MARKETPLACE LENDING ASSOCIATION

January 17, 2017

Via E-mail (specialpurposecharter@occ.treas.gov)

Office of the Comptroller of Currency
400 7th Street, SW
Washington, D.C. 20219

> **RE: Comments on OCC Paper Titled "Exploring Special Purpose National Bank Charters for Fintech Companies"**

Ladies and Gentlemen,

The Marketplace Lending Association (MLA) appreciates the opportunity to provide feedback on the Office of the Comptroller of the Currency's (OCC) paper on Exploring Special Purpose National Bank Charters for Fintech Companies (Fintech Charter Paper). MLA is an association of technology enabled lending companies with a mission to promote transparent, efficient, and customer-friendly financial systems by supporting the responsible growth of marketplace lending, fostering innovation in financial technology (Fintech), and encouraging sound public policy. Our members include two-sided platforms that connect borrowers and investors, technology-enabled platforms that lend from their balance sheets, and hybrids of these two models, and we use "marketplace lending" and "marketplace lending platform" (MLP) to refer to all these models. Advances in technology, availability of better data, and increased consumer and business demands to accessible, faster, and more efficient funding sources have led to the emergence and sustainability of marketplace lending.

Marketplace lending was born on the Internet. Using this borderless medium, MLPs are opening new credit opportunities to millions of underserved borrowers. If Fintech Charters were available when MLPs were first launched, they would have been a favored choice to reach the vast underserved market that this new financial technology opens up. In launching its initiative to grant special purpose national bank charters to Fintech companies (Fintech Charter) engaged in lending, the OCC has recognized the benefits that a uniform, nationwide charter can bring to consumers and businesses by allowing MLPs to take full advantage of the Internet's reach.

It is no secret that the financial services industry is rapidly changing to incorporate new technologies that offer different opportunities to a broader range of consumers and businesses. Traditional rules and regulations, while still applicable, have not caught up with these advances in lending or access to financial services, which have in some cases hindered access to credit to underserved communities. On the other hand, MLPs are creating opportunities for borrowers to have safer, affordable credit options and faster loan approvals than ever before. This innovation has helped borrowers pay off expensive credit card debt at lower rates, invest in their growing small businesses, pay for family emergencies, refinance sky high student loan balances, and save on interest costs when they make big purchases. MLPs are delivering innovative financial products that are beginning to transform our financial system, and providing services that are seamless and transparent when customers apply for loans. In today's economy, few can afford to wait weeks or months for a credit decision, only to see an application for financing rejected.

Because many of the innovative financial products and services offered by MLPs are subject to a patchwork of state laws that can be challenging to navigate and have the unintended consequences of increasing cost, complexity, and limiting market reach, a Fintech Charter would allow certain MLPs to operate on a nationwide basis in a highly rigorous regulatory environment—leveling the playing field with traditional financial institutions, making room for competition and innovative financial products, and promoting safety and soundness.

The MLA urges the OCC to use its broad authority to grant a special purpose national bank charter. As stated in the OCC Fintech Charter Paper and in more detail below, "[c]onsistent with legal precedent, the OCC views the National Bank Act as sufficiently adaptable to permit national banks – full service and special purpose – to engage in new activities as part of the business of banking ***or to engage in traditional activities in new ways***" [1] without Federal Deposit Insurance Corporation (FDIC) insurance so long as the entity engages in fiduciary activities or conducts at least one of the three core banking functions such as lending money. [2] A Fintech Charter for MLPs fits squarely within the OCC's consistent mission and clear regulatory authority.

In response to the OCC Fintech Charter Paper's request for comments, we discuss below: (1) the current MLP structure options and the difficulties of these structures to businesses and consumers alike, (2) the OCC's authority to grant a Fintech Charter and its long history in fostering innovative thinking and regulation in the financial services industry, (3) the benefits of a Fintech Charter, and (4) recommendations on the construct of a Fintech Charter, including

[1] *See* OCC, Exploring Special Purpose National Bank Charters for Fintech Companies, p. 4 (Dec. 2016) (emphasis added) ("Fintech Charter Paper").
[2] 12 C.F.R. § 5.20(e)(1)(i)-(ii), (e)(3) (FDIC insurance requirement applies to Federal savings associations); 12 U.S.C. § 1 *et seq*.; 12 U.S.C. § 1461 *et seq.*

suggested regulatory expectations. We are pleased to share our thoughts with the OCC and welcome the opportunity to continue this dialogue as the OCC formulates the parameters for this new charter option.

I. Current Structure Options

Currently, MLPs have two options for engaging in business nationwide: (1) direct lending, which requires state-by-state licensing, and/or (2) working as a third party service provider and facilitator for nationally-chartered or state-chartered bank (Bank Partnership).

- Direct Lending: If a MLP would like to engage in the lending business in a certain state, it must obtain a license in that state. While this option may be feasible for companies that engage in business in a few states, this option is more burdensome if a MLP wants to engage in business in many or all jurisdictions. To do so, the MLP would be required to obtain 51 (exclusive of the territories) different licenses/registrations, as applicable, and comply with 51 different regulatory schemes to offer products online (where state lines are significantly blurred). This means that a MLP intending to lend on a nationwide basis would have to build a regulatory compliance framework for numerous and differing rules that apply to various business practices, usury laws, fee restrictions, and other requirements. Many of these laws are dependent upon the amount of loan principal and borrower location, location of the collateral, and other factors (as set forth in state law).

  Moreover, some of these laws were drafted in a manner that may add restrictions to loans depending on the state in which the borrower is located. For example:

  - Physical Branch Requirement: Under the Nebraska Installment Loan Act, licensees are only authorized "to make loans *at the location specified in the application*."[3] This requirement may be difficult for some Fintech companies to comply with if the Fintech company makes loans online and does not have a physical location.

  - Usury Limitations: In many cases, banks are able to offer loan products without the need to consider local interest rate restraints, but licensed non-banks are not. This reduces competition generally and can limit borrowers in certain states from accessing more affordable credit options, including the ability to refinance certain

[3] Neb. Rev. Stat. § 45-1008 (emphasis added); *see also* NMLS, Nebraska Installment Loan Company License, Description, *available at* http://mortgage.nationwidelicensingsystem.org/slr/PublishedStateDocuments/NE-Installment-Loan-Company-Description.pdf.

debt obligations such as credit card debt at lower rates.[4] A special purpose Fintech charter should have the same powers to offer credit as their national bank counterparts and subject to the same rigorous supervision and oversight.

- Fee Restrictions: The amount of the origination fee that may be charged across states depends on the type of license obtained, the loan amount, and/or whether the loan is a refinance. For example, in Arizona, a Consumer Lenders Act licensee may charge a loan origination fee of 5% of a closed-end consumer loan of $10,000 or less capped at $150, while in Louisiana, a Consumer Credit Law licensee may charge a $50 origination fee for consumer loans regardless of the size of the loan or the percentage of the fee.[5]

These statutory and regulatory differences across states create uncertainty for borrowers and investors alike. Furthermore, under this option, a MLP is subject to multi-state supervision and examination by regulators in each state in which it does business, which not only significantly increases regulatory compliance costs (which can be cost prohibitive for smaller platforms), but also decreases competition and creates potentially unfair variability across the borrowing public.

- Bank Partnerships: Under this option, MLPs do not originate loans to borrowers. Rather, they purchase and/or service loans originated by a bank, and they may provide marketing, processing, credit modeling and/or underwriting technology, loan administration, and loan servicing and other support services to assist bank partners. Under this structure, generally banks are exempt from state lender licensing and usury requirements (or the requirements are preempted), among others, because such banks are subject to other state and/or Federal regulatory laws and oversight (as applicable). By extension, MLPs partnering with such banks may not need licensure (depending on the activity) but must comply with the same regulatory laws prescribed for banks. For example, MLP partners are subject to the supervisory and enforcement jurisdiction of the bank's relevant prudential regulator and are seen as vendors or service providers but still are subject to additional bank third-party compliance requirements. Notwithstanding, we note that there are state licenses that a MLP may still need to obtain depending on the activities performed (*e.g.,* servicing license, collection agency license, etc.) regardless of a Bank Partnership.

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[4] *See e.g.,* Mich. Comp. Laws §§ 438.31; 445.1854(1) ("This act shall not apply to the rate of interest on any note, bond or other evidence of indebtedness issued by any corporation, association or person… regulated by any other law of this state, or of the United States"), 493.20.
[5] Ariz. Rev. Stat. §§ 6-635(A)(4), 6-602(B)(1); La. Stat. Ann. § 9:3530(A)(1).

> MLPs also must comply with the requirements for robust compliance risk management programs, including compliance with Federal/state consumer and/or commercial finance laws and best practices. Banks oversee and supervise all aspects of compliance with respect to loan origination (*e.g.*, develop marketing materials, set the credit underwriting criteria, issue all policies and procedures, etc.) and will not partner with entities that are unable to uphold and/or comply with these bank requirements including anti-money laundering compliance and cybersecurity requirements. Essentially, banks and their regulators require MLPs to perform at the same standards as if the bank performed the activities. This is set forth under law by the Bank Service Company Act, which gives federal banking regulators the ability to regulate and examine MLPs in connection with their activities in partnerships with banks.

These methods of organization are not unique to marketplace lending; they have been used in other areas of lending (*e.g.*, credit card lending, student lending, etc.) with success and applying appropriate regulatory oversight. While we do not believe that the two current business models described above need additional regulations, we agree with the OCC that the time is right for a more transparent and direct regulatory framework similar to the proposed Fintech Charter. Robust technology and customer demand, combined with the need for regulatory clarity around the rules and requirements, will only benefit the majority of participants in the marketplace and lead to a competitive and inclusive lending landscape.

II. **OCC Has Authority to Grant Fintech Charter**

OCC History

As noted in the OCC's Fintech Charter Paper, Congress's original goals in enacting the National Bank Act of 1864 (NBA) and creating a Federal charter align with the goals for creating a Fintech Charter. The NBA, which established the Federal charter system, was intended to create a national and uniform currency and to help stabilize the economy during and after the Civil War.[6] Consistent with the Congressional goals of creating a uniform and secure national currency, and stabilizing and supporting the national economy and growth, a Fintech Charter would: (1) create national and uniform standards that would apply to lenders that cross

[6] OCC, Bank Activities and Operations; Real Estate Lending and Appraisals; Notice of Proposed Rulemaking, 68 Fed. Reg. 46119, 46120 (Aug. 5, 2003) (summarizing the legislative history of the national banking laws). Prior to the NBA, all the of the country's banks were state-chartered institutions (with two exceptions). *Id.*; Comptroller of the Currency Administrator of National Banks, National Banks and the Dual Banking System, p. 6 (September 2003), *available at* https://www.occ.gov/publications/publications-by-type/other-publications-reports/national-banks-and-the-dual-banking-system.pdf. The Whigs advocated for a national bank in order to "stabilize the currency and money supply and provide needed credit to support national economic growth." Comptroller of the Currency Administrator of National Banks, National Banks and the Dual Banking System, p. 6.

state lines, (2) increase transparency in oversight and regulation, which would stimulate growth, and (3) increase regulatory efficiency.

The OCC was created to implement this Federal supervisory regime.[7] Congress gave it "broad authority 'to make a thorough examination of all the affairs of [a national bank],' and solidified this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks, except where Federal law provided otherwise."[8] In addition, Congress provided the OCC with the authority to grant charters for national banks, including special purpose national banks.[9] The OCC's national bank chartering authority remains the most flexible chartering authority available to the OCC.[10]

The NBA was written broadly, requiring simply that associations "carrying on the business of banking" be granted charters.[11] The OCC and courts have taken the view that the "business of banking" is not limited to the powers enumerated in the NBA and the OCC has discretion to authorize activities beyond those specifically enumerated so long as the OCC's discretion is reasonable.[12]

<u>*OCC Authority*</u>

Today, the OCC has broad authority to, among other things, grant a special purpose national bank charter (assuming application requirements are met), even if Federal Deposit Insurance Corporation (FDIC) insurance is not obtained (unless required), so long as the entity engages in fiduciary activities or conducts at least one of the following three core banking functions: (1) receiving deposits, (2) paying checks, or (3) lending money.[13] In other words, if an entity engages in fiduciary activities, receives deposits, pays checks, and/or lends money, then the entity has satisfied the "purpose" requirement for a special purpose national bank charter.[14]

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[7] 68 Fed. Reg. at 46120.
[8] *Id*.
[9] *See* 12 U.S.C. § 1 *et seq.;* 12 C.F.R. §§ 5.20(b), (e)(1)(i).
[10] *See* 12 C.F.R. § 160.30; 12 C.F.R. § 5.20(e)(1), (e)(3).
[11] 12 U.S.C. § 21.
[12] *See* Fintech Charter Paper, p. 2-4; *NationsBank of North Carolina v. Variable Annuity Life Ins. Co*., 513 U.S. 251, 257-261 (1995); *Gutierrez v. Wells Fargo Bank, N.A.*, 2008 WL 4279550, at *5-*6 (N.D. Cal. Sept. 11, 2008) (unreported) ("Accordingly, the OCC may authorize additional banking activities beyond those expressly enumerated so long as they are a reasonable interpretation of 12 U.S.C. 24 (Seventh)."); *Baptista v. JP Morgan Chase Bank N.A*., 2010 WL 2342436, at *3 (M.D. Fla. June 4, 2010), *aff'd sub nom. Baptista v. JPMorgan Chase Bank, N.A*., 640 F.3d 1194 (11th Cir. 2011) (unreported).
[13] 12 C.F.R. § 5.20(e)(1)(i)-(ii), (e)(3) (FDIC insurance requirement applies to Federal savings associations); 12 U.S.C. § 1 *et seq*.; 12 U.S.C. § 1461 *et seq.*
[14] The Supreme Court has stated that whether an activity constitutes a "core banking" service must be viewed from the standpoint of the customer. *First National Bank in Plant City v. Dickinson, Comptroller of Florida*, 396 U.S. 122 (1969); OCC Interpretive Letter No. 634 (March 1, 1994) ("In *Plant City*, the Supreme Court said that core banking services must be viewed from the customer's standpoint.").

As stated in the OCC Fintech Charter Paper, "[c]onsistent with legal precedent, the OCC views the National Bank Act as sufficiently adaptable to permit national banks – full service and special purpose – to engage in new activities as part of the business of banking ***or to engage in traditional activities in new ways***. For example, discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans ***are forms of lending money***."[15] MLP activities in facilitating online lending is the modern equivalent of the business of banking and the core banking function of lending money.

By proposing a Fintech Charter, the OCC has indicated its understanding that the concept of core banking activities must be dynamic, rather than static, in order for the national bank system to accommodate and regulate new technology in the banking arena. We agree that Fintech companies should have a national bank charter option that takes into account their particular business models and regulatory needs.

III. Benefits of the Fintech Charter Option

Providing a Fintech Charter option has a number of benefits to borrowers, investors, and MLPs, including uniformity, transparency, and regulatory certainty, which translates into more efficient systems and cost savings for borrowers. As noted above, those MLPs that are not partnered with banks are regulated at the state level and must be licensed and/or registered in the states where the company does business, which requires a MLP to comply with different regulatory requirements for each state where it does business. A Fintech Charter would address these marketplace deficiencies, which negatively impact customers. A Fintech Charter is the logical extension of both direct lending and Bank Partnership models.

We support the Fintech Charter proposal for the following reasons:

- Benefits to the Borrower: A Fintech Charter will benefit borrowers because it will allow Fintech companies to be able to offer diverse products in a cost-efficient and effective manner. With a Fintech Charter, MLPs would be able to offer online products to customers in all states without the restrictions of 51 different sets of rules and regulatory requirements, and would thus be able to pass cost reductions on to borrowers.

- Compliance Risk Management: Offering a Fintech Charter greatly increases the ability of a company to effectively manage compliance risks. In other words, with a Fintech Charter, a Fintech company will be overseen by a primary Federal regulator to ensure compliance with all applicable laws.

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[15] *See* Fintech Charter Paper, p. 4 (emphasis added).

- Uniformity: Today, borrowers no longer need to apply for a loan at a brick-and-mortar building and can do so from anywhere regardless of their location or the location of the lender. As a result, borrowers' access to a range of responsible credit products should not be limited by a state border line. Complying with 51 different regulatory schemes is: (1) impractical and burdensome in light of the blurred lines, and (2) hinders competition by limiting the ability of new business models to compete with more seasoned lenders and prevents lenders from offering innovative products and services or adopting cost-efficient practices.[16] A Fintech Charter is a major opportunity to increase efficiency and reduce unnecessary costs, which directly impacts borrowers.

- Level Playing Field: The Fintech Charter would level the playing field between banks and non-banks such as MLPs and promote competition, which drives down costs for consumers and businesses seeking access to financing. We strongly support the development of a Fintech Charter that will allow Fintech companies the full benefits of rate exportation, which will enable new, competitive financial products to enter the national market and will create a better set of products for consumers and businesses. Currently, banks are permitted to export interest rates (unless otherwise provided).[17] National banks also enjoy preemption of state law to the extent it is preempted by the NBA as amended by the Dodd-Frank Act. [18] Extending these benefits to institutions with a Fintech Charter will allow them to be on the same level playing field as banks, which increases competition and drives down costs for the community. Furthermore, flexibility with rate exportation and preemption will allow institutions with a Fintech Charter to operate efficiently and consistently to allow for maximum benefit and product diversity for borrowers and investors under the supervision of a Federal banking regulator.

The OCC has advised that the national banking system is considered "the venue for testing and evaluating the efficiencies and benefits that flow from uniform national standards …In other words, the national banking system is a laboratory, too, but what it demonstrates is the value of applying uniform national standards to activities and products that, today, have national

[16] *See* U.S. House of Representatives, 109th Congress, Hearing Before the Subcommittee on Housing and Community Opportunity of the Committee of Financial Services, Serial No. 109-112, The Changing Real Estate Market, p. 37-39 (July 25, 2006), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-109hhrg31541/pdf/CHRG-109hhrg31541.pdf.

[17] Currently, national banks are permitted to export the interest rate allowed by the laws of the state, territory, or district where the national bank is located. 12 U.S.C. § 85; *see also* 12 U.S.C. § 25b(f). The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) also provides insured state-chartered banks with the authority to charge loan interest at rates not exceeding the greater of the maximum rate allowed by the laws of the "State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located…" 12 U.S.C. § 1831d. Note that pursuant to 12 U.S.C. § 1735f-7a(b)(4), states may override DIDMCA preemption as to caps on discount points by enacting a cap on discount points after March 31, 1980.

[18] 12 U.S.C. § 25b(b).

markets."[19] In this regard, a charter is even more appropriate in the Fintech industry to ensure that national standards are applied to products that have national markets (*i.e.*, where state lines disappear). Both companies and consumers would benefit from the imposition of clear and uniform standards, which we anticipate would accompany any Fintech Charter rules/regulations. In addition to uniformity, obtaining charter status will enhance the confidence of: (1) investors who provide the capital required to finance MLP operations, and (2) other banks (and/or their regulators) who may be more inclined to partner with a chartered institution for various reasons. MLA members recognize the importance of effective regulation and MLPs already comply with a complex and overlapping array of state and Federal laws. We cannot overemphasize the importance of uniformity and the value of direct regulation by an experienced prudential regulator.

Furthermore, the OCC is in a prime position to oversee Fintech companies because of its nationwide reach and experience with special purpose national charters. Through the Fintech Charter, the OCC will be able to: (1) grant a Fintech Charter to only those companies that meet the rigorous standards for a charter, thus promoting safety and soundness and ensuring that supervision keeps pace with financial innovation, (2) level the playing field, (3) provide consistent supervision, and (4) resolve inconsistent regulations facing Fintech companies engaged in business on a nationwide basis. The OCC will be able to "develop and maintain highly expert credit examination and risk management capabilities that benefit all sizes and types of" institutions, as it did with national banks.[20]

We believe state regulators still have a critical role to play as it relates to support and oversight of MLPs. Even with a Fintech Charter, states would still be able to oversee Fintech companies to the same (or similar) extent they oversee national banks. Furthermore, state regulators are important due to their geographic proximity to debtors, which gives them a unique perspective on the needs of the community. A Fintech Charter will still allow states to continue to ensure MLPs do not engage in unfair and deceptive practices in their lending practices.[21]

IV. <u>Recommendations for Fintech Charter Option</u>

The MLA supports the OCC's efforts to develop a Fintech Charter that would speed innovation and ensure nationwide market access. The promise of a national Fintech Charter framework is significant; it means that no matter where in America you come from, you can access the best

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[19] Comptroller of the Currency Administrator of National Banks, National Banks and the Dual Banking System, p. 10.
[20] *Id*., p. 11.
[21] The OCC has taken the position that "state laws aimed at unfair or deceptive treatment of customers apply to national banks" and "[t]he OCC looks to the substantive content of the state statute and not its title or characterization to determine whether it falls within this category." Fintech Charter Paper, p. 5 and fn. 12.

products and services that the financial system has to offer. We 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.
The MLA would like to comment on the following points raised in the Fintech Charter Paper:

Current Compliance Requirements

Today, MLPs must comply with many borrower protection laws[22] including, but not limited to, the following laws (depending on the business structure as noted above and/or borrower/product), which would also apply equally to any institution with a Fintech Charter under the OCC proposal:

- State laws prohibiting unfair and deceptive practices;
- Truth in Lending Act and Regulation Z;
- Equal Credit Opportunity Act and Regulation B;
- Electronic Signatures in Global and National Commerce Act;
- Telephone Consumer Protection Act;
- Telemarketing Sales Rule;
- Interagency Guidelines Establishing Standards for Safeguarding Customer Information;
- Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice;
- Gramm-Leach-Bliley Act, Regulation P, and, in certain cases, analogous state privacy laws;
- CAN-SPAM Act;
- Electronic Fund Transfer Act and Regulation E;
- Fair Credit Billing Act;
- Fair Credit Reporting Act and Regulation V;
- Fair Debt Collections Practices Act;
- Dodd-Frank Act;
- Federal Trade Commission Act;
- Servicemembers Civil Relief Act;

[22] The Consumer Financial Protection Bureau (CFPB) has direct supervisory authority over, among others, non-bank mortgage originators and servicers, payday lenders, and their service providers. 12 U.S.C. § 5514(a)(1), (d). The CFPB also has direct supervisory authority over financial institutions with $10 billion or more of assets and may work with and assist other Federal banking regulators with respect to institutions under the $10 billion threshold. 12 U.S.C. §§ 5515(a)-(b), 5516. For the latter group, the CFPB may require reporting, may notify prudential regulators if such persons engage in material violations of Federal consumer financial laws, and may provide input regarding the scope and conduct of an examination, the contents of the examination report, the designation of matters that require attention, and examination ratings. 12 U.S.C. § 5516.

- Military Lending Act and its implementing regulations;
- Bank Secrecy Act and its implementing regulations;
- Office of Foreign Assets and Compliance;
- Requirements under the Securities Exchange Act of 1934 (to the extent a MLP sells securities under a registration statement); and/or
- The prohibitions on unfair or deceptive acts or practices (Section 5 of the Federal Trade Commission Act), similar prohibitions on unfair, deceptive, or abusive acts or practices (Consumer Financial Protection Act), and the Credit Practices Rule (Federal Trade Commission).

To assure compliance with these laws, MLA members already have robust compliance systems, controls, governances, and policies and procedures in place.

Accordingly, the MLA urges the OCC to coordinate with other state and Federal regulators to ensure conformity with, and consistent application of, these laws by regulators. For example, the OCC should coordinate oversight of national bank partnerships with the FDIC so that guidance regarding these laws is applied consistently by regulators to different entities. Further, the OCC should consider tailoring its approach to regulatory implementation to the extent that the products and services offered do not fit within the four corners of regulation in order to satisfy the purpose of the applicable statute or regulation and enable innovation to flourish.

Financial Inclusion

The OCC's mission includes "ensuring that national banks treat customers fairly and provide fair access to financial services."[23] "The OCC expects an applicant seeking a special purpose national bank charter that engages in lending activities to demonstrate a commitment to financial inclusion that supports fair access to financial services and fair treatment of customers."[24]

Need for Inclusion

Borrowing habits are shifting rapidly and many customers are no longer applying for loans at brick and mortar branches but are seeking products and services that are convenient and online. Using smartphones to engage in banking activities continues to grow rapidly, which presents "promising opportunities to … increase economic inclusion."[25] However, access to high quality

[23] Fintech Charter Paper, p. 11.
[24] *Id*., p. 12.
[25] FDIC, 2015 FDIC National Survey of Unbanked and Underbanked Households, p. 9 (2015), *available at* https://www.fdic.gov/householdsurvey/2015/2015report.pdf; *see also* CFPB, Mobile Financial Services, p. 12-20 (Nov. 2015), *available at* http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

financial services remains uneven across the country. Changes in our economy have often hit underserved communities the hardest. The FDIC estimates that today, 26.9% of all American households are unbanked or underbanked.[26] Specifically, based on the 2015 FDIC National Survey of Unbanked and Underbanked Households, (1) 19.9% of U.S. households (approximately 24.5 million) were "underbanked" and "used one of the following products or services from an alternative financial services (AFS) provider in the past 12 months: money orders, check cashing, international remittances, payday loans, refund anticipation loans, rent-to-own services, pawn shop loans, or auto title loans", and (2) 7% of U.S. households (approximately 9 million) were "unbanked."[27] Against this backdrop, a Fintech Charter will be crucial to ensure that all Americans – both consumers and businesses – can gain universal access to the convenient, affordable credit options they need to achieve their financial goals.

MLPs Are Uniquely Positioned to Facilitate Inclusion

MLPs are uniquely positioned to promote and foster financial inclusion. Marketplace lending emerged in response to demands for credit from non-traditional borrowers lacking access to credit from more traditional sources. As it is now, MLPs offer access to products that are not typically offered by traditional lending institutions. These products, which include small business loans, unsecured consumer installment loans, credit consolidation, and consumer loan refinancing, are valued by consumers and small businesses because they are often more manageable than traditional credit such as credit cards. For example, consumers use these products to pay off other debts that have higher interest rates and find that the lower interest rates result in lower payments that are easier to make. On the business side, many small business owners find that MLPs offer products that are able to meet their credit needs, which they are unable to obtain from traditional sources.

The Power of Data

MLPs embrace the opportunity to expand the number and type of financial products in the market and better serve underserved market segments because of their lower cost structure, and their technology and data expertise. Today, many consumers and small business owners do not have the ability or time to visit a traditional financial institution in person, carrying printed records. Outdated approaches to data analysis have resulted in lack of access to credit and lack of meaningful competition, which in turn has led to less price responsiveness. While they may utilize many similar data points, such as tax returns, credit history, and/or bank records, many MLPs rely on data-driven algorithms and more accurate approaches to credit to screen the creditworthiness of potential borrowers. This method of determining creditworthiness provides

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[26] FDIC, 2015 FDIC National Survey of Unbanked and Underbanked Households, p. 1.
[27] *Id.*, p. 13.

MLPs with the ability to: (1) offer products and approve borrowers that may have been underserved, (2) reach funding decisions quickly and efficiently as opposed to traditional credit underwriting, and (3) rely on more automated decisions, which result in more consistent outcomes because there is less deviation from subjective manual analysis. Furthermore, reliance on data-driven algorithms has increased competition among lenders striving to increase the accuracy of credit analysis while decreasing the costs of underwriting, which drives down prices for customers. Data-driven algorithms can harness these benefits while reducing fair lending risks that can result from traditional underwriting methods.

Technology Driven Analysis and Efficiencies

With a risk analysis that incorporates a broad array of information to determine repayment ability, certain MLPs are positioned to provide credit to the underserved. Reliance on data driven algorithms and emerging technologies reduces the costs of origination and allows many MLPs to offer products to borrowers who may not be able to obtain credit through traditional lending avenues faced with high costs related to underwriting and processing. Many MLPs also have the ability to process applications very quickly without compromising underwriting standards or fraud detection (which can be more robust and sophisticated than fraud detection performed by banks). Efficiency in underwriting and processing reduces costs, which directly impacts borrowers because it lowers costs and expands the number of products and services that are available. The electronic data sources can also provide MLPs with precise credit underwriting and risk analysis based on a wide range of factors as opposed to the more limited factors used by many traditional lenders. By leveraging these advantages, MLPs have the potential to offer affordable credit to a greater population of customers nationwide.

Marketplace lending also creates competition, which directly benefits the borrower because it drives down prices. For example, unsecured, installment consumer loans provide consumers with an option to refinance other debt (*e.g.,* credit card debt) that typically carries high interest rates, which often helps consumers pay off their debt and see improvements in their credit score.

Flexibility Needed

MLA members are strongly committed to financial inclusion in their core business and believe that fostering greater innovation is an important way to accomplish that goal. In short, the fact that MLPs are internet-based organizations, rather than operating through physical locations, has helped these companies become adept at serving borrowers who likely would otherwise lack access to such a variety of competitive product offerings. Rather than apply a one-size-fits-all standard that might not be applicable to a particular business model, the MLA and its members encourage the OCC to use the supervisory process to evaluate a particular Fintech firm's

approach to, and record on, financial inclusion. MLPs are new entrants to the financial services marketplace and can be expected to evolve over time. The OCC's regulatory approach, while seeking to provide generally applicable guidance, should maintain the flexibility to accommodate innovation in a rapidly changing marketplace.

Capital and Liquidity Requirements

In the Fintech Charter Paper, the OCC noted that its evaluation of a company's capital is important to assess the strength of an individual company and to evaluate the safety and soundness of an entire Federal banking system.[28] Similarly, the OCC evaluates liquidity to determine a national bank's capacity to readily and efficiently meet expected and unexpected cash flows and collateral needs at a reasonable cost, without adversely impacting daily operations or financial conditions.[29]

MLP Capital Structures

MLP capital structures differ greatly and sources of funding vary based on business models. Some loans are funded by individual retail investors and others are funded through institutional investors. In addition, some MLPs sell their loans to investors without retaining interest while others retain interest on the loans originated. Some platforms also utilize a combination of these options. MLPs also may have thousands of different investors, which give MLPs greater ability to continue to make credit available when a single investor no longer provides funds for the loans. Furthermore, MLPs have the flexibility of adjusting to changes in capital and liquidity. In cases where MLPs do not portfolio loans, MLPs have the option and ability to reduce their activities to avoid liquidity issues. On the other hand, portfolio platforms can benefit from the diversified revenue of the net interest they receive.

Tailored Capital and Liquidity Requirements

Capital and liquidity requirements that take into consideration a specific Fintech company and its business structure and products (as opposed to blanket requirements) are important because of the unique nature of how capital and liquidity are maintained in Fintech companies. As noted above, Fintech companies utilize many different models. These models differ from those of existing special purpose national banks. For example, MLP models are very different from special purpose trust charters because MLPs are not acting in a fiduciary and/or trust capacity and as such, the capital and liquidity requirements for special purpose trust charters are inappropriate to apply in the Fintech context. In other words, any capital and liquidity

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[28] Fintech Charter Paper, p. 9.
[29] *Id*., p. 10.

requirements adopted should be rational, flexible, and based on size and complexity of the companies' business activities as opposed to applying current standards across the board.

The OCC also should focus on durability through all market conditions and continuity of business to determine whether a MLP has adequate capital and liquidity, which is a very different standard from the one used to determine capital and liquidity for depository institutions. For non-depository institutions, the key to ensuring the protection of borrowers and investors in the event of an adverse event may require equal focus on a well-thought out wind-down plan and reasonable capital requirements. This is an area where more precision and guidance would be helpful in light of the unique structures of MLPs.

Despite the fact that some Fintech companies that obtain a charter from the OCC may not collect insured deposits, their status as national associations makes it important that they be adequately capitalized to assure their safe and sound operation. The fact, however, that FDIC insurance funds would not be exposed to risk by the current Fintech models does provide another reason for the OCC to utilize a tailored approach in applying prudential standards. MLPs recognize that sufficient capitalization and liquidity is important for business purposes as it will give investors confidence in funding institutions with a Fintech Charter or buying securities issued by such companies. This in turn will expand credit opportunities for borrowers and permit further enhancement of lending technologies.

The MLA supports the OCC's position on assessing capital and liquidity and stands ready to consult with the OCC as it develops its supervisory policies related to capital and liquidity to ensure flexibility. Our members are among the leaders in developing financial technology and, to the extent the OCC desires, the MLA is available to provide insights as to how capital and liquidity should be assessed to ensure safety and soundness. As noted, we recognize the importance of establishing strong standards for institutions with a Fintech Charter, which will promote confidence in these institutions, while at the same time permitting the flexibility that is needed to let different and creative business models develop.

Separation of Banking and Commerce

Some commentators have raised concerns that the authorization of Fintech Charters by the OCC would undermine the separation of banking and commerce that has been a historic feature of banking in the United States. Under the OCC's proposal, the owners of institutions with a Fintech Charter may be companies engaged in commercial enterprises that would not be considered to be closely related to banking. This would include some of the venture capital firms who have provided the financing to launch Fintech companies.

A careful consideration of the statutory framework embodied in the NBA and the Bank Holding Company Act (BHCA) reveals that the OCC's proposal is perfectly consistent with the separation of banking and commerce that has been a historic part of our country's banking regime. Indeed, the OCC's proposal protects the U.S. Treasury and the taxpayers, as well as traditional insured depository institutions, from any exposure to losses at institutions with a Fintech Charter, while at the same time facilitating the use of new data analytics to provide new sources of credit to underserved borrowers.

The BHCA defines "bank" as follows:

> **(A)** An insured bank as defined in [in section 3(h) of the Federal Deposit Insurance Act] [12 U.S.C. § 1813(h)].
>
> **(B)** An institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which both--
>
> > **(i)** accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and
> > **(ii)** is engaged in the business of making commercial loans.[30]

This definition of "bank" includes institutions that have the benefit of deposit insurance (paid for by bank fees, but ultimately carrying the backing of the U.S. Treasury). Such institutions include full service national banks chartered by the OCC. Banks, as defined under the BHCA, have special status because they are permitted to access funds that ultimately have the full faith and credit backing of the United States government. Under longstanding public policy, banking legislation has generally not given commercial companies access to Federally-backed funding.

Many institutions that obtain Fintech Charters, unlike full service national banks, would not be depository institutions and would not obtain their funding through FDIC-insured deposits. Thus, subjecting these institutions to the ownership restrictions imposed on bank holding companies is not necessary. Fintech Charters would be making loans with privately supplied capital and would be subject to the same consumer protection rules as traditional national banks.

The authors of the BHCA got it right. If a national bank is a depository institution, there are good public policy reasons to restrict its ownership to holding companies that are only engaged in businesses closely related to banking. But Congress appropriately excluded from this restriction entities that do not take deposits, and the OCC proposal is perfectly consistent with this public policy decision made by Congress.

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[30] 12 U.S.C. § 1841(c)(1).

Regulatory Expectations

In order to ensure safety and soundness and the fair treatment of customers, we encourage the OCC to require the following rigorous regulatory expectations, which MLA members have endorsed for institutions with Fintech Charters:

- A business continuity plan that adequately addresses possible risks to the business without material disruption to investors or borrowers.
- Strong controls to ensure compliance with applicable laws including requirements to demonstrate compliance management and client money management, meet audit standards, and maintain effective complaint resolution.
- Effective model governance that periodically monitors and validates credit risk and fraud risk models and that uses recent and appropriate data in model development.
- Robust information security, customer authentication, fraud detection, and money laundering prevention programs.
- A governance framework for managing enterprise risk based on the size and risk profile of MLPs.
- Management (including Board of Directors) that has experience appropriate to understand the governance, framework, challenges, and risks related to a national Fintech company.
- Ensure that the company's business plan includes a discussion and analysis of alternative business and recovery plans, including exit strategy.
- Ensure investors have access to a backup loan servicer (if chosen) able to assume full servicing responsibility in the event of material disruptions that impact servicing.

Notwithstanding, the standards the OCC issues with respect to the Fintech Charter should be drafted in a manner that gives Fintech companies the flexibility to grow, evolve, and therefore, succeed.

Conclusion

The MLA applauds the OCC's efforts to encourage a diversified and evolving financial services industry by examining how technology is affecting all aspects of credit. The OCC's experience with national bank charters provides the OCC with unique insights and experience to oversee entities engaged in the business of banking on a national level. The ability for the OCC to recognize that entities need to adapt to the changing needs of consumers, small businesses, and the market enables the Federal charter system to flourish. The MLA supports the OCC's efforts to foster innovation, promote safety and soundness, encourage consistency in the application of applicable law and regulation, and ensure that as many consumers and small businesses as possible receive access to fairly priced credit.

Thank you for allowing us the opportunity to provide feedback on the Fintech Charter Paper. If you have any questions, please do not hesitate to contact me at nat.hoopes@marketplacelendingassociation.org or (202) 660-1825.

Sincerely,

Nathaniel L. Hoopes

Executive Director

Marketplace Lending Association