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Fintech Companies and Bank Charters: Options and Considerations for 2018

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Fintech companies focused on payments or lending activities continue to seek solutions to minimize barriers to entry presented by myriad and disparate state licensing requirements. These efforts have given rise to numerous approaches, including, most notably, fintech-bank partnerships structured to avoid state licensing regimes. While another obvious option is a bank charter, few fintech firms have seriously considered bank charters due to a number of cost, compliance and other factors that make becoming a bank too burdensome. Recent developments, however, suggest that the bank charter option may be worthy of reconsideration. This article explores the opportunities, costs, risks and other factors that fintech firms should weigh in considering a bank charter and various charter options currently available or in development in the US. Notably, the scope of this article does not include non-US charter and similar options, of which there are a number of alternatives, including in the UK, Singapore and other jurisdictions.

Introduction

What once was old is new again. The fintech ecosystem that sprung up in the wake of the 2008 financial crisis has grown and matured. The early companies developing and marketing fintech applications (fintechs) set out to disrupt or displace traditional banks. But fintechs have largely come to see banks as partners in providing innovative products and services, helping even to modernize banks' internal systems. Now, partly due to the challenges of operating under a patchwork of state and federal laws and regulations, fintechs are considering becoming banks themselves. Following an interesting year of regulatory developments in 2017 and looking forward to 2018, fintechs have a range of viable bank charter options to explore in the US.

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The Regulatory Landscape

In the ten years since the financial crisis, fintechs have helped revolutionize the financial services marketplace—from the scope of products and services available, to how they are delivered. By developing and leveraging mobile applications, big data, machine learning, distributed ledgers and other technologies, fintechs have spurred innovation in offering credit, facilitating payments, providing advisory services, settling transactions, contracting for services, fraud prevention and cybersecurity and a wide range of other areas that now touch our everyday lives, including even our concept of money. In so doing, fintechs have also brought more unbanked and underbanked populations into mainstream financial services—an area in which traditional financial service providers often struggle–and, overall, have raised the bar on consumer expectations for what, how, where and when financial products and services are structured and delivered.

The history and evolution of banking and financial regulation in the US is complex and too broad to cover in this article. The result, however, is a regulatory snarl of overlapping federal and state agencies whose jurisdictions vary based on both the nature of the financial activity, product or service involved, and on the corporate charter of the regulated entity.

Banks are regulated entities that obtain their authorization to do business from, and are regularly examined by, a state and/or federal bank regulatory agency. Companies that are not banks also are often subject to the authority of a banking or financial regulatory agency if they provide financial products or services, particularly to consumers. In general, however, if a company wants to engage in the "business of banking," which can include a wide range of financial products and services but at its core revolves around deposit-taking, it must first apply for and receive a bank charter.[1]

A company that provides other financial services (without taking deposits) can be organized under any type of corporate charter, but it might need to obtain a license (or licenses) in each state where it intends to operate. The financial services that require a license are generally those that involve making loans (*e.g.*, mortgages, personal, auto or small-dollar) or transmitting money on behalf of others (*e.g.*, money transmission or payroll processing). Each state has its own laws and requirements for these licenses, some of which are vastly different in scope and regulatory focus.

Most of the consumer products and services developed by fintechs involve activities (payments and lending) that require state licenses if conducted directly by a fintech. Fintechs that operate predominantly online and have customers throughout the US often need to obtain licenses in all 50 states and the District of Columbia. The process of getting licensed in every state is costly and time consuming—requirements are inconsistent, state regulators' financial and technical sophistication can vary significantly, filing fees can be costly and states do not always prioritize the processing of applications. Once licensed, companies are generally subject to periodic exams or audits of their regulated activities by the issuing agency.

2017 Developments in Brief

While some start-up fintechs and commercial enterprises with fintech business lines have explored the possibility of organizing or investing in a bank as a means to reduce their state licensing burden, the general view is that becoming a bank is an arduous process. Receiving regulatory approval to form a new bank (a "*de novo*" bank) is difficult even for companies seeking to operate a traditional bank. From 2011 through 2016, there were five *de novo* charters granted, all for a traditional bank model.[2] Thus, right or wrong, there has been a strong and persistent perception that the *de novo* prospects for a fintech that does not fit the typical business-of-banking model are even more challenging. Whether it was due to the hurdles to *de novo* formation, the challenge of getting regulators comfortable with novel business models, the difficulty in maintaining bank-like capital and liquidity, or the desire to avoid bank examinations, most fintechs that have considered the issue have quickly dismissed the option of becoming a bank.

Recent changes to the regulatory landscape, including agency leadership changes and greater focus and agency awareness on fintech and regtech issues and opportunities, as well as bipartisan recognition on Capitol Hill regarding the promise of fintech for financial services providers and consumers, suggest that 2018 may be a new day for fintechs regarding consideration of the viability of operating through a bank or bank-like charter. Presaging this new thinking and approach to a fintech's bank charter analysis and decision making calculus were a number of formative developments, including the following:

Proposed federal charter for fintechs. In late 2016, the Office of the Comptroller of the Currency (OCC), the federal regulator that charters and supervises national banks and federal savings associations, issued a report (Fintech Whitepaper), outlining the agency's exploration of a possible special purpose national bank charter for fintech companies (fintech charter).[3] The OCC recognized that the need to obtain multiple state licenses could inhibit fintech development and that "institutions with federal charters [should] have a regulatory framework that is receptive to responsible innovation and the supervision that supports it."[4] In 2017, the OCC published draft licensing procedures describing the application requirements for a fintech charter.[5] As discussed below, the OCC's proposed requirements are potentially easier to satisfy than a 50-state licensing regime and more tailored to fintech business models. Also as discussed below, the fintech charter has been challenged in court by state financial regulators who see it as infringing on their jurisdiction and beyond the OCC's authority under the National Bank Act.

More *de novo* banks. 2017 also saw renewed interest in *de novo* banks of all types, but particularly in classic charter types, which fintechs could also seek to use. The Federal Deposit Insurance Corporation (FDIC) has, at times, received criticism for how few *de novo* banks it approves.[6] To help ease the application process, the FDIC published a Handbook for Organizers of De Novo Institutions in April 2017,[7] and an updated Deposit Insurance Applications Procedure Manual in June 2017.[8] Whether due to the new publications or a change in its regulatory posture, the FDIC approved six *de novo* applications in 2017,[9] but none to a fintech or fintech-inspired model.

ILC applications. During 2017, the FDIC received two applications from fintechs seeking to form banks chartered as industrial loan companies (ILCs).[10] An ILC charter is a state charter that permits a company to conduct many of the same activities as other state-chartered banks. ILCs are required to obtain FDIC insurance, but as discussed below, they are not treated as banks under the Bank Holding Company Act (BHCA), which means the *parent* company of an ILC is not subject to federal banking supervision. This feature could be a boon to fintechs that are often owned by corporate parents that are commercial firms (and not eligible to own a bank), rather than banking or financial companies.

Increased state coordination. States themselves recognize that requiring different licenses in each state could inhibit development of the fintech market. In May 2017, the Conference of State Bank Supervisors (CSBS) announced Vision 2020, a coordinated initiative among state regulators designed to "make[] supervision more efficient and recognize[] standards across state lines."[11] Vision 2020 is partly a response to the OCC fintech charter proposal, and one of its main focuses is to have increased harmonization and uniformity of licensing, regulations and examinations across states.[12]

Charter Options for Fintechs

Given the developments of 2017, following is a more fulsome examination of the potential charter options available to fintechs. This review includes a high-level overview of the bank regulatory framework that undergirds any charter selection analysis. Then, for each charter type, we summarize each charter's core characteristics, application and approval requirements; potential costs and benefits for a fintech; and potential difficulties, risks and uncertainties.

Bank Regulatory Considerations

Conducting a cost-benefit analysis of any charter option involves the following key regulatory concepts:

Primary federal regulator. All banks, whether state- or federally-chartered, are supervised by a primary federal regulator.[13] The federal banking agency that supervises a bank is determined by the type of charter and by whether or not the bank is a member of the Federal Reserve System (FRS).[14] Historically, the various charter types conveyed different powers and obligations, but under current law, the most meaningful distinction among banks and savings associations is the designated federal regulator.[15] A state bank, therefore, is supervised by both the state agency that issued its charter and the appropriate federal regulator. *See* Box 1 below for a summary of the various bank charters and the primary federal regulator for each.

Federal Preemption. Under the US Constitution, federal laws supersede state laws (*i.e.*, state laws are preempted) whenever there is a conflicting provision.[16] Because national banks and federal thrifts are authorized and regulated by federal law, many state banking laws do not apply to their activities.[17] Federal preemption helps ensure that national banks and federal thrifts face uniform regulations throughout the US and may provide an advantage for lending institutions to better compete in the US national market.

Licensing exemptions or exclusions. As discussed above, states generally require a company to obtain a license before engaging in certain regulated financial activities. Typically, a bank would be excluded from such requirements because its charter authorizes it to engage in the activity. For example, a bank generally does not need to obtain state licenses to engage in lending or money transmission,[18] but a fintech would typically require such licenses. In addition, the laws governing interstate branching make it easier, in some cases, for a bank to enter a new state in comparison with other types of companies, including most fintechs, attempting to do so.[19]

Holding companies. In general, a company that owns or controls a bank is a bank holding company under the BHCA, and a company that owns or controls a savings association is a savings and loan holding company under the Home Owners' Loan Act. Such holding companies are regulated by the Board of Governors of the FRS (FRB), and must limit their activities to those that are closely related to banking.[20] Because of those restrictions, non-financial (*i.e.*, commercial) companies often avoid ownership of or limit their investments in banks to avoid controlling a bank.

Box 1: Charters by Federal Regulator

Charter Type	Primary Federal Regulator
National bank Special purpose national bank (including proposed fintech charter) Federal savings and loan association Federal savings bank	OCC
State bank (not a member of FRS) State savings and loan association State savings bank Industrial loan company	FDIC
State bank (member of FRS)	FRB

Fintech Charter

A special purpose national bank fintech or similarly designed or tailored charter presumably will have certain advantages or features that will be of interest to a fintech. Important considerations involving the special purpose national bank fintech charter proposed by the OCC include the following:

Characteristics

Formation. Subject to the OCC finalizing the Licensing Manual Draft Supplement for fintech charters, the OCC would issue the fintech charter; federal law and OCC regulations would govern the corporate form. The home state of a bank with a fintech charter (fintech bank) would be wherever its main office is located.

Powers. Subject to the OCC developing regulations consistent with the Fintech Whitepaper and Licensing Manual Draft Supplement, a fintech bank would generally have the powers of a national bank except for the power to accept deposits (otherwise it would be indistinct from a national bank).[21] The OCC will determine on a case-by-case basis whether new fintech activities are permissible.[22] While the traditional national bank charter is not separately discussed in this article, it remains a viable option (subject to the various limitations and requirements noted above) for fintechs and companies engaging in activities seeking to accept deposits.[23]

Application and Approval Requirements

Meeting. Prior to filing an application, a fintech will be expected to meet with OCC staff to discuss its proposed business model and to hear the OCC's application requirements. Although the application process will be tailored to fintechs, it will be largely similar to the OCC's process for national bank chartering.

Application. The fintech must complete an application by providing similar information as required for entities seeking a traditional national bank charter.

Business plan. The fintech application requires a robust, well developed business plan covering at least three years of proposed operations with details on products and services, markets to be served, forecasts and risk assessments.

Governance. The application should detail the proposed governance structure that identifies and describes management's expertise and financial acumen.

Capital and liquidity. The OCC will evaluate the adequacy of the fintech bank's planned regulatory capital and whether it will meet the required minimum liquidity, taking into account the business plan, forecasted cash flow, risks and funding sources.

Compliance. The application must indicate that the fintech bank will have a strong compliance infrastructure, provide fair access to financial services, ensure fair treatment of customers and comply with all applicable laws.

Potential Benefits

Bank powers with reduced regulatory requirements. The OCC has indicated that it intends to tailor the requirements for obtaining a fintech charter to the products, operation and risk profile of each applicant. An approach that embraces lower requirements for a special purpose fintech charter would enable more companies to become banks than otherwise would be eligible for a traditional bank charter.

Federal preemption and state licensing. A fintech bank operating as a special purpose national bank under US law will presumably enjoy the same degree of federal preemption as any other national bank. A fintech national bank would not need a state license to conduct financial activities in states where banks are exempt or excluded from such requirements.

Fewer regulators and examinations. As the primary regulator of a fintech national bank, the OCC will supervise and oversee the bank, including conducting all applicable regulatory exams.[24] Like any other national bank, a fintech national bank would not have the burden of submitting to examinations and audits (as well as the initial approval process) associated with a multiple state licensing regime.

Greater independence. As currently envisioned, a fintech national bank will be able to engage in a wide range of banking and financial activities for which a non-bank fintech would require a bank partner or license, such as accessing payment systems or engaging in certain lending activities.

Potential Difficulties or Uncertainties

New and untested. To date, the OCC has neither approved a fintech bank, nor accepted a fintech charter application for processing. There has been significant turnover in key decision-makers in the federal banking agency leadership structure since the national bank fintech charter was announced, including a new Administration and Comptroller to lead the agency. While the new Comptroller, Joseph Otting, has expressed support for the fintech charter, it remains unclear precisely how the current Administration and OCC will develop the roadmap for the national bank fintech charter laid out by their predecessors.[25]

Legal challenges. Several state banking regulators have expressed strong disagreement with the national bank fintech charter, stating that it improperly infringes on state oversight of entities that would otherwise be subject to state licensing and regulation. The NY Department of Financial Services (NYDFS) and the Conference of State Bank Supervisors separately sued the OCC to block the national bank fintech charter, arguing that such a charter is outside the OCC's statutory authority.[26] The NYDFS suit was recently dismissed on standing grounds, but could be reinstituted if the OCC issues a fintech charter.[27] The CSBS case is still pending.

Requirements might not be lessened. As currently structured, fintech national banks, like traditional national banks, will be required to meet minimum regulatory capital and liquidity requirements. The OCC has indicated that these requirements will be modified, commensurate with the risk of each fintech bank, but it is unclear if such requirements will be materially less stringent.[28] Similarly, the OCC has indicated that fintech national banks will have obligations under or similar to the Community Reinvestment Act, such as financial inclusiveness requirements, but has not specified how such requirements would be imposed or how evaluations would be conducted for fintech banks without physical locations.[29]

Holding company status. Companies that own or control a fintech bank would be deemed bank holding companies. As noted above, non-financial (commercial) companies are generally wary of coming under FRB supervision, and in many cases, would be unable to meet FRB requirements including activities restrictions for a bank holding company. Therefore, as compared with a fintech that is not a bank, a fintech national bank may be more limited in its ability to attract investors and likely precluded or materially impaired in its ability to operate as a subsidiary in a commercial organization.[30]

ILC Charter

Another option for a fintech to consider is the ILC charter. While *de novo* ILC charter activity has been dormant due to a number of external factors since 2008, 26 *de novo* ILCs were approved by the FDIC between 2000 and 2006.[31] And based on two recent *de novo* ILC applications, discussed below, the ILC charter appears to be alive and well, at least in the view of some industry and fintech players. Like a special purpose national bank fintech charter, an ILC charter brings with it certain advantages or features that may be of interest to a fintech. Important considerations regarding an ILC charter include the following:

Characteristics

Formation. Institutions with ILC charters currently operate in California, Hawaii, Minnesota, Nevada and Utah,[32] with two additional states, Colorado and Indiana, authorizing ILC charters. While FDIC approval for deposit insurance is required for an ILC to be established, the charter itself is approved by the state, and state banking laws and regulations govern the corporate form.

Powers. ILCs are permitted to conduct the same banking activities as national or state-chartered banks, including making loans and accepting deposits, with the noted exception that ILCs with total assets greater than $100 million are not permitted to accept demand deposits.

Application and Approval Requirements

State and FDIC applications. A fintech seeking an ILC charter would need to apply to both a state banking agency (for the charter, *i.e.*, in one of the states currently authorizing ILC charters) and the FDIC (for deposit insurance).

Bank-like requirements. The FDIC requires ILC applicants to provide the same information as deposit insurance applicants for any other charter type.

Written agreements. As part of the approval process, the FDIC may impose conditions or operating constraints on the parent companies of ILCs in order to ensure the safe and sound operation of the ILC. The ILC and its parent companies may be required to enter into written agreements regarding capital maintenance and liquidity requirements.[33] The ability of the FDIC to impose operating requirements and conditions on both the ILC and its parent company(ies) as part of the FDIC's approval process is a response by the agency, in part, to critics asserting the ILC charter skirts meaningful holding company oversight and restrictions.[34]

Potential Benefits

No holding company status. ILCs are not treated as "banks" under the BHCA. Thus, the parent companies of ILCs are not deemed "bank holding companies" and, as such, are neither subject to bank holding company activity limitations and restrictions, nor FRB supervision. While, as noted above, the FDIC can impose limitations through written agreements, the agency would be able to work with a fintech ILC and its parent to develop a more tailored approach in connection with any such efforts.

State licensing and fewer regulators. Similar to other bank charters, an ILC would not need a state license to conduct financial activities in states where banks are exempt or excluded from such requirements, which will reduce the burden of a multiple state licensing regime, including the application process, and related examinations and audits.

Exporting interest rates. An ILC, like other state banks, can export the interest rate from the state where it is located to out-of-state borrowers. This "most favored lender" status allows banks, in certain cases, to avoid state usury rates.[35] A favorable permissible interest rate in a state offering an ILC charter may provide a fintech ILC chartered in that state with a competitive advantage relative to other competitors, including fintechs and banks.

Greater independence. Similar to a fintech bank, an ILC would not need a bank partner to conduct banking and financial activities, such as accessing payment systems or engaging in certain lending activities.

Potential Difficulties or Uncertainties

Dormant charter. As noted above, the FDIC has not approved an ILC deposit insurance application since 2008 and, until recently, had not accepted for filing any ILC applications since 2009.[36] Meanwhile, some banking regulators and policymakers continue to view ILCs as posing a risk to the banking system.[37] Thus, it remains uncertain whether the FDIC will be receptive to approving new ILC applications, particularly for fintechs that pose their own unique issues and challenges, and with which the FDIC does not have a track record or any meaningful experience.[38]

Novel use of an existing charter. An ILC charter has never been granted to a fintech or a company that has a business model similar to a fintech. It is unclear what information the FDIC would require as part of an application from a fintech or what commitments it would seek to impose as a condition of approval.

Anti-tying and transactions with affiliates. Although an ILC is not a bank for purposes of the BHCA, it is still subject to federal banking laws concerning anti-tying and affiliate transactions restrictions. These laws will prohibit or limit certain relationships among an ILC, its parent company and its affiliates. Fintechs that are part of commercial enterprises—which may include many of the fintechs most interested in an ILC charter—may find existing inter-company service agreements disrupted by these restrictions.

Regulatory posture. Unlike the OCC, the FDIC has not clearly expressed how it views fintechs. The FDIC, if it were to approve an ILC charter for a fintech, could adopt an overly cautious supervisory approach. Further, the FDIC may choose to require a fintech ILC to obtain prior approval to deviate from its approved business plan, make certain corporate changes, or enter into contracts with affiliates, among other conditions or operating restrictions that could be imposed for a limited period of time (*e.g.*, three or seven years under various *de novo* guidance issued over the years by the FDIC), an unspecified period of time or permanently. Such restrictions could require a fintech to alter its operations or business model, potentially muting some or many of the attractive features to which fintechs were initially drawn.

Other State-Based Options

In addition to fintech and ILC charter options, fintechs may soon have other charter prospects, particularly state-based charter options that are designed to compete with the OCC's fintech national bank approach and avoid the complications that may exist in dealing with the FDIC in connection with an ILC charter. Important issues and considerations that are likely to influence any such state efforts include the following:

Traditional State Bank Charters

In an effort to bring more financial institutions to their state, state regulators often compete to be more attractive for *de novo* banks. Depending on how the OCC fintech charter program progresses, fintechs might find state regulators become more willing to offer modified application processes, as well as provide regulatory, procedural or other types of relief. Already in response to the fintech charter, some states are seeking to take a leadership role in easing the licensing requirements for fintechs.[39]

Depending on its business model and, specifically, whether a fintech intends to accept consumer deposits, a fintech applying for a state bank charter may also need to apply for FDIC insurance. While the FDIC is taking steps to update its *de novo* application process, it is unclear how the agency would evaluate an application from a fintech seeking a state bank charter.

Coordination Among the States

State financial regulators are also working together under the coordination of the CSBS to reduce the difficulties associated with the existing multi-state licensing regime.[40] CSBS's Vision 2020 initiative includes leveraging the multi-state mortgage lender licensing platform (already adapted by some states to license money transmitters) to establish a single platform for fintechs to seek licensing in all 50 states. CSBS is also encouraging states to develop and implement a common platform for conducting examinations of state-licensed fintechs. The ambitious Vision 2020 initiative seeks to harmonize supervision by banking regulators across all states to create a coordinated examination, reporting and enforcement authority over state-licensed fintechs.

Although this single platform would alleviate the initial and ongoing compliance burden facing fintechs, it is unclear how such harmonization will work in practice and over time, and particularly during periods of economic stress. State banking regulators have tended to put the interests of their state above their desire for uniformity. At this time, Vision 2020 does not provide specifics on the extent to which coordinated examinations would emulate or function as a coordinated examination by a single (or joint) supervisor.

Conclusion

As a result of the rapid pace of change and development within the fintech space and the cautious risk-averse approach inherent in banking supervision, development of fintech regulation has lagged behind the development of fintech itself. Fintech companies are seeking ways to comply with a system of state licensing that was created long before internet and mobile computing. While obtaining a bank or bank-like charter could alleviate the burdens imposed on many fintechs by the existing multi-state licensing regime, until recently, the regulatory costs and barriers to entry into banking—particularly for nontraditional players—have been too great for fintechs to overcome. Recent developments, however, suggest that financial regulators are also rapidly evolving and interested in catching up with the pace of change. With the OCC's proposed fintech charter and renewed ILC application activity at the state level, the time may be ripe for fintechs possessing the right blend of operating model and growth objectives to reexamine existing and emerging bank charters as a potential optimal approach to executing on their existing business plan and long-term strategic objectives.

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[1] *See*, *e.g.*, 12 U.S.C. §§ 21 and 26; and N.Y. Bank. L. §§ 2, 96, and 1002.

[2] *See* Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation on *De Novo* Banks and Industrial Loan Companies before the Committee on Oversight and Government Reform (July 13, 2016), available at: https://www.fdic.gov/news/news/speeches/spjul1316.html. *See also*, FDIC Decisions on Bank Applications, available at: https://www.fdic.gov/regulations/laws/bankdecisions/depins/index.html.

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

[4] OCC Press Release (Oct. 26, 2016), available at: https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-135.html.

[5] OCC, *Comptroller's Licensing Manual Draft Supplement: Evaluating Charter Applications From Financial Technology Companies* (Mar. 15, 2017), available at: https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf.

[6] Lalita Clozel, *FDIC defends right to charter new banks against OCC criticism*, American Banker (Aug. 4, 2017), available at: https://www.americanbanker.com/news/fdic-defends-right-to-charter-new-banks-against-occ-criticism.

[7] FDIC*, Applying for Deposit Insurance, A Handbook for Organizers of De Novo Institutions* (Apr. 2017), available at: https://www.fdic.gov/regulations/applications/handbook.pdf.

[8] FDIC, *Deposit Insurance Applications, Procedures Manual* (June 2017), available at: https://www.fdic.gov/regulations/applications/procmanual.pdf.

[9] FDIC Decisions on Bank Applications.

[10] Forming an ILC requires a company to apply to a state for a charter and the FDIC for deposit insurance. Social Finance (SoFi Bank) submitted applications to the Utah Department of Financial Institutions (UDFI) and the FDIC on June 6, 2017, and Square Inc. submitted applications to the UDFI and the FDIC on September 17, 2017. SoFi Bank withdrew its application for reasons unrelated to the viability of an ILC charter for fintechs, and Square's application is still pending. *See* UDFI, *Application Status*, available at: https://dfi.utah.gov/general-information/application-status.

[11] *See* CSBS Press Release (May 10, 2017), available at: https://www.csbs.org/csbs-announces-vision-2020-fintech-and-non-bank-regulation.

[12] *Id*.

[13] For purposes of this article, the term "bank" means any chartered financial institution, including state bank, national bank, state savings association, state savings bank and federal savings association.

[14] *See* 12 U.S.C. § 1813(q) (the term "appropriate federal banking agency" means OCC, FDIC or FRB, depending on the type of financial institution, and the definition includes both state- and federally-chartered financial institutions). *See also* 12 U.S.C. § 1813(a), (b) (definitions of "bank," "savings association" and related terms).

[15] Savings associations, also called thrifts, historically focused on offering savings accounts and real estate loans, but today conduct the same deposit taking and lending activities as a bank. Also, for any parent company, whether the subsidiary financial institution is a bank or a savings association determines whether the parent is a bank holding company or a savings and loan holding company.

[16] Article VI of the US Constitution affords federal law "supremacy" over state laws that impair, conflict or interfere with federal laws. Preemption permits the establishment of uniform nationwide regulations and standards, and has existed as a doctrine since *McCulloch v. Maryland*, 17 US 316 (1819).

[17] Historically, the OCC has broadly interpreted the extent of preemption for national banks, but the Dodd-Frank Act slightly pared it back, particularly with regard to state consumer financial laws. *See* 12 U.S.C. § 25b.

[18] *See*, *e.g.*, N.Y. Banking Law § 641.1 and Cal. Fin. Code § 2010(d).

[19] The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 removed several obstacles for state-chartered banks to the opening of branches across state lines. The Act provided uniform nationwide branching and interstate acquisition rules, such as allowing well-managed and well-capitalized bank holding companies to acquire banks in any state.

[20] *See* 12 U.S.C. § 1843(c)(8). The FRB may authorize bank holding companies to engage in, or acquire subsidiaries that engage in, nonbanking activities that the FRB determines to be closely related to banking (*e.g.*, mortgage banking, leasing, collection agency, consumer and commercial finance and loan servicing).

[21] Comptroller's Licensing Manual Draft Supplement at 2 and 5 ("[F]or 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. . . . Accordingly, the OCC anticipates that SPNBs likely will elect to demonstrate that they are engaged in paying checks or lending money.")

[22] Comptroller's Licensing Manual Draft Supplement at 5.

[23] In July 2017, Varo Money, Inc., a mobile banking startup, applied to the OCC and FDIC to form Varo Bank, N.A. "Varo Bank, N.A. seeks to be the first national bank in American history designed for people who want to bank on their smart phones." *See* Varo Bank Press Release (July 25, 2017), available at https://www.varomoney.com/press_release/varo-bank-n-applies-national-bank-charter.

[24] Any fintech bank with over $10 billion in assets also would subject to supervision by the Consumer Financial Protection Bureau (CFPB) with regard to applicable consumer protection laws. (12 U.S.C. § 5515).

[25] "'I'm not sure what it looks like, and how it's funded, but I do think there's a space there that a technology solution can solve,' Otting said when asked whether he sees a future for the Office of the Comptroller of the Currency's nascent fintech charter." John Heltman, *OCC's Otting sees future for fintech charter, CRA reform*, American Banker (Dec. 20, 2017), available at: https://www.americanbanker.com/news/occs-otting-sees-future-for-fintech-charter-cra-reform.

[26] *See Vullo v. Office of the Comptroller of the Currency et al.*, case number 1:17-cv-03574-NRB (S.D.N.Y. May 12, 2017) and *Conf. of State Bank Supervisors v. Office of the Comptroller of the Currency*, Case 1:17-cv-00763-DLF (D.D.C. Apr. 26, 2017), respectively.

[27] *Vullo*, Doc. No. 30 at 26 (dismissing NY DFS lawsuit without prejudice).

[28] Fintech Charter Whitepaper at 9–10.

[29] *See* Lalita Clozel, *How the OCC Plans to Apply CRA-Like Requirements to Fintech Firms*, American Banker (Dec. 8, 2016), available at: https://www.americanbanker.com/news/how-the-occ-plans-to-apply-cra-like-requirements-to-fintech-firms.

[30] We note, however, the possibility of some arrangement that could be structured with the approval or tacit consent of the FRB regarding the permissible activities conducted by a fintech national bank or its subsidiaries.

[31] *See* Statement of Martin J. Gruenberg (July 13, 2016).

[32] Statement of Martin J. Gruenberg (July 13, 2016) at note 14. The exclusion for ILCs from the definition of bank under the BHCA added by the Competitive Equality Banking Act of 1987 applied only to states that as of March 5, 1987, required (or had pending legislative action to require) its ILCs to be FDIC insured. 12 U.S.C. § 1841(c)(2)(H). Six states met this requirement: California, Colorado, Hawaii, Minnesota, Nevada, and Utah. *See* GAO, *Industrial Loan Corporations*, GAO-05-621 (September 2005) at p.17, available at: https://www.gao.gov/assets/250/247759.pdf. The FDIC, however, previously identified Indiana as also authorizing ILCs. See FDIC, The FDIC's Supervision of Industrial Loan Companies: A Historical Perspective (June 25, 2004) at Table 2, available at: https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum04/industrial_loans.html.

[33] Statement of Martin J. Gruenberg (July 13, 2016) at note 14.

[34] *Id*.

[35] FDIC General Counsel's Opinion No. 11, *Interest Charges By Interstate State Banks*, available at: https://www.fdic.gov/regulations/laws/rules/5500-800.html.

[36] *See* Statement of Martin J. Gruenberg (July 13, 2016). During this period, ILC applications were subject to several moratoria on approvals, including a three-year moratorium imposed by section 603 of the Dodd-Frank Act.

[37] Julie Stackhouse, *Fintech Interest in Industrial Loan Company Charters: Spurring the Growth of a New Shadow Banking System?*, Federal Reserve Bank of St. Louis (Oct. 24, 2017), available at: https://www.stlouisfed.org/on-the-economy/2017/october/fintech-interest-industrial-loan-company-charters-spurring-new-shadow-banking-system.

[38] Jelena McWilliams was proposed to serve as the new FDIC Chair on November 30, 2017, but she has not been formally nominated. It is unclear how she views ILCs or how receptive the FDIC would be under her leadership to fintechs seeking an ILC charter.

[39] *See* Lalita Clozel, *California Regulator Acknowledges 'Legitimate Criticisms' of State Licensing*, American Banker (Feb. 14, 2017), available at: https://www.americanbanker.com/news/california-regulator-acknowledges-legitimate-criticisms-of-state-licensing.

[40] *See* CSBS Press Release (May 10, 2017).