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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: Exploring Special Purpose National Bank Charters for Fintech Companies

Dear Comptroller Curry:

The New York State Attorney General (“NYAG”) welcomes the opportunity to submit comments in response to the Office of the Comptroller of the Currency’s (“OCC”) whitepaper entitled *Exploring Special Purpose National Bank Charters for Fintech Companies*.¹ As an initial matter, we question whether the OCC has the statutory authority to create nondepository special purpose charters for fintech companies.² In addition, while we recognize the need for innovative financial products and appreciate the OCC’s interest in supporting innovation in the financial sector, the NYAG is concerned that granting special purpose bank charters to fintech companies will foster irresponsible lending practices that harm consumers. We oppose in particular any intent to preempt state laws that serve to protect consumers from unfair, deceptive, and abusive lending practices.

¹ See OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (Dec. 2016), available at <https://occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf>; see also, *Remarks by Thomas J. Curry Regarding Special Purpose National Charters for Fintech Companies* (Dec. 2, 2016), available at <https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf>.

² See Letter of the Conference of State Bank Supervisors to OCC, *Receiverships for Uninsured National Banks*, at 1-4 (Nov. 14, 2016), available at <https://www.csbs.org/regulatory/policy/Documents/2016/CSBS%20Comment%20Letter%20on%20OCC%20Receiverships%20for%20Uninsured%20National%20Banks%20NPRM.pdf> (explaining that the National Bank Act does not grant the OCC with the authority to issue full-service bank charters to institutions that do not receive deposits and that, in an attempt to circumvent this restriction, the OCC is relying on its regulations to create nondepository special purpose charters for fintech companies when there is no historical precedent.); see also Letter of National Consumer Law Center and 43 Other Organizations to OCC, *Receiverships for Uninsured National Banks*, at 1 (Nov. 2016), available at <http://www.nclc.org/images/pdf/rulemaking/occ-fintech-charter-44grps.pdf> (“The OCC’s legal authority to charter nondepository lenders unilaterally and without Congressional assent is doubtful . . .”).

1. Preemption of State Usury Laws

The NYAG is primarily concerned that granting special purpose charters will open the door to high-cost short-term, “payday” and other high-cost loans that disadvantage consumers. Currently, there are no federal interest rate caps that cover financial products and services offered by national banks. Rather, national banks are permitted to export the interest rate of their home state and disregard the more stringent interest rates of other states in which they do business.³ In contrast, states like New York have strong interest rate caps that effectively prohibit high-cost consumer loans. In New York, licensed lenders can charge up to 25% interest while unlicensed lenders cannot charge more than 16% interest for small consumer loans.⁴

We are concerned that a national charter for fintech companies will eliminate the state interest rate limitations, which have effectively curbed high-cost lending in states like New York, and that we will see a return to the proliferation of payday lending that has been a source of increasing concern over recent years.⁵ Companies engaged in payday lending earn millions of dollars by targeting and exploiting financially fragile consumers through television, radio, and internet advertisements, promising them “fast cash” to meet their most basic living expenses. Although many of these companies profess to offer cash-strapped consumers much needed access to loans, they typically charge exorbitant interest rates that essentially force struggling consumers to roll over one payday loan into another and that trap consumers in a vicious, never ending cycle of high-cost borrowing that they can never repay.⁶ The economic consequences of these lending activities are significant. According to a March 2013 study from the Insight Center for Community Economic Development, “the payday lending industry had a negative impact of \$774 million in 2011, resulting in the estimated loss of more than 14,000 jobs. U.S. households lost an additional

³ See National Bank Act, 12 U.S.C. § 85.

⁴ New York’s civil usury law prohibits most non-bank lenders that are not licensed by New York State from charging more than 16% interest on small unsecured loans. See N.Y. Gen. Oblig. L. § 5-501; N.Y. Banking L. § 14-a. Lenders that are licensed by New York State cannot charge more than 25% under New York’s criminal usury laws. See N.Y. Penal Law § 190.40. Any loans that exceed these thresholds are void under New York state law. See N.Y. Gen. Oblig. L. § 5-511(1).

⁵ See generally Consumer Financial Protection Bureau, *Online Payday Loan Payments* (Apr. 2016), available at http://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf; Consumer Financial Protection Bureau, *CFPB Data Point: Payday Lending*, (Mar. 2014), available at http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf; Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings* (Apr. 24, 2013), available at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf. See also NPR, *Payday Loans – And Endless Cycles of Debt – Targeted By Federal Watchdog* (Mar. 26, 2015), available at <http://www.npr.org/2015/03/26/395421117/payday-loans-and-endless-cycles-of-debt-targeted-by-federal-watchdog> (reporting that payday lending has exploded from a \$14 billion industry in 2001 to a \$46 billion industry in 2015).

⁶ A recent CFPB study found that four out of five payday loans are reborrowed within 14 days of the previous loan being repaid and that more than 80 percent of payday loans taken out by these borrowers were rolled over or reborrowed within 30 days. See Consumer Financial Protection Bureau, *Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products*, at 115-116 (June 2016), available at http://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf; see also CFPB *Payday Loans and Deposit Advance Products White Paper*, at 21-23 (finding that the average payday borrower takes out ten loans a year).

\$169 million as a result of an increase in Chapter 13 bankruptcies linked to payday lending usage, bringing the total loss to nearly \$1 billion.”⁷ In addition, approximately one-third of borrowers default within six months of their first payday loan and almost half of borrowers default within two years of their first payday loan.⁸

It is well-documented that usury caps are the single most effective way of ending the harms of payday and other high interest consumer lending.⁹ States with strong usury caps and robust payday lending laws translate into significant monetary and non-monetary benefits to consumers. For example, one study estimates that in states that ban payday loans consumers save more than \$2.2 billion annually in fees.¹⁰ In addition, these laws help consumers by preventing “increased difficulty paying bills, delayed medical spending, involuntary bank account closure, higher likelihood of filing for bankruptcy, and decreased job performance.”¹¹

Because of its strong usury caps, New York has been able to prevent the abuses associated with such predatory lending. Thus, lenders that set up their operations out-of-state, overseas, or on tribal lands in an attempt to evade state regulation are still subject to New York state law when lending to New York consumers.¹² It is essential to preserve the ability of individual states like New York to maintain their existing usury caps and not provide incentives for fintech companies to set up shop in states where they can evade New York’s legal interest rates.

2. Preemption of Other State Consumer Protections

We are also concerned that national charters for fintech companies will preempt other important consumer protections. While we appreciate the OCC’s acknowledgement that a national charter does not preempt compliance with a state’s deceptive practices laws, there are other important consumer protections bestowed by state law that should not be sacrificed as a result of a national charter. For example, check cashers licensed and located in New York are subject to

⁷ Insight Center for Community Economic Development, *The Net Economic Impact of Payday Lending in the U.S.*, at 1 (Mar. 2013), available at <http://ww1.insightcced.org/uploads/assets/Net%20Economic%20Impact%20of%20Payday%20Lending.pdf>.

⁸ See Center for Responsible Lending, *Payday Mayday: Visible and Invisible Payday Lending Defaults*, at 5 (Mar. 2015), available at http://www.responsiblelending.org/payday-lending/research-analysis/finalpaydaymayday_defaults.pdf

⁹ Center for Responsible Lending, *Springing the Debt Trap: Rate caps are only proven payday lending reform* (Dec. 13, 2007), available at <http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/springing-the-debt-trap.pdf>.

¹⁰ See Center for Responsible Lending, *States without Payday and Car-title Lending Save \$5Billion in Fees Annually*, at 1-2 (June 2016), available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_payday_fee_savings_jun2016.pdf.

¹¹ Center for Responsible Lending, *Shark Free Waters: States are Better Off without Payday Lending*, at 1, 5-6 (Aug. 2016), available at http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_shark_free_waters_aug2016.pdf.

¹² See, e.g., *Otoe-Missouria Tribe of Indians v. N.Y. State Dep’t of Fin. Servs.*, 769 F.3d 105, 114-115 (2d Cir. 2014).

limitations on the fees they can charge.¹³ The NYAG opposes granting a special purpose bank charter to fintech companies if the effect of such a charter is to enable companies to evade the protections of state laws.

History has also shown that some purportedly “innovative” products often come at the expense of consumer protection. Products seen as innovative when first used, such as “no-doc” and “interest-only” mortgages, helped fuel the mortgage crisis.¹⁴ In the years leading up to the mortgage crisis, the OCC took an unduly expansive view of its authority to preempt state laws that were designed to safeguard consumers against predatory lending practices, thereby effectively undermining the efforts of states like New York to stop such practices.¹⁵ This should not be permitted to happen with respect to nondepository entities such as payday and short-term lenders, auto loan lenders, check cashing entities, and alternative payment systems.

3. State Attorneys General are the First Lines of Defense for Consumers

While federal supervision and enforcement authority play an important role in consumer protection, states are on the front lines and are therefore in the best position to take immediate action to protect consumers. States like New York have proven well-able to respond quickly and effectively to irresponsible lending practices that surface in their jurisdictions.¹⁶ In New York, we

¹³ N.Y. Banking L. § 372(1).

¹⁴ See *Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, 12 CFR 1026, 78 Fed. Reg. 6407, at 6408 (Jan. 30, 2013) (“During the years preceding the mortgage crisis, too many mortgages were made to consumers without regard to the consumer’s ability to repay the loans. Loose underwriting practices by some creditors—including failure to verify the consumer’s income or debts and qualifying consumers for mortgages based on “teaser” interest rates that would cause monthly payments to jump to unaffordable levels after the first few years—contributed to a mortgage crisis that led to the nation’s most serious recession since the Great Depression.”).

¹⁵ See Sheila L. Bautista, *The Role of the State Attorneys General in Preserving Anti-Competitive Enforcement of Anti-Predatory Lending Regulations*, available at <http://web.law.columbia.edu/sites/default/files/microsites/career-services/The%20Role%20of%20State%20Attorneys%20General%20in%20Preserving%20Competitive%20Enforcement%20of%20Anti-Predatory%20Lending%20Regulations.pdf>.

¹⁶ In fact, while conveying the OCC’s concerns about a house bill that would have granted nonbank financial services providers a federal charter, Deputy Comptroller Grovetta Gardineer stated:

H.R. 6139 raises serious consumer protection, compliance, and safety and soundness issues by creating a new federal charter for companies concentrating on products and services most prone to abuse and that are most often targeted to minority populations, low-income neighborhoods, and communities with high concentrations of our military service members. These are products and services that the OCC has largely extinguished from the national banking system, ***and we would not support, license, nor charter an institution concentrating in these services today. Furthermore, where these services are offered, state officials and the CFPB have adequate authority to regulate these products and services and the companies that provide them.*** (emphasis added).

The Consumer Credit Access, Innovation, and Modernization Act: Hearing on H.R. 6139 Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs., 112th Cong. 124 (2012) (statement of Grovetta Gardineer, Deputy Comptroller for Compliance Policy, Office of the Comptroller of the Currency).

have vigorously used the tools of state law to stop these abusive practices. For example, New York has vigorously enforced its usury laws against companies engaged in illegal payday lending activities.¹⁷ New York has also used its enforcement authority to stop payday lenders from making predatory loans under a fraudulent “rent-a-bank scheme” in which the lenders used a Delaware state bank to avoid New York’s interest rate caps.¹⁸ Multi-million dollar settlements obtained by the Attorneys General of New York and other states with sub-prime lenders Ameriquest¹⁹ and Household International²⁰ further attest to the important role of the states in rooting out predatory lending practices. It is absolutely critical that states continue to have the power to regulate and enforce their consumer protection statutes to prevent these and other harmful schemes.

4. Conclusion

It is important to strike the appropriate balance between financial innovation and consumer protection. Granting special purpose bank charters to fintech companies should not tip the scales decidedly away from consumer protection.

The NYAG strongly opposes granting any special purpose bank charter to fintech companies that preempts stronger state laws and strips New York consumers of the protections they currently have. The OCC should not take any action that undermines more stringent state protections and enforcement efforts that have proven so effective in combatting predatory lending.

¹⁷ For example, the NYAG successfully sued Western Sky Financial, LLC, CashCall, Inc., WS Funding, LLC, and their owners (collectively, “Western Sky”) for violations of New York’s usury and licensed lender laws in connection with personal loans made to over 18,000 New Yorkers over the Internet and telephone carrying interest rates as high as 355%. In a settlement with the NYAG, Western Sky agreed to cease collecting interest on outstanding loans to New York consumers, provided refunds to New York borrowers who have paid back more than the principal of their loan plus the legal interest rate of 16%, and paid \$1.5 million in penalties. See <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-western-sky-financial-and-cashcall-illegal-loans>. The NYAG has been successful at stopping numerous other companies from engaging in predatory payday or high-cost loans. See, e.g., <http://www.ag.ny.gov/press-release/payday-lender-forgive-loans-and-provide-refunds> (announcing the NYAG’s November 2004 settlement with Las Vegas-based Cashback Payday Loans, Inc., which charged New York consumers annual interest rates of up to 400 percent on payday loans); <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-five-companies-collected-illegal-payday-loans> (announcing the NYAG’s September 2013 settlement with five debt collection companies that were collecting on illegal payday loans from New Yorkers).

¹⁸ In this case, the NYAG charged Pennsylvania-based payday lenders TC Services Corporation d/b/a Telecash (“Telecash”), and CRA Services Inc., d/b/a Cashnet (“Cashnet”) with using County Bank of Rehoboth Beach (“County Bank”) to make predatory loans. However, County Bank was the lender in name only. Both Cashnet and Telecash provided the capital to market, advertise, originate, service, and collect the payday loans. Cashnet and Telecash also charged high fees for extending repayment dates for those consumers who could not afford to repay the short term payday loan on its original due date. See <http://www.ag.ny.gov/press-release/new-york-sues-stop-illegal-payday-lending-scheme>.

¹⁹ See <https://ag.ny.gov/press-release/ameriquest-pay-325-million-and-reform-lending-practices> (announcing a January 2006 multistate settlement for \$325 million with the nation’s largest subprime mortgage lender to overhaul its sales, appraisal, and closing practices).

²⁰ See <https://ag.ny.gov/press-release/new-york-reaches-unprecedented-484-million-agreement-predatory-lender> (announcing an October 2002 multistate settlement for \$484 million dollars in restitution to consumers nationwide).

If we can provide any further information, please do not hesitate to contact me.

Respectfully submitted,

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Consumer Frauds and Protection