



Comments to the Office of the Comptroller of the Currency on Exploring Special Purpose National Bank Charters for Fintech Companies

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Introduction

Coin Center is an independent nonprofit research and advocacy center focused on the public policy issues facing digital currency technologies such as Bitcoin. Our mission is to build a better understanding of these technologies and to promote a regulatory climate that preserves the freedom to innovate using blockchain technologies. We do this by producing and publishing policy research from respected academics and experts, educating policymakers and the media about blockchain technology, and by engaging in advocacy for sound public policy.

In this brief comment we will reiterate and underscore the need for a Special Purpose National Bank (“SPNB”) charter that is suitable for digital payments companies, and we will suggest one subject, the description of check paying as a core banking function, that could be better addressed in the draft supplement to the Comptroller's Manual.

The Pressing Need for an SPNB Charter

We continue to applaud the OCC for its unmatched leadership in encouraging responsible financial technology innovation here in the United State. As the OCC has correctly pointed out, technology increasingly allows financial service providers to be untethered from any particular local or state jurisdiction. Given this emerging capability, the dual banking system offers a valuable choice for U.S. banks and their customers. Banks can be subject to sub-national standards in the various locations wherein they have customers, or they may take a national approach that may be more suitable to their increasingly locality-agnostic structure. This dual environment offers a carefully circumscribed and ongoing experiment that continually seeks and uncovers standards and rules best able to promote healthy competition, as well as efficient and comprehensive regulation. As the OCC has previously stated,

the national banking system is the venue for testing and evaluating the efficiencies and benefits that flow from uniform national standards. This takes on a new value as the banking and financial marketplace evolves, increasingly oblivious to state boundaries,

as a result of enhanced technology and the growth of national markets for loans, deposits and other financial products.¹

Until the development of the SPNB charter, however, there existed no dual system for financial technology companies who did not fit the more traditional understanding of “bank.” As exemplified in the non-depository money transmission space, only one regulatory route presented itself: state-by-state money transmission licensing. We believe that a single route is insufficient to guarantee that innovation can thrive in the U.S.² A dual system will also ensure that consumers are best protected.³ Choice and good-natured regulatory competition are what these highly innovative technologies and business models need. By offering a new path towards uniform national standards for financial technology companies, the SPNB creates that badly needed choice and competition.

The OCC is also rightly pursuing the development of the SPNB charter as an exercise in self-betterment and growth. If the OCC does eventually charter a digital payments firm as a new national bank it will gain an invaluable “window” into these rapidly growing networks, and derive the insights necessary to ensure that American consumers, as well as the American economy at large, remain safe and prosperous within an increasingly online and global financial system.

Check Paying and the Comptroller's Manual

We agree that digital payments firms, and virtual currency firms among them, are less likely to characterize their activities as fiduciary in nature, but instead will understand them as purely

¹ OCC, *National Banks and The Dual Banking System* (2003) available at <https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/national-banks-and-the-dual-banking-system.pdf>

² Without a federal charter, a digital payments firm will likely be treated as a money services business and, more narrowly, a money transmitter. As a money transmitter, a firm must be prepared to interface with multiple federal regulators as well as regulators in every one of the several states wherein they have or expect to have customers. Money transmission regulations were developed long before the emergence of online wallets or digital currency technologies and often inflexibly demand rote compliance with rules that are inappropriate or confounding as applied to these new technologies. A handful of states are drafting new licensing laws aimed specifically at digital currencies, but—despite laudable efforts to foster a unified approach—the process remains a patchwork. Little coordination exists between these several regulatory bodies and conflicting approaches and non-uniformity abound. The resulting complexity and uncertainty massively increases the costs of operating these businesses in the U.S. as compared to other nations, while simultaneously providing little if anything in the way of enhanced consumer protections.

³ The current regulatory landscape may be sub-optimal in protecting money transmitter customers from harm. This can be the case because each individual state will generally be concerned only with the activities of licensed firms that touch their own citizens, rather than the systemic health and risk profile of the licensee as a whole. This is a particularly odd regulatory approach for businesses that, by virtue of the Internet, are almost assuredly global in the scope of their operations. For example, in Alabama, a money transmission licensee need only prove a minimum net worth of \$5,000 and obtain a surety bond of \$10,000 in order to satisfy the capital and liquidity protections mandated by that state’s money transmission laws. At best this may be barely sufficient to protect customers in Alabama, and in general it appears severely disjointed from the realities of the modern payments and financial services industry.

custodial and payment-oriented.⁴ These firms, by and large, do not offer advice or portfolio management. They simply move, hold, and/or make available new digital assets for their customers at their customer's command. Generally speaking, these firms simply hold these assets off-balance-sheet on behalf of their customers and without hypothecation and never on a fractional reserve basis. Thus to qualify for a charter these firms will need to make a good-faith case that they are engaged in the "check paying" activity of the three core banking activities.⁵

We believe that the OCC has somewhat under-articulated its understanding of this check paying activity when communicating to prospective charter applicants. The newly drafted Supplement to the Comptroller's Licensing Manual provides an opportunity to offer greater clarity on this point.

In the current draft, the lending activity is described clearly with several examples of well-understood practices. "For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money."⁶ The draft's characterization of a modern-day check-paying activity, however, remains fuzzy and lists fewer practical examples. "[I]ssuing debit cards or engaging in other means of facilitating payments electronically may be considered the modern equivalent of paying checks."⁷

A technology that creates a pass through vehicle for credit card payments, such as Apple Pay or Android Pay, would seemingly fit the bill for facilitation of electronic payments; so too might an online money transmitter such as PayPal, Venmo, or Square; and so too might a virtual currency company that facilitates payment transactions involving natively digital money, or payments that involve a conversion or exchange between traditional money and a virtual currency. If the OCC is, indeed, open to at least entertaining charter applications from firms involved in some or all of these activities, we believe it would be highly useful to the industry to understand that interest with a greater degree of specificity.

We humbly ask that the OCC offer a more elaborate description of new activities that may qualify as check paying. This description should, of course, avoid offering any guarantee that one or another activity will or will not qualify; it should, however, point innovators in the right direction and help them understand how they may or may not fit into a SPNB charter.

⁴ OCC, Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies (Mar. 2017) available at <https://occ.gov/news-issuances/news-releases/2017/nr-occ-2017-31.html> ("Accordingly, the OCC anticipates that SPNBs likely will elect to demonstrate that they are engaged in paying checks or lending money.").

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

We thank the OCC for this opportunity. If you have any questions or concerns regarding these emerging technologies and business models, do not hesitate to get in touch.