



# Client Alert

## Americas FS Regulatory Center of Excellence



### OCC Takes a Step towards a FinTech Charter

On September 13, 2016, the Office of the Comptroller of the Currency (OCC) released a proposed rule outlining a receivership framework for uninsured non-depository national banks.<sup>1</sup> The OCC indicates the proposal is prompted by its commitment to “responsible innovation” in finance generally and by FinTech innovations in particular. As such, the proposal potentially presents a major step towards development of a federal FinTech banking charter. The OCC requests comments by November 14, 2016.

#### The OCC Receivership Authority

The OCC proposal clarifies its receivership framework for uninsured national banks, an authority not used since the 1930s. The agency cited as precedent 2,762 receiverships before 1933 but noted that “the details have not been widely articulated in recent jurisprudence or legal commentary.”

The OCC indicates its receivership authority over uninsured non-depository national banks is implied from the silence in the Federal Deposit Insurance Act (FDIA) regarding these banks paired with existing parallel authorities in 12 U.S.C. 191 of the National Bank Act that authorize the OCC to appoint a receiver for any national bank. Consequently, while the FDIC must be the receiver for insured banks, the OCC retains discretion in appointing a receiver for uninsured banks.

The OCC indicates receivership of an uninsured bank would be governed “exclusively by the NBA

(National Banking Act) provisions, the common law of receivers, and cases applying the statutes and common law to national bank receiverships.” In applying the NBA framework for receivership to uninsured banks, the proposed rule largely follows the FDIC framework for insured banks.

#### The OCC Supervisory Authority

The OCC’s supervisory authority over uninsured national trust banks could also provide it with authority over marketplace lenders, as the two have similar business models. Trust banks focus on fee income for fiduciary and custodial services, including the “global settlement and safekeeping” of securities. They often hold uninsured trust funds, have few assets, do not receive deposits, and do not make loans.<sup>2</sup> Most online marketplace lenders provide platforms that facilitate the distribution of funding either in the form of loans or investments for companies, but the platforms themselves do not extend the credit.

<sup>1</sup> *Receiverships for Uninsured National Banks*, Notice of Proposed Rulemaking, Office of the Comptroller of the Currency, 81 Fed.Reg. 62835 (September 13, 2016).

<sup>2</sup> *Id.*, at 62836-62837.



Additionally, the OCC has the authority to charter and supervise special purpose banks, which must perform one of the three “core banking functions” of taking deposits, paying checks, or lending money. The OCC is considering whether such a charter would be appropriate for FinTech firms. However, as noted above, such a special purpose charter might have limited utility for FinTech companies whose business models currently do not involve accepting deposits and directly extending credit to obligors.

### **OCC Policy Goals**

Providing support for the proposal, Thomas J. Curry, Comptroller of the Currency, outlined the OCC’s policy goals in a speech before the Marketplace Lending Policy Summit on the same day that the proposed regulations were released. The Comptroller indicated that “If a firm merited a federal bank charter,” Curry said, “the question would be resolved as it would be squarely under the primary federal supervision of the OCC.”

The Comptroller’s speech articulated eight principles that will guide the OCC’s development of a regulatory framework applicable to “responsible innovation.” These principles suggest the outline of regulatory framework for non-depository uninsured financial institutions that will include OCC supervision of risk management and corporate governance as well as a commitment to collaborate with other regulators to develop “common understanding and consistent application of laws, regulations, and guidance.”

These policy goals are consistent with establishing clear receivership authority over non-depository uninsured banks.

### **Requests for Comment**

The proposed rule describes the authority and process for appointing a receiver; notice of receivership; the process for filing claims against the receivership, including set-offs; the order of priorities for payment of administrative expenses, unsecured creditors, subordinated creditors, and shareholders; the powers and duties of the receiver; the process of dividend payments; and the termination of the receivership.

The OCC requests comment on several issues:

- whether the application of the NBA framework to FinTech banks raise any unique considerations;
- possible alternatives that take account of cost considerations;
- appropriate notices of receiverships, including types, channels, and frequency; and whether an additional customized notice should be provided;
- additional characteristics or situations for set-offs that should be included in the rule;
- other Federal statutes regarding specific types of claims that may be applicable to a receivership of an uninsured bank under the NBA and that would give certain claims a different priority;
- alternatives for making ratable distributions in accordance with section 12 U.S.C. 194;
- whether the rule should provide receivership termination procedures not addressed in 12 U.S.C. 197.

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