides a framework of uniform standards and robust supervision for companies that qualify. Applying this framework to fintech companies would help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities. In addition, the OCC believes supervision by a federal regulator would promote consistency in the application of federal laws and regulations across the country.

Further, making charters available to qualifying fintech companies supports a robust dual banking system by providing these companies the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections. This is the same choice Congress has made available to companies that deliver banking products and services in traditional ways.

Moreover, providing a path for fintech companies to become national banks can make the financial system stronger by promoting growth, modernization, and competition. The OCC believes that denying fintech companies this option could make the federal banking system less capable of adapting to evolving business and consumer needs. Additionally, the OCC's supervision of fintech companies chartered as SPNBs would deepen the agency's expertise in the emerging technologies that will be crucial to delivering banking products and services in the future.

Finally, the OCC believes innovation has the potential to broaden access to financial services. Many fintech companies state that they offer products and services that reach consumers who have had limited access to banks in the past. Chartering fintech companies increases the potential to reach consumers and thereby promote financial inclusion.

General Comments

Many commenters supported the OCC's decision to consider charter applications from fintech companies and noted many of the same public benefits cited by the OCC. For example, many agreed that a national charter would provide fintech companies with uniform, clear, and consistent supervision and regulation. Numerous commenters also viewed the national bank charter as a means to empower consumers and provide greater access to credit in underserved communities. Others said the availability of a national charter would spur innovation and encourage competition. One commenter pointed out that a federal charter would give the OCC a better-informed, direct view of innovations that are reshaping the financial system. Several commenters also noted that having a national bank charter would eliminate the need for state-by-state licenses, thereby reducing regulatory burdens and costs and facilitating growth.

Other commenters warned of possible risks of permitting fintech companies to operate as national banks. Some expressed concern about the potential for consumer harm, noting that a fintech company chartered as an SPNB could avoid consumer protections granted by state laws or federal laws that only apply to deposit-taking banks. Other commenters warned that the OCC has not limited SPNB charters to fintech companies, and thus the charters could be used by payday lenders.

In addition, several commenters expressed concern that the OCC's supervision of fintech companies chartered as national banks would be less stringent than the supervision fintech companies receive from state regulators today. Others were concerned SPNBs might receive less rigorous supervision than full-service national banks.

In contrast, some commenters were concerned that a rigid regulatory framework could stifle innovation and urged the OCC to provide flexible regulation tailored to the fintech company's business model and risks. Moreover, some argued that imposing standards that only the largest fintech companies could meet could lead to industry consolidation and ultimately less innovation.

Certain commenters opposed to the charter challenged the OCC's chartering authority and suggested that a national bank charter for fintech companies could undermine the separation of banking and commerce.

Charter proponents and critics alike urged the OCC to establish clear supervisory standards in advance and to make the charter approval process transparent. Many commenters supported requiring fintech banks to demonstrate a commitment to financial inclusion.

The following sections of this statement address these and other key issues raised by commenters.

Consumer Protection

Several commenters expressed concern that granting a national bank charter to a fintech company would allow such a company to avoid state laws designed to protect consumers. Other commenters argued that federal preemption of state law could encourage charter shopping. In particular, some commenters expressed concern that SPNBs would not be subject to state laws prohibiting unfair or deceptive acts or practices. Further, some commenters stated that granting a national bank charter to fintech companies would weaken states' ability to enforce consumer protection laws by removing their visitorial oversight, thereby making it more difficult to investigate and prosecute potential violations of law.

The OCC disagrees. Consumer protection laws and enforcement activities vary from state to state. A fintech company that is approved for a national bank charter would be subject to consistent federal consumer protection standards and federal supervision and regulation.

With the passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank Act), Congress expanded federal protections for consumers through the Consumer Financial Protection Act and the establishment of the Consumer Financial Protection Bureau (CFPB).[5] Other federal laws also contain extensive protections for consumers. The Federal Trade Commission Act (FTC Act) provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful.[6] The OCC enforces the FTC Act with respect to both insured and uninsured national banks[7] and has taken a number of public enforcement actions against national banks for unfair or deceptive acts or practices.[8] Many state laws prohibiting unfair or deceptive acts or practices borrow FTC Act language and explicitly reference FTC standards and related judicial precedents. Consequently, OCC enforcement actions under the FTC Act often address the same conduct as is covered under the state "mini-FTC Acts."[9]

Congress has also carefully considered the OCC's use of federal preemption, and the Dodd-Frank Act clarified the standards and scope of the OCC's application of federal preemption for national banks and federal savings associations. The OCC acts in accordance with those provisions, which would also apply to the OCC's regulation of SPNBs. Thus, state law applies to an SPNB in the same way and to the same extent as it applies to other national banks. For example, state laws that address anti-discrimination, fair lending, debt collection, taxation, zoning, crime, and torts, generally apply to national banks and would also apply to SPNBs. In contrast to commenters' assertions, state laws that prohibit unfair or deceptive acts or practices, for example, business conduct laws that address consumer protection concerns such as material

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[5] For example, in addition to prohibiting unfair or deceptive acts or practices, the Dodd–Frank Act prohibits "abusive" acts or practices as well. Dodd–Frank, section 1031, codified at 12 USC 5531. The Dodd-Frank Act also generally preserves any state law that affords consumers greater protection than Title X of the Act, including with respect to unfair, deceptive, or abusive acts or practices. The Dodd–Frank Act, section 1041(a)(2), codified at 12 USC 5551(a)(2). Title X, section 1011(a), codified at 12 USC 5491(a), created the CFPB.

[6] See 15 USC 45(a)(1) and 15 USC 45(n). See also "FTC Policy Statement on Unfairness," Federal Trade Commission (December 17, 1980); "FTC Policy Statement on Deception," Federal Trade Commission (October 14, 1983).

[7] See 12 USC 1818(b). OCC regulations regarding non-real estate and real estate lending, as well as the OCC's enforceable "Guidelines for Residential Mortgage Lending Practices," expressly reference the FTC Act standards. See 12 CFR 7.4008(c); 12 CFR 34.3(c); 12 CFR 30, appendix C. Further, OCC guidance also directly addresses unfair or deceptive acts or practices with respect to national banks. See OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002); OCC Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (February 21, 2003) (OCC Advisory Letter 2003-2); OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (February 21, 2003) (OCC Advisory Letter 2003-3); OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013) (OCC Bulletin 2013-40); OCC Bulletin 2014-37, "Risk Management Guidance: Consumer Debt Sales" (August 4, 2014) (OCC Bulletin 2014-37); and "Interagency Guidance Regarding Unfair or Deceptive Credit Practices" (August 22, 2014).

[8] For example, OCC actions have addressed national banks' failure to: provide sufficient information to allow consumers to understand the terms of the product or service being offered; adequately disclose when significant fees or similar material prerequisites are imposed in order to obtain the particular product or service being offered; and adequately disclose material limitations affecting the product or service being offered.

[9] Moreover, as explained in this statement, generally state laws prohibiting unfair or deceptive acts or practices are not preempted by either the FTC Act or the National Bank Act.

misrepresentations and omissions about products and services in billing, disclosure, and marketing materials, generally would apply to national banks, including SPNBs. The OCC understands that this would be the result even when the language of the state statute does not specifically refer to banks. Moreover, to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank and provides consumers with the right to bring a lawsuit against the bank, that remedy would be available against an SPNB. In addition, to the extent that a state law prohibiting unfair or deceptive acts or practices applies to a national bank and authorizes the state attorney general to enforce the law through judicial action, the state attorney general could bring an action in court against an SPNB for violation of the law.[10]

In addition to concerns regarding consumer protection laws, certain commenters expressed concerns that state laws establishing interest rate caps would be preempted for federally chartered banks. In particular, commenters warned that preemption and the availability of a fintech national bank charter could open the door for predatory lenders.

The OCC shares commenters' concerns about predatory lending and has taken significant steps to eliminate predatory, unfair, or deceptive practices in the federal banking system. For example, the OCC requires national banks engaged in lending to take into account the borrower's ability to repay the loan according to its terms.[11] Additionally, the OCC has cautioned national banks about lending activities that may be considered predatory, unfair, or deceptive, and notes that many of these lending practices already are unlawful under existing federal laws and regulations, including the FTC Act, and otherwise present significant safety and soundness and other risks. The highlighted practices include those that target prospective borrowers who cannot afford credit on the terms being offered, provide inadequate disclosures of the true costs and risks of transactions, involve loans with high fees and frequent renewals, or constitute loan "flipping" (frequent refinancings that result in little or no economic benefit to the borrower that are undertaken with the primary or sole objective of generating additional fees).[12] The OCC's policies establish that such practices conflict with the high standards expected of national banks and also present significant safety and soundness, reputation, and other risks.

The OCC does not approve charter applications from any company that plans to offer financial products and services with predatory, unfair, or deceptive features and so would not approve any such application from a fintech company. Further, the OCC takes appropriate supervisory action

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[10] See *Cuomo v. Clearing House Assn., LLC,* 557 U.S. 519 (2009).

[11] See, e.g., 12 CFR 7.4008(b) (secured consumer lending); 12 CFR 34.3(b) (secured consumer real estate lending). In addition, insured depository institutions must consider, as part of prudent credit underwriting practices, "the borrower's overall financial condition and resources . . . and the borrower's character and willingness to repay as agreed." See 12 CFR 30, appendix A, "Safety and Soundness Standards." As described in the draft Supplement, the OCC could impose special conditions on SPNBs that are similar to certain laws that apply by statute to only insured banks, to the extent appropriate given the business model and risk profile of the applicant.

[12] See OCC Advisory Letter 2000-7, "Abusive Lending Practices" (July 25, 2000); OCC Advisory Letter 2000-10, "Payday Lending" (November 27, 2000); OCC Advisory Letter 2003-2; OCC Advisory Letter 2003-3; OCC Bulletin 2013-40; OCC Bulletin 2014-37.

to ensure compliance with applicable laws, address unsafe or unsound banking practices, and prevent practices that harm consumers.[13]

Finally, it is important to remember that although a national bank can export the usury laws of the state in which it is located,[14] Congress provided this same benefit to state-chartered banks in 1980, by giving insured state banks the same ability as national banks to extend credit under their home state usury rules.

Small Business Protections

In addition to consumer protections, many commenters urged the OCC to address gaps in protection for small business customers. Some commenters suggested that the OCC look to the Small Business Borrowers' Bill of Rights, an agreement by certain online lenders to provide certain disclosures to small business borrowers. Others suggested that the OCC impose consumer protections whenever an individual may be held personally liable for the loan.

Some commenters argued against the OCC's imposition of small business borrower protections, however, noting that Congress has not extended consumer borrower protections to small businesses. They noted that Congress has repeatedly recognized important distinctions between individuals and small businesses, such as their level of sophistication. Some commenters warned that imposing any such requirements could impede the flow of capital to more sophisticated borrowers.

Other commenters argued that small business lending is regulated sufficiently by such laws as the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the FTC Act, and, thus, additional protections are not required. Some commenters urged the OCC to rely on industry developed standards and not impose standards of its own.

The OCC would take appropriate supervisory action to ensure compliance with all applicable laws,[15] including laws that address unfair or deceptive practices[16] that affect small business borrowers.[17] In addition, the OCC would expect an SPNB involved in lending to provide sufficient disclosures and clear information to ensure that all borrowers, including consumers and small businesses, can make informed credit decisions. The OCC recognizes the efforts by some companies in the online lending community to address this important issue. The OCC

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[13] Federal consumer financial laws are supervised and enforced by either the OCC or CFPB as set forth in Title X of the Dodd–Frank Act.

[14] See 12 USC 85.

[15] Applicable laws include for example the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and section 5 of the FTC Act.

[16] The FTC Act, by its terms, does not limit the prohibition against unfair or deceptive acts or practices to individual consumers. 15 USC 45(a) (". . . unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful").

[17] As previously noted, federal consumer financial laws are enforced by either the OCC or CFPB, as set forth in Title X of the Dodd–Frank Act.

would look favorably on an applicant's commitment to educate small business borrowers about their rights and responsibilities.

Financial Inclusion

The OCC's statutory mission includes ensuring that national banks provide fair access to financial services and treat customers fairly.[18] To fulfill that mission, the OCC is guided by certain principles in determining whether to approve a charter application to establish a national bank. These principles include encouraging a national bank "to provide fair access to financial services by helping to meet the credit needs of its entire community" and "promoting fair treatment of customers, including efficiency and better service."[19]

The OCC requires an applicant for a traditional national bank charter to submit a business plan that demonstrates how the proposed bank plans to respond to the needs of the community, consistent with the safe and sound operation of the bank.[20] As outlined in appendix B to the draft Supplement, the OCC also would expect an applicant for an SPNB charter that intends to engage in lending or provide financial services to consumers or small businesses to include a financial inclusion plan as a component of its business plan. The nature of the commitment would depend on the entity's business model and the types of products or services it intends to provide.

The OCC received many comments on whether it should seek a financial inclusion commitment from SPNBs and how these institutions could promote financial inclusion. Many commenters argued that SPNBs can provide valuable services to underserved communities and should make a commitment to financial inclusion. They urged the OCC to require financial inclusion plans that include measurable goals and are formulated with input from the community. Without requiring a financial inclusion commitment, one commenter warned, many individuals and communities could remain underserved.

Other commenters were opposed to requiring such a commitment. Some commenters suggested that fintech companies naturally promote financial inclusion, and therefore no formal commitment is necessary.

Many commenters urged the OCC to be flexible in evaluating how different SPNBs promote financial inclusion. Some commenters proposed specific activities SPNBs could engage in to demonstrate their commitment. For example, a number of commenters suggested that SPNBs could establish financial literacy programs or provide funding for credit building and credit counseling services in low- and moderate-income communities. Other commenters viewed partnerships and investments as promising means for SPNBs to promote financial inclusion. Some commenters specifically identified Community Development Financial Institutions as potential partners or investments for SPNBs.

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[18] See 12 USC 1(a).

[19] See 12 CFR 5.20(f)(1)(ii) and (iv).

[20] See 12 CFR 5.20(h)(5).

The OCC agrees that many fintech companies have significant potential to expand access to financial services. To help ensure that this potential is realized, the OCC would expect a formal commitment to, and plan for, financial inclusion from SPNBs engaged in lending activities or providing financial services to consumers or small businesses.

The OCC also agrees that there are many different activities SPNBs could engage in to promote financial inclusion. The OCC encourages the development of innovative products or services designed to address the needs of low- and moderate-income individuals and communities. SPNBs could also demonstrate their commitment to financial inclusion in more traditional ways. For example, the OCC has supported national banks' participation in programs, such as financial literacy and credit counseling services, that improve individuals' understanding of the financial products and services that meet their needs. Investments in certain funds or organizations may also be part of an effective financial inclusion plan. The OCC looks forward to working with potential SPNB applicants on both new and conventional ways to promote financial inclusion.

Regulatory and Supervisory Standards

The OCC has been clear that it would hold companies granted SPNB charters to the same high standards of safety, soundness, and fairness that all other federally chartered banks must meet. As it does for all banks, the OCC would tailor these requirements based on the bank's size, complexity, and risk, consistent with applicable law. While most commenters agreed with that standard, some commenters urged the OCC to be flexible in its regulation and supervision of fintech companies that become national banks. For example, certain commenters questioned whether start-up fintech companies would be able to meet the OCC's standards, even when tailored to the companies' size, risk, and complexity. These commenters asked whether the OCC would consider adapting its standards for fintech start-ups, with some suggesting that the OCC consider separate, more lenient standards for start-ups.

The OCC is sensitive to commenters' concerns regarding the need for appropriate standards. As the prudential regulator for approximately 1,400 national banks and federal savings associations, including nearly 1,200 community banks and savings associations, the OCC is experienced in evaluating whether a proposed bank would be able to meet the criteria to become an SPNB. Size alone is not a disqualifying factor. As explained in the draft Supplement, there are, however, certain minimum statutory and regulatory standards an institution must meet to qualify for a national bank charter. For example, an applicant must demonstrate that the bank has a reasonable chance of success, will operate in a safe and sound manner, and will foster healthy competition. In evaluating whether an institution meets those standards, the OCC considers, among other factors, whether the organizers and proposed management have the appropriate skills and experience to operate as a national bank. Further, banks must maintain sufficient liquidity and adequate capital. Additional criteria are outlined in the draft Supplement and the "Charters" booklet of the *Comptroller's Licensing Manual.*

Other commenters emphasized the need for flexibility to give SPNBs the ability to innovate rapidly. For example, some commenters expressed concern that the OCC may require SPNBs to obtain the OCC's approval before making significant deviations from their business plans and that such a requirement could make them less nimble. Specifically, these commenters referred to

the condition imposed on all de novo banks to provide notice and obtain a supervisory non-objection letter from the OCC before making significant deviations from their approved business plans.

The OCC recognizes that certain deviations may be necessary and desirable to meet changes in market conditions or to introduce technological innovations that improve the customer experience. As explained in appendix F of the "Charters" booklet, however, new banks are particularly vulnerable to significant internal and external risks until they achieve a certain level of stability and profitability. The significant deviation condition provides the OCC with the opportunity to evaluate whether a proposed change could significantly increase a bank's risk profile and whether the bank can properly manage any increased risk.

It is also important to understand that the condition does not apply to all changes, just those changes that constitute significant deviations from a bank's business plan.[21] For example, a bank may decide to significantly reduce its emphasis on its targeted niche (e.g., consumer or small business lending) in favor of expanding into another area (e.g., payments processing). In that case, the bank would need to obtain the OCC's supervisory non-objection before undertaking changes to its business plan or operations. The significant deviation condition, however, would not preclude limited testing or piloting of new products or services, provided the bank has put in place appropriate internal controls and protections for targeted customers.

Capital and Liquidity Requirements

Commenters also addressed potential capital and liquidity requirements for SPNBs. Some commenters felt strongly that capital and liquidity requirements should be as consistent with current national bank chartering requirements as possible. They argued that without consistent requirements, fintech companies chartered as special purpose national banks would have a competitive advantage. Others held that capital and liquidity requirements should be commensurate with the scope of activities contemplated in the company's charter application. Some commenters recommended that a fintech company chartered as a special purpose national bank only be required to have the capital and liquidity necessary to wind down its business plan without harming customers in the event of failure. Along these lines, some suggested that companies with simpler business models or a narrower range of services, such as an online lending platform, should have lower capital requirements than full-service national banks.

Capital

Like all national banks, SPNBs would be subject to the leverage and risk-based capital requirements in 12 CFR 3. As commenters pointed out, however, for any entities that have few on-balance-sheet exposures, it will be necessary to tailor an SPNB's capital requirements to capture the different risks associated with limited balance sheets or nontraditional strategies. The

[21] See appendix F, "Significant Deviations After Opening," of the *Comptroller's Licensing Manual,* "Charters," pp. 105-06. The "Charters" booklet defines "significant deviation" as a "material variance from the bank's business plan or operations, or introduction of any new product, service, or activity or change in market that was not part of the approved business plan." Significant deviations may include, but are not limited to, significant deviations in the bank's projected growth, business strategy, lines of business, or funding sources.

OCC acknowledges that the minimum capital requirements set forth in 12 CFR 3, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, may not be sufficient for measuring capital adequacy for some SPNBs. In those cases, the OCC will use alternative approaches to determine the appropriate capital requirement. As noted in the draft Supplement, the OCC has considerable experience imposing individual capital and liquidity requirements when appropriate.

Beyond those minimum requirements, capital levels must be commensurate with the risk and complexity of the bank's proposed activities (including on- and off-balance-sheet activities). The OCC's evaluation of capital adequacy considers the risks and complexities of the proposed products, services, and operating characteristics, taking into account factors such as the scope and nature of the bank's proposed activities, quality of management, and stability or volatility of sources of funds. The OCC also considers on- and off-balance-sheet composition, credit risk, concentrations, and market risk.

Liquidity

As with capital, the OCC would consider any applicant's specific business model when evaluating its liquidity profile and liquidity risk management. For other types of special purpose national banks, the OCC has imposed tailored requirements to ensure adequate liquidity. Such requirements could include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

Some commenters urged the OCC to require SPNBs to assess their liquidity needs over various periods and scenarios, including normal and stressed conditions. They highlighted that many fintech companies emerged during a period of strong credit conditions and have not yet been tested throughout a full credit cycle. One commenter suggested that fintech companies chartered as national banks engaged in lending be required to have adequate funds to meet a specified level of future loan originations, to ensure lending continues during a liquidity crisis.

The OCC is aware that many companies and business models have not yet operated in stressed conditions. As a result, the OCC expects any charter applicant to consider and address, among other items, projected borrowing capacity under normal and adverse market conditions. For instance, a fintech bank could establish a minimum number of months of current projected operating expenses to maintain adequate liquidity. In addition, the OCC believes SPNBs should establish comprehensive contingency funding plans, just as other national banks do.

Charter Application Process

While many commenters wanted flexible and tailored regulation, they also advocated for a clear understanding of the standards that would apply during the chartering process. In particular, they urged the OCC to make the application process transparent by establishing at the outset the conditions a fintech company would be required to meet. Other commenters advised the OCC to adopt a clear definition of "fintech" and identify the types of companies the OCC views as eligible for an SPNB charter.

Commenters also expressed concern that having the OCC make chartering decisions on a case-by-case basis could lead to inconsistent treatment. Certain commenters were concerned that exercising such broad discretion could put the OCC in the position of picking winners and losers. To ensure consistent treatment, a number of commenters urged the OCC to outline the criteria for charter approval clearly, limit the use of charter conditions and operating agreements, and make chartering decisions, including applicable conditions, publicly available.

The OCC strives to make the charter application process clear, understandable, and transparent. The OCC provides detailed information about this process in its charter regulation at 12 CFR 5.20 and in the "Charters" booklet. These materials list the OCC's criteria and requirements for charter approvals of national banks, including special purpose national banks. As discussed above, the OCC is also issuing for public comment a draft Supplement to the *Comptroller's Licensing Manual* for any fintech companies seeking an SPNB charter. In addition, applicants would have an opportunity to ask questions about the process, including the conditions for approval, through multiple prefiling meetings with OCC Licensing and supervisory staff. The OCC's Office of Innovation also is available to facilitate the application process.

The decision to impose special conditions for approval of a charter application is made on the basis of many factors, including the applicant's business plan, proposed management, and relevant experience. Conditions may be imposed directly in the preliminary approval letter, or the OCC may require as a condition of approval that the applicant enter into an operating agreement. The operating agreement may impose safeguards to address certain aspects of a bank's operations, including growth, capital, or liquidity. The OCC publishes all conditional approvals, which disclose the existence of an operating agreement.

As the prudential regulator for national banks and federal savings associations, the OCC must exercise its judgment in deciding whether to approve a national bank charter to a particular company. As explained in the "Charters" booklet and the draft Supplement, the OCC's decision to approve a charter is guided by its mission to promote a vibrant and diverse banking system that benefits consumers, communities, businesses, and the U.S. economy. In general, the OCC would approve applications to charter an SPNB from any companies that have a reasonable chance of success, will provide fair access to financial services, will ensure compliance with applicable laws and regulations, and will promote fair treatment of customers and foster healthy competition.[22]

Coordination Among Regulators

Many commenters urged the OCC to coordinate with other federal and state regulators to provide consistency and clarity regarding the regulation of fintech companies. Some commenters suggested this coordination could be achieved by the creation of an interagency working group or a special subcommittee of the Federal Financial Institutions Examination Council (FFIEC).

The OCC agrees with commenters that coordination among federal and state regulators is essential to fostering responsible financial innovation. The OCC will continue to engage with

[22] The charter regulation, 12 CFR 5.20(e), *Comptroller's Licensing Manual*, "Charters," and the draft Supplement outline the factors the OCC considers in reviewing a charter application.

other regulators in a collaborative way regarding financial technology to promote a common understanding and consistent application of laws, regulations, and guidance. The OCC regularly coordinates with other state and federal banking regulators through its participation in the FFIEC. For example, the OCC participated in the FFIEC's cybersecurity initiative to raise financial institutions' awareness of cybersecurity concerns and strengthen the oversight of cybersecurity readiness.[23] The OCC also currently chairs the FFIEC Task Force on Consumer Compliance. In addition, the OCC collaborates with the CFPB on consumer-related matters, and the OCC is an active member of many of the U.S. Department of the Treasury's working groups and committees, including one for marketplace lending. The OCC also co-chairs the Basel Committee's Task Force on Financial Technology (TFFT).[24] The OCC will continue to leverage these channels of communication to collaborate and share information regarding the chartering and supervision of SPNBs.

Depending on the structure of a fintech bank and the activities it conducts, other regulators may have oversight roles as well. As a result, any fintech company considering an SPNB charter likely will need to engage with other regulators in addition to the OCC. In considering applications, the OCC would coordinate as appropriate with other federal regulators with jurisdiction over the SPNB, including to facilitate simultaneous consideration of any applications or approvals that may be required by those regulators.

Ongoing Supervision

Commenters questioned how the OCC would supervise fintech companies that become national banks. Several commenters asserted that SPNBs should be subject to the same oversight and regular examination as traditional banks. Specifically, commenters noted the importance of having regular, rigorous examinations to ensure compliance with requirements regarding safety and soundness, Bank Secrecy Act/anti-money laundering (BSA/AML) provisions, financial inclusion, fair lending, and other applicable laws. Other commenters asserted that the OCC did not have the resources or expertise necessary to properly supervise fintech companies that would become SPNBs.

As discussed in appendix A of the draft Supplement, an SPNB would be subject to the same oversight and supervision as other national banks. The OCC's supervisory process for all national banks and federal savings associations establishes minimum supervisory standards, reflects the unique characteristics of each institution, and is responsive to changes within individual institutions and the markets where they compete. Consistent with the OCC's supervision of other national banks, the OCC's supervisory strategy for SPNBs would be tailored to each bank's business model and include on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team.

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[23] FFIEC Cybersecurity Awareness Initiative, available at https://www.ffiec.gov/cybersecurity.htm.

[24] The TFFT fosters financial stability through the assessment of the risks and supervisory challenges associated with innovation and technological changes affecting banking. The TFFT's work is currently focused on the impact that fintech has on banks and banks' business models, and the implications this has for supervision.

The OCC has technical expertise in a number of areas that would likely be relevant for a newly chartered SPNB, including compliance with capital, liquidity, risk management, and consumer protection requirements. As it does with any other de novo charter, the OCC would leverage those examiners who have expertise appropriate for the bank's business model and activities. Likewise, dedicated licensing specialists, economists, other subject matter experts (e.g., those specialized in credit risk, compliance, financial inclusion, BSA/AML, operational risk, cybersecurity, or information technology), lawyers, and other staff would be assigned to individual charters, as appropriate, to support their supervision. For example, the examination team for a fintech company specializing in payment processing technology would be assisted by the OCC's Payments Systems Policy Group, whose expertise includes the latest innovations in payments systems, including distributed ledger technology. In addition, the OCC has significant experience assisting national banks in their assessment and management of risks associated with technology service providers and other third-party relationships.[25] Further, to ensure consistency in OCC supervision, a dedicated Assistant Deputy Comptroller would oversee any SPNB.

Other commenters noted the importance of ensuring that SPNBs maintain robust compliance and risk management programs. As detailed in the draft Supplement, the OCC would require any SPNB to establish and maintain well-developed, robust compliance and risk management programs that address, among other things, BSA/AML, consumer protection, third-party risk management, and data and information security requirements. The OCC expects a bank's risk management systems to be commensurate to the size, complexity, and risks of its activities. Regardless of the risk management program's design, it should address the following: risk identification, risk measurement, risk monitoring, and risk control. For example, the OCC would expect SPNBs to have a rigorous cybersecurity framework in place to assess cybersecurity risks and respond to, manage, and defend against cyber attacks.

Some commenters recommended that the OCC develop and deploy technology to modernize its approach to regulation and supervision. The OCC is committed to broadening and increasing its expertise in areas related to innovation. As part of its Responsible Innovation initiative, the OCC is open to considering ways current procedures and processes can be improved through the use of technology.

Chartering Authority

Some commenters questioned the OCC's authority to charter SPNBs that are not authorized to offer FDIC-insured deposits. They asserted that the OCC could only charter non-deposit-taking banks when expressly authorized by statute, as is the case for trust banks, bankers' banks, and credit card banks. In these commenters' view, to be chartered as a national bank under the National Bank Act, the bank must engage in the "business of banking," which they suggest requires, at a minimum, taking deposits.

Under the National Bank Act, the OCC has broad authority to grant charters for national banks to carry on the "business of banking." The OCC has interpreted the "business of banking" to include any of the three core banking functions of receiving deposits, paying checks, or lending money. The Act does not require that a bank take deposits in order to be engaged in the

[25] See OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance" (October 30, 2013).

"business of banking." Rather, under the Act, performing only one of these three activities is sufficient to be performing core banking functions. This is reflected in the OCC's regulation 12 CFR 5.20, which provides that, to be eligible for a national bank charter, a special purpose bank must either be engaged in fiduciary activities or conduct at least one of three core banking functions: receiving deposits, paying checks, or lending money.

Separation of Banking and Commerce

Some commenters expressed concern that granting a national bank charter to a non-depository fintech company could erode the traditional separation of banking and commerce. As noted in the draft Supplement and above, the OCC will not approve charter proposals that would result in the inappropriate commingling of banking and commerce. Such proposals could introduce into the banking system risks associated with nonbanking commercial activities, interfere with the efficient allocation of credit throughout the U.S. economy, and foster anti-competitive effects and undesirable concentrations of economic power.

Conclusion

The OCC appreciates the suggestions, issues, and concerns raised in the more than 100 comment letters that we received in response to the SPNB Paper. These comments informed our development of the draft Supplement, which explains how the OCC would evaluate applications from fintech companies for SPNB charters. For more information about the envisioned application process for fintech companies seeking an SPNB charter, please refer to the draft *Comptroller's Licensing Manual Supplement: Evaluating Charter Applications From Financial Technology Companies*.

The OCC will accept comments on the Supplement through close of business April 14, 2017. Comments should be submitted to specialpurposecharter@occ.treas.gov.

EXHIBIT G

Office of the
Comptroller of the Currency

COMPTROLLER'S LICENSING MANUAL
DRAFT SUPPLEMENT

Evaluating Charter Applications From Financial Technology Companies

March 2017

Contents

Introduction

Purpose

The Office of the Comptroller of the Currency (OCC) has determined that it is in the public interest to consider applications for a special purpose national bank (SPNB) charter from financial technology (fintech) companies that engage in banking activities and that meet the OCC's chartering standards. The OCC has reached this decision for a number of reasons.[1]

First, in the modern economy, where technology companies already are delivering key financial services to millions of Americans, an SPNB charter provides a framework of uniform standards and supervision for companies that qualify. Applying this framework to fintech companies will help ensure that these companies, like other banks that operate under federal charters, conduct business in a safe and sound manner while effectively serving the needs of consumers, businesses, and communities.

Second, an SPNB charter supports the dual banking system by providing fintech companies the option of offering banking products and services under a federal charter and operating under federal law, while ensuring essential consumer protections. This is the same choice available to companies that deliver banking products and services in traditional ways.

Third, providing a path for fintech companies to become national banks can make the financial system stronger by promoting growth, modernization, and competition. Moreover, the OCC's supervision of fintech companies will deepen the expertise the OCC already has acquired in emerging technologies for banking services—through, for example, its supervision of technology service providers. This enhanced "window" into developing technologies and financial innovations positions the OCC to better evaluate and respond to the risks that accompany the delivery of those technologies. Finally, as *this Comptroller's Licensing Manual* Supplement (Supplement) explains, the chartering process will enable the OCC to encourage fintech companies to use innovative ways to promote financial inclusion.

[1] The OCC made this determination based on its work assessing the role of innovation in banking. In March 2016, the OCC published a paper to provide its perspective on responsible innovation in the financial services industry, outline principles guiding its approach to financial innovation, and solicit feedback on nine questions and other topics presented in the paper. See Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective. On June 23, 2016, the OCC held a forum to discuss issues regarding responsible innovation. The forum included participants from the banking industry, fintech companies, academia, and community and consumer groups. On October 26, 2016, the OCC announced the decision to establish an Office of Innovation and implement a framework supporting responsible innovation. See OCC Issues Responsible Innovation Framework. Then, on December 2, 2016, the OCC announced that fintech companies may qualify for SPNB charters under certain circumstances. The OCC published a paper discussing issues related to chartering special purpose national banks and solicited public comment to help inform its path forward. See Exploring Special Purpose National Bank Charters for Fintech Companies. In developing this *Comptroller's Licensing Manual* Supplement, the OCC has carefully considered the comments it received.

Scope

The OCC has regulations and policies that govern its review and decision making with respect to chartering national banks. Consistent with administrative law terminology, these materials frequently refer to chartering as a "licensing" process. This Supplement explains how the OCC will apply the licensing standards and requirements in its existing regulations and policies to fintech companies applying for an SPNB charter.[2]

While the term "special purpose national bank" is used elsewhere in the OCC's rules and policies to refer to a number of types of special purpose national banks, for purposes of this Supplement, "SPNB" means a national bank that engages in a limited range of banking activities, including one of the core banking functions described at 12 CFR 5.20(e)(1), but does not take deposits within the meaning of the Federal Deposit Insurance Act (FDIA) and therefore is not insured by the Federal Deposit Insurance Corporation (FDIC). This Supplement applies specifically to the OCC's consideration of applications from fintech companies to charter an SPNB and does not apply to other types of special purpose banks described in current OCC Licensing Policy.[3]

The OCC recognizes that fintech companies that want to operate in the regulated space will choose different ways of doing so, and the SPNB charter is one option of many. Some may operate under state bank or state trust bank charters in states that offer those options. Some may apply for, or seek to acquire, full-service national bank charters; others may qualify to be another type of special purpose national bank. Still others may wish to continue, or initiate, partnerships with banks by providing technology-related services and expertise. This Supplement is not intended to discourage these other ways of conducting business but rather to clarify the OCC's expectations for a particular segment of financial service providers—that is, fintech companies seeking an SPNB charter.

The OCC anticipates that the activities of fintech companies interested in a national bank charter may vary significantly. As noted above, national bank charters are varied and include full-service charters and other special purpose national bank charters, such as trust charters. National bank charter applicants are held to the same chartering standards and procedures whether seeking to become a full-service national bank, a national trust bank, or an SPNB. Moreover, while references to "full-service bank," "trust bank," and "SPNB" are convenient ways to distinguish among national banks based on their business models, these designations do not signify a difference in the character of the national bank charter. In each of these cases, an applicant that receives OCC approval for a charter becomes a national bank subject to the laws, regulations, and federal supervision that apply to all national banks.

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[2] See 12 CFR 5.20(l) (directing applicants for a special purpose charter to adhere to established charter procedures with modifications appropriate for the circumstances as determined by the OCC). See also OCC *Comptroller's Licensing Manual*, "Charters."

[3] For example, this Supplement would not apply to a fintech company that intends to engage in fiduciary activities and otherwise meets the requirements of a trust bank.

Initial Steps Toward an SPNB Charter

Applicable Licensing Procedures; Initial Contact With the OCC

The OCC uses its existing chartering standards and procedures as the basis for processing applications for all national banks. This Supplement describes the OCC's approach to key aspects of the chartering process for fintech companies. It is not a comprehensive guide to all of the procedures and requirements relevant to filing an application for an SPNB charter. Fintech companies considering applying for an SPNB charter should carefully review the following materials:

- 12 CFR 5: The OCC's Rules, Policies, and Procedures for Corporate Activities are found in 12 CFR 5, and regulations on organizing a national bank are set forth in 12 CFR 5.20. These regulations are applicable to all national banks.[4]
- The *Comptroller's Licensing Manual*, including the "Charters" and "Background Investigations" booklets. The policies in the *Comptroller's Licensing Manual* are generally applicable to all national banks, and prospective applicants are strongly encouraged to read the manual.
- The "Interagency Charter and Federal Deposit Insurance Application," Business Plan Guidelines.
- The OCC's *The Director's Book*.

Fintech companies seeking an SPNB charter should make an initial inquiry concerning a charter application through the OCC's Office of Innovation, innovation@occ.treas.gov. The Office of Innovation (Office) is the primary point of contact within the OCC for all inquiries by fintech companies, including questions and preliminary inquiries related to chartering. If a fintech company is interested in further discussions regarding an SPNB charter, the Office will schedule an exploratory meeting with the appropriate OCC staff, including the OCC Licensing Division (OCC Licensing).[5] The meeting will include a discussion of the company's business model, this Supplement, and the OCC's expectations.

Prefiling Communications With the OCC

Applying for a national bank charter is an iterative process, and the OCC finds it mutually beneficial for the applicant and the OCC to maintain an open dialogue throughout the process. After the exploratory meeting, the OCC will begin to identify aspects of the proposed charter that present novel or complex issues.

[4] See 12 CFR 5.20(c) (describing the procedures and requirements governing the OCC's review and approval of an application to establish a national bank as applicable to a special purpose national bank).

[5] An exploratory meeting is intended to provide the opportunity for a potential applicant to ask questions, clarify concerns, and become acquainted with the regulatory environment. See *Comptroller's Licensing Manual*, "Charters."

An OCC Licensing contact will be assigned. This contact will assemble other appropriate staff—including examiners, subject matter experts, legal staff, and staff from the Office—to informally discuss with the organizers the proposal, the chartering process, and the requirements that accompany a national bank charter.

The prefiling stage may include one or more formal prefiling meetings with OCC Licensing and other appropriate staff. The number and frequency of meetings will depend on the novelty and complexity of the applicant's proposal.

Before the initial formal prefiling meeting, organizers should provide the OCC with an overview of the fintech charter proposal, including a discussion of the business plan and the relevant market, as well as any novel policy or legal issues and any unique aspects of the proposal.[6] Applicants should also include information about the qualifications of the organizers and proposed senior management. In addition, the OCC will request informational submissions for review in advance of the submission of an application, such as a draft business plan.

The OCC will expect an SPNB applicant whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion. As described below, the OCC will condition its preliminary approval of an SPNB charter on the applicant's implementation of a Financial Inclusion Plan (FIP). Accordingly, an applicant will be expected to include an FIP within its business plan and publish it for comment.

Activities of the Proposed SPNB

Bank-permissible activities: All activities of a national bank, including an SPNB, are limited to those that are permissible for national banks under a statute,[7] regulation,[8] or federal judicial precedent, or that the OCC has determined to be permissible.[9]

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[6] The term "organizers" generally refers to the individuals or group applying for the new bank charter. See *Comptroller's Licensing Manual,* "Charters," for a more detailed discussion of organizers.

[7] 12 USC 24 expressly permits numerous specific activities for all national banks, including discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits; buying and selling exchange, coin, and bullion; lending money on personal security; and obtaining, issuing, and circulating notes. Section 24(Seventh) more generally authorizes national banks to engage in activities that are part of, or incidental to, the business of banking. 12 USC 92a authorizes national banks to engage in fiduciary activities.

[8] Numerous activities are expressly authorized throughout OCC regulations, including, for example: establishing and operating a messenger service (12 CFR 7.1012), acting as a finder (12 CFR 7.1002), sales of equipment convenient for a customer's use of electronic banking services (12 CFR 7.5001), providing electronic bill presentment services (12 CFR 7.5002), offering electronic stored value systems (12 CFR 7.5002), and producing and selling software that performs a service the bank could perform directly (12 CFR 7.5006).

[9] The OCC and the courts that have considered the scope of bank-permissible activities also recognize that the business of banking develops over time as the economy and business methods evolve. See, e.g., *NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 513 U.S. 251 (1995); OCC Interpretive Letter No. 494 (December 20, 1989) (allowing national banks to purchase and sell financial futures for their own account). The

Core banking activities: Under 12 CFR 5.20(e)(1), a special purpose national bank that conducts activities other than fiduciary activities must conduct at least one of the following three core banking activities: taking deposits, paying checks, or lending money.[10] This Supplement covers entities other than traditional trust companies or full-service national banks that accept deposits and therefore must be insured by the FDIC. Accordingly, the OCC anticipates that SPNBs likely will elect to demonstrate that they are engaged in paying checks or lending money.

Consistent with judicial precedent, the OCC views the National Bank Act, which is the primary statutory source of national banks' authority to conduct various types of business, as sufficiently adaptable to permit national banks to engage in new activities as part of the business of banking or to engage in traditional activities in new ways.[11] For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically may be considered the modern equivalent of paying checks.

In some cases, the activities proposed for an SPNB may include activities that have not previously been determined to be part of, or incidental to, the business of banking or to fall within an established core banking function. If so, the company should discuss in prefiling meetings with the OCC the permissibility of the activities and their status as core banking activities. The OCC may ask the company to prepare a legal analysis supporting its view that its proposed activities are permissible and fall within one of the core banking categories. In connection with the chartering process, the OCC will conduct an independent legal analysis to determine whether the activities are permissible for an SPNB. As described in section V, the OCC publishes conditional approvals of charter applications; the approval typically would include the OCC's legal analysis supporting its decision. Publication will occur at the conclusion of the charter decision process.

Filing Procedures—Publication and Public Comment; Confidentiality

After the prefiling phase, the organizers for an SPNB charter should file the charter application, including the business plan and the appropriate Interagency Biographical Report on all identified insiders. For additional information on filing the application, organizers should refer to the "Charters" booklet of the *Comptroller's Licensing Manual*. The filing procedures for an SPNB will be substantially the same as those applicable to any other

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OCC expressly recognizes this proposition in 12 CFR 7.5002, which states that a national bank may provide through electronic means any activity, function, product, or service that it is otherwise authorized to perform.

[10] See 12 CFR 5.20(e)(1)(i).

[11] See, e.g., 12 CFR 7.5002.

national bank.[12] An applicant for a national bank charter must publish notice of its charter in the community in which the proposed bank will be located as soon as possible before or after the filing date.[13] A public comment period runs for 30 days after the publication of the public notice.[14] The OCC maintains a public file of the application and makes it available to any person requesting it; the public file is also available on the OCC's public website.[15] Portions of the business plan of an SPNB, such as the FIP section, will be included in the public file. Applicants may request that confidential treatment be afforded to certain portions of the application, for example, portions containing proprietary information.[16]

Chartering Standards

Standards and Policy Considerations

Under the OCC's governing statutes and regulations, in evaluating an application to establish a national bank, including an SPNB, the OCC is guided by the following principles:

- Maintaining a safe and sound banking system
- Encouraging a national bank to provide fair access to financial services by helping to meet the credit needs of its entire community
- Ensuring compliance with laws and regulations
- Promoting fair treatment of customers, including efficiency and better service[17]

The OCC's regulations and policies also set forth additional considerations, including whether the proposed bank can reasonably be expected to achieve and maintain profitability[18] and whether approving its charter will foster healthy competition.[19]

Once a firm submits a proposal, the OCC determines whether it satisfies the chartering standards in the OCC's regulations and policies. The OCC will not approve proposals that are contrary to OCC policy or other established public policy. For example, proposals to provide financial products and services that have predatory, unfair, or deceptive features or

[12] For details see 12 CFR 5 and *Comptroller's Licensing Manual,* "Charters."

[13] See generally 12 CFR 5.8. Given the fact that many fintechs will operate online, the OCC will consider the operations of the SPNB in determining where publication of this notice would be appropriate.

[14] See 12 CFR 5.10.

[15] See 12 CFR 5.9(a) and (b).

[16] See 12 CFR 5.9(c).

[17] See 12 USC 1(a) and CFR 5.20(f)(1). See also *Comptroller's Licensing Manual*, "Charters."

[18] See 12 CFR 5.20(f)(2).

[19] *Comptroller's Licensing Manual*, "Charters."

that pose undue risk to consumer protection, compliance, or safety and soundness would be inconsistent with the OCC's chartering standards and will not be approved.[20]

Further, the OCC will not approve proposals that would result in an inappropriate commingling of banking and commerce. As noted earlier, under its chartering standards the OCC considers whether a given proposal is consistent with maintaining a safe and sound banking system and will foster healthy competition. Proposals that inappropriately commingle banking and commerce could introduce into the banking system risks associated with non-banking related commercial activities, interfere with the efficient allocation of credit throughout the U.S. economy and foster anti-competitive effects and undesirable concentrations of economic power, and would thus be inconsistent with the OCC's chartering standards. Proposals from companies that implicate such concerns will not be approved. The OCC also will collaborate with other regulators as necessary to avoid the inappropriate mixing of banking and commerce.

Evaluating an Application

The OCC will evaluate an application from a fintech company for an SPNB charter to determine whether it meets the standards and policy considerations noted above. In evaluating whether these are met, the OCC will consider, among other things, whether the proposed bank

- has organizers and management with appropriate skills and experience.
- has adequate capital to support the projected volume and type of business and proposed risk profile.
- has a business plan that articulates a clear path and a timeline to profitability.
- includes in its business plan, if applicable, an FIP that has an appropriate description of the proposed goals, approach, activities, and milestones for serving the relevant market and community.

The OCC's evaluation may identify specific controls or requirements that are necessary for the success of the applicant's business plan or to ensure the OCC's chartering standards are met. The OCC will impose special conditions in connection with the charter approval to achieve these goals.[21] Moreover, the OCC imposes certain standard conditions on all de novo charters, including the requirement that a bank obtain a supervisory non-objection letter from the OCC if it deviates significantly from its approved business plan. For a detailed discussion of conditions associated with approvals, see the "Chartering Decisions" section of this Supplement.

[20] See, e.g., OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013); OCC Advisory Letter 2000-7, "Abusive Practices" (July 25, 2000).

[21] An SPNB that does not take deposits will not be subject to certain requirements that apply only to insured depository institutions; for example, the safety and soundness standards contained in 12 CFR 30 of the OCC's regulations. The OCC has the authority to impose special conditions requiring the applicant to comply with standards that generally apply only to insured banks.

Coordination With Other Regulators; Continuation of Remedies

Depending on the structure of the proposed SPNB, regulators in addition to the OCC may have oversight and supervisory roles over a particular bank. In considering applications for SPNB charters, the OCC will coordinate as appropriate with other regulators with jurisdiction over the proposed SPNB, to facilitate simultaneous consideration of any applications or approvals that may be required by those regulators.

The OCC does not permit companies that are the subject of a formal investigation or enforcement action by another regulator to avoid the consequences of that investigation or enforcement action by seeking a national bank charter. A pending investigation or enforcement action may be grounds for denial of a charter application. At a minimum, after consultation with the other regulator, the OCC will ensure that a company's obligation to remediate or pay penalties for any violations or deficiencies cited or identified by another regulator is carried forward and enforced through conditions imposed on an approval of an SPNB charter.[22]

Requirements for Organizing Group, Management, and Directors

OCC regulations and licensing policy provide guidance regarding the qualifications of organizers, management, and directors, as well as the respective roles of each.[23] These criteria and qualifications are generally applicable to SPNBs, although the OCC may tailor certain criteria as appropriate. As with all banks, organizers, managers, and directors are critical to the success of an SPNB. The OCC expects them to be well qualified, with diverse experience in relevant areas. Although the OCC would expect some members of the organizing group, the proposed board of directors, and management to have experience in regulated financial services, other relevant experience will depend on the specific products or services offered by the proposed SPNB. For example, it may be important for one or more of the organizers, managers, or directors of a proposed bank with novel technology-based products or services to have experience with those activities.

[22] See, e.g., section 612 of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203, 124 Stat.1376) which prohibits, subject to exceptions, the conversion of a state bank or thrift to a national charter, or national bank or thrift to a state charter, if the converting institution's original regulator has subjected the institution to a formal enforcement action or memorandum of understanding with respect to a significant supervisory matter.

[23] See 12 CFR 5; the "Charters" and "Background Investigations" booklets of the *Comptroller's Licensing Manual*, and the OCC's *The Director's Book*.

Business Plan

Overview

All applicants for a national bank charter must submit a business plan to the OCC.[24] Having a comprehensive proposed business plan, including the bank's financial projections, analysis of risk, and planned risk management systems and controls, is critical to the OCC's decision whether to approve a charter proposal. Proposals from companies without an established business record are subject to a higher degree of scrutiny to evaluate whether the proposed bank has a reasonable likelihood of long-term success.

Detailed information about the elements of the business plan appears in the Interagency Business Plan Guidelines.[25] The Business Plan Guidelines, which are applicable to all national banks, describe the general elements of a business plan, including: description of the business; marketing plan; management plan; records, systems, and controls; the financial management plan; monitoring and revising the plan; alternative business strategies; and financial projections. The OCC recognizes, however, that applicants for an SPNB charter may have structures and business models that differ from those of traditional, full-service national banks. Thus, in addition to the generally applicable information in the Business Plan Guidelines, applicants should consider the supplemental guidance below on specific parts of the business plan.

Applicants are also encouraged to contact the OCC with questions regarding the content of their business plans.[26]

Supplemental Guidance on Business Plan

(1) Risk Assessment

An applicant's business plan should include a risk assessment that identifies and discusses the particular risks the organizers expect the proposed bank to face given its business model. Such risks may include, for example, concentration risk, compliance risk, reputation risk, strategic risk, and operational risk, including cybersecurity risk. The risk assessment should set out the degree of risk the bank would generally assume (its "risk appetite") and how it would effectively manage the identified risks. The risk assessment factors in the target

[24] See 12 CFR 5.20(h). This regulation details specific items that should be addressed in a business plan, including earnings prospects, management, capital, community service, and safety and soundness.

[25] In addition to the Business Plan Guidelines, *Comptroller's Licensing Manual,* "Charters," provides additional information regarding the business plan. The *Comptroller's Handbook* and other resource materials should also be referenced for additional information related to specific products and services, and OCC expectations for all areas of operating a bank, including, for example, audit requirements, information technology, and corporate and risk governance.

[26] As noted in "Initial Steps Toward an SPNB Charter" in this Supplement, charter applicants may request confidential treatment of certain portions of their business plan. The FIP will be included in the public file.

markets' economic and competitive conditions, including the proposed products, services, and customers; the targeted geography (*e.g.*, regional, nationwide); and any regulatory considerations regarding serving those markets. These regulatory considerations include risks related to Bank Secrecy Act/Anti-Money Laundering (BSA/AML), consumer protection, and fair lending requirements. The risk assessment should also address the internal and system controls to monitor and mitigate risk, including management information systems, in accordance with the bank's established risk appetite.

(2) Records, Systems, and Controls

This section describes the bank's system for customer record keeping and transaction processing and the internal controls that will enable the bank to protect customer data and process transactions in an accurate and efficient manner. This section also describes the bank's compliance management programs. This section should include

- a description of the bank's information technology program, including
  - a general description of internal controls ensuring transaction and data integrity, security, and auditability;
  - overviews of the operational architecture, security framework, and resiliency structures;[27] and
  - a description of the framework that provides for effective cyber-risk governance, including continuous monitoring and management of cyber risk; strategies for cyber resilience; and processes for maintaining awareness of cybersecurity postures enterprise-wide.

- a description of the compliance management program, which should support a culture of compliance that includes a top-down, enterprise-wide commitment to understanding and adhering to applicable laws and regulations, including, but not limited to: the BSA, other AML statutes, Office of Foreign Asset Control economic sanctions obligations, statutes prohibiting discrimination or unfair or deceptive acts or practices, and other applicable consumer protection laws and regulations.

- a description of a structured plan to provide for independent testing of the business activities, systems and controls, and compliance management requirements, including but not limited to plans for independent audits.

- a description of outsourcing and third-party risk management, including a description of any functions or services that will be outsourced and risk management processes that are commensurate with the level of risk and complexity of the third-party relationships. For additional guidance, applicants should review OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance" (October 30, 2013).

[27] Applicants should review 12 CFR 30, appendix B, "Interagency Guidelines Establishing Information Security." These guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

(3) Financial Management

An SPNB will be subject to the minimum leverage and risk-based capital requirements in 12 CFR 3, which apply to all national banks. However, these requirements, which measure regulatory capital levels relative to an entity's assets and off-balance-sheet exposures, may not be sufficient for measuring capital adequacy for some SPNBs. The risks posed by an SPNB with limited on-balance-sheet assets or nontraditional strategies may not be fully captured in its reported assets and off-balance-sheet exposures. As a result, additional approaches may be necessary to determine the minimum amount of capital needed to support the bank's activities. For example, for a proposed bank with limited on-balance-sheet assets, the OCC may consider other metrics related to activity—such as revenue—and the risks associated with the applicant's business plan when evaluating capital adequacy.

This section of the business plan should propose both minimum capital levels the bank will adhere to initially that are sufficient to support the proposed bank's business plan until the bank can achieve and sustain profitable operations and minimum capital levels the bank will adhere to after profitability that would be appropriate for its ongoing operations. This section should also discuss how the proposed bank would address adverse market conditions that could deplete capital, such as broad market volatility or volatility specific to a business line. Additional factors that applicants should consider include the following:

- On- and off-balance-sheet composition, including credit risk, concentration risk, market risk, operational risk, and compliance risk associated with nontraditional products, services, or operating characteristics.
- Proposed activities and anticipated volume (new accounts, transactions) and impact on capital.
- Plans and prospects for growth, including any material action necessary to address business activity that is either below or above expectations and management's past experience in managing growth.
- Stability or volatility of sources of funds and access to capital.
- Sufficient additional capital to implement the exit strategy laid out in the business plan.

Consistent with the process for chartering other special purpose banks,[28] preliminary conditional approval for a fintech company will include a condition specifying a minimum capital level the bank must be at or above at all times. This amount would be based on the OCC's analysis of quantitative and qualitative factors, including those described above. The OCC expects that capital in a fintech company with an SPNB charter would increase beyond

[28] The OCC tailors capital requirements for other special purpose banks. For example, the OCC typically imposes capital requirements on trust banks in addition to the minimum requirements calculated according to 12 CFR 3.

the initial minimum amount as the size, complexity, and corresponding risks of the firm evolve.

The financial management section should also address liquidity and funds management. Liquidity is a bank's capacity to readily meet its cash and collateral obligations at a reasonable cost without adversely affecting either daily operations or the bank's financial condition.[29] The OCC will consider the proposed bank's specific business model when evaluating the SPNB's liquidity profile and processes for monitoring and mitigating liquidity risk.

For other special purpose banks, the OCC has imposed requirements tailored to the bank's business model to ensure it maintains adequate liquidity. Such requirements include entering into a liquidity maintenance agreement with a parent company or maintaining a certain amount of high-quality liquid assets.

(4) Monitoring and Revising the Plan

The Business Plan Guidelines provide that this section should include a discussion of how the board of directors will monitor adherence to the business plan and adjust or amend the business plan as appropriate to accommodate significant or material changes.[30] This is an ongoing requirement, and technology-dependent businesses will need to have mechanisms in place to accommodate new or evolving technologies.

(5) Alternative Business Strategy; Contingency Plans; Recovery and Exit Strategies

Depending on the applicant's proposed business strategy and structure, the OCC may require an applicant to include an alternative business strategy detailing how the bank will manage potential scenarios when expectations—such as operating expenses, marketing costs, or growth rates—differ significantly from the original plan.[31]

While it will not always be necessary for a bank to develop an alternative business strategy, all applicants should discuss

- realistic contingency plans based on critical assumptions;
- recovery planning, including financial or other risk triggers, and a range of credible options to remain viable under stress; and

[29] For additional details regarding liquidity, applicants may refer to the "Liquidity" booklet (June 2012) of the *Comptroller's Handbook*.

[30] As discussed in the "Chartering Standards" section of this Supplement, significant deviations to the business plan may require OCC supervisory non-objection.

[31] If the bank's alternative business strategy would be considered a significant deviation from the approved business plan, the OCC would expect the applicant to obtain a supervisory non-objection before executing the strategy.

- exit strategies that provide a means for the bank to unwind in an organized manner.

(6) Financial Inclusion Plan (FIP)

As noted earlier in the "Chartering Standards" section of this Supplement, the OCC's chartering standards require consideration of whether the applicant will provide fair access to financial services and promote fair treatment of customers consistent with the safe and sound operations of the bank.[32] OCC regulations require that applicants include in their business plans an indication of the organizing group's knowledge of and plans to serve the community.[33] As discussed in detail in appendix B, "Financial Inclusion Plan Section of the Business Plan," the OCC expects an applicant for an SPNB charter whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.

Applicants engaged in such activities should include in the business plan an FIP that describes the proposed goals, approach, activities, and milestones for serving the relevant market and community. The nature and scope of an FIP developed by an applicant for an SPNB charter will vary depending on the SPNB's business model and the products or services it intends to provide to consumers or small businesses.

The OCC expects that the commitment to meet financial inclusion objectives that support fair access to financial services and fair treatment of customers will be ongoing, and accordingly, the OCC will expect the SPNB to update its FIP as appropriate.

Chartering Decision

As discussed in detail in the "Charters" booklet of the *Comptroller's Licensing Manual*, the OCC grants approval of a charter application in two steps: preliminary conditional approval and final approval. The period between the preliminary conditional approval and final approval is referred to as the organization phase.

Preliminary Conditional Approval

Following review of the application, the OCC determines whether to grant preliminary conditional approval or deny the application. A preliminary conditional approval determination indicates the OCC's permission to proceed with the organization of the bank according to the plan set forth in the application and specifies standard requirements and enforceable supervisory conditions. The OCC will include in a preliminary conditional approval of any SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses an enforceable condition that will require the SPNB to implement its FIP.

[32] See 12 USC 1(a) and 12 CFR 5.20(f)(1).

[33] See 12 CFR 5.20(h)(5).

A preliminary conditional approval decision is not an assurance that the OCC will grant final approval for a new bank charter. Granting preliminary conditional approval provides the organizers of the bank with assurances that the application has passed the first phase of OCC review before the organizers expend additional funds to raise capital, hire officers and employees, and fully develop policies and procedures, including those relating to financial inclusion. A national bank must generally open for business within 18 months of the OCC's preliminary conditional approval, unless the OCC grants an extension.[34]

Standard and Special Requirements

The OCC imposes a number of standard requirements on a bank when it grants preliminary conditional approval. Standard requirements are requirements imposed on all de novo national banks. For example, these requirements include establishing appropriate policies and procedures and adopting an internal audit system appropriate to the size, nature, and scope of the bank's activities. The OCC may also place additional special requirements on SPNB charters with certain characteristics. While standard requirements apply to all de novo charters, special requirements are tailored to a particular applicant. A requirement for a bank to raise a higher amount of capital than proposed in the business plan is an example of a special requirement. The organizing group must satisfy standard and special requirements before the OCC grants final approval. [35]

Standard and Special Conditions

In addition to the standard and special requirements discussed above, the OCC may also impose standard and special conditions that remain in place after the bank opens for business.[36]

The OCC imposes certain standard conditions on all categories of de novo charters, and those would apply to SPNBs. These standard conditions address a variety of issues, including ensuring that the bank does not significantly deviate from the business model proposed in its application without prior OCC non-objection and guaranteeing maintenance of minimum capital levels commensurate with the prospective risk of the bank's business plan.[37] It is a standard condition for an SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses that the SPNB implement its FIP.

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[34] See 12 CFR 5.20(i)(5)(iv).

[35] For additional information regarding the organization phase, please refer to *Comptroller's Licensing Manual,* "Charters."

[36] Conditions imposed in connection with the approval of a national bank charter are considered "conditions imposed in writing" and enforceable under the OCC's enforcement authority at 12 USC 1818. The OCC regularly examines for compliance with such conditions.

[37] For more information about significant deviations from business plans, see appendix F, "Significant Deviations After Opening," of *Comptroller's Licensing Manual,* "Charters."

The OCC may also impose special conditions on an individual SPNB. Examples of such conditions include requiring the bank to have a resolution plan to sell itself or wind down, if necessary, and requiring the bank to adhere to specific commitments, such as a requirement to enter into an operating agreement. In addition, in the case of an uninsured bank, the OCC can impose special conditions similar to those in laws that apply by statute to insured banks only. Where a law does not apply directly, the OCC may work with a fintech company to achieve the goals of a particular statute or regulation through the OCC's authority to impose conditions on its approval of a charter, taking into account any relevant differences between a full-service bank and special purpose bank.[38]

In addition, the OCC will impose assessments on an SPNB through special conditions established at the time of preliminary approval. The OCC is funded through assessments and fees charged to the banks it supervises.[39] SPNBs will be subject to periodic assessments, just as other national banks are.[40] The OCC has modified the assessments it charges to other special purpose national banks, however, to account for the scope and activities of the bank and the amount and type of assets that the bank holds.[41] The OCC would determine assessments for an SPNB to account for similar factors.[42]

Conditions may be imposed directly in the preliminary approval letter, or the OCC may require as a condition of approval that the applicant enter into an operating agreement with the OCC. The operating agreement may impose safeguards to address certain aspects of a bank's operations, including growth, capital, or liquidity. As noted above, for all SPNBs engaged in lending or providing financial services to consumers or small businesses, implementation of an FIP will be a condition imposed through an operating agreement. The OCC publishes all conditional approvals, which disclose the existence of an operating agreement.[43]

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[38] For more information about the conditions that may be imposed, see Comptroller's Licensing Manual, "Charters."

[39] See 12 USC 16, 481.

[40] See 12 CFR 8.

[41] Additional assessments are required of certain national banks. See, e.g., 12 CFR 8.2(c) and 8.6(c) (additional assessments imposed on independent credit card banks and independent trust banks).

[42] As it gains experience with fintech companies, the OCC may amend its rules to address assessments for fintech companies.

[43] An operating agreement is enforceable under 12 USC 1818. That section of the FDIA contains the OCC's general enforcement authorities; it expressly applies to uninsured national banks. See 12 USC 1818(b)(5).

Final Approval

Receipt of final approval from the OCC means the OCC has issued a charter for the bank, and the bank can begin to conduct banking business.[44] After the OCC issues final approval and the SPNB opens for business, the OCC will supervise the SPNB, as all other national banks, under scheduled supervisory cycles, including on-site examination and periodic off-site monitoring. Any conditions imposed with the granting of a charter (e.g., operating agreement) will remain in place until removed or modified by the OCC and will be reviewed for compliance during the examination process.

Because this Supplement is focused on the licensing process for SPNBs, it does not provide extensive guidance regarding the OCC's supervisory expectations and the supervision of national banks. Key supervisory considerations, however, are highlighted in appendix A to this Supplement. For additional information on specific supervisory areas, applicants should refer to the booklets of the *Comptroller's Handbook*, available on the OCC's website.

[44] Final approval occurs once the organizers have completed all key phases of organizing the bank as determined by the OCC and received any other necessary regulatory approvals. See *Comptroller's Licensing Manual,* "Charters," for more detail.

Appendices

Appendix A: Supervisory Considerations

OCC Supervisory Framework

The supervisory framework for SPNBs will incorporate core elements already in place for all national banks. These elements include a dedicated Assistant Deputy Comptroller (ADC), an assigned portfolio manager, a supervisory strategy tailored to the bank's business model, and a blend of on-site and off-site supervisory activities conducted by an experienced, knowledgeable examination team. In addition to the statutory examination requirements[45] and consistent with longstanding OCC de novo supervision policy,[46] newly chartered SPNBs will be subject to more frequent and intensive supervision in their early years of operation. 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. Examples of SPNB examination and supervision activities include frequent contact with the board of directors and bank management.

Similar to the OCC's supervision framework for existing special purpose national banks, SPNBs will be housed in a common portfolio, assigned individual portfolio managers, and overseen by an ADC for SPNB Supervision, who will be based in Washington, D.C., and report to the Deputy Comptroller for Thrift Supervision and Special Supervision.[47] Centralized oversight of SPNBs will provide for a consistent approach to supervision. Each bank will have an assigned portfolio manager who will serve as the primary point of contact and examiner-in-charge for the institution. The portfolio manager and the examination team will have subject matter expertise appropriate for the bank's business model. In addition, dedicated licensing and risk specialists, legal staff, and other subject matter experts will be assigned to each bank, as appropriate.

Rating Framework

SPNBs will be subject to the same ratings framework as other national banks. As outlined in appendixes A-G of the "Bank Supervision Process" booklet of the *Comptroller's Handbook,* national banks are assessed in accordance with the Uniform Financial Institutions Rating System (UFIRS). Composite ratings are based on an evaluation of an institution's managerial, operational, financial, risk management, and compliance performance.

Under this uniform system, the OCC ensures that all national banks are evaluated in a comprehensive and uniform manner and that supervisory attention is focused appropriately

[45] SPNBs will be subject to the statutory examination cycle prescribed by 12 USC 1820(d) and 12 CFR 4.6.

[46] PPM 5400-9 (REV), "De Novo and Converted Banks."

[47] Using dedicated subject matter experts across the OCC, the supervisory office will obtain assistance to participate on examinations and advise on complex issues that SPNBs might present.

on those banks that exhibit financial and operational weaknesses or adverse trends. The UFIRS helps identify adverse trends or deteriorating financial institutions, as well as categorizing deficiencies. The rating system is commonly referred to as the CAMELS/ITCC, and it assesses components of a bank's performance as well as specialty areas that include: capital adequacy, asset quality, management, earnings, liquidity, sensitivity to market risk, information technology, trust, consumer compliance, and performance under the Community Reinvestment Act (if applicable). Each component is rated based on an evaluation of factors relevant to the specific area.

Risk Management Framework

The OCC expects every national bank to have appropriate risk management systems to address all relevant risks in the bank. The structure, sophistication, and oversight of these systems should be commensurate with the complexity and volume of risk a bank assumes. Regardless of the bank's size or complexity, sound risk management systems should do the following:

- **Identify risk:** Banks must recognize and understand existing risks and risks that may arise from new business initiatives, including risks posed by third-party relationships, by external market forces, or by regulatory or statutory changes. Risk identification should be a continuing process and occur at both the transaction and portfolio levels.

- **Measure risk:** Banks must have effective risk management systems that measure risks accurately and timely. A bank that does not have an effective risk measurement system has limited ability to control or monitor risk levels.

- **Monitor risk:** Banks must monitor risk levels to ensure timely review of risk positions and exceptions to risk limits. Monitoring reports must be timely, accurate, and relevant, and should be distributed to appropriate individuals to ensure action, when needed.

- **Control risk:** Banks must establish and communicate risk limits through policies, standards, and procedures that define responsibilities and authority. These limits serve as a means to control exposures to the various risks associated with the bank's activities.

The OCC employs a risk-based supervisory philosophy focused on evaluating risk, identifying material and emerging problems, and ensuring that individual banks take corrective action before problems compromise their safety and soundness. This supervision-by-risk approach provides a consistent definition of risk and a system for assessing risks (known as the Risk Assessment System or RAS), and it integrates risk assessment into the supervisory process. The RAS is applicable to all risks identified across a bank and can include (although it is not limited to): credit risk, information technology systems and controls, operational risk, cybersecurity risk, liquidity and funds management, consumer compliance risk, and strategic and reputation risks. Following risk evaluations, the supervisory office tailors and conducts supervisory activities based on the risks identified, and periodic testing is completed in order to validate a bank's risk assessment.

Corporate Governance Framework

The OCC expects the governance structure for any proposed SPNB to be commensurate with the risk and complexity of its proposed products, services, and activities, as it is for other national banks. The OCC sets standards for governance and for risk management systems that identify, measure, monitor, and control risk in national banks. The OCC expects national banks to have expertise, financial acumen, and a risk management framework that includes the three lines of defense. The three lines of defense model explains governance and roles among the bank's business units, support functions, and the internal audit function from a risk management perspective.

- First line of defense risk management activities take place at the frontline units where risks are created and owned.

- The second line of defense risk management activities occur in an area or function separate from the frontline unit, sometimes referred to as independent risk management (IRM). IRM oversees and assesses the frontline units' risk management activities.

- The internal audit function is often referred to as the third line of defense in this model. In its primary responsibility of providing *independent* assurance and challenge, the internal audit function assesses the effectiveness of the policies, processes, personnel, and control systems created in the first and second lines of defense. Internal audit (including co-sourcing and outsourced arrangements) must be an independent function and report directly to the Audit Committee of the board of directors.[48]

The board of directors must have a prominent role in the overall governance structure by participating on key committees and guiding the bank's risk management framework. Board members also must actively oversee management, provide credible challenge, and exercise independent judgment.

OCC Communication

The OCC is committed to ongoing communication with the banks it supervises and with other banking regulators. This includes formal and informal conversations, meetings, examination reports, and other written communications. At a minimum, the OCC must provide a bank's board of directors a report of examination (ROE) at least once each supervisory cycle. The ROE conveys the bank's overall condition, ratings, and risk assessment summary. It will also summarize examination activities and findings identified during the supervisory cycle.[49]

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[48] For additional information on the audit function, see the "Internal and External Audits" booklet of the *Comptroller's Handbook*.

[49] Additional information about communication guidance can be found in the the "Bank Supervision Process" booklet of the *Comptroller's Handbook*.

Appendix B: Financial Inclusion Plan Section of Business Plan

Overview and Process

The OCC expects an SPNB covered by this Supplement whose business plan includes lending or providing financial services to consumers or small businesses to demonstrate a commitment to financial inclusion.[50]

As part of the prefiling process, the OCC expects a fintech company seeking an SPNB charter to provide information describing how it proposes to engage with its relevant market and community, including any underserved populations, and how it proposes to identify and address that community's financial needs.[51] The OCC recognizes that outreach to interested community and consumer groups may be particularly helpful in determining these community financial needs.

A fintech company's SPNB charter application should include in the FIP section of its business plan a description of its proposed goals, approaches, activities, and milestones for serving the relevant market and community.[52] The OCC recognizes that some applicants may have a business model incorporating financial inclusion as an integral aspect of the products and services they provide, and in those cases, the applicant should identify and discuss with the OCC the aspects of its business plan that address its financial inclusion goals, approach, activities, or milestones.

The OCC will include in a preliminary conditional approval of any SPNB charter with a business plan that includes lending or providing financial services to consumers or small businesses an enforceable condition that will require the SPNB to implement its FIP.

Developing the FIP

The nature and scope of an FIP will vary depending on the applicant's business model and the products or services it intends to provide to consumers or small businesses. An FIP should describe:

- The products or services the SPNB intends to offer, including any financial products or services that will foster financial inclusion, whether defined by income, geography, or other criteria such as unserved or underserved populations.

[50] See 12 CFR 5.20(f)(1) and 5.20(h)(5); see also 12 USC 1 (providing that the OCC is "charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services and fair treatment of customers" by the institutions it supervises).

[51] The prefiling process is discussed in more detail in this Supplement.

[52] As noted in this Supplement, portions of the business plan, including the FIP, will be included in the public file.

- Identification of, and method for defining, the SPNB's relevant market and community, including underserved populations or geographies, which may include, for example, low- and moderate-income individuals.

- Identification of, and method for defining, the financial services needs of the relevant market and community and how some of those needs could be met by the SPNB's products and services.

- Identification of milestones, including measurable goals, for the accomplishment of the SPNB's financial inclusion objectives and description of a reasonable approach for meeting those goals.

- Identification of terms and conditions under which the SPNB will provide lending or financial products and services to consumers or small businesses.[53]

Review of Financial Inclusion Factors

The OCC will review the adequacy of the applicant's FIP and consider whether the SPNB has addressed factors that would support fair access to financial services and fair treatment of customers, such as the following:

- The SPNB's ability, efforts, and commitment to meet various community financial needs based on the applicant's financial condition and size, economic conditions in the relevant market and community, and other factors, including any expected participation by the SPNB in governmentally insured, guaranteed, or subsidized loan programs for housing, small business, community development, or small farms.

- How the SPNB's policies, procedures, and practices, including those described in its compliance management program, are designed to ensure products and services will be offered and provided on a fair and non-discriminatory basis, with full disclosure of terms and conditions to all customers, and in compliance with applicable laws and regulations.[54]

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[53] The OCC has issued guidance cautioning national banks about lending activities that may be considered predatory, unfair, or deceptive or that may present safety and soundness and other risks. See, for example, OCC Advisory Letter 2000-7, "Abusive Lending Practices" (July 25, 2000) (identifying interest rates and fees that far exceed the true risk and cost of making loans as indicia of such lending practices); OCC Bulletin 2013-40, "Deposit Advance Products: Final Supervisory Guidance" (December 26, 2013) (clarifying the OCC's application of principles of safe and sound banking practices and consumer protection in connection with deposit advance products).

[54] Applicable laws vary, depending on the characteristics of the specific product or service, and may include the following laws and any implementing regulations: Truth in Lending Act, Equal Credit Opportunity Act, Credit Card Accountability Responsibility and Disclosure Act, Electronic Fund Transfer Act, and section 5 of the FTC Act.

- Investments, partnerships, ongoing outreach, and collaboration strategies, or expected participation in governmentally insured, guaranteed, or subsidized loan programs that the SPNB will use to achieve its financial inclusion objectives.

- Other factors that reasonably bear upon the extent to which the SPNB will help meet the credit and other financial services needs of the relevant market and community.

Implementation and Ongoing Communication

The SPNB's commitment to meet its financial inclusion goals, approach, activities, and milestones that support fair access to financial services and fair treatment of customers is ongoing through the life of the charter. For this reason, the OCC will require that the SPNB update its FIP in appropriate circumstances. The FIP should address how the SPNB will continue serving the needs of the relevant market and community beyond the initial years after a charter is granted, including how the SPNB will do the following:

- Communicate, and receive public input, regarding its progress in executing on its FIP.

- Update or modify its FIP in appropriate circumstances, including significant deviations to its business plan, the products or services offered, or relevant markets and communities served.

- Obtain, consider, and address public input in connection with updates to its FIP, when appropriate.

After the OCC issues final approval and the SPNB opens for business, the OCC will approach supervision of the SPNB in a manner consistent with its scheduled supervisory cycle applicable to other national banks. Conditions imposed with the approving the charter, including the condition related to implementation of the FIP, will remain in place until removed or modified by the OCC and will be reviewed for compliance during the examination process.

EXHIBIT H

DIST.	OFF.	NATURE OF SUIT	NUMBER	MO.	DAY	YEAR	NATURE OF ACTION	CAUSE	ORIGIN				DEMAND	MAG. NO.	COUNTY	DEM.	YR.	NUMBER
113A	3	84	1403	12	14	84	3	430	1				Nearest $1,000	J 3A12 M	12031		84	1403

PLAINTIFFS

1.00 INDEPENDENT BANKERS ASSOCIATION OF AMERICA, a corporation;

2.00 COMMUNITY BANKERS OF FLORIDA, INC., a corporation

3.00 FLORIDA BANKERS ASSOCIATION, INC., a corporation

4.00 BARNETT BANK OF JACKSONVILLE, N.A., a national banking association

5.00 BARNETT BANK OF MARTIN COUNTY, N.A., a national association

DEFENDANTS

6.00 C. T. CONOVER, in his official capacity as the Comptroller of the Currency, of the United States

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

5 U.S.C. Section 702. A.P.A. Challenge to Comptroller of the Currency approval of nonbank national banks.

ATTORNEYS

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☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

SEE ADD. LIST OF ATTY.

DATE	RECEIPT NUMBER	C.D. NUMBER
	CLOSED	

STATISTICAL REPORTS PROCESSED

Filing 01/85
Termination 09-11-87
Change

DATE	NR.	PROCEEDINGS	
.2/14/84	1	VERIFIED COMPLAINT for Declaratory and Injunctive Relief.	jc
	2	MOTION for Preliminary Injunction by Pltfs.	jc
	3	AFFIDAVIT in Support of Motion for Preliminary Injunction by Pltfs.	jc
	*	PROPOSED Order Granting Preliminary Injunction on (2) rec'd.	jc
	*	SUMMONS/NOTICE of Consent issued as to ROBERT W. MERKLE; C. T. CONOVER, Administrator of National Banks; and WILLIAM FRENCH SMITH, Attorney General (Orig. & 2 to Attorney).	jc
	4	MOTION for Permission to File Memo. More Than Twenty Pages in Length by Pltfs.	jc
	*	PROPOSED Memo. of Law in Support of Pltfs.' Motion for Preliminary Injunction rec'd. (4)	jc
	*	PROPOSED Order received on (4).	jc
	5	MOTION to Seal File by Pltfs. (until 9:00 a.m., Mon., 12/17/84.)	jc
	*	PROPOSED Order received on (5).	jc
	6	ORDER that Pltfs.' Motion for Permission to File Memo. More Than Twenty Pages in Length (4), is GRANTED. HTS s/12/14/84. (Counsel Notified)	jc
	7	MEMO. of Law in Support of Pltfs.' Motion for Preliminary Injunction (2), by Pltfs.	jc
	8	ORDER that Pltfs.' Motion to Seal the File until 9:00 a.m., Monday, December 17, 1984 (5), is GRANTED. HTS s/12/14/84 (Counsel Notified)	jc
.2/18/84	9	SUMMONS returned executed as to WILLIAM FRENCH SMITH, ATTORNEY GENERAL on 12/17/84.	jc
	10	SUMMONS returned executed as to C. T. CONOVER on 12/17/84.	jc
.2/19/84	11	NOTICE of Filing Substitute Page by Pltfs. (Page 9)	jc
.2/21/84	12	MOTION to Continue This Court's Hearing on Pltf.'s Motion for A Preliminary Injunction (2), by Deft. Prop. Order rec'd.	jc
	13	ORDER that Deft.'s Motion is hereby GRANTED and that the hearing to (12) consider Pltfs.' Motion for a Preliminary Injunction be set for (2) 01/30/85, at 2:00 p.m., Rm. 511, U.S. Courthouse and Post Office, 311 @. Monroe St., Jacksonville, FL, and it is further ordered that Deft. must file his opposition to Pltfs.' pending Motion for a Preliminary Injunction on or before 01/22/85, and that Pltfs.' reply, if any, must be filed on or before 01/28/85. HWM s/12/21/84. (Counsel Notified)	jc
12/27/84	14	SUMMONS returned executed as to ROBERT W. MERKLE on 12/19/84.	jc

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PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
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DATE 1985	NR.	PROCEEDINGS	
01/18/85	15	MOTION to Waive 20 Page Limit by Deft.	jc
	16	MEMO. of Law In Support of Motion to Waive 20-Page Limit by Deft. (15)	jc
	*	PROPOSED Order received on (15).	jc
01-22-85	17	ORDER: Deft's Motion to Waive 20 Page Limit (15) is GRANTED. HTS s/1/22/85 (counsel ntfd)	ja
	18	MOTION to File Memo. One Day Out of Time by Deft.	jc
	*	PROPOSED Order received on #18.	jc
01/23/85	19	MOTION to Dismiss by Deft.	jc
	20	BRIEF In Support of Defts.' Motion to Dismiss (19) and In Opposition to Pltfs.' Motion for Preliminary Injunction (2), by Deft.	jc
	21	CERTIFICATE of Service by Deft. of Document #19 & 20.	jc
01/28/85	*	REPLY Memorandum of Law in Support of Pltfs.' Motion for Preliminary Injunction (2) and In Opposition to Deft.'s Motion to Dismiss (19), by Pltfs. w/Affidavit received.	jc
	22	MOTION for Leave to Appear as Amicus Curiae by Comptroller of State of Florida.	jc
	*	PROPOSED Amicus Curiae Brief of the Comptroller of the State of Florida received on (23).	jc
01/29/85	23	REPLY MEMO. of Law in Support of Pltfs.' Motion for Preliminary Injunction (2) and In Opposition to Deft.'s Motion to Dismiss (19), by Pltfs.	jc
	24	AFFIDAVIT In Support of Motion for Preliminary Injunction (2), by Pltfs.	jc
01/30/85	25	RECORD OF HEARING: on Pltf.'s Application for Preliminary Injunction. Order Granting Deft.'s Motion to file Memo. of Law One Day Out of Time, filed in Open Court. Amicus Curiae Brief of the Comptroller of the State of Florida, filed in Open Court and GRANTED by the Court. Arguments of Counsel. Counsel to submit briefs by 5:00 P.M. on 02/06/85. Taken under advisement by the Court. Hon. Howell W. Melton.	jc

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PLAINTIFF	DEFENDANT	84-1403-Civ-J-12 DOCKET NO.
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 3 OF ___ PAG

DATE	NR.	VOL. 2 PROCEEDINGS	
01/30/85	26	ORDER that this cause before the Court on deft.'s Motion to File Federal Deft.'s Memo. of Law One Day Out of Time (18), & the same having been duly considered, the Motion will be GRANTED. HWM s/01/30/85 (Counsel Ntfd.) (Filed in Open Court)	jc
	27	AMICUS CURIAE BRIEF of the Comptroller of the State of Florida. (Filed in Open Court).	jc
01/31/85	28	TRANSCRIPT of Hearing on Pltfs.' Application for Preliminary Injunction before Howell W. Melton on 01/30/85 at 2:00 P.M.(2)	jc
02-05-85	29	**OPPOSITION** to Deft's Motion to Dismiss by Pltf.(19) (copy)	Pg
02/07/85	30	OPPOSITION to Deft.'s Motion to Dismiss by Pltfs. (19).	jc
02/13/85	31	REPLY to Pltfs.' Oppositions to Deft.'s Motion to Dismiss (29 & 30), by Deft.	jc
02/15/85	32	MEMO. Opinion and ORDER on Deft.'s Motion to Dismiss (19) and On Pltfs.' Motion for Preliminary Injunction (2): (1) Deft.'s Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted is DENIED; (2) Pltf.'s Motion for a Preliminary Injunction enjoining the Comptroller from issuing preliminary approvals for nonbank banks is DENIED. (3) Pltfs.' Motion for a preliminary injunction enjoining the Comptroller from issuing final approvals or charters for nonbank banks is GRANTED. HWM s/02/15/85 (Counsel Ntfd.)	jc
03/01/85	33	ANSWER by C. T. CONOVER to the Complaint.	jc
03/04/85	34	ORDER Directing Counsel to Confer & Pltf. to Report. HWM s/03/01/85. (Counsel Ntfd.)	jc
03/06/85	35	MOTION to Modify Preliminary Injunction by Deft.	jc
	*	PROPOSED Brief In Support of Deft.'s Motion to Modify Preliminary Injunction (35).	jc
03/06/85	36	MOTION to Waive 20-Page Limit by Deft.	jc
	37	MEMO. of Law in Support of Motion to Waive 20-Page Limit (36), by Deft.	jc
	*	PROPOSED Order received on (36).	jc

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PLAINTIFF	DEFENDANT	84-1403-Civ DOCKET NO.
INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 4 OF

DATE	NR.	PROCEEDINGS	
03/11/85	38	ORDER that this cause came before the Court on Deft.'s Motion to Waive the 20-page limit per Local Rule 3.01(c), and the same having been duly considered, the motion will be GRANTED. HTS s/03/11/85. (Counsel Ntfd.)	jc
	39	BRIEF In Support of Deft.'s Motion to Modify Preliminary Injunction (35), by Deft.	jc
03/15/85	40	MOTION for Leave to File Memo. In Excess of 20 Pages and for Enlargement of Time by Pltfs.	jc
	*	PROPOSED Order rec'd. (40)	jc
03/18/85	41	ORDER that Pltfs.' Motion for Leave to File Memo. in Excess of 20 Pages (40), is GRANTED; and it is ordered that Pltfs. shall have through March 22, 1985, within which to file their Memo. in Opposition to Deft.'s Motion to Modify Preliminary Injunction. (35). HTS s/03/18/85. (Counsel Ntfd.)	jc
03/19/85	42	OPPOSITION to Motion for Enlargement of Time by Deft. (40).	jc
	43	MOTION of the Conference of State Bank Supervisors for Leave to File Brief as Amicus Curiae in Opposition to Deft.'s Motion to Modify Preliminary Injunction. (35)	jc
	*	PROPOSED Brief Amicus Curiae of Conference of State Bank Supervisors in Opposition to Deft.'s Motion to Modify Preliminary Injunction received. (43).	jc
	*	PROPOSED Written Designation and Consent to Act received. (43).	jc
	44	MOTION to Extend Time for Response to Court's Order Dated 03/01/85 (34), by Pltfs.	jc
	*	PROPOSED Order received on (#44).	jc
03/21/85	45	ORDER that the Pltfs.' Motion to Extend Time for Response to Court's Order Dated 03/01/85 (44), is GRANTED, and it is Further Ordered that Pltfs. shall have through 04/03/85, within which to confer with other counsel of record and make the report to the clerk required by the Court's Order. HWM s/03/21/85. (Counsel Notified).	jc
	46	ORDER that Deft. shall file a Memo. in opposition to Motion of the Conference of State Bank Supervisors for Leave to File Brief as Amicus Curiae in Opposition to Deft.'s Motion to Modify Preliminary Injunction (43) on or before Friday, 03/29/85, if said motion is opposed. HWM s/03/21/85. (Counsel Ntfd.)	jc
	47	NOTICE of Hearing on Deft.'s Motion to Modify Preliminary Injunction (35) set for 04/05/85 at 9:30 a.m. HWM s/03/21/85 (Counsel Ntfd.)	jc

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INDEPENDENT BANKERS ASSOC. OF AM., et al.	C. T. CONOVER	PAGE 5 OF ___ PAGE

DATE	NR.	PROCEEDINGS	
03/22/85	48	OPPOSITION to Deft.'s Motion to Modify Preliminary Injunction (35) by Pltfs.	jc
04/03/85	49	NOTICE of Change of Address of Counsel for Pltf. INDEPENDENT BANKERS ASSOCIATION OF AMERICA.	jc
	50	NOTICE of Filing Order Directing Counsel to Confer & Pltf. to Report. Est. time to complete discovery- 6 months; est. time for trial- 2 to 3 days; and probability of settlement- 0.	jc
** 04/04/85	51	WRITTEN Designation & Consent to Act by Counsel for Conference of State Bank Supervisors and designates Michael P. McMahon, Esq. to whom all notices and papers can be served.	jc
	52	ORDER: (1) That the Motion of the Conference of State Bank Supervisors for Leave to File Brief as Amicus Curiae in Opposition to Deft.'s Motion to Modify Preliminary Injunction, filed herein on 03/19/85 (43) is GRANTED; (2) That the Clerk of the Court is directed to file herein the Brief Amicus Curiae of Conference of State Bank Supervisors in Opposition to Deft.'s Motion to Modify Preliminary Injunction (35).	jc
	53	BRIEF AMICUS CURIAE of Conference of State Bank Supervisors of In Opposition to Deft.'s Motion to Modify Preliminary Injunction. (35).	jc
04-05-85	54	**RECORD OF HEARING:** Hearing held on Deft's Motion to Modify Preliminary Injunction (35). Arguments by Counsel. Taken under advisement. HWM	Pg
04-08-85	55	**ORDER:** That Deft's Motion to Modify Preliminary Injnction (35) is hereby **DENIED.** s/4/8/85 HWM (Counsel Notified).	Pg
04/10/85	56	**TRANSCRIPT** of Hearing on Deft.'s Motion to Modify Preliminary Injunction before Hon. Howell W. Melton on 04/05/85 at 9:30 a.m.	jc
04/11/85	57	**NOTICE** of Appeal by Deft. C. T. Conover of Memorandum Opinion and Order entered on 02/15/85. (Counsel Notified) (32)	jc
	58	**NOTICE** of Appeal by Deft. C. T. Conover of Order entered on 04/08/85 (55). (Counsel Notified)	jc
	*	**APPEAL** Information Sheet furnished to Mr. Koslowe.	jc
	*	**CERTIFIED** copies of Notice of Appeal, docket entries, Orders #32 & 55 mailed to Clerk, U.S. Court of Appeals.	jc
04/17/85	*	I telephoned Mr. Neil Koslowe, Attorney for Deft. re. a Designation of Record for Appeal and he advised me he would send one to us.	jc

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PLAINTIFF	DEFENDANT	84-1403-Civ-J DOCKET NO. ___
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DATE	NR.	PROCEEDINGS	
04/19/85	59	**MOTION** for Stay Pending Appeal by Deft. (to stay the Preliminary Injunction entered by the Court on 02/15/85 (32) and the Order entered by the Court on 04/08/85 (55).	jc
	60	**MEMORANDUM** of Law in Support of Deft.'s Motion for Stay Pending Appeal (59).	jc
	61	**CERTIFICATE** of Service by Deft. (of documents #59 & 60).	jc
04/24/85	62	**LETTER** designating the record on appeal by Mr. Koslowe.	jc
	63	**SUPPLEMENTAL LETTER** designating the record on appeal by Mr. Koslowe.	jc
	64	**STATEMENT** of Issues on Appeal by Deft.	jc
04/25/85	*	I telephoned Brenda Hauck at U.SC.A. and they have assigned their Case Number - 85-3268.	jc
	*	**RECORD ON APPEAL** mailed to Clerk, U.S.C.A.	jc
04/29/85	*	**FORM LETTER** from the U.S.C.A. requesting the record to be forwarded to them, pursuant to FRAP Rule 11.	jc
	65	**MOTION** to Compel Answers to Interrogatories by Deft. Comptroller of the Currency by Pltfs. **MEMORANDUM OF LAW** in Support of Motion to Compel Answers to Interrogatories by Deft. Comptroller of the Currency attached.	jc
	*	PROPOSED Order received on #65.	jc
04/30/85	66	**MEMORANDUM** of Points and Authorities In Opposition to Deft.'s Motion for Stay Pending Appeal by Pltfs. (59)	jc
05-01-85	67	**ORDER:** That deft's Motion for Stay Pending Appeal, filed herein(59) is **DENIED.** s/5/1/85 HWM (Counsel notified).	Pg
05/03/85	*	**ACKNOWLEDGMENT** from U.S.C.A. of receipt of Record on Appeal.	jc
05/14/85	68	OPPOSITION to Pltfs.' Motion to Compel Answers to Pltfs. First Set of Interrogatories (65), by Deft.	jc
05/20/85	69	**ORDER** that Pltfs.' Motion to Compel Answers to Interrogatories by Deft. Comptroller of the Currency filed on 04/29/85 (65), is **GRANTED** as to interrogatories 2, 3, 10, 12, 13, 15, and 21; otherwise the motion is **DENIED.** Pltfs.' request in the Motion for an award of reasonable expenses including attorneys' fees is **DENIED.** Deft. shall have fifteen days from the date of this Order to answer subject interrogatories. HTS s/05/20/85. (Counsel Notified)	jc

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DATE	NR.	PROCEEDINGS	
05/22/85	70	**MOTION** for Clarification (of Court's preliminary injunction order entered on 02/15/85), by Deft.	jc
05/23/85	71	**NOTICE** of Intervening Event by Pltf., FLORIDA BANKERS ASSOCIATION.	jc
05/28/85	72	**RESPONSE** to Motion for Clarification (70), by Pltf. FLORIDA BANKERS ASSOCIATION.	jc
	73	**MOTION** for Entry of Order Directing Compliance with Injunction by Pltf. FLORIDA BANKERS ASSOCIATION. Appendix in accordian folder	jc
	74	**MOTION** for Permission to File Memo. More Than 20 Pages in Length by Pltf. FLORIDA BANKERS ASSOCIATION.	jc
	*	PROPOSED Memo. of Law in Support of Motion for Entry of Order Directing Compliance with Injunction received.	jc
05/29/85	*	I telephoned Mr. Koslowe and advised him that any pleadings filed after the Record on Appeal was mailed to U.S.C.A., he should designate them if he would like them to go to U.S.C.A.	jc
		VOLUME 3	
05/30/85	75	**ORDER** that the FLORIDA BANKERS ASSOCIATION's Motion for Permission to File Memo. More than 20 Pages in Length filed on 05/28/85 (74), is **GRANTED.** The Clerk of the Court is directed to file, forthwith, the Memo. of Law in Support of Motion for Entry of Order Directing Compliance with Injunction which was submitted with the Motion. HTS s/05/30/85 (Counsel Notified)	jc
	76	**MEMORANDUM OF LAW** In Support of Motion for Entry of Order Directing Compliance with Injunction (73), by Pltf., FLORIDA BANKERS ASSOCIATION.	jc
	77	**MOTION** to Vacate in Part Magistrate's Discovery Order by Deft.	jc
	78	**MEMORANDUM OF LAW** in Support of Deft.'s Motion to Vacate In Part Magistrate's Discovery Order (77), by Deft.	jc
06-10-85	79	**NOTICE** of Entry of Appearance by INDEPENDENT BANKERS ASSOCIATION and COMMUNITY BANKERS OF FLORIDA, INC. of Peri N. Nash replacing Thomas Roberts from the firm of Surrey & Morse.	jc
	80	**MEMORANDUM** of Points and Authorities in Opposition to Deft.'s Motion to Vacate Magistrate's Discovery Order (77), by Pltfs.	jc
06-13-85	81	**NOTICE** of Filing Supplement to Appendix to Motion for Entry of Order Directing Compliance With Injunction (73) by Pltfs.	jc
	82	**SUPPLEMENT** to Appendix to Motion for Entry of Order Directing Compliance with Injunction (73) by Pltf.s	jc

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DATE	NR.	PROCEEDINGS	
06-13-85	83	**NOTICE** of Joinder in Motion for Entry of Order Directing Compliance With Injunction (73), by Pltf. FLORIDA BANKERS ASSOCIATION.	jc
06-14-85	*	**LETTER** from U.S.C.A. returning the Record on Appeal (#85-3279 & 85-3268 dismissing the appeal which is issued as and for the mandate.	jc
	84	**VOLUNTARY DISMISSAL OF APPEAL** (#85-3268 & 85-3279) along with **ENTRY OF DISMISSAL** that the Motion of Appellant was dismissed this 12th day of June, 1985. Deputy Clerk, U.S.C.A. M.R. 108/219 and M.R. 108/223.	jc
07-18-85	85	**MOTION** to Intervene as Defts., by SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION, and CONTINENTAL TELECOM, INC.	jc
	86	**MEMORANDUM** in Support of Applicants' Motion to Intervene as Defts. (85).	jc
	*	PROPOSED Motion to Dismiss of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC. received.	jc
	*	PROPOSED MOTION for Permission To File Memorandum More Than Twenty Pages in Length received.	jc
	*	PROPOSED Memorandum in Support of Motion to Dismiss of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC. received.	jc
07-26-85	87	**NOTICE** of Designation and Consent to Act by Counsel for applicants for Intervention appointing Waddell A. Wallace, III, Esq. as local counsel, Smith & Hulsey, 500 Barnett Bank Bldg., Jacksonville, Florida 32202.	jc
07-26-85	88	**STIPULATED MOTION** for Extension of Time to Respond to Motions of Southern National Bank of Broward County, National Bancard Corporation and Continental Telecom, Inc. (85), by Pltfs.	jc
08-01-85	89	**ORDER** that Pltfs.' Stipulated Motion for Extension of Time To Respond to Motions of Southern National Bank of Broward County, National Bancard Corporation, and Continental Telecom, Inc., which Motion for Extensionof time was filed on 07/26/85 (88), is **GRANTED**. Pltfs. shall have up to and including 08/12/85 to respond to the pending Motions of the applicants for intervention. HTS s/08/01/85 (Counsel Notified)	jc

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DATE	NR.	PROCEEDINGS	
08-13-85	90	**STIPULATED MOTION** for Additional Extension of Time to Respond to Motions of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION AND CONTINENTAL TELECOM, INC. (85)	jc
08-19-85	91	**ORDER** that Pltfs.' Stipulated Motion for Additional Extension of Time to Respond to Motions of SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC., (90), is **GRANTED** and Pltfs. shall do so by on or before 08/19/85. HTS s/08/19/85 (Counsel Notified)	jc
08-21-85	92	**RESPONSE** to Application for Leave to Intervene, by Pltfs. (85)	jc
	93	**RESPONSE** to Motion to Dismiss of Applicants for Intervention, by Pltfs.	jc
08-23-85	94	**JOINT MOTION** to Stay All Proceedings for Six Months by the parties and Applicants for Intervention.	jc
	*	PROPOSED ORDER received on 94.	jc
08-26-85	95	**ORDER:** All further proceedings in this action are **STAYED** for six months, subject to extension on motion. See Order for further information. HWM s/08/23/85 (Counsel Notified).	jc
1986			
02-28-86	96	**JOINT** Motion for Continuance of the Stay of All Proceedings for Thirty Days.	
02-28-86	*	**RECEIVED** Proposed Order (96).	jc
03-04-86	97	**ORDER** that Pltfs.' Motion to Stay Proceedings for an additional 30 days beginning 02-28-86 and continuing through 03-30-86, is **GRANTED.** HWM s/03-03-86 (Counsel Notified)	jc
12/29/86	98	**MOTION** to Vacate Preliminary Injunctive (2,32) filed by Deft (With Attached Brief in Support of Motion)	mc
12/31/86	99	**MOTION** for Enlargement of Time Within Which to File Memorandum in Opposition to Deft's Motion to Vacate Preliminary Injunction (98) filed by Pltfs	mc
12/31/86	*	**RECEIVED** proposed Order for Enlargement of Time (99)	mc

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DATE	NR.	PROCEEDINGS	
1987			
./05/87	100	**ORDER** Enlarging Time to File Memorandum in Response to Motion to Vacate Preliminary Injunction. Pltfs' Motion to Enlarge the Time Within Which Pltfs must respond to Deft's Motion to Vacate Preliminary Injunction (99) is **granted** and Pltfs shall have until **01/25/87** to serve a responsive brief or memorandum. s/HWM 01/05/87 (counsel notified)	mc
./26/87	101	**RESPONSE** to Motion to Vacate Preliminary Injunction (99,100) filed by Pltfs	mc
		VOLUME 4	
1/29/87	102	**NOTICE** of Hearing on Deft's Motion to Vacate Preliminary Injunction (98) scheduled for **03/13/87** at **9:30 a.m.** Courtroom No. 1. Counsel will be limited to 30 minutes per side on argument. (counsel notified, HWM, Courtroom Deputy)	mc
2/12/87	103	**NOTICE** of Intention to Withdraw as Counsel of Record filed by Pltfs INDEPENDENT BANKERS and COMMUNITY BANKERS OF FLORIDA. Said Pltfs will be continued to be represented by J. Thomas Cardwell and Michael P. McMahon. (counsel for Florida Bankers	mc
2/17/87	104	**MOTION** for Substitution of Counsel filed by Pltf's counsel LEONARD J. RUBIN	mc
2/23/87	105	**NOTICE** of Material Developments Affecting Pltfs' Motion For Entry of Order Directing Compliance With Injunction (73) filed by Pltfs	mc
2/27/87	106	**ORDER:** The Motion for Substitution of Counsel (104) is **granted.** Leonard Rubin, Esquire is permitted to withdraw as counsel for Pltf's INDEPENDENT BANKERS and COMMUNITY BANKERS. J. Thomas Caldwell, Esquire and Michael P. McMahon, Esquire shall continue to represent said Pltfs. s/HTS 02/27/87 (counsel notified)	mc
3/03/87	107	**WITHDRAWAL** Of Motion to Intervene (85) filed by Intervenors, SOUTHERN NATIONAL BANK OF BROWARD COUNTY, NATIONAL BANCARD CORPORATION and CONTINENTAL TELECOM, INC.	mc
3/05/87	108	**ORDER.** Southern National Bank of Broward County; National Bancard Corporation; and Continental Telecom, Inc. are **released** from further obligation, re: appearances in this cause. s/03-05-87 HWM (counsel notified)	jf

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DATE	NR.	PROCEEDINGS	
03/09/87	109	**MOTION** For Summary Judgment filed by Deft	mc
03/09/87	110	**MOTION** For Leave to File Brief in Excess of 20 Pages filed by Deft	mc
03/09/87	*	**RECEIVED (proposed) BRIEF** in Support of Motion For Summary Judgment (109) filed by Deft	mc
03/09/87	111	**NOTICE** of Supplementary Authority filed by Pltf	mc
03/12/87	112	**MOTION** For Leave to File Reply to Pltfs' Response to Motion to Vacate Preliminary Injunction (101) filed by Deft	mc
03/12/87	*	**RECEIVED (proposed)** Reply to Pltfs' Response to Motion to Vacate Preliminary Injunction (112) filed by Deft	mc
03/12/87	113	**CERTIFICATE** OF Servive (112) filed by Deft	mc
03/13/87	114	**RECORD** of Hearing on Deft's Motion to Vacate Preliminary Injunction. (98,102) before the Honorable Howell W. Melton. Arguments of counsel. Deft's Motion to File Reply to Pltf's Response to Motion to Vacate Preliminary Injunction (101,112) is **granted.** Deft's Motion to Vacate Preliminary Injunction (98) is taken under advisement.	mc
03/13/87	115	**REPLY** to Pltfs' Response to Motion to Vacate Preliminary Injunction (101, 112) filed by Deft	mc
03/16/87	116	**TRANSCRIPT** of Hearing on Deft's Motion to Vacate Preliminary Injunction (98,102) (See Separate Folder) (114) held before the Honorable Howell W. Melton on 03/13/87	mc
03/18/87	117	**MOTION** For Extension of Time to Serve Response to Motion For Summary Judgment (109) filed by Pltfs	mc
03/24/87	118	**ORDER.** Deft's Motion for Leave to File Brief in Excess of 20 Pages is GRANTED. (110) Pltfs' Motion for Extension of Time to Serve Response to Motion for Summary Judgment is GRANTED. Pltfs shall have until **04-03-87** within which to do so. (117) (109) s/03-24-87 HTS (counsel notified)	jf
03/24/87	119	**BRIEF** in Support of Deft's Motion for Summary Judgment, by Deft (filed per Order #118)	jf
03/25/87	*	**RECEIVED** attorney Philip S. Corwin's copy of Order (108) **returned** marked: "Return to Sender: Moved, Not Forwardable"	jf
04/01/87	*	**RECEIVED** letter addressed to Hon. Howell W. Melton from Special Litigation Counsel, with proposed memo opinion/order and Committee Print No. 3	jf

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DATE	NR.	PROCEEDINGS	
4-01-87	120	**ORDER** Denying Defendant's Motion to Vacate Preliminary Injunction. s/03-31-87 HWM (counsel notified) (98) (2)	jf
4/06/87	121	**MOTION** for Leave to File Memo of Law in Excess of Twenty Pages by Pltfs	jf
4/06/87	*	**RECEIVED** proposed "Response to Deft's Motion for Summary Judgment," (121)	jf
4/06/87	*	**RECEIVED** letter addressed to Hon. Howell W. Melton from attorney Mahon, with attachment	jf
4/09/87	122	**ORDER.** Pltfs' Motion for Leave to File Memo in Excess of 20 Pages is GRANTED. (121) s/04-09-87 HTS (counsel notified)	jf
4/09/87	123	**RESPONSE** to Deft's Motion for Summary Judgment, by Pltfs (120)(109) (Filed per Order #122)	jf
4/17/87	124	**MOTION** for Leave to File Brief as Amicus Curiae in Support of (109) Deft's Motion for Summary Judgment, by NEW YORK CLEARING HOUSE	
4/17/87	*	**RECEIVED** proposed "Memo of N.Y. Clearing House amicus curiae" (124)	jf
4/28/87	125	**RESPONSE** to Motion of NEW YORK CLEARING HOUSE ASSN. For Leave to File Brief as Amicus Curiae filed by Pltfs (124)	mc
5/05/87	126	**ORDER:** The Motion of the NEW YORK CLEARING HOUSE ASSN. For Leave to File Brief as Amicus Curiae in Support of Deft's Motion for Summary Judgment (109,124) is **granted.** The Clerk of the Court is directed to file the Memorandum of the NEW YORK CLEARING HOUSE ASSN., Amicus Curiae, in Support of Deft's Motion for Summary Judgment. s/HTS 05/05/87 (counsel notified)	mc
5/05/87	127	**MEMORANDUM,** Amicus Curiae, in Support of Deft's Motion for Summary Judgment (109, 126) filed by NEW YORK CLEARING HOUSE ASSN.	mc
5/18/87	128	**LETTER** from Mr. William Proxmire, Chairman, U. S. Senate, Committee on Banking, Housing and Urban Affairs, to Honorable Howell W. Melton regarding letter dated 03/24/87 from Mr. Neil H. Koslowe (Counsel notified)	mc
6/04/87	129	**NOTICE** of Hearing on Deft's Motion for Summary Judgment (109) scheduled for **08/19/87** at **2:00 p.m.** (Counsel, HWM and Courtroom Deputy notified)	mc

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DATE	NR.	PROCEEDINGS	
08-12-87	130	**MOTION** For Leave to File Reply to Pltf's Response to Deft's Motion for Summary Judgment (123) by Deft	mc
08-12-87	*	**PROPOSED** Order (130)	mc
08-12-87	*	**PROPOSED** "Reply to Pltf's Response to Deft's Motion to Summary Judgment (130) by Deft	mc
08-12-87	131	**MOTION** to Vacate Preliminary Injunction (2) by Deft	mc
08-17-87	132	**ORDER:** Deft's Motion for Leave to File Reply to Pltfs' Response to Deft's Motion for Summary Judgment (130) is **granted.** The Clerk is directed to file Deft's Reply to Pltfs' Response to Deft's Motion for Summary Judgment. s/HTS 08-17-87 (counsel notified)	mc
08-17-87	133	**REPLY** to Pltfs' Response to Deft's Motion for Summary Judgment (132) by Deft	mc
08-18-87	134	**MOTION** for Entry of Order of Dismissal Without Prejudice by Pltfs	mc
08-18-87	*	**PROPOSED** Order (134)	mc
08-31-87	135	**RESPONSE** to Motion to Vacate Preliminary Injunction (131) by Pltfs	mc
09-04-87	136	**RESPONSE** to Pltfs' Motion for Entry of Order of Dismissal Without Prejudice (134) by Deft	mc
09-04-87	*	**PROPOSED** Order (136)	mc
09-11-87	137	**ORDER** of Dismissal. This cause is before the Court on Pltfs' Motion for Entry of Dismissal Without Prejudice (134). Deft responded (136). ORDERED: That the Memorandum Opinion and Order on Deft's Motion to Dismiss and on Pltfs' Motion for Preliminary Injunction (32) is hereby **vacated.** That all pending motions, other than Pltfs' motion to dismiss (19) are hereby **dismissed** as moot; and, that this action is hereby **dismissed without prejudice,** with each party to bear its own costs and attorneys' fees. s/HWM 09-11-87 (counsel notified) MR 112/509-510.	mc