



December 7, 2020

Via Electronic Mail

Mr. Louis T. Gittleman
Director for District Licensing
Office of the Comptroller of the Currency
Western District Office
1225 17th Street, Suite 300
Denver, CO 80202

Re: Figure Bank, N.A. Charter Application

Dear Mr. Gittleman:

The undersigned trade associations¹ represent banks and credit unions that make up a wide cross-spectrum of the U.S. banking system (together, the “Associations”) appreciate the opportunity to comment on the application by Figure Bank, National Association, Reno, Nevada (“Applicant”) for a national bank charter submitted to the Office of the Comptroller of the Currency on November 6, 2020. Given the significant policy, legal, systemic, and other implications that chartering an organization like Applicant, with its unique business model and structure, would have for the banking system, the Associations urge the OCC to postpone its consideration of Figure Bank’s application until after it has solicited and evaluated public comments, and consulted with Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Department of Justice.

As a threshold matter, the precedent-shattering approach of granting a national bank charter to an institution that accepts only uninsured deposits would violate the Federal law, the consistently expressed intent of Congress, and public policy considerations essential to the functioning of the nation’s financial system. Conversely, approving a national bank charter for such an institution would provide a new pathway to evade the comprehensive regulatory regime established by Congress for banks and their affiliates.

In addition, the descriptions of the bank’s business plan and proposed activities contained in the public portions of the charter application do not provide sufficient information to allow interested parties to thoroughly evaluate or consider this aspect of the application. Some details regarding Applicant’s proposed bank operations have been shared only in public statements made by officials of Applicant, but this information should have been included in the public portion of the application in order to preserve the transparency of the OCC’s charter application review process. The lack of

¹ Please see Annex for a description of the Associations.

information in the public portion of the application about the key aspects of Applicant's business model and proposed operations raises significant process concerns, and granting this charter would represent a fundamental departure from existing policy by the OCC.

I. The OCC Has Provided the Public with Only a Limited Understanding of Figure Bank's Proposed Activities.

According to the public information contained in the application released by the OCC, Applicant intends to "conduct[] lending, payments, and custody activities."² While Applicant has provided some additional information on its proposed activities in the "Financial Inclusion Framework" attachment to its application (Exhibit 5), the OCC has thus far acceded to Applicant's request to keep its business plan confidential in its entirety. Consequently, the public information released by the OCC includes only a skeletal description of Applicant's proposed activities and does not provide the public with a sufficient factual basis to comment on the application. The Associations accordingly request that the OCC postpone consideration of the application until it has released a more fulsome description of Applicant's proposed activities.

Crucially, the Associations are aware of additional facts regarding Applicant's proposed business activities as a result of public statements by officials of Applicant that radically change the nature, and legal and policy analysis, of the application.³ As a result of these statements, the Associations understand that, in addition to "conducting lending, payments, and custody activities," as identified in the public information released by the OCC, Applicant will also accept deposits in minimum denominations of \$250,000 from its affiliates and third parties that are "accredited investors."⁴ The Associations further understand that Applicant's motivation for accepting deposits is, at least in part, to avoid any question about whether it should be entitled to open a master account at the Federal Reserve Bank of San Francisco and permitted to access the services of the Federal Reserve System.

As such, it appears that Applicant intends to take deposits and become a depository institution, despite having no intent to become an insured depository institution.

II. Granting an Application for an Uninsured National Bank Would Violate the Federal Reserve Act.

A. Statutory Language Demonstrates that a National Bank that Received Deposits Must be Insured.

The OCC has previously suggested, and, in order to approve the application, the OCC must take the position, that Section 2 of the Federal Reserve Act ("FRA") (12 U.S.C. § 222) does not require

² Figure Bank Application, p. 8.

³ Specifically, the Associations make reference to a webinar hosted by Lendit Fintech Digital on November 23, 2020, featuring Ashley Harris, General Counsel of Figure Technologies, Inc., and Michele Alt, Managing Director, Klaros Group LLC, a consultant to Figure, available at <https://digital.lendit.com/talks/deep-dive-into-figures-bank-charter-application/#>. See also, Wack, Kevin, A fintech's novel bank charter application draws industry's ire, American Banker, December 2, 2020.

⁴ The Associations assume that Applicant intends to take deposits from third parties that are "accredited investors" as defined in Regulation D of the Securities and Exchange Commission.

national banks that accept deposits to be insured banks and thereby protect their depositors with federal deposit insurance.⁵ This position cannot be upheld under the plain language of the statute.

The starting, and normally ending, point of interpretation of statutory language is the plain meaning of the statute.⁶ Section 2 is clear that every national bank must be a member of the Federal Reserve System and every member of the Federal Reserve System must be an insured bank.⁷

Every national bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located, become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this chapter and shall thereupon be an insured bank under the Federal Deposit Insurance Act [12 U.S.C. § 1811 et seq.], and failure to do so shall subject such bank to the penalty provided by section 501a of this title.

Accordingly, the grant of a national bank charter to a bank that proposes to take deposits but would be an uninsured bank under the Federal Deposit Insurance Act would be inconsistent with Federal law even if all of the deposits of the bank were in amounts above the maximum level of federal deposit insurance.

The OCC would apparently interpret Section C as reading:

Every national bank in any State shall...become a member bank and shall, *unless otherwise determined by the Comptroller of the Currency*, thereupon be an insured bank...

Even assuming that the OCC has the authority to interpret Section 2 (which, as discussed below, it does not), the addition of the italicized language to aggregate to itself additional powers is impermissible as it contravenes the plain meaning of the statutory language.

B. Congressional Intent, Consistent with the Plain Language of Section 2, Demonstrates that a Chartered National Bank that Accepts Deposits Must Be Insured.

Following the devastating impact of the bank collapses of the 1930s, a foundational piece of the Congressional response was federal deposit insurance. The Banking Act of 1933 introduced mandatory Federal Reserve membership for national banks and mandatory depository insurance for all member banks.⁸ Under the Banking Act of 1935, existing national banks and state member banks automatically

⁵ Brief for Defendants-Appellants, Linda Lacewell v. Office of the Comptroller of the Currency, No. 19-4271 (2nd Cir. April 23, 2020) (“OCC Brief”).

⁶ *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

⁷ We note that national trust banks chartered by the OCC are members of the Federal Reserve System. These institutions do not accept deposits, and are therefore uninsured. This discussion focuses on the requirements applicable to full service national banks, which is the charter for which Applicant has applied.

⁸ See Act of June 1933, ch. 89 §1, 48 Stat. 162 (enacting new Section 12B of the Federal Reserve Act). Under the Banking Act of 1933, all member banks were required to become members of the Temporary Federal Deposit

became insured banks,⁹ and the requirements that national banks¹⁰ obtain membership in the Federal Reserve System and that all member banks be insured remained.¹¹ There was simply no way to be a national bank and not be insured.¹² State banks, by contrast, had the option not to become Federal Reserve members and, consequently, not to obtain deposit insurance.¹³

In 1950, the provisions of the FRA relating to federal deposit insurance were transferred from the FRA to create the separate Federal Deposit Insurance Act ("FDIA"). The transferred provisions carried over the language from the FRA and maintained the same framework for deposit insurance. That is, the inextricable link for a national bank between Federal Reserve membership and deposit insurance was preserved. There is no indication in the legislative history that this statutory restructuring was intended to make deposit insurance optional rather than mandatory for national banks or state member banks. It is inconceivable that such a fundamental change would have been effectuated without any Congressional debate or mention.

In 1958 and 1959, provisions were added to the FRA at the time the States of Alaska¹⁴ and

Insurance Fund ("Temporary Fund") that was intended to insure deposits between January 1 and July 1, 1934. Under the Banking Act of 1933, prior to July 1, 1934, national banks were required to obtain Federal Reserve membership and deposit insurance. State banks could apply to be covered by the Temporary Fund (other than state banks that were already members and therefore were required to apply), and any state bank that wanted to be an insured bank would have to become a Federal Reserve member and obtain deposit insurance. Ultimately, the Temporary Fund was extended until the Banking Act of 1935 was enacted and revised requirements regarding Federal Reserve membership and deposit insurance were included in the Banking Act of 1935, as discussed below.

⁹ Former Section 12B(e)(1) of the Federal Reserve Act (12 U.S.C. § 264).

¹⁰ At the time, national banks in Hawaii, Alaska, Puerto Rico, and the Virgin Islands were the only national banks that were not required to become members of the Federal Reserve System (though they had the option to become members and could therefore be "national nonmember banks"). 12 U.S.C. § 264(c).

¹¹ See Act of Aug. 23, 1935, ch. 614, § 8101, 49 Stat. 685.

¹² Under former Section 12B(e)(1) of the Federal Reserve Act (12 U.S.C. § 264), any bank authorized to commence or resume the business of banking after that date, and every state bank that converts to a national bank, is an insured bank from the time it is so authorized or resumes the business of banking. Sec. 12B(e)(2). Section 12B(i)(1) confirmed this, making it clear that neither a national bank nor a state bank could terminate its deposit insurance. If the insured status of a national bank were terminated, the Comptroller was required to appoint a receiver for the bank. Likewise, if the insured status of a state member bank were terminated, Federal Reserve membership was automatically terminated.

¹³ The Banking Act of 1935 gave state banks the option until 1941 to become members of the Federal Reserve. In 1941, the Act would have permitted only state banks with deposits of \$1,000,000 or less to opt out of Federal Reserve membership. 12 U.S.C. § 264(y). In 1939, however, the Federal Reserve membership requirement for state banks was rescinded altogether, permitting state banks to obtain (or maintain) insurance without becoming Federal Reserve members. Act of June 20, 1939, ch. 214 § 2, 53 Stat. 842.

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Hawaii¹⁵ were admitted to the Union, including the language in Section 2 noted above that all national banks must become members of the Federal Reserve System and be insured. The OCC has argued that the language added to Section 2 merely “clarified” the requirement that national banks in newly admitted states that previously did not have to join the Federal Reserve System would be required to join and would “thereby benefit[] from [the] automatic deposit-insurance process available to national banks in already-admitted states”¹⁶ and do not reflect an independent deposit insurance requirement. The record demonstrates the opposite.

The amendments were recommended by the Federal Reserve to ensure that national banks in newly admitted states would become subject to the same requirements as national banks in the existing States that were already subject to the requirements of Federal Reserve membership and deposit insurance. Specifically, the Secretary of the Federal Reserve Board wrote:

Under present law, all national banks in the existing States of the Union are required to be members of the Federal Reserve System and, as such members, to be insured banks and to be governed by the many important statutory limitations and restrictions which by their terms are applicable to members and insured banks.... In the Board's opinion, there is no sound reason why any national banks located in a new State of the Union, enjoying the prestige and privileges conferred by organization under the National Bank Act, including the right to act as depositories of Government funds, should be exempt in this manner from the obligations and responsibilities which must be assumed by national banks in other States.¹⁷

Although the new provision did bring national banks in newly admitted states within the ambit of the requirement, the provision explicitly reaffirmed the obligation reflected in the language of the FDIA that all national banks must be members and, on membership, be insured.

As part of the amendments to the FDIA in 1991, the provision in that Act that automatically conferred deposit insurance on national banks was eliminated—not because the deposit insurance requirement for national banks was eliminated but because the processes for obtaining a national bank charter and Federal Reserve membership and deposit insurance were decoupled. Rather than deposit insurance automatically coming with being chartered as a national bank and Federal Reserve membership, organizers of a proposed national bank now had to apply separately to the FDIC to obtain insurance (and, failing so, cannot be chartered, as a national bank). The underlying requirement that a national bank be insured remained, as reflected in the express language of Section 2 of the FRA.

Congress’ intent that national banks be insured was subsequently reaffirmed. During a hearing before the Subcommittee on Financial Institutions and Regulatory Relief in 1995, then-Comptroller Ludwig urged such committee to amend Section 2 of the FRA by deleting the “and shall thereupon be an insured bank under the [FDIA]” clause in order to terminate the independent requirement that a

¹⁵ Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4.

¹⁶ OCC Brief at 50.

¹⁷ 96 Cong. Rec. 9744-45 (July 10, 1959).

national bank obtain deposit insurance.¹⁸ Had Congress wanted to make such a change (or, if the view expressed by the current Acting Comptroller regarding the language added to Section 2 were correct,¹⁹ effectively ratifying a previous *sub rosa* elimination of the requirement that all national banks be insured), it could easily have acceded to Comptroller Ludwig's request. Congress made the decision in 1933, over strident opposition, to provide deposit insurance on a mandatory basis. Only Congress can reverse that decision.

C. The OCC Lacks the Authority to Interpret Section 2.

The relevant statutory provision in question is part of the FRA. It is the Board of Governors of the Federal Reserve System, and not the Comptroller, that has the authority to interpret the FRA. Accordingly, the Acting Comptroller is not authorized to issue a national bank charter for an institution with uninsured deposits without an interpretation from the Federal Reserve that he is authorized to do so. The necessity of acceding to the Federal Reserve's interpretation is underscored by the Comptroller's self-interest in the construction he urges. The courts have consistently expressed skepticism about a regulator's interpretation that expands its powers, even when the regulator is interpreting its own statute.

In summary, ever since 1933, all national banks taking deposits have been required to be insured. Although the language and structure of this requirement have been modified over the years, that fundamental requirement has not been altered.

III. Approval of the Application Would Result in an Evasion of the Prudential Standards that Congress has Established to Protect the Safety and Soundness and the Financial System and Prevent the Mixing of Banking and Commerce.

As an *uninsured* national bank, Applicant would evade core prudential standards and limits that Congress has established to ensure the safety and soundness of banks, protect the financial stability of the United States, and prevent the mixing of banking and commerce. By evading these fundamental precepts of bank regulation in the United States, Applicant and its affiliates would also gain a substantial and unfair advantage over other national and state banks that operate, consistent with Federal law, as insured banks.

A. Applicant Would Evade Regulation and Supervision of its Parent and Affiliates.

The Bank Holding Company Act of 1956 (12 U.S.C. § 1841, *et seq.*) (the "BHC Act") was the product of a deep Congressional concern that the combination of banking and commerce would create a concentration of economic power that would be inimical to not only competition, but fair and equitable access to financial services.²⁰ That concern would be magnified today should the country's largest

¹⁸ See Economic Growth and Regulatory Paperwork Reduction Act: Hearing on S. 650 Before the S. Comm. on Banking, 104th Cong., 91-92 (1995).

¹⁹ *Supra* note 12.

²⁰ See S. Rep. No. 1095, 84th Cong. 1st Sess. 2 (1955).

technology and retail companies be permitted to acquire a full-service bank charter. Yet, that is exactly what OCC approval of the application would permit.

Based on publicly available information, Applicant would not be considered a “bank” under the BHC Act. Under section 2 of the BHC Act, a bank either (i) has FDIC insurance or (ii) both accepts demand deposits and makes commercial loans. As stated in its application and discussed above, Applicant would not be insured by the FDIC, and while Applicant would make loans, it would not engage in commercial lending activity. As a result, its parent company Figure Technologies Inc. (“FTI”) would not be a bank holding company, and it and its affiliates would not be subject to consolidated supervision by the Federal Reserve.

FTI and Applicant should not be exempt from such supervision. As the Associations have previously stated in their comment letter on the proposed OCC Payments Charter, there is no exemption in the BHC Act for a non-depository, full-service national bank,²¹ and that is at least equally true for a depository, full-service bank. The importance of the Federal Reserve providing oversight and supervision of holding companies that engage in activities outside its bank subsidiary has long been recognized by the United States Congress. Indeed, Congress, in the Competitive Equality Banking Act of 1987, enacted provisions expressly to close the loophole that permitted certain nonbank banks to avoid regulation under the BHC Act by amending the definition of “bank” in the BHC Act and excluding from the definition only specifically identified entities.²² As it has always applied to full-service national banks and their parent companies, so should it apply to FTI and Applicant. The decision to accept only deposits that are uninsured appears to be a clear attempt to avoid consolidated supervision by the Federal Reserve and the prudential standards applicable to bank holding companies (e.g., consolidated capital and liquidity standards).

One of the key reasons for this regulation was to limit the risk that the activities of the bank’s parent and other affiliates could pose to the national bank and its depositors. While Applicant may argue that the OCC can adequately supervise Applicant, and that the existing regulations governing transactions between a member bank and its affiliates will adequately protect the bank from the risk of its affiliates, Congress has *not* deemed such supervision or regulation to be sufficient by itself. Rather, Congress has required that the corporate owners of banks also be subject to consolidated supervision and regulation by the Federal Reserve to assure the safety and soundness of the nation’s banks.

B. As an Uninsured Institution, Applicant Would Also Evade FDIC Oversight, Despite Engaging in Deposit-Taking Activities.

If the deposits to be accepted by Applicant were insured, the FDIC would have approval

²¹ ABA, BPI, CBA, CUNA ICBA, NAFCU, TCH, *Proposed Payments Charter* (July 29, 2020), available at <https://www.aba.com/-/media/documents/comment-letter/joint-trades-letter-on-proposed-payments-charter.pdf?rev=6c673df60b6e4ea08ba040ec21a3eef3>.

²² 12 U.S.C. 1841(c). See S. Rep. No. 100-19, 100th Cong., 1st Sess. (1987) noting that failing to close the nonbank bank loophole would, among other things, “...erode the policy of separating banking from commerce; create new competitive inequities in our financial system, undermining the ability of the bank regulators to maintain a safe banking system; and jeopardize the payments system.”

authority over the application for a charter.²³ The uninsured nature of the bank would evade that second level of approval, even though the bank would still engage in deposit-taking activities.²⁴

Applicant would also evade a comprehensive regulatory scheme Congress has developed for depository institutions. Among the specific requirements that an uninsured bank would evade are basic standards for overall safety and soundness (12 U.S.C. § 1831p-1), internal controls (12 U.S.C. § 1831m), prompt corrective action, and brokered deposits.

C. Applicant Would Not Be Subject to Similar Standards Under the Community Reinvestment Act (“CRA”).

As an uninsured depository institution, Applicant would not be subject to the CRA.²⁵ Applicant appears to acknowledge its responsibility to provide products and services to low- and moderate-income individuals and communities that the bank would serve, and specifies, in its “Financial Inclusion Framework”, that it intends to review and consider “the CRA strategic plans of financial institutions of comparable size to the Bank [to develop] the Bank’s measurable goals”. The Framework also notes that Applicant plans to take into account the OCC’s list of qualifying CRA activities in developing its plan and to “work with the OCC and community advocates to define financial inclusion goals for each of the three years of its *de novo* period.”

However, the OCC has not articulated what standards, if any, it would apply to this bank to ensure that it meets the needs of the communities it serves. Notwithstanding the concerns related to the Special Purpose National Bank Charter as a general matter, the OCC at least specified a set of “financial inclusion” standards for those charters, stating that it intended to apply the following key principles for new charter applications, by “‘encouraging’ the national bank ‘to provide fair access to financial services by helping to meet the credit needs of its entire community’ and ‘promoting fair treatment of customers including efficiency and better service.’”²⁶ Given that the application is one for a “full service charter,” it is unclear whether these same principles or other principles would hold.

Furthermore, unlike that prior effort (where the OCC publicly indicated its expectations related to financial inclusion and signaled its intention to provide further guidance), the OCC has failed to share any measures or standards that would guide the public to understand how Applicant would reasonably meet the needs of the communities which it services.

IV. Granting a National Bank Charter to an Uninsured Depository Institution Would Represent a Significant Policy Shift Requiring the Need for Congressional Action.

Public policy considerations also argue strongly against the chartering of uninsured national banks, and they undergird Congress’ decision to make deposit insurance mandatory for all Federal

²³ 12 U.S.C. § 1815.

²⁴ The FDIC must consider the factors enumerated in 12 U.S.C. § 1816 in determining whether to issue a certificate of insurance.

²⁵ See 12 U.S.C. § 2902 (defining “regulated financial institution” to mean an “insured depository institution”). See also 12 CFR 25.12 (defining “bank” as a national bank with federally insured deposits).

²⁶ See OCC, *Exploring Special Purpose National Bank Charters for FinTech Companies* (Dec. 2016).

Reserve member banks, including national banks. As described above, deposit insurance is a statutory requirement under the FRA, and, as an uninsured depository institution, Applicant would not be acting as a national bank as required under Federal law.²⁷

After fulsome debate, and over strident opposition, Congress decided not only to establish a federal deposit insurance system, but to make it mandatory for all national banks and state member banks because it was required in the national interest.²⁸ It would clearly be contrary to the public policy considerations that led to this Congressional decision for an agency to now render federal deposit insurance optional for national banks. Even if the risk of bank collapses and bank runs were not high as a result of such optionality, the potential consequences are far too grave.

While Applicant notes it will be uninsured bank officials have indicated through public statements that they intend to accept deposits from accredited investors and bank affiliates.²⁹ As we understand it, these deposits will be held directly by the bank, not by a third-party depository institution. If the OCC ultimately approves the application, its rationale for doing so would presumably be that deposit insurance is not necessary for “qualified depositors” because they have sufficient sophistication to understand the risks involved. Any such argument is unavailing.

- *First*, whatever the merits of such a demarcation, it is one for Congress, and not a regulatory agency, to make, particularly in light of the clear statutory language requiring that national banks be insured. In the absence of an explicit Congressional determination to provide such authority to an agency, the agency has no legal right to seize it.³⁰
- *Second*, if the OCC has the sole authority to determine whether national banks must have deposit insurance, the OCC could exercise that authority without any minimum deposit amount (or a much lower minimum). Likewise, the Federal Reserve could take such action for state member banks. There is no basis to believe that Congress intended to assign to each of these two banking agencies complete authority to override such a fundamental Congressional determination.
- *Third*, the public policy considerations argue persuasively against such a bifurcated approach even if it could be legally implemented. An uninsured depository institution would be particularly exposed to a “run on the bank”, which is the reason federal

²⁷ Although there have been uninsured trust companies chartered as national banks, they are chartered under a special statutory provision (12 U.S.C. § 27(a)) and, more importantly, do not accept deposits. Trust funds are not deposits for purposes of federal banking law. *See, e.g.*, 12 U.S.C. § 92a(d).

²⁸ *See, e.g.*, Federal Deposit Insurance Corporation, *A Brief History of Deposit Insurance in the United States* (1998), <https://www.fdic.gov/bank/historical/brief/brhist.pdf>.

²⁹ *Supra* note 3.

³⁰ In closing the nonbank bank loophole in 1987, Congress explicitly recognized that “[g]iven the pace of technological change in the delivery of financial services, it may be that banks need to engage in a broader range of financial services, while other financial services firms may need greater entry into banking. *But the Committee believes any redrawing of the boundary lines must come about as the result of deliberate congressional decision and not through the exploitation of loopholes.*” S. Rep. 100-19 at 10 (emphasis added).

deposit insurance was originally developed. There would be a serious risk that depositors would, upon any indications of systemic or idiosyncratic concern, immediately seek to withdraw their funds, precipitating the bank's collapse. They would understandably be concerned that a large portion of their deposits would be at risk because of the lighter regulatory scheme and the absence of the well-developed resolution structure under the FDIA.

- *Fourth*, if Applicant is successfully able to establish itself as a national bank and a depository institution, despite not being an insured depository institution, it is likely that other enterprises would follow this path, thereby creating a new and growing source of systemic risk. Even if the number of uninsured national banks and the amount of their deposits were relatively limited, the potential impact of the failure of one or more of these banks upon other banks may not be. This is particularly the case because the OCC has not acted as a receiver in decades,³¹ and the resolution of such a firm is likely to be confusing and uncertain.
- *Fifth*, the impact of the failure of one uninsured bank on all other uninsured banks is likely to be immediate and severe. Experience with the failure of other uninsured depositories, such as the Ohio thrift crisis,³² demonstrates the serious risk of a run on all uninsured depositories. And because, in this case, the failed banks would have a national charter rather than a special state charter, the risk of spill-over into the insured banking system is meaningful. Depositors of insured banks (particularly the less-sophisticated) may not understand the difference between insured and uninsured national banks and would withdraw their deposits as soon as possible.
- *Sixth*, based on public statements by officials of Applicant, we understand that Applicant expects to seek to open a master account at the Federal Reserve and therefore to have access to Federal Reserve systems. However, such an action would directly contradict the provisions in section 2 of the FRA.

If instead Applicant would not engage in deposit-taking, the bank would have a significantly different risk profile from a traditional bank, but there would be significant uncertainty about the scope of OCC's authority to issue charters to non-depository institutions that are not limited purpose trust

³¹ The OCC noted in its 2016 final rule "Receiverships for Uninsured National Banks" that it has not appointed a receiver for an uninsured bank since the banking panics of 1930-33. 81 Fed. Reg. 92594, 92595 (Dec. 20, 2016). The 2016 final rule is focused on national trust banks, the only type of uninsured bank the OCC currently supervises. The resolution of an uninsured depository institution would present fundamentally different challenges than an uninsured trust bank, given the material differences between a depository institution and a non-depository trust company in respect of balance sheets, risk profiles, and business activities.

³² Although some Ohio thrifts were insured by the Federal Savings and Loan Insurance Corporation, many were insured by the state-sponsored insurance program. The Ohio insurance program, as well as those in other states, all failed. See, e.g., Chapter 4, An Examination of the Banking Crisis of the 1980s and Early 1990s, available at https://www.fdic.gov/bank/historical/history/167_188.pdf.

banks.³³ In fact, the New York Division of Financial Services successfully challenged the OCC's authority to issue non-depository special purpose charters for entities with business models very similar to that of Applicant, and that case remains under consideration by the Second Circuit.³⁴ The OCC would sidestep that pending legal action if it grants a non-depository entity like Applicant a national bank charter.

Even assuming the OCC has the legal authority to grant a national bank charter to an uninsured depository institution, doing so not only represents a major policy shift,³⁵ but is also precedent-setting and will open the door to a new class of national banks. Moreover, failure to give full consideration to these important legal and policy issues raised by Figure Bank's application could result in any approval being inconsistent with the legal requirements for agency actions.

V. The OCC Should Coordinate with the DOJ to Determine Whether an Uninsured National Bank Would Raise Concerns under Section 21(a)(2) of the Banking Act of 1933.

We note that Section 21(a)(2) of the Banking Act of 1933 (12 U.S.C. § 378) makes it a criminal offense for any institution to receive deposits unless it is "authorized to engage in such business by the laws of the United States" or "permitted by the United States ... to engage in such business".

It is presumably beyond question that the terms "authorized" and "permitted" require that the authorization or permission be legally valid. In other words, if a national bank is prohibited from taking uninsured deposits, a national bank that nonetheless took deposits that were uninsured would not be authorized or permitted to take such deposits within the meaning of Section 21(a)(2).

Accordingly, the OCC should not grant a charter that contemplates uninsured deposits without obtaining the view of the United States Department of Justice. Because Section 21(a)(2) is a criminal statute, it is the DOJ, and not a bank regulatory agency, that has authority over its enforcement. It would be contrary to the public interest and the future of the national bank charter if a bank chartered by the OCC was later prosecuted for violating a federal criminal statute.

* * * * *

³³ "The OCC generally requires FDIC deposit insurance for all bank charters, except for certain national trust bank charters." Comptroller's Licensing Manual, Charters, p. 54, available at <https://occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/charters.pdf>.

³⁴ *Linda Lacewell v Office of the Comptroller of the Currency*, 2019 WL 6334895 (2109).

³⁵ In addition to the statements from then-Comptroller Ludwig noted above, the Associations note that they are not aware of the OCC ever granting a national bank charter to an enterprise that sought to accept deposits but did not intend to be an insured depository institution.

The Associations appreciate the opportunity to comment on the application. If you have any questions, please contact Dafina Stewart by phone at 202.589.2424 or by email at dafina.stewart@bpi.com.

Respectfully submitted,

*American Bankers Association
Bank Policy Institute
Credit Union National Association
Independent Community Bankers of America
National Association of Federally-Insured Credit Unions
The Clearing House
The Consumer Bankers Association*

cc: Brian Brooks
Acting Comptroller of the Currency
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Johnathan Gould
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Principal Deputy Chief Counsel
Office of the Comptroller of the Currency

Stephen Lybarger
Deputy Comptroller for Licensing
Office of the Comptroller of the Currency

Annex

The Associations

American Bankers Association. The American Bankers Association is the voice of the nation's \$21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$17 trillion in deposits and extend nearly \$11 trillion in loans.

Bank Policy Institute. The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The Consumer Bankers Association. The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

Credit Union National Association. The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,300 federal and state credit unions, which collectively serve more than 120 million members nationwide. CUNA's mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

Independent Community Bankers of America. The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, nearly \$4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

National Association of Federally-Insured Credit Unions. The National Association of Federally-Insured Credit Unions advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 123 million consumers with personal and small business financial service products. NAFCU membership is direct and provides credit unions with the best in federal advocacy, education and compliance assistance.

The Clearing House. Since its founding in 1853, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues. Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching the RTP® system, an immediate payment system that modernizes core payments capabilities for all U.S. financial institutions. As the country's oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues facing financial institutions today. The Clearing House is owned by 23 of the country's largest commercial banks and supports hundreds of banks and credit unions through its core systems and related services.