

## V. *The OCC's Step Towards Innovation: The Fintech Charter*

### A. Introduction

On July 31, 2018, the Office of the Comptroller of the Currency (OCC) announced that it would begin accepting and reviewing charter applications for financial technology (fintech) companies under its special purpose national bank (SPNB) charter.<sup>1</sup> The OCC's decision has been met with both support and hostility, both from governmental entities and individual commentators.<sup>2</sup> In addition to the present debate, questions remain as to whether fintech companies will actually apply for these charters.<sup>3</sup> In August 2018, Varo Bank became the first fintech company to receive preliminary approval for its charter

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<sup>1</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 1 (2018), <https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf> [<https://perma.cc/NT5H-ZDUJ>] [hereinafter OCC POLICY STATEMENT] (announcing the OCC's policy decision to begin reviewing charter applications from fintech companies).

<sup>2</sup> See, e.g., U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK, FINANCIALS, FINTECH, AND INNOVATION 73 (2018), <https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf> [<https://perma.cc/M7S7-55YV>] ("This [SPNB] charter may provide a more efficient, and at least a more standardized, regulatory regime, than the current state-based regime in which they operate."); J. Parker Murphy, *More Sense than Money: National Charter Options for Fintech Firms is the Right Choice*, 18 N.C. J. L. & TECH. 359, 394 (2017) (supporting SPNB fintech charters as a means to unify the regulatory regime fintech companies are subject to); Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1423–33 (2018) (arguing that the OCC does not have authority to charter fintech companies and that such charters will have a significant, negative impact on the existing financial sector); Michelle Price, *U.S. State Banking Regulators Sue Government to Stop Fintech Charters*, REUTERS (Oct. 25, 2018, 10:20 AM), <https://www.reuters.com/article/us-usa-occ-fintech/u-s-state-banking-regulators-sue-government-to-stop-fintech-charters-idUSKCN1MZ256> [<https://perma.cc/6KGS-SQZP>].

<sup>3</sup> Pete Schroeder, *Fintech Firms Want to Shake Up Banking, and That Worries the Fed*, REUTERS (Jan. 14, 2019, 1:05 AM), <https://www.reuters.com/article/us-usa-fintech-fed/fintech-firms-want-to-shake-up-banking-and-that-worries-the-fed-idUSKCN1P80C0> [<https://perma.cc/53X6-A29Z>].

application from the OCC, though it chose to apply for a traditional national charter.<sup>4</sup>

This article addresses the OCC's recent policy decision to provide SPNB charter options to fintech companies as well as the current debate surrounding this policy decision. First, Section B furnishes background information on the OCC charter system. Next, Section C provides an in-depth discussion of the fintech charter, its requirements, implications, and possible future developments. Section D then highlights both sides of the current debate as to whether the OCC should charter fintech companies. Finally, Section E concludes with a summary of the main points of contention surrounding the OCC's decision to review and grant fintech charters.

## **B. Background: The OCC Charter System**

The National Bank Act of 1864 (NBA) created the OCC and charged it 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 . . . subject to its jurisdiction.”<sup>5</sup> The NBA also granted authority to the OCC to issue national charters and regulate those banks which it charters.<sup>6</sup> In determining whether to grant a charter application, the OCC initially examines the amount of capital that has been paid in, the name and residences of the institution's directors, and the amount of capital stock each director owns.<sup>7</sup> In addition to these three considerations, the OCC also evaluates whether the institution:

(A) [h]as organizers who are familiar with national banking laws and regulations or Federal savings association laws and regulations, respectively; (B) [h]as

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<sup>4</sup> Office of the Comptroller of the Currency, Conditional Approval Letter #1205 (Aug. 31, 2018) [hereinafter OCC Conditional Approval Letter] (granting preliminary charter approval to Varo Bank).

<sup>5</sup> 12 U.S.C. § 38 (2012) (codifying the National Bank Act of 1864); 12 U.S.C. § 1 (defining the duties of the OCC).

<sup>6</sup> 12 U.S.C. § 1 (highlighting the responsibilities of the OCC, including ensuring that national financial institutions comply with laws and regulations); 12 U.S.C. § 26 (granting authority to the OCC to “determine if association can commence business”).

<sup>7</sup> 12 U.S.C. § 26 (identifying factors the OCC should consider when granting charter applications).

competent management, including a board of directors, with ability and experience relevant to the types of services to be provided; (C) [h]as capital that is sufficient to support the projected volume and type of business; (D) [c]an reasonably be expected to achieve and maintain profitability; (E) [w]ill be operated in a safe and sound manner; and (F) [d]oes not have a title that misrepresents the nature of the institution or the services it offers.<sup>8</sup>

Under the NBA, the OCC also has the authority to issue SPNB charters.<sup>9</sup> To qualify for a SPNB charter, the institution must participate in either fiduciary activities or another activity “within the business of banking.”<sup>10</sup> The business of banking includes three core banking activities: “[r]eceiving deposits; paying checks; or lending money.”<sup>11</sup>

On July 31, 2018, the OCC, under the authority granted to it by the NBA, announced that it would extend the opportunity to apply for SPNB charters to fintech companies.<sup>12</sup> The SPNB charters are limited to “fintech companies that have nontraditional or limited business models, do not take deposits, and rely on funding sources different from those relied on by insured banks.”<sup>13</sup> At this point, the only fintech company that has applied and received approval for a charter from the OCC is Varo Bank, which chose to apply for a traditional national bank charter rather than a SPNB charter.<sup>14</sup> Though Varo Bank is a fintech company, its business model reflects a traditional deposi-

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<sup>8</sup> 12 C.F.R. § 5.20(f)(2)(A)–(F) (2017).

<sup>9</sup> 12 C.F.R. § 5.20(e)(1)(i) (“The Bank may be a special purpose bank.”).

<sup>10</sup> *Id.* (limiting the activities which a special purpose bank may participate in to fiduciary activities or other activities falling under the business of banking).

<sup>11</sup> *Id.*

<sup>12</sup> OCC POLICY STATEMENT, *supra* note 1, at 2 (“[T]he OCC has authority to grant a national bank charter to a fintech company that engages in one or more of those core banking activities.”).

<sup>13</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES 1 (2018), <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/pub-considering-charter-apps-from-fin-tech-co.pdf> [<https://perma.cc/96V3-6JF7>] [hereinafter OCC Charter Applications] (explaining the specific type of fintech companies for which the SPNB charter will be available).

<sup>14</sup> OCC Conditional Approval Letter, *supra* note 4, at 1.

tory bank,<sup>15</sup> leaving open the question whether fintech companies engaging in less traditional banking functions will choose to apply for SPNB charters.<sup>16</sup>

### C. The Fintech Charter: The Policy and Its Implications

#### 1. Requirements

Under the OCC's policy statement announcing that it would begin accepting SPNB charters from fintech companies, the OCC requires that the fintech companies applying for these charters satisfy the same requirements and standards traditional institutions must meet.<sup>17</sup> In addition to these requirements and standards, the OCC also considers whether the fintech company "can reasonably be expected to achieve and maintain profitability and whether approving the charter will foster healthy competition."<sup>18</sup> Additionally, the OCC considers "whether the proposed bank has a business plan that articulates a clear path and timeline to profitability, has adequate capital and liquidity to support the projected volume, and has organizers and management with appropriate skills and experience."<sup>19</sup> Likewise, due to the new and unique services that fintech companies offer, they are subject to new and unique standards, such as: requiring technical experts;<sup>20</sup> subjecting newly established companies to higher scrutiny;<sup>21</sup> and requiring some companies to request and receive a legal opinion from the OCC's Chief Counsel's Office.<sup>22</sup> Finally, though minimum and ongoing capital requirements for a traditional bank are typically based

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<sup>15</sup> *Id.* at 1 ("The Bank's proposed business model combines a traditional retail banking approach with modern technology.").

<sup>16</sup> See Schroeder, *supra* note 3.

<sup>17</sup> OCC Charter Applications, *supra* note 13, at 3 ("[A]ll SPNBs will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet."); OCC POLICY STATEMENT, *supra* note 1, at 3 ("A fintech company that receives a national bank charter will be subject to the same high standards . . . that all federally chartered banks must meet.").

<sup>18</sup> OCC Charter Applications, *supra* note 13, at 5.

<sup>19</sup> *Id.* (outlining the considerations the OCC takes into account when determining whether to grant charter approval to fintech companies applying for SPNB charters).

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 7.

on its capital and liquidity ratios,<sup>23</sup> the minimum and ongoing capital requirements of a fintech company applying for SPNB charters depend not only on the risks associated with the company's activities, but also on the complexity of the fintech company's activities.<sup>24</sup>

Though fintech companies will be held to the same standards as traditional banks as well as additional requirements, companies seeking SPNB charters are prohibited from taking deposits and will not be insured by the Federal Deposit Insurance Corporation (FDIC).<sup>25</sup> Because of this, the OCC requires fintech companies seeking SPNB charters to include greater details about their capital and liquidity maintenance<sup>26</sup> as well as their contingency plans.<sup>27</sup> In addition to this prohibition, fintech companies with SPNB charters also do not have access to the Federal Reserve's payment system.<sup>28</sup>

## 2. *Potential Future Developments in the Federal Government*

Though the OCC's chartering decision is the only official federal action that has been taken regarding fintech companies thus far, other governmental entities are considering additional actions.<sup>29</sup> For example, in September 2018, the House of Representatives passed the Financial Technology Protection Act, which would create an inde-

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<sup>23</sup> 12 C.F.R. § 3.10(a)–(b) (2017) (explaining the capital ratio as being related to the bank's risk-weighted assets and the leverage ratio as being related to the bank's total assets).

<sup>24</sup> OCC Charter Applications, *supra* note 13, at 8 (“For an SPNB, minimum and ongoing capital levels should be commensurate with the risk and complexity of the proposed activities.”).

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 9 (“Since SPNBs are uninsured and likely to rely on funding that is potentially more volatile in certain environments, organizers should describe how the SPNB can be funded and maintain sufficient liquidity under stressed conditions.”).

<sup>27</sup> *Id.* at 12.

<sup>28</sup> Brian Knight, *BankThinkL Fed Should Open the Payments System to Fintechs*, AM. BANKER (Jan. 24, 2019, 10:00 AM), <https://www.americanbanker.com/opinion/fed-should-open-the-payments-system-to-fintechs> (highlighting the Federal Reserve's reluctance to allow fintech companies access to its payment system); Schroeder, *supra* note 3.

<sup>29</sup> Financial Technology Protection Act of 2018, H.R. 5036, 115th Cong. (2018) (describing actions that, if taken, would help promote the development of the fintech sector).

pendent financial technology task force as well as a Fintech Leadership in Innovation Program.<sup>30</sup> The bill is currently before the Senate.<sup>31</sup>

### 3. *Implications of Current Policy*

The OCC's policy decision is rooted in its view that "providing a path for fintech companies to become national banks promotes consumer choice, economic growth, modernization, and competition—all of which strengthen the federal banking system and support the nation's economy."<sup>32</sup> Additionally, the OCC believes that "fintech companies . . . can level the playing field with regulated institutions and help ensure that they operate in a safe and sound manner and fairly serve the needs of consumers, businesses, and communities."<sup>33</sup> Finally, the OCC views the SPNB charter option as a means to provide consistency to the banking legal and regulatory systems while also ensuring the fair treatment of consumers.<sup>34</sup>

Upon receiving a SPNB charter, fintech companies will be subject to national banking laws, which generally preempt state banking laws.<sup>35</sup> Additionally, "state consumer protection laws are preempted, . . . if" the state law: (i) has "a discriminatory effect on national banks;" (ii) "prevents or significantly interferes with the exercise by the national bank of its powers;" or (iii) is preempted by another federal law.<sup>36</sup> This preemption has led to arguments that allowing fintech companies to preempt state law using these charters will remove them from the reach of consumer protection laws and policies that are stronger than those of the federal government.<sup>37</sup> On the other hand, however, the OCC argues that such preemption provides for greater unity in the financial system.<sup>38</sup>

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<sup>30</sup> *Id.* (creating a federal Independent Financial Technology Task Force and a FinTech Leadership in Innovation Program, provided it passes the Senate).

<sup>31</sup> *Id.*

<sup>32</sup> OCC POLICY STATEMENT, *supra* note 1, at 2.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> 12 U.S.C. § 43 (2012) (providing authority to the OCC to determine whether a national law as applied to national banks preempts a state law).

<sup>36</sup> *Id.* § 25b(b)(1)(A)-(C) (2012) (highlighting instances where national consumer protection laws preempt state consumer protection laws).

<sup>37</sup> *Vullo v. Office of the Comptroller of the Currency*, 17 Civ. 3574 (NRB), 2017 U.S. Dist. LEXIS 205259, at \*5 (S.D.N.Y. Dec. 12, 2017) (arguing that the OCC's decision will "threaten state consumer protection laws").

<sup>38</sup> OCC POLICY STATEMENT, *supra* note 1, at 2.

Finally, despite the OCC's purported desire to encourage growth, unity, and competition, fintech companies applying for the SPNB charters cannot accept deposits, which prevents them from receiving FDIC insurance or access to the Federal Reserve's payment system.<sup>39</sup> Because of this limitation, many fintech companies are wary about pursuing a costly and timely application process if they will be unable to receive the typical benefits of being a national institution.<sup>40</sup> In addition, the lack of communication from the Federal Reserve has not quelled the fears raised by these companies.<sup>41</sup> Until the Federal Reserve either clarifies its position or provides fintech companies access to the payment system, it remains unclear whether fintech companies will be willing to apply for these charters.<sup>42</sup>

## D. The Debate

### 1. Pro-SPNB Charter Arguments

The OCC is, of course, the primary proponent of chartering fintech companies.<sup>43</sup> Supposedly, these charters will promote: (i) the evolution of the financial system to meet the needs of consumers, businesses, and communities; (ii) the operation of the industry in a safe and sound manner; (iii) the provision of fair access to financial services; (iv) the fair and equal treatment of consumers; and (v) the growth of economic opportunity and job creation.<sup>44</sup> The OCC supports its argument by focusing on responsible innovation and the benefits it provides.<sup>45</sup> Furthermore, the modifiability of its requirements under the SPNB charter model provide it with the ability to make changes as

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<sup>39</sup> OCC Charter Applications, *supra* note 13, at 2–3; Knight, *supra* note 28 (discussing the Fed's reluctance to provide access to the payment system to fintech companies).

<sup>40</sup> Schroeder, *supra* note 3 (quoting Jason Oxman, CEO of the Electronic Transactions Association, questioning whether it would be worthwhile for fintech companies to apply for these charters without access to the payment system and other federal benefits).

<sup>41</sup> *Id.* (quoting Sam Taussig, Head of Global Policy at Kabbage, describing the lack of communication from the Federal Reserve).

<sup>42</sup> *See id.* (“[S]ome fintech firms say they would be reluctant to invest the time and resources in applying for and maintaining the new OCC fintech license unless the Fed gives them access to the payments system . . . .”)

<sup>43</sup> OCC POLICY STATEMENT, *supra* note 1, at 1.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

necessary to prevent any undue risks or burdens, not only on the fintech company itself, but also on consumers and the financial system as a whole.<sup>46</sup> Finally, the OCC's SPNB supervisory framework will take a risk-based approach "tailored to the bank's business model," ensuring that individual fintech companies will not have an outsized impact on the safety and soundness of the financial sector.<sup>47</sup>

In addition to the OCC's stance, an argument in favor of the SPNB charter includes promoting innovation and competition.<sup>48</sup> Innovation and competition can provide a myriad of benefits, including promoting financial stability,<sup>49</sup> consumer welfare,<sup>50</sup> international competitiveness,<sup>51</sup> and equitable distribution.<sup>52</sup> The innovations which fintech companies have already promoted also include benefits such as easy transmission of information, technological improvements, easy implementation, and efficiency.<sup>53</sup> Another key argument in support of the SPNB charter includes creating a unified

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<sup>46</sup> OCC Charter Applications, *supra* note 13, at 3 ("[T]he OCC will tailor these standards based on the bank's business model, size, complexity, and risks, consistent with applicable law.").

<sup>47</sup> *Id.* at 14–15.

<sup>48</sup> Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 234, 250–52 (2018) (discussing the benefits of emerging fintech companies on competition, innovation, and consumer protection).

<sup>49</sup> *Id.* at 249–51 (highlighting the disruptive, but beneficial, effects fintech companies could have if given the ability to compete on the same playing field as traditional national banks, including diminishing big banks market control over the financial industry by limiting the growth of already too big to fail institutions).

<sup>50</sup> *Id.* at 251–53.

<sup>51</sup> *Id.* at 253–54 ("Given the portion of the global economy taken up by finance, the fintech lag could constitute a large-scale missed opportunity for U.S. firms to strengthen the economy by bringing in revenues earned abroad."). See Douglas W. Arner, et al., *The Evolution of Fintech: A New Post-Crisis Paradigm*, 47 GEO. J. INT'L L. 1271, 1295–1306 (2016) (explaining the fintech innovations that Asia and Africa have made, which have outstripped the United States' fintech advancements).

<sup>52</sup> Van Loo, *supra* note 48, at 254–55 ("[F]intechs' lower operating costs and automation offer a partial solution [to the unbanked and underbanked problem] by making it cheaper to provide services for smaller value loans and bank accounts.").

<sup>53</sup> See Christopher G. Bradley, *Fintech's Double Edges*, 93 CHI.-KENT L. REV. 61, 70–77 (2018) (highlighting the various benefits fintech companies provide to consumers and the financial sector as a whole).



regulatory regime.<sup>54</sup> The benefits fintech companies provide can be inhibited by the disjointed effect of state-by-state regulation,<sup>55</sup> making unified federal regulation likely more effective in promoting the success of fintech companies. Moreover, the “rigorous, multi-layered scheme of federal regulation is likely stricter than, and possibly as complex as, the state-by-state system,”<sup>56</sup> meaning that the SPNB charter will not only create a unified regulatory system, but also one that maintains strict prudential and consumer protection standards while allowing fintech companies to provide innovative new services to the market.<sup>57</sup> Furthermore, fintech companies could potentially engage in risky or unforeseen activities, and the OCC would be better fit to regulate these activities than state regulators are.<sup>58</sup>

Finally, the Trump Administration has been a clear proponent of the OCC’s decision, arguing that chartering banks under the OCC’s national authority will benefit the financial industry by providing regulatory coordination, while also claiming that the OCC will be able to prevent any concerns about potential harms to the system.<sup>59</sup> The Department of the Treasury (Treasury Department) asserts that because the OCC will not approve SPNB charters for depository fintech companies, chartering these companies will pose no direct risk to taxpayers.<sup>60</sup> Additionally, the Treasury Department suggests that safety and soundness concerns can be resolved by the OCC through its adaptation of new modified capital requirements which adequately reflect the risks of a fintech company’s business.<sup>61</sup> The Treasury Department also contends that the dual nature of these protections allays concerns regarding consumer protection, meaning that though national consumer protection laws preempt state laws where they directly conflict, state consumer protection laws still apply in instances where no federal law preempts them.<sup>62</sup> Lastly, the Treasury

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<sup>54</sup> Murphy, *supra* note 2, at 394.

<sup>55</sup> Bradley, *supra* note 53, at 82 (arguing that the regulatory regime prior to the OCC’s chartering decision “may be too slow and inflexible to successfully regulate FinTech”).

<sup>56</sup> Murphy, *supra* note 2, at 394.

<sup>57</sup> *Id.* at 394–95.

<sup>58</sup> *See id.* at 402.

<sup>59</sup> U.S. DEP’T OF THE TREASURY, *supra* note 2, at 70–73 (suggesting that the OCC provide national charter access to fintech companies).

<sup>60</sup> *Id.* at 72 (“An OCC special purpose national bank chartered firm that does not obtain FDIC insurance . . . would not present a direct risk to taxpayers.”)

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Department alleges that the OCC will be able to prevent any risks arising from uncertain business activities by fintech companies by reviewing and considering fintech companies' proposed activities on a case-by-case basis.<sup>63</sup>

## 2. *Anti-SPNB Charter Arguments*

Though the proponents of the SPNB charter have compelling arguments, two substantial players in this regulatory discussion have their concerns.<sup>64</sup> First, the Federal Reserve and traditional banks are concerned about offering fintech companies an official place in the national financial system.<sup>65</sup> In response, fintech companies do not want to heavily invest their resources in the chartering process if they will not receive access to many of the benefits of being a nationally chartered institution.<sup>66</sup> In addition to the concerns of the major players, others, including state governments, have expressed concerns that the OCC lacks authority to make this decision.<sup>67</sup> Still others argue that the chartering of fintech companies will have significant, negative effects on the existing financial sector.<sup>68</sup>

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<sup>63</sup> *Id.* at 73 (discussing the OCC's ability to review the permissibility of a company's banking activities or those activities incidental to banking).

<sup>64</sup> *See* Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, 313 F. Supp. 3d 285, 293 (D.D.C. 2018) (explaining the Conference of State Bank Supervisors' (CSBS) concerns regarding the OCC's decision to charter fintech companies); Vullo v. Office of the Comptroller of the Currency, 17 Civ. 3574 (NRB), 2017 U.S. Dist. LEXIS 205259, at \*12 (S.D.N.Y. Dec. 12, 2017) (describing New York's concerns regarding the SPNB charter option for fintech companies); Schroeder, *supra* note 3.

<sup>65</sup> Schroeder, *supra* note 3.

<sup>66</sup> *Id.* (explaining fintech companies' response to the Federal Reserve's refusal to consider allowing access to the federal payment system to fintech companies).

<sup>67</sup> *Conference of State Bank Supervisors*, 313 F. Supp. 3d at 293 (discussing the CSBS's argument that the OCC lacks statutory authority to grant SPNB charters to fintech companies); *Vullo*, 2017 U.S. Dist. LEXIS 205259, at \*12 (discussing New York's argument that the OCC lacks statutory authority to grant SPNB charters to fintech companies); Upton, *supra* note 2, at 1429 (arguing that the OCC does not have authority to grant SPNB charters to fintech companies).

<sup>68</sup> William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1199–1204 (2018) (arguing that fintech companies pose a substantial danger of imposing outsized systemic risks on the financial sector); Upton, *supra* 2, at 1433–37.

The Federal Reserve is concerned about offering fintech companies access to the federal payment system because of the potential effects these companies may have on the overall financial system.<sup>69</sup> For example, James Bullard, the president of the St. Louis Federal Reserve, acknowledged that he believes fintech companies will cause the next financial crisis.<sup>70</sup> Additionally, “[m]any Fed officials fear these firms lack robust risk-management controls and consumer protections that banks have in place.”<sup>71</sup> Likewise, traditional banks “are not in favor of fintech[] [companies] getting access to the payment system unless they face the same rules banks face.”<sup>72</sup> Conversely, given the Federal Reserve’s discomfort with providing access to its services to fintech companies, these companies do not want to dedicate resources to a rigorous application process without guaranteed access to the benefits provided by the Federal Reserve.<sup>73</sup> Without such access, fintech companies will have to continue to rely on banks to route money for them, meaning they will have to pay both the expensive chartering application fees as well as the expensive bank routing fees.<sup>74</sup> Moreover, becoming subject to the SPNB charter requirements will in turn subject fintech companies to numerous new requirements, including: “[h]igher capital and liquidity requirements than full-service banks; [c]ompliance with obligations to ensure financial inclusion; [o]ngoing monitoring of business activities; [r]igorous examinations by the OCC;” and other laws that pertain to national banks.<sup>75</sup>

In addition to the concerns raised by the Federal Reserve, banks, and fintech companies, others have expressed concerns regarding the OCC’s authority to charter fintech companies under a SPNB charter<sup>76</sup> as well as concerns regarding fintech companies’

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<sup>69</sup> Knight, *supra* note 28 (“[S]everal high-ranking Fed members have recently expressed reticence about letting fintechs in.”).

<sup>70</sup> Schroeder, *supra* note 3.

<sup>71</sup> *Id.*

<sup>72</sup> Knight, *supra* note 28.

<sup>73</sup> Schroeder, *supra* note 3.

<sup>74</sup> *Id.*

<sup>75</sup> Lawrence D. Kaplan et al., *The OCC’s Proposed Fintech Charter: If It Walks Like a Bank and Quacks Like a Bank, It’s a Bank*, 134 BANKING L.J. 192, 204 (2017).

<sup>76</sup> *See generally* cases cited *supra* note 67 (highlighting the arguments by various entities alleging that the OCC lacks authority to grant SPNB charters).

potential impacts on the overall financial sector.<sup>77</sup> Both the New York Department of Financial Services (NYDFS) and the Conference of State Bank Supervisors previously sued the OCC.<sup>78</sup> Though both of these suits were initially thrown out, NYDFS and CSBS have re-filed their claims, alleging “that the OCC is overstepping its legal authority in offering charters to non-depositories and intruding on states’ jurisdiction over non-bank lenders and money transmitters.”<sup>79</sup> As for the state governments’ arguments, some argue that under accepted canons of statutory interpretation, the NBA should be construed narrowly, implying “that the OCC does *not* have authority to issue charters for *other* types of non-depository national banks,” which fall outside the limits of the NBA.<sup>80</sup>

In addition to the concerns surrounding the authority of the OCC to grant these charters, prudential issues are also of concern.<sup>81</sup> For example, because the current OCC charter initiative does not explicitly subject fintech companies to the Bank Holding Company Act—which requires banks to only engage in banking activities<sup>82</sup>—fintech companies will not necessarily be subject to the principle of the separation of banking and commerce.<sup>83</sup> Mixing banking and com-

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<sup>77</sup> See generally sources cited *supra* note 68 (highlighting the arguments that chartering fintech companies will have a severe, negative impact on the financial sector).

<sup>78</sup> *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, 313 F. Supp. 3d 285, 302 (D.D.C. 2018) (dismissing CSBS’s suit against the OCC alleging the OCC’s lack of jurisdiction); *Vullo v. Office of the Comptroller of the Currency*, 17 Civ. 3574 (NRB), 2017 U.S. Dist. LEXIS 205259, at \*27-\*28 (S.D.N.Y. Dec. 12, 2017) (dismissing NYDFS’s suit against the OCC alleging the OCC’s lack of jurisdiction).

<sup>79</sup> Brian Knight, *States Must Rework Their Arguments Against OCC Fintech Charters*, HILL (Jan. 6, 2019, 9:00 AM), <https://thehill.com/opinion/technology/423890-states-must-rework-their-arguments-against-occ-fintech-charters> [<https://perma.cc/7SWD-TCNK>] (assessing the NYDFS and CSBS’s arguments against the OCC’s decision to charter fintech companies under a SPNB charter).

<sup>80</sup> Upton, *supra* note 2, at 1429.

<sup>81</sup> See generally sources cited *supra* note 68 (asserting that the OCC’s decision to charter fintech companies poses threats to the overall financial sector).

<sup>82</sup> 12 U.S.C. § 1843 (2012).

<sup>83</sup> Upton, *supra* note 2, at 1433 (“[T]he OCC is intentionally structuring the SPNBs to avoid . . . the [Bank Holding Company Act], which is intended to protect the system by keeping banking and commerce separate.”).

merce, along with violating a traditional pillar of financial regulation, “creates a significant risk of abuse of the financial resources of SPNBs, unfair access to low-cost deposits, and a dangerous expansion of the federal safety net that could lead to the subsidization of commercial conglomerates like Google and Amazon.”<sup>84</sup> In addition to defying the principle of the separation of banking and commerce, chartering fintech companies could lead to significant systemic risk issues.<sup>85</sup> Fintech companies “are particularly vulnerable to adverse shocks, they have multiple pathways for those shocks to spread to other actors, they present significant informational asymmetries, and their market is growing.”<sup>86</sup> All of these factors make fintech companies harder to regulate, leading to a fragmented financial system and the accidental concealment of potential risks.<sup>87</sup>

### E. Conclusion

Due to the novelty of the OCC’s decision to begin chartering fintech companies, much remains to be seen regarding the successfulness of the charter and its potential risks to the financial system. At this point, the only fintech company that has applied for a charter has been Varo Bank, which chose to apply for a traditional charter rather than a SPNB charter.<sup>88</sup> Those who support the SPNB charter, including the OCC and the Treasury Department, assert that the SPNB charter system will promote innovation, competition, and consumer choice.<sup>89</sup> Others additionally purport that bringing all financial institutions under one regulatory regime will provide a unified regulatory system better equipped to regulate fintech companies.<sup>90</sup> However, in contrast, opponents to the OCC’s policy—including the Federal Reserve, fintech companies, and state governments—argue that the SPNB charter as is remains inadequate, that OCC lacks

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<sup>84</sup> *Id.*

<sup>85</sup> Magnuson, *supra* note 68, at 1204 (exploring the red flags fintech companies raise in terms of systemic risk).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1207 (“[B]y contributing to the fragmentation of finance, fintech may be obscuring risk.”).

<sup>88</sup> OCC Conditional Approval Letter, *supra* note 4.

<sup>89</sup> See OCC POLICY STATEMENT, *supra* note 1, at 2; U.S. DEP’T OF THE TREASURY, *supra* note 2, at 16–17.

<sup>90</sup> See *supra* notes 43–63 and accompanying text (highlighting the arguments in favor of the SPNB charter).

authority to charter fintech companies, and that fintech charters impose substantial risks to the overall financial market.<sup>91</sup> Given the lack of applications for SPNB charters as well as the current reservations many fintech companies have regarding the many expensive requirements and lack of benefits they would receive,<sup>92</sup> it is unclear whether they will even consider these charters a viable option for them to pursue business.

Sabrina Chartrand<sup>93</sup>

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<sup>91</sup> See *supra* notes 64–87 and accompanying text (highlighting the arguments opposing the SPNB charters).

<sup>92</sup> See Schroeder, *supra* note 3.

<sup>93</sup> Student, Boston University School of Law (J.D. 2020).