

January 17, 2017

Submitted electronically to specialpurposecharter@occ.treas.gov

Comptroller of the Currency Thomas J. Curry
Office of the Comptroller of the Currency
400 7th Street, SW, #3E-218
Washington, DC 20219

RE: Exploring Special Purpose National Bank Charters for Fintech Companies

Dear Comptroller Curry:

Funding Circle deeply appreciates the Office of the Comptroller of the Currency's (the "OCC") attention and commitment to fostering responsible innovation in the financial services industry, most recently demonstrated in its proposal, *Exploring Special Purpose National Bank Charters for Fintech Companies* (the "Charter Proposal").¹ As a leading global marketplace lending platform, we remain greatly encouraged by the OCC's openness to technological innovation in our financial system. Accordingly, we furnish this letter to both signal our clear support for an efficient nationwide regulatory framework for our industry and offer our perspective on certain key regulatory considerations raised in the Charter Proposal.

Founded in 2010, Funding Circle is the largest marketplace lending platform dedicated to serving small businesses. Over the past six years, we have helped over 25,000 small businesses obtain more than \$3 billion in loans in the US, the UK, Germany, the Netherlands, and Spain.

Funding Circle's loans address the core of the US small business credit gap: term loans that a small business owner can use to expand her store front, open a new location, hire more staff, or launch a new product. Our average loan size is approximately \$100,000 and our average borrower is a business that has operated for ten or more years, has 14 or more employees, and earns between \$1 million and \$2 million annually in revenue. In addition to focusing on lower principal amounts – *i.e.*, the kind of term financing most needed by small businesses, and least likely for a bank to provide – our technology-enabled platform provides small business owners the ability to apply for credit online, in the same way they obtain an increasing number of services, allowing them to devote more time to growing their business.

We strongly believe that by vastly improving credit access for American small businesses, Funding Circle provides a vital and much needed service for both those businesses and for the

¹ Office of the Comptroller of the Currency, *Exploring Special Purpose National Bank Charters for Fintech Companies* (December 2016).

US economy as a whole.² A survey of Funding Circle’s borrowers in the UK demonstrated that our platform’s loans made “between August 2010 and June 2016 contributed to the creation of approximately 40,000 jobs”.³ While we have not yet undertaken a similar formal impact assessment here in the US, our data to date demonstrates that financing provided by Funding Circle has, on average, allowed our US borrowers to create between one and three new jobs. As further validation of our impact footprint abroad, government-sponsored programs, such as those through the British Business Bank and the European Investment Bank, invest in loans through our platform as part of their efforts to stimulate lending to small businesses.⁴

Funding Circle is deeply committed to offering responsible, transparent, and user-friendly financial products and services to all of our valued customers – small businesses and investors alike. We believe that a special purpose national bank charter for fintech companies (a “*Fintech Charter*”) would help us better achieve those goals, by providing standardization as to how the industry is regulated, while ensuring room to innovate and still protecting the system as a whole.⁵ Funding Circle looks forward to working closely with the OCC on this critical initiative.

A. Public Policy Benefits of a Nationwide Regulatory Framework for Fintech Companies

Nothing could be more vital to the healthy evolution and continued growth of the fintech ecosystem than an efficient nationwide regulatory framework. Acknowledging the important step in this direction that the OCC has taken in putting forth the Charter Proposal, we have highlighted the following associated public policy benefits:

- 1. Job creation as a result of better capital availability for small businesses.** Funding Circle was founded with the purpose of reaching the otherwise underserved Main Street small businesses that are seeking access to the capital they need to grow and expand. These small businesses provide roughly half of American jobs, have accounted for two-thirds of net new job creation since 1995, and serve as critical onramps for small

² See, e.g., U.S. Dep’t of Treasury, *Opportunities and Challenges in Online Marketplace Lending*, at 3 (May 10, 2016) (“Access to credit is the lifeblood of business and economic growth. From Main Street storefronts to high tech startups, American small businesses have been responsible for creating two out of every three net new jobs over the last two decades. The ability for individuals to pursue an idea, to start a company, and to grow a business is the foundation of the U.S. economy.”)

³ “Small business, big impact: the changing face of business finance,” a research report commissioned by Funding Circle from the Centre for Economics and Business Research, at 20 (August 2016) (full report is available [here](#)).

⁴ See, e.g., “British Business Bank to invest another £40 million through Funding Circle” (January 9, 2017), available at <http://www.altfi.com/article/2534-british-business-bank-to-invest-another-40m-through-funding-circle>; “EIB and Funding Circle announce groundbreaking £100 million investment into UK small businesses” (June 20, 2016), available at <http://www.eib.org/infocentre/press/releases/all/2016/2016-154-eib-and-funding-circle-announce-groundbreaking-pound100-million-investment-into-uk-small-businesses.htm>.

⁵ We note that these benefits could likewise be achieved through the portability of state law, a legislative banking charter, or other means that provide uniformity, consistency, and clarity as to an overseer, approaches of which Funding Circle would also be generally supportive.

business owners to broader prosperity, which in turn helps address income inequality.⁶ As the US Department of Treasury (“*Treasury*”) cautioned in its white paper entitled *Opportunities and Challenges in Online Marketplace Lending*: “without credit, Americans cannot grow their businesses to create new jobs and opportunities for the next generation.”⁷

For many of these 28 million American small businesses, however, the status quo of traditional financing options has not been working.⁸ The nature of a small business’ needs has made it difficult, and often inefficient, for them to access capital via traditional financing options. By way of illustration, “Federal Reserve research finds that small business borrowers often spend almost 25 hours on paperwork for bank loans and approach multiple banks during the application process.”⁹ Moreover, financing a small business loan may be equally burdensome to the lender – “it costs about the same to underwrite a \$5 million loan as a \$200,000 loan.”¹⁰

As a nation, it is imperative that we work together, and use all of the tools at our disposal, to tackle the small business credit gap. Working *together*, particularly across state boundaries and bridging new and incumbent models of financial services, will never be as effective without a shared set of industry rules of the road and unity in their oversight. Just as job creation in American hinges on access to safe and affordable credit for small businesses, the power and potential of responsible financial innovation to address the unmet capital needs of small businesses requires standardization, consistency, and certainty in our collective regulatory approach.

- 2. Savings to borrowers as a result of increased competition.** Leveling the playing field between traditional financial institutions, who currently operate with significant advantages based in large part on their access to rate exportation and choice of regulator, and fintech companies will help foster healthy competition in financial services. Regulatory parity among companies, new and incumbent, that engage in the same business activities is not only a matter of fairness, but also drives more market participants to operate under the same rulebook. Greater competition among these

⁶ See Karen Gordon Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game*, at 3 (Harv. Bus. Sch., Working Paper No. 15-004, 2014); see also Ann Marie Wiersch & Scott Shane, *Why Small Business Lending Isn’t What It Used to Be*, at 1 (Fed. Reserve Bank of Cleveland Econ. Commentary, August 14, 2013).

⁷ U.S. Dep’t of Treasury, *supra* note 2, at 3.

⁸ According to 2015 Small Business Credit Survey published by the Federal Reserve Banks of Atlanta, Boston, Cleveland, New York, Philadelphia, Richmond and St. Louis, only half of small employer firms received the full amount of financing requested. The Federal Reserve Bank of Atlanta, Boston, Cleveland, New York, Philadelphia, Richmond and St. Louis, “Small Business Credit Survey 2015” (March 2016), available at <https://www.newyorkfed.org/smallbusiness/joint-small-business-credit-survey-2014.html>.

⁹ Mills & McCarthy, *supra* note 6, at 6.

¹⁰ David G. Clunie, “Public Input on Expanding Access to Credit through Online Marketplace Lending”, 80 Fed. Reg., no. 138, at 42867 (July 20, 2015).

market participants in terms of design, pricing, and delivery of financial products and services benefits borrowers in the form of increased choice and access to credit at lower cost.¹¹

- 3. Stakeholder confidence as a result of consistency.** A Fintech Charter would enable the OCC to ensure consistency in holding all companies engaged in similar business activities to the same high standards set by the OCC. This consistency would build confidence across all major industry stakeholders. Small businesses can have confidence that the financial products or services they obtain meet the same rigorous standards as those provided by a traditional financial institution. Fintech companies can have greater confidence in the scope and applicability of regulatory requirements and oversight, enabling them, for example, to lend further down the credit spectrum (which is critical to realizing many financial inclusion benefits but challenging amidst regulatory uncertainty). Investors who believe in those small businesses or in those fintech companies can have confidence in more stable, predictable regulatory outcomes in the context of their debt and/or equity investments. Supervised institutions seeking to partner with fintech companies can have confidence in the steps necessary or advisable to vet fintech companies, which will drive more mutually beneficial partnerships across financial services.

- 4. Equitable access to credit opportunities as a result of uniformity.** As stated in the Marketplace Lending Association’s (a trade association of online lenders of which Funding Circle was a founding member) response to the Charter Proposal, the ability of fintech companies to operate on a nationwide basis “means that no matter where in America you come from, you can access the best products and services that the financial system has to offer.”¹² The latticework of state licensing and usury laws applicable to lending, with no current provisions for passporting, can have troubling unintended consequences for small business owners seeking credit in different jurisdictions. For example, a small business owner located in one state may be denied choices among credit opportunities that she would have enjoyed were she simply located elsewhere. Her ineligibility for a credit opportunity may owe entirely to a state law requirement of an in-state branch or employee (a requirement of very little, if any, utility in today’s digital world), an overly restrictive interest rate cap that is not calibrated to the type of financing product or service she seeks, or an overbroad consumer finance statute that indiscriminately picks up many commercial credit arrangements where such restrictive protections are less, or not at all, appropriate in the small business lending context. In each of these instances, the perverse outcome for this small business owner is that she would be able to seek an identical financial product or service from a bank, but is left with no option other than a bank.

¹¹ For additional discussion regarding this topic, please see the Marketplace Lending Association’s response to the OCC’s Charter Proposal, at 8 (January 17, 2017).

¹² *Id.* at 9-10.

- 5. Improved compliance management as a result of standardization.** Building and delivering financial products and services that comply with more than 50 different state and territory laws – which can vary greatly in substance and formulation¹³ – dramatically increases both the operational compliance burden on fintech companies and potential risks of inadvertent non-compliance; however, it is difficult to see how these additional costs and uncertainties are necessary, or even helpful, to achieving greater levels of customer protection or financial stability. Instead, these additional costs and uncertainties of a complex, uncertain regulatory environment discourage new market entrants and/or are passed along in the form of higher costs to borrowers for fintech companies who do enter the market. Strong compliance management infrastructure is a pillar of safety and soundness oversight. By determining a regulatory compliance standard, and reinforcing it through federal oversight and examination, the OCC could not only ensure a higher level of compliance industry-wide but also help fintech companies do more with less (*i.e.*, through more effective prioritization and resourcing of compliance functions).
- 6. Enhanced oversight as a result of states’ ongoing role.** The advent of a Fintech Charter does not eliminate the critical role that states play in protecting the interests of consumers and businesses within their jurisdictions. Quite the opposite, as the OCC notes in the Charter Proposal, “state law applies to a special purpose national bank in the same way and to the same extent as it applies to a full-service national bank.”¹⁴ While, as discussed above, a Fintech Charter would significantly reduce the number of ways in which traditional financial institutions operate under entirely different sets of rules at the state level than do fintech companies engaging in the same business activities, chartered fintech companies would remain on the hook for the same suite of substantive state laws (*e.g.*, unfair or deceptive practices) that continue to apply to chartered banks.
- 7. More innovation as a result of greater certainty.** Providing clarity as to the regulatory requirements for fintech companies, and a unified system for oversight of their activities, will have the additional benefit of encouraging chartered fintech companies to press ahead in developing innovative solutions to legacy issues associated with the delivery of financial products and services. As Treasury has noted, financial innovation can result in “greater convenience, faster decisions and funding, reduced clerical risk, heightened transparency, and reduced search costs.”¹⁵ In addition, sophisticated

¹³ For example, current state laws offer various methods for calculating fee or rate limitations, differentiate among borrower entity types or depend on factors such as loan principal amount or the location of collateral.

¹⁴ Office of the Comptroller of the Currency, *supra* note 1, at 5 (Those state laws generally include, “state laws on anti-discrimination, fair lending, debt collection, taxation, zoning, criminal laws, and torts” as well as “state laws aimed at unfair or deceptive treatment of customers apply to national banks.”).

¹⁵ U.S. Dep’t of Treasury, *supra* note 2, at 23.

technology-enabled fraud prevention methods may be better able to protect the integrity of lending and money transfers. However, without certainty as to who supervises a fintech company, and with inconsistency or ambiguity around compliance expectations, would-be-innovators and creative problem solvers are discouraged from driving improvements to the financial services industry.

B. Key Considerations in Developing Regulatory Expectations for a Fintech Charter

As stated in the Marketplace Lending Association’s response to the Charter Proposal, “[w]e view the Fintech Charter as a privilege to be granted to those that have the capacity to meet regulatory expectations (e.g., true compliance, adequate capital, safety and soundness, etc.) because ultimately, it is to everyone’s benefit for fintech companies to succeed.”¹⁶ This perspective highlights the critical role of regulatory expectation-setting in the process of developing, administering, and overseeing a Fintech Charter application process and evaluation framework. As the OCC approaches this all-important task of properly setting those regulatory expectations, we would offer the following high-level considerations that we would encourage the OCC to bear in mind as it continues work on the Fintech Charter:

- 1. Financial inclusion.** In many ways, the fintech industry was born of a desire and commitment to make financial services more widespread and accessible; in that sense, for many fintech companies, like Funding Circle, “financial inclusion” is inextricably linked with its business model and founding purpose. Indeed, for Funding Circle, the mission to “build a better financial world”, by, in large part, increasing access to capital for small businesses with otherwise un- or under-met needs, is aligned with the OCC’s statutory mission to ensure “that national banks treat customers fairly and provide fair access to financial services.”¹⁷

In the Charter Proposal, the OCC pointed out that “[s]pecial purpose national banks that are not insured depository institutions ... are not subject to the [Community Reinvestment Act and Interstate Deposit Production Regulations (the “CRA”)]. While we agree that CRA requirements should not apply to non-deposit taking institutions (since they are not accessing the benefit of government-backed funds), Funding Circle remains committed to “helping meet the credit needs of its entire community, including low- and moderate-income neighborhoods, individuals, and underserved geographic areas,”¹⁸ and, as explained above, especially committed to community development by lending to small businesses.¹⁹

¹⁶ Marketplace Lending Association’s response to the OCC’s Charter Proposal, *supra* note 11, at 10.

¹⁷ Office of the Comptroller of the Currency, *supra* note 1, at 11 (citing §12 USC 1).

¹⁸ *Id.*

¹⁹ See 12 CFR §25.11.

Significantly, recent Federal Reserve research suggests that minority-owned small businesses represent a significantly larger portion of applicants to online lenders than they do to traditional banks.²⁰ These statistics show that fintech companies may be better positioned to meet the needs of women- and minority-owned businesses and underserved communities, so long as those services are conducted responsibly and with appropriate customer protection guardrails. Indeed, we believe that certain characteristics of fintech companies – particularly their tech-enabled nature – allow them to more easily reach diverse communities nationwide. If a small business owner has access to the internet, she can apply for a Funding Circle loan, irrespective of geography, demographic, or population density. In this way, fintech companies like Funding Circle help solve issues of bank deserts – that is, where brick and mortar banks may be missing. In addition, objective, data-focused credit evaluation methods commonly employed by fintech companies may have non-discrimination advantages over more subjective, face-to-face assessments.

- 2. Safety and soundness.** In order to ensure a chartered fintech company operates in a safe and sound manner and in the public interest, the OCC should develop rigorous expectations that address systemic risks particular to that fintech company’s business model and activities.

In the case of Funding Circle, for instance, operating in a safe and sound manner may in large part mean ensuring connectivity between borrowers and investors in the event of an insolvency or significant business interruption. Accordingly, the OCC could assess the effectiveness of mechanisms or arrangements for ensuring that, in such an event, existing borrowers can continue to pay down their loans, and that existing holders of economic interests in those loans can continue to receive payments of principal and interest which are due to them.

In addition, credit performance of fintech company portfolios may pose some level of systemic risk (although much less than for a depository institution backed by government funds). Since many fintech companies, including Funding Circle, use proprietary data-driven risk models when evaluating credit applicants, the OCC should consider focusing on model governance to guard against this systemic risk. Working with fintech companies to ensure that they routinely monitor, validate, and update risk models with recent and realtime data, the OCC can guide them toward increasing predictive accuracy while also increasing their ability to quickly diagnose performance shifts and nimbly adjust risk assessments accordingly.

²⁰ Ann Marie Wiersch, Barbara J. Lipman, Brett Barkley, “Click, Submit: New Insights on Online Lender Applicants from the Small Business Credit Survey,” Federal Reserve Bank of Cleveland (October 12, 2016) (finding that 36% of applicants to online lenders were minority-owned small businesses, as compared to 14% of applicants to banks).

Finally, unlike credit performance risks, operational risks and reputation and conduct risks, including regulatory compliance risks, may be similar across fintech companies and traditional financial institutions. As a result, the OCC should consider focusing on enterprise risk management and work with supervised fintech companies to ensure strong internal policies and procedures as well as robust internal controls around money management, information security, customer verification and validation, fraud prevention, complaint management, vendor management, and more.

- 3. Capital and liquidity requirements.** As discussed in much greater detail in the Marketplace Lending Association’s response to the Charter Proposal, capitalization is important to fintech companies inasmuch as they need to meet near-term obligations and to provide an added degree of confidence for the markets and investors. We note, however, that rigid capitalization requirements would not be appropriate where taxpayer-backed funds are not on the line, as would be the case with fintech companies who do not take FDIC-insured deposits. Additionally, capital and liquidity requirements may vary depending on the particular fintech company’s business model. For instance, companies operating as pure marketplaces, like Funding Circle, have the ability to adapt their lending activities to changes in capital supply. Accordingly, we believe the better way to protect borrowers and investors participating in the fintech ecosystem is through the means discussed above around safety and soundness (*i.e.*, thoughtful and appropriate wind-down or business continuity plans, enterprise risk management, etc.), rather than hard-and-fast capital and liquidity requirements.
- 4. Customer protection.** Fintech companies are already required to comply with all borrower protection laws²¹ applicable to the scope and type of lending activities they undertake and would, other than state-specific licensing and interest rate limitations, largely remain so after receiving a Fintech Charter. As the OCC notes, appropriate compliance risk management would entail a regulatory compliance program “designed to ensure the fair treatment of customers and fair access to financial services.”²² By developing a common approach to oversight of how fintech companies meet these existing customer protections, the OCC can influence the manner in which all institutions comply with those protections as well as regularly assess their adequacy, scope, and effectiveness in achieving their purpose.

²¹ These federal laws include, among others, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, anti-money laundering requirements (e.g., the Bank Secrecy Act and the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), privacy and data regulations, the Servicemembers Civil Relief Act, marketing regulations (e.g., the Telephone Consumer Protection Act of 1991 and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003), the Dodd-Frank Wall Street Reform and Consumer Protection Act and requirements relating to unfair, deceptive, or abusive acts or practices. Lenders engaging in electronic processes are also subject to various electronic transactions legislation (e.g., the Electronic Fund Transfer Act, the Electronic Signatures in Global and National Commerce Act, and the Uniform Electronic Transactions Act).

²² Office of the Comptroller of the Currency, *supra* note 1, at 11.

Funding Circle has long believed that a strong, unified commitment to responsible lending practices is key to combatting predation in small business lending. As evidence of our own commitment, we have steadfastly championed clear self-regulating industry standards. In August 2015, we co-authored and launched the *Small Business Borrowers' Bill of Rights*, which identified fundamental financing rights that all small businesses deserve.²³ Those rights included:

- Transparent pricing, including disclosure of annualized interest rate and all fees;
- Offering non-abusive products, so that borrowers don't get trapped in a vicious cycle of expensive re-borrowing;
- Responsible underwriting, so that borrowers are not placed into loans they are unable to repay;
- Inclusive credit access, without discrimination;
- Fair collection practices; and
- Prevention of harassment and unfair treatment.

The *Small Business Borrowers' Bill of Rights* was developed to educate, protect, and empower small businesses in accessing credit, and represented the first consensus on responsible business lending practices. Should the OCC wish to increase customer protections afforded to small businesses, we would strongly encourage using the industry standards outlined in the *Small Business Borrowers' Bill of Rights* as guiding principles in undertaking such a regulatory re-evaluation.²⁴

5. Coordination among regulators. As noted in the OCC's previous white paper entitled *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, the OCC's collaboration with other regulators to "[promote] a common understanding and consistent application of laws, regulation, and guidance" is essential.²⁵ Fragmentation among, and overlap across, the various authorities and jurisdictions of the vast number of federal and state agencies involved in US financial services regulation can have a significant cooling effect on innovation.²⁶ For example, as discussed above, labyrinthine regulation at the state level can overburden new entrants and insulate incumbents, regulatory uncertainty can deter novel approaches (or investment in those novel approaches), and gaps in regulation can incentivize circumvention rather than adherence. Unifying federal supervision of fintech companies through a Fintech Charter would represent a massive first step toward

²³ For more information on the *Small Business Borrowers' Bill of Rights*, including its full text and a roster of signatories, see www.responsiblebusinesslending.org.

²⁴ For additional suggestions regarding how to protect small business borrowers through the Fintech Charter, please see the Responsible Business Lending Coalition's letter submitted in response to the OCC's Charter Proposal.

²⁵ Office of the Comptroller of the Currency, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, at 10 (March 2016).

²⁶ See, e.g., Government Accountability Office, "Financial Regulation: Complex and Fragmented Structure Could be Streamlined to Improve Effectiveness" (February 2016).

efficiency in oversight and greater certainty in regulatory outcomes; however, the ongoing importance of effective collaboration among regulators cannot be overstated. In this sense, we would support the creation of a national advisory board on responsible financial innovation that would consist of key government stakeholders (e.g., the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Federal Reserve, the Federal Trade Commission, the Securities and Exchange Commission, Treasury, etc.). Such an initiative would benefit from giving industry participants a seat at the table as well. In addition, given our view that many state regulations will, and should, continue to apply to the activities of fintech companies, the OCC should explore a framework for how it interacts with state financial services regulators in areas where activities may implicate issues of both federal and state law.

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As stated previously, Funding Circle greatly appreciates the opportunity to provide input on the Charter Proposal, and is willing to commit significant time and resources to engaging with the OCC to architect a shared vision of responsible financial innovation through this initiative. We believe that our experiences in the UK, where we worked closely with the Financial Conduct Authority to enact balanced legislation to support the prudent growth of the peer-to-peer lending industry there, may be highly relevant to such a discourse. We hope to continue an open dialogue with the OCC as it formulates the parameters of a Fintech Charter and begins the application and chartering process. Indeed, we believe that the OCC has the opportunity through the Fintech Charter to create jobs by improving the ways our financial system can efficiently deliver capital into the hands of small businesses as well as to foster the safe growth of the fintech industry as a whole.

Thank you in advance for your time and consideration of our response.

Very truly yours,

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General Counsel