

## Emerging Trends in the Regulation of Fintech and Blockchain Technology: An Update on the National Fintech Charter

by Mark E. Konrad, Esq.

Given the heavily regulated nature of financial services in the United States, it should not be a surprise that one of the biggest challenges facing the “fintech”<sup>1</sup> industry is regulatory uncertainty. As explained by the General Accounting Office (GAO) in its March 2018 study, *Financial Technology: Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory Oversight* (GAO 3/18 Study):

The U.S. regulatory structure poses challenges to fintech firms. With numerous regulators, fintech firms noted that identifying the applicable laws and how their activities will be regulated can be difficult. Although regulators have issued some guidance, fintech payment and lending firms say complying with fragmented state requirements is costly and time-consuming.<sup>2</sup>

Based on this, one of the key recommendations made by the U.S. Treasury in its July 31, 2018 report, *A Financial System That Creates Economic Opportunities-Nonbank Financials, Fintech, and Innovation* (“Treasury Fintech Report”) was the following:

Treasury recommends that the OCC move forward with prudent and carefully considered applications for special purpose national bank charters. OCC special purpose national banks should not be permitted to accept FDIC-insured deposits, to reduce risks to taxpayers. The OCC should consider whether it is appropriate to apply financial inclusion requirements to special purpose national banks. The Federal Reserve should assess whether OCC special purpose national banks should receive access to federal payment services.<sup>3</sup>

On July 31, 2018, consistent with Treasury’s recommendation, the OCC announced that it will begin accepting applications for national bank charters from fintech companies engaged in the business of banking.<sup>4</sup> As explained by the OCC, “[a]s the banking industry changes, companies that engage in the business of banking in new and innovative ways should have the same opportunity to obtain a national bank charter as companies that provide banking services through more traditional means.” In its policy statement, the OCC asserted that it had the authority to charter a “special purpose national bank” (“SPNB”), that the OCC’s regulations define the “business of banking” to include “any of the three core banking functions of receiving deposits, paying checks, or lending money, and that it could grant a national bank charter “to a fintech company that engages in one or more of those core banking activities.”

In considering whether to award an SPNB charter, the OCC stated it would use its existing chartering standards and procedures as set forth in the *Comptroller’s Licensing Manual*. Some of the matters which the OCC will consider as part of an SPNB charter application will be whether the proposed fintech business “has a reasonable chance of success, will be operated in a safe and sound manner, will provide fair access to financial services, will treat customers fairly, and will comply

<sup>1</sup> As defined by the Office of the Comptroller of the Currency (OCC) “fintech” firms relate to “nondepository financial technology companies engaged in the business of banking.” OCC News Release dated July 31, 2018 entitled “OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies.” NR 2018-74.

<sup>2</sup> See GAO 3/18 Study, Highlights, at 1 available at <https://www.gao.gov/assets/700/690803.pdf>.

<sup>3</sup> See *Treasury Fintech Report*, at 201.

<sup>4</sup> See OCC “Policy Statement on Financial Technology Companies’ Eligibility to Apply for National Bank Charters,” July 31, 2018 available at <https://www.occ.treas.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html>

with applicable laws and regulations.” The OCC further stated that it “expects a fintech company that receives a national bank charter to demonstrate a commitment to financial inclusion” and the “nature of that commitment will depend on the company’s business model and the types of products, services, and activities it plans to provide.”

As for the future regulation of SPNBs, the OCC stated:

A fintech company that receives a national bank charter will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet. As it does for all banks under its supervision, the OCC would tailor these standards based on the bank’s size, complexity, and risk profile, consistent with applicable law. In addition, a fintech company with a national bank charter will be supervised like similarly situated national banks, including with respect to capital, liquidity, and risk management.

The implications of this new policy are significant. Fintech companies, which seek to harness the power of the internet to provide financial services in multiple states without having a brick and mortar presence, now have the potential of significantly simplifying their regulatory issues by obtaining an SPNB charter. Armed with an SPNB fintech charter, fintech companies could potentially be subject to the regulation of the OCC and assert that their charter preempts the labyrinth of conflicting state laws. Indeed, this development may well open the door for financial services businesses outside the traditional banking sector (e.g. direct to consumer lenders, money transmitters, internet-based commercial lenders, etc.) to expand their businesses, simplify their regulatory compliance policies, and significantly reduce administrative regulatory costs.

Notwithstanding the potential benefits of the new fintech charter, it should also be recognized that the new SPNB charter will likely face a legal challenge in the near future. Indeed, last year, two different lawsuits were filed - *Conf. of State Bank Supervisors v. Office of the Comptroller of the Currency*, No. 17-cv-00763 (D.D.C. April 26, 2017) 2017 WL 14888257 and *Vullo v. Office of the Comptroller of the Currency*, No. 17-cv-03574 (S.D.N.Y. May 12, 2017) 2017 WL 2115444, - which challenged 12 C.F.R. § 5.20(e)(1) (the OCC regulation relating to its fintech charter program) on the grounds that the fintech charter violated federal law and the U. S. Constitution. In 2018, the OCC filed motions to dismiss in each case which were ultimately granted on the grounds that the issues raised therein were premature and/or not yet ripe for judicial review. With the new policy guidance provided by the OCC, it is quite possible that similar litigation may be refiled in the near future to challenge the SPNB charter program announced on July 31, 2018.



**Mark E. Konrad**  
520.882.1220  
[mkonrad@swlaw.com](mailto:mkonrad@swlaw.com)

Mark Konrad is a partner in the Tucson office. His Arizona, Colorado and Nevada practice is concentrated in commercial litigation with significant experience in financial services, real property disputes, technology matters and construction law. Mark’s technology experience includes blockchain technology and fintech issues as well as technology company-related litigation.