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By electronic submission to [specialpurposecharter@occ.treas.gov](mailto:specialpurposecharter@occ.treas.gov)

Office of the Comptroller of the Currency  
U.S. Department of the Treasury  
400 7th Street, SW  
Washington, DC 20219

**Re: Exploring Special Purpose National Bank Charters for Fintech Companies**

**Introduction**

The Online Lenders Alliance (“OLA”) welcomes the opportunity to comment on the paper entitled *Exploring Special Purpose National Bank Charters for Fintech Companies* issued by the Office of the Comptroller of the Currency (“OCC”) on December 2, 2016.<sup>1</sup> OLA applauds the announcement by the Comptroller of the Currency, which accompanied release of the Fintech Charter Whitepaper, that the OCC will move forward with granting special purpose national bank charters to financial technology, or fintech, companies.<sup>2</sup>

OLA believes this type of regulatory innovation is both constructive and necessary for promoting and keeping pace with the explosive growth and untapped potential of fintech innovation. The OCC’s outside-the-box thinking exemplifies how financial regulation can and should evolve to reflect the new ways of delivering financial products and services in the 21st century.

The Internet, and the commerce conducted over the Internet, operate across both state and national borders. Accordingly, the rules governing Internet commerce, including online lending, should reflect the cross-border nature of Internet-based commercial activities.

Internet commerce demands national standards, not fragmented, state-specific standards – as demonstrated by the example of credit cards, discussed below – and true innovation in financial services can fulfill its potential only if it applies on a national basis. The granting of special purpose national bank charters to fintech companies by the OCC could represent a major step

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<sup>1</sup> Office of the Comptroller of the Currency, *Exploring Special Purpose National Bank Charters for Fintech Companies*, available at <https://occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf> (hereafter “Fintech Charter Whitepaper”).

<sup>2</sup> Remarks by Thomas J. Curry, Comptroller of the Currency Regarding Special Purpose National Bank Charters for Fintech Companies at 3 (Georgetown University Law Center, December 2, 2012), available at <https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.

forward in developing national standards for online lending and could spur the development of new financial products as well as facilitate consumer accessibility.

The OCC's national chartering regime for fintech companies could expand the market beyond those innovators currently offering financial services over the Internet, promote competition, and provide options to consumers and small businesses who are currently underserved or not served by the banking system.

### **The Current Regulatory Regime Limits the Potential for National Online Lending**

Online lenders have filled and are filling a need not served by traditional lending channels. The capabilities of online lenders enable them to provide potential borrowers with lending products that typical "bricks and mortar" lenders – such as bank branches, storefront lenders, or even electronic kiosks like ATMs – cannot provide, with the same degree of service, convenience, safety or choice. The Internet has changed the financial service landscape, by enabling the creation of products and services available to consumers and small businesses previously not available through traditional lending channels. The utility that online lending provides, particularly for financial inclusion, should be encouraged by the OCC and other regulators, and not be stifled by rigid or outdated regulatory regimes.

In many instances, traditional markets have been slow to offer the financial products and services that online lenders have been able to introduce in a comparatively short time period. Unburdened by slower legacy lending models and processes, online lenders have pioneered savvy marketing techniques, innovative underwriting methods, and rapid, almost instantaneous, loan decisions. Although online lenders have disrupted the traditional lending industry in a short period of time, online lending cannot achieve its full potential under the current, fragmented regulatory regime.

The current, fragmented regulatory regime inefficiently serves consumers and significantly limits the potential benefits online lenders can deliver. This patchwork regulatory landscape makes it impractical for consumers to identify and evaluate all credit opportunities that may be available to them. For online lenders, the vast and in some instance duplicative array of state lending laws makes online lending costly and difficult, stifling innovation, reducing competition, and makes it impractical to offer nationally uniform rates and terms for online products. Some of these laws restrict the types of financial services products that online lenders can offer. In addition, online lenders face burdensome state licensing laws, some of which disadvantage out-of-state lenders. Collectively, these state laws impose substantial cost and compliance burdens on online lenders which their bank competitors do not face. These costs and burdens limit the commercial viability of online lending and harm consumers by impeding innovation, reducing competition, and leaving many consumers financially excluded and unable to obtain the credit they need.

To make online lending viable against this background of burdensome state lending and licensing laws, many non-bank innovators rely on partnerships with banks to realize national standards and scale. However, in many instances court and regulatory actions have impeded these

partnerships.<sup>3</sup> This has contributed to an air of uncertainty in the current environment limiting the investment in capital, technology and human resources needed to build a national Internet lender.

Credit cards once faced the same uncertainty and risk that online lenders now face. The development of the national credit card industry in the 1980s provides some interesting parallels to today's online lending industry. Until the 1978 U.S. Supreme Court case of *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*,<sup>4</sup> banks would not engage in interstate credit card lending because it was uncertain whether the bank's home state interest rate could be "exported" to consumers nationwide. The *Marquette* decision, and the subsequent passage by Congress of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980,<sup>5</sup> which granted exportation powers to state-chartered banks and insured branches of foreign banks, resolved this uncertainty and spurred the rapid growth of the credit card marketplace by allowing consumers nationwide to obtain a credit card from a national issuer. Prior to that time, banks would only issue credit cards to local customers and cancelled accounts when a consumer moved to a different state. The advent of uniform federal standards governing interest rate exportation allowed the credit card industry to expand and flourish which allowed greater consumer convenience and access to credit.<sup>6</sup>

With the flexibility to operate in all 50 states free from substantial state law restrictions, the credit card industry developed into a robust, efficient, and innovative industry with the ability to price the product appropriately for the cost of funds and the costs of doing business. The ability of credit card issuers to operate on a large nationwide scale fostered consumer-friendly innovations such as no annual fee cards, zero liability cards, rewards programs, cash rebates, and added services, and enabled consumers in all states to obtain the convenience of a competitively priced credit card issued by a national lender with the benefits we take for granted today.

Online lenders today find themselves in the same position that banks did until 1978, having to navigate the confusing array of state laws that restrict a national online lending market from developing. Online lenders incur the costs of complying with applicable state lending laws in all 50 states, and also must determine if a state even allows lenders to offer an online lending product. A good example is open-end loans. A number of states do not permit online lenders to offer open-end loans in their state. Restrictions like this hinder the development of innovative online products, such as consumer lines of credit, and limit consumers' options. In addition, just as states in the pre-*Marquette* era restricted interest rates that credit card issuers could charge, many states today have very restrictive interest rates regimes that effectively prohibit online lenders from offering a viable credit product in their state.

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<sup>3</sup> See, e.g., *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (June 26, 2016); Federal Deposit Insurance Corp., Proposed Guidance for Third-Party Lending, FIL-50-2016 (July 29, 2016).

<sup>4</sup> 439 U.S. 299 (1978).

<sup>5</sup> Pub. L. No. 96-221, 94 Stat. 132, 164-65 (96th Cong., Mar. 31, 1980).

<sup>6</sup> An excellent history of the development of the national credit card marketplace is by Mark Furletti, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temple L. Rev. 425 (2004).

(continued...)

The OCC has a history of granting special purpose national bank charters to credit card banks that “offer only a small number of products, target a limited customer base, incorporate nontraditional elements, or have narrowly targeted business plans.”<sup>7</sup> In the wake of the *Marquette* decision, the OCC’s exercise of its chartering powers in this constructive manner was instrumental in fostering the nationwide expansion of the credit card market. OLA urges the OCC to exercise those same chartering powers in a like manner with respect to fintech companies.

### **About OLA and its Members**

OLA represents the growing industry of innovative companies that develop and deploy financial technology, including proprietary and innovative underwriting methods, data analytics, and non-traditional delivery channels, to offer online consumer loans and related products and services. OLA members include online lenders, as well as vendors and service providers to lenders, such as consumer reporting agencies, payment processors, and online marketing firms. Our members provide unsecured installment loans to millions of American consumers, a much-needed credit product for consumers who do not have other realistic or safe options to meet unexpected or emergency expenses or to make ends meet when money is tight. These loans provide convenience that consumers value.

Online lenders and their service providers have pioneered innovative online techniques for advertising and marketing, preventing and managing fraud risk, underwriting and managing credit risk, servicing loans, and conducting collection activities in a manner that is fair and transparent to consumers seeking and obtaining loans over the Internet. Online lenders provide benefits to consumers, particularly underserved consumers, with fast, safe, and convenient choices that simply are not available through traditional lending markets.

A national charter for fintech companies, such as online lenders and payment processors, is needed to break down barriers to financial innovation and to realize the full potential of Internet-based financial product offerings.

OLA members are good candidates for special purpose national bank charters because the qualifications for OLA membership include compliance with all applicable federal and state laws and with OLA Best Practices. Every OLA member must strictly adhere to the high standards set by the OLA Best Practices.<sup>8</sup> Any OLA member that violates the OLA Best Practices is subject to disciplinary action, including suspension or termination of membership.<sup>9</sup>

The overarching guidelines of the OLA Best Practices require that members, among other things:

- Comply with all applicable laws and regulations, including laws and regulations governing advertising and marketing practices, loan applications and originations, payments, and collection practices;

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<sup>7</sup> Office of the Comptroller of the Currency, *Comptroller’s Licensing Manual, Charters*, at 50-54 (Sept. 2016).

<sup>8</sup> Online Lenders Alliance Best Practices (April 2016), available at <http://onlendlendersalliance.org/best-practices/>.

<sup>9</sup> *Id.* at 3.

- Never engage in activities that are unfair, abusive or deceptive;
- Protect every consumer’s personal data with comprehensive website security and a privacy policy;
- Provide comprehensive website security and fraud prevention practices; and
- Appropriately manage third-party service providers.<sup>10</sup>

The OLA Code of Conduct, which is part of the OLA Best Practices, requires OLA members to “[t]reat people fairly and with respect.”<sup>11</sup> Based on the overarching guidelines and code of conduct, the OLA Best Practices enumerate detailed best practices in seven areas relevant to the online lending industry:

- Advertising and Marketing;
- Application and Origination;
- Security of Information;
- Payment Processing;
- Collections;
- Mobile; and
- Vendor Selection and Compliance.<sup>12</sup>

In addition, our members believe that consumers should have the ability to repay their loans, and use proprietary and innovative underwriting methods to avoid making loans to consumers who cannot repay.

The OLA Best Practices further the OCC’s goals of promoting fair and responsible lending, safe and sound lending, financial inclusion, and compliance. These Best Practices also reflect OLA’s support for efforts by the OCC and other federal regulators to stop bad actors from engaging in deceptive, unfair, or abusive lending practices. In sum, OLA members’ adherence to the OLA Best Practices make them good candidates for special purpose national bank charters because OLA members must follow practices similar to what the OCC would expect of a national bank.

### **OLA Supports Financial Inclusion**

Online lenders have demonstrated the ability to make credit available to people who have few other credit options, including consumers who may have low credit scores, or who have little or no access to other forms of credit, such as credit cards. Through the use of data and analytics, OLA members have been able to successfully provide access to credit this growing population. The business models of many online lenders focus on providing access to credit to consumers who would not likely qualify for credit from banks and other traditional lending sources. Consequently, OLA supports a system that promotes greater financial inclusion and facilitates the offering of innovative financial products and services that may lead to greater financial inclusion.

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<sup>10</sup> *Id.* at 2.

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

<sup>12</sup> *Id.* at 8-44.

Moreover, financial inclusion can have the salutary effect of enhancing protection for consumers. For example, financial inclusion can promote the use of off-ramps to help borrowers avoid unsustainable cycles of debt and the creation of rescission or cancellation rights that consumers may exercise if they have second thoughts about a product, and can limit the use of certain high-risk features, such as balloon payments. The recommendations developed by the Small Dollar Roundtable (industry and consumer organizations) provides helpful insights into creative approaches that enhance consumer protection without stifling innovation. These include recommendations on enhanced data reporting requirements, and disclosures explaining the payment authorization process that are clear and understandable. Following these guidelines will increase consumer access to credit without unduly restricting the creation of cutting edge products.

In the interest of promoting financial inclusion, however, the OCC should not restrict the types of businesses or business models that can qualify for a special purpose national bank charter. In particular, OLA urges the OCC to guard against granting special purpose national bank charters only to fintech companies that serve consumers who already have access to other forms of credit, but not granting charters to fintech companies that serve consumers who do not have access to traditional bank credit. Such a result would contravene the OCC's stated goal of promoting financial inclusion. Instead, such a selective use of the OCC's chartering power would perpetuate the current system in which low-risk consumers well served by the banking system would benefit from having still more choices, but higher-risk consumers currently underserved by chartered banking institutions would remain underserved and outside the banking system.

### **Eligibility for a Special Purpose National Bank Charter for Fintech Companies Should Be Widely Available and Not Restricted Based on the Structure or Terms of Loan Products**

The OCC should make access to special purpose national bank charters reasonably attainable for a wide range of fintech companies. The eligibility criteria for obtaining a special purpose national bank charter should not be set so that few, if any, online lenders can realistically qualify for a charter.

Specifically, eligibility for a special purpose national bank charter should not depend upon the structure or terms of loan products offered. The OCC should not use the chartering process to pick winners and losers by granting charters only to lenders that make loans in accordance with specific terms or structures. An approach that arbitrarily limits which lenders can qualify for special purpose national bank fintech charters would likely have several adverse consequences:

- First, it would frustrate the goal of opening the system to innovative fintech lenders;
- Second, it would undermine the OCC's goal of promoting financial inclusion. Such an approach would perpetuate a system in which charters are available only to lenders who serve consumers already well served by the traditional banking system – the “haves” – but not to fintech lenders that serve consumers currently underserved by the national banking system – the “have nots”; and
- Third, it would disregard the need for online lenders, like any charter applicant, to make loans in a safe and sound, and profitable, manner in the markets they serve.

In addition, eligibility for a special purpose national bank charter should take into consideration the fact that fintech companies, including online lenders, do not operate like traditional lenders. The chartering criteria should not require these innovative companies to forfeit their nimble, innovative operating structures and operate instead like banks in order to qualify for a charter. The OCC acknowledged in the Fintech Charter Whitepaper that it “may need to account for differences in business models” when approving a fintech charter.<sup>13</sup>

OLA encourages the OCC to consider and elaborate on how it will account for, and preserve, the decidedly un-bank-like business models and operating structures of fintech companies when granting fintech charters. For example, online lenders, like credit card banks, tend to focus on one or a small number of products, resulting in heightened concentration risk. Diversification should not be a requirement for a fintech charter as it would divert attention away from the focused innovation that is one of the singular strengths of online lenders. Similarly, although adequate capitalization, liquidity, and vendor risk management are important elements of any chartering decision, the OCC’s assessment of these factors in the case of innovative fintech companies may need to be more flexible to avoid hampering innovation or denying meritorious charter applications.

## **Conclusion**

OLA strongly supports the OCC’s decision to move forward with granting special purpose national bank charters to fintech companies. OLA believes such a charter is needed to replace outdated and restrictive state lending and licensing laws that no longer make sense for lending over the Internet, a powerful platform for delivering financial products and services that transcends state boundaries. Granting special purpose national bank charters to fintech companies can foster innovation, promote fair and responsible lending practices, and enhance financial inclusion. Such charters can also permit innovative online lenders to operate on a nationwide basis by exporting interest rates and by eliminating state lending law restrictions on product offerings and burdensome state licensing requirements.

It is important, however, for the OCC to exercise its chartering authority in a way that makes charters reasonably available to a wide range of fintech companies, including online lenders. In exercising this authority, OLA urges the OCC to recognize the unique attributes of fintech companies and refrain from imposing unnecessary and exclusionary eligibility criteria on charter applicants, particularly criteria based on the structure and terms of specific products and services, such that few online lenders would qualify for charters. Finally, OLA reiterates that its members are good candidates for special purpose national bank charters for fintech companies because they operate at the cutting edge of Internet-based lending and must adhere to the OLA Best Practices to retain their good standing as OLA members.

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<sup>13</sup> Office of the Comptroller of the Currency, *Fintech Charter Whitepaper*, at 2.

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We appreciate the opportunity to provide input on this important and constructive regulatory initiative. If you have questions or would additional information, I can be reached at [lmcgreevy@oladc.org](mailto:lmcgreevy@oladc.org).

Very Truly Yours,

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