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Via Email (*specialpurposecharter@occ.treas.gov*)
Thomas J. Curry, Comptroller
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219

Re: Evaluating Charter Applications From Financial Technology Companies

Dear Comptroller Curry:

As counsel to a number of money transmitters and other payments companies (collectively, "MTs"), we welcome the opportunity to comment on the recent draft supplement to the existing Licensing Manual published by the Office of the Comptroller of the Currency ("OCC"), entitled "Evaluating Charter Applications From Financial Technology Companies" (the "Supplement"). We understand the Supplement was issued to provide additional detail on the OCC's evaluation of special purpose national bank ("SPNB") charter applications from financial technology ("fintech") companies that engage in the business of banking, and we commend the OCC for its efforts in this regard.

We are writing to inquire about the Supplement's discussion of an SPNB applicant's "banking activities." Specifically, we ask the OCC to confirm that the activity of receiving money or monetary value for transmission, when engaged in by an SPNB, would not be considered deposit-taking activity.

Discussion

As used elsewhere in the OCC's rules and policies, the term "special purpose national bank" refers to a number of types of special purpose national banks. However, we understand that for purposes of the Supplement, "SPNB" means a national bank that engages in a limited range of banking activities, including at least one of two core banking functions—"paying checks" or "lending money"—but does not take deposits within the meaning of the Federal Deposit Insurance Act ("FDIA") and therefore is not insured by the Federal Deposit Insurance Corporation ("FDIC").

We anticipate that MTs seeking an SPNB charter will attempt to demonstrate that they engage in "paying checks." The OCC has explained that "issuing debit cards or engaging in other means of facilitating payments electronically may be considered the modern equivalent of paying checks."[1]

[1] Exploring Special Purpose National Bank Charters for Fintech Companies, Dec. 2, 2016, *available at* www.occ.treas.gov/topics/bank-operations/innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf.

MTs seeking an SPNB charter will also need to demonstrate that they are not engaged in "taking deposits."[2] Doing so will require a determination that money or monetary value received by an SPNB for the purpose of transmission does not constitute deposits.

Even assuming the OCC would consider chartering a deposit-taking SPNB, this point will be a gating issue in an MT's decision to seek an SPNB charter. If receiving money or monetary value for transmission is considered to be "taking deposits" when conducted by an SPNB, then any MT operating as an SPNB would be required to obtain FDIC insurance, subjecting any parent company to the Bank Holding Company Act ("BHCA") and rules and regulations of the Board of Governors of the Federal Reserve System thereunder. Such parent company treatment would eliminate one of the most important benefits of an SPNB charter.[3] Under such circumstances, it is not clear why an SPNB charter would be any more attractive than a traditional bank charter.

Accordingly, we seek confirmation that receiving money or monetary value for transmission does not constitute "taking deposits," even when conducted by an SPNB.[4] In this regard, we note certain attributes that distinguish receiving money or monetary value for transmission from the activity of "taking deposits."

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[2] For purposes of this comment letter, we are focused on the money transmitter activity of receiving money or monetary value for transmission. However, we note that "money transmission" is typically more broadly defined under state licensing laws to include: (a) selling or issuing payment instruments (including checks and money orders); selling or issuing stored value redeemable at multiple unaffiliated merchants or service providers, or automated teller machines; or (c) receiving money or monetary value for transmission. *See* Uniform Money Services Act § 102(14); *see e.g.*, Cal Fin Code § 2003(q) (defining "money transmission" to mean any of the following: (1) selling or issuing payment instruments; (2) selling or issuing stored value; or (3) receiving money for transmission); 3 NYCRR § 406.2(a) (defining "money transmission" to include "all instruments sold or issued including travelers checks, money orders, checks, drafts, orders, wire or electronic transfers, facsimile transfers and shipments by courier for the transmission or payment of money"); Tex. Fin. Code § 151.301(a)(4) (defining "money transmission" as "the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location" and to include selling or issuing stored value or payment instruments, receiving money or monetary value for transmission, or providing third-party bill payment services); Wash. Rev. Code Ann. § 19.230.010(18) (defining "money transmission" as "receiving money or its equivalent value to transmit, deliver, or instruct to be delivered the money or its equivalent value to another location, inside or outside the United States, by any means including but not limited to by wire, facsimile, or electronic transfer" and to include selling, issuing, or acting as an intermediary for open-loop stored value and payment instruments). MTs that are appropriately licensed under the applicable state law are authorized to engage in these activities and are not considered deposit taking institutions.

[3] The regulation of the MT SPNB's parent company under the BHCA would likely be viewed as excessive and unattractive to the industry. Because MTs do not provide the same scope of services as traditional banks, they do not present the same degree of capital risk as traditional banks (primarily because the transfers are generally paid to the beneficiary quickly, and until paid, maintained in cash or backed by cash or other conservative, liquid investments). Thus, their parent companies would likely be averse to being held to the capital expectations and other requirements currently in place for parent companies of traditional banks. However, because the current exceptions to the definition of "bank" contained in the BHCA would not be available for an FDIC-insured SPNB, their parent companies would be subject to the same BHCA requirements applicable to parent companies of traditional banks absent a legislative change.

[4] We recognize that the "taking deposits" determination must ultimately be made by (or with input from) the FDIC. If confirmation cannot be provided, we would appreciate more information and clarification as to how and when the "taking deposits" determination will be made, and any other guidance that you could provide to the MT industry on this issue.

First, money transmission customers neither have nor maintain “accounts” with the MT that can be credited. The MT accepts funds for the sole purpose of transmitting funds to a third party. A customer would not give funds to the MT with the expectation that the MT would permit the customer to reclaim the funds on demand or after a period of time. Second, MTs do not maintain balances or pay interest on the money they receive, and they only hold funds long enough to transmit them to a designated third party. Moreover, such activity does not constitute deposit-taking under any state law. In fact, many state regulatory authorities explicitly classify MTs as “nondepository” institutions.[5] Finally, no federal banking regulator has, to our knowledge, ever considered such activity to be deposit-taking under federal law when conducted by a nonbank.

In our view, concluding that money or monetary value received by an SPNB for the purpose of transmission does not constitute a deposit would not only be correct, but would also substantially further the policy goals underlying the fintech charter.[6] Innovation in the manner in which money is moved and payments are made arguably represents the vanguard of financial technology. We would, therefore, assume that providing a viable national charter for such innovators would be at the forefront of the OCC’s fintech policy. Many MTs are constantly looking for responsible innovation opportunities, and the fintech charter has the potential to facilitate such innovation, provided the “taking deposits” determination we seek is given.

Thank you for the opportunity to provide this comment letter.

Very truly yours,

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Donald J. Mosher

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[5] For example, Kentucky's Department of Financial Institutions includes a “Division of Nondepository Institutions” that regulates money transmitters. *See also* BHC Supervision Manual § 3160.5.1 Engaging in Transmitting Money in the United States at n.4. (“Many states permit companies that are not chartered as banks to transmit money without deeming this activity to involve the taking of deposits.”).

[6] While it may be argued that money or monetary value received by an SPNB for transmission satisfies the definition of “deposit” under the FDIA because it is “received or held . . . in the usual course of business for a special or specific purpose,” we believe the better view is that neither this definition of “deposit” nor any other was intended to cover funds received for the sole purpose of transmission to a third party. *See* 12 U.S.C. § 1813(l)(3). Such funds are not similar to the statute's delineated examples (*e.g.*, escrow funds, funds held as security for an obligation due to the bank, or funds held for distribution or purchase of securities). In addition, although money transmission funds are to be transferred to a predetermined specific party, such funds are not being held in a customer “account” that can be credited. *Cf.* FDIC Advisory Opinion No. 97-4 (May 12, 1997) (determining that funds credited to a customer account for the purpose of being transferred represented an obligation owed to a predetermined specific party, and were therefore being held for a special or specific purpose).