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National Association of Federally-Insured Credit Unions

August 3, 2020

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

RE: National Bank and Federal Savings Association Digital Activities
Docket ID OCC-2019-0028

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the questions posed by the Office of the Comptroller of the Currency (OCC) regarding actions the agency might take to guide financial innovation and how these actions might impact the broader financial services industry. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 121 million consumers with personal and small business financial service products. In general, NAFCU advocates for competitive equality between traditional financial institutions and fintech companies, which we generalize as non-chartered, nonbank institutions that reach consumers through digital channels. NAFCU has also sought to empower credit unions with the tools to innovate and serve their communities better and more efficiently.

In recognition of these dual objectives, NAFCU believes that regulators, including the OCC, should not give preference to fintech as a *new* model of banking ready to replace traditional institutions, but rather seek to modernize traditional supervisory frameworks to ensure that the promise of better, more efficient service or expanded access to credit is predicated on responsible innovation rather than regulatory arbitrage. In addition, we believe that the OCC should not seek to introduce specialized chartering options without a full and transparent rulemaking process that invites careful consideration of how recipients of fintech-specific charters might impact the safety and soundness of the financial sector. The OCC must also work with other FFIEC member agencies, including the National Credit Union Administration (NCUA), if it intends to introduce specialized chartering options that could impact overall sector stability.

General Comments

The emergence of new, fintech-powered business models has accelerated the disaggregation of bank services, which has not only increased competitive pressure but also challenged depository-centric models of financial supervision. There are now branchless banks that only accept savings deposits, student loan refinance companies, online small business lenders, and—for some time now— online mortgage lenders, often specializing in just a few products instead of providing a complete banking experience. Consumers' ability to split their financial activities between multiple firms is nothing new—but financial technology has made it easier, particularly where account aggregation services permit streamlined control across different platforms.

The diversity of fintech companies and their role in the broader financial sector may necessitate reconsideration of existing models of regulation in the long run; however, an immediate focus for regulators must be to ensure that fintech companies are operating on a level playing field relative to credit unions and traditional financial institutions. NAFCU has defined this focus in terms of compliance with federal consumer financial law, but adequate supervision is an equally important consideration. There is now research suggesting that fintech mortgage lenders enjoy structural advantages as nonbanks; in essence, benefiting from reduced regulatory burden that corresponds with relaxed federal safety and soundness standards. One report presented at the Federal Deposit Insurance Corporation's (FDIC) April 2019 Fintech Symposium posited that 60-70 percent of "shadowbank" (i.e., nonbank lender) growth is likely due to regulatory arbitrage, and the rest due to advances in technology.[1] Other fintechs may be enjoying reduced supervisory oversight even if they are subject to federal consumer financial law.

NAFCU recognizes that innovation depends on a fair, but flexible, regulatory regime for financial technology. Many credit unions partner with fintech companies to improve member service and historically these partnerships have proven invaluable to the growth and competitiveness of our industry. Accordingly, NAFCU has advocated for expanding opportunities for credit unions to access pilot programs or regulatory sandboxes to test new products or services. At the same time, we have cautioned that frameworks designed to encourage innovation must not favor certain market participants at the expense of others.

The largest financial companies will continue to benefit from economies of scale and greater in-house capabilities, which could potentially grant a significant advantage in a sandbox environment, where rules may be modified or suspended to accommodate new products, services or approaches to compliance. Current models of sandbox relief appear to favor applicants that can afford sophisticated monitoring tools and extensive data collections, which are used to improve regulatory oversight. While it may seem counterintuitive that additional investments in compliance and reporting systems would yield relief, certain technologies employed at scale could help eliminate long term costs that are attributable to manual compliance processes. To ensure that sandbox programs operate equitably, NAFCU has sought to ensure that application and participation requirements are tailored to financial institutions of all types and sizes, and do not favor the most sophisticated financial institutions or fintech companies.

When the OCC first introduced its general plan for a special purpose charter for fintech companies, NAFCU recommended that the OCC retain the core features of a national bank charter; namely, capital and liquidity requirements. Our position then assumed what we believe now, which is that the recipient of a specialized charter must be supervised as if it were *bank*, even if its particular business model places greater emphasis on services other than deposit-taking or lending. In this regard, we remain skeptical of the OCC's assertion that it can offer a charter to a nonbank licensee

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[1] *See* Piskorski, Tomasz, Fintech and Shadow Banking (April 2019), available at https://www.fdic.gov/bank/analytical/fintech/presentations/piskorski.pdf.

which confers the benefits of national preemption, interest rate exportation, and other privileges that have traditionally supported banks' deposit taking and lending roles. A special payments charter, as envisioned by the Acting Comptroller, would likely suffer from the same legal defects as the present fintech charter. Pursuing such a charter despite obvious legal shortcomings (not to mention the other harms it might present) would distract from the OCC's statutory obligation to supervise the activity of *banks*.

The OCC should not pursue new chartering options for fintechs without a full and transparent rulemaking process that considers in equal measure potential threats to safety and soundness and consumer protection.

Public comments from the Acting Comptroller about new chartering options for fintech companies (with potentially reduced regulatory expectations) raise serious questions about how the OCC will fulfill its duties as a prudential regulator.[2] The fact that the Acting Comptroller has proposed such a charter informally, acknowledged that work is already underway, and done so without notice and comment casts serious doubts about the propriety of any future rulemaking process. Furthermore, the Acting Comptroller's suggestion that institutions "that lack scale […] will find themselves under pressure to consider unbundling or spinning off various functions" suggests a casual disregard for the benefits of a full service banking model.

While preventing "leakage" of financial services activities into unregulated areas is a commendable goal, the reality of a specialized payments charter may be the same as with the OCC's general fintech charter. Companies that have the ability and desire to operate outside of a regulated space will continue doing so until regulatory barriers are lowered, possibly to such an extent that there is no meaningful containment of risk. In the absence of legislative action, the OCC must entice new entrants to accept additional oversight in order to bring them within the supervisory fold. Such a strategy is hardly conducive to maintaining a safe and sound banking system.

Likewise, the "unbundling" of traditional banking functions may appear desirable in the near term as a means of spurring additional competition, but the deposit-taking function of traditional financial institutions serves as a foundation of consumer trust and safety. Embracing a decentralized model of banking might undermine trust in critical parts of the financial system or expose consumers to elevated harm if supervisory expectations deviate substantially from the rigorous standards credit unions and bank must meet. If the OCC envisions fintech companies accessing critical payments infrastructure, then it must ensure that safety and soundness considerations are fully explained in a rulemaking process, with emphasis placed on cybersecurity and compliance with federal consumer financial law.

NAFCU believes that a national bank charter will be sufficient in most cases to serve the needs of large fintech companies and further the aim of supporting de novo chartering. Embracing narrower,

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[2] In one interview, the Acting Comptroller has referred to future variations of the currently litigated fintech charter—so far branded as Payments Charter 1.0 and 2.0. *See* Cocheo, Steve, "Fintech Charters Signal a Tectonic Realignment in Banking," July 22, 2020, available at https://thefinancialbrand.com/98636/occ-comptroller-brian-brooks-fintech-charter-payments-innovation-crypto-branch/.

specialized charters with divergent regulatory standards is more likely to drive consolidation within the financial sector as innovative firms seek to achieve greater economies of scale to offset regulatory disadvantages. Already there is evidence of this occurring within the credit union industry. Furthermore, additional chartering activity from narrowly focused fintechs would do little to alleviate the substantive concerns associated with consolidation in the credit union and banking industries since the resulting firms would not necessarily be full-service banks. Lastly, encouraging disaggregation of traditional banking services could ultimately result in less operational resiliency within the financial sector.

NAFCU supports a focus on existing chartering authority because it supports a full-service banking model. Full service banking naturally incentives restraint and careful stewardship of consumer assets; if the deposit relationship is lost, so too are the other services a credit union or bank might also provide. By adopting a deposit-taking function, chartered institutions are granted special privileges, such as national preemption and access to the Federal Reserve's payment systems. However, plans to extend these privileges to nonbanks with narrower business interests and reduced supervisory oversight could invite excessive risk taking. It could also dilute the strength of the overall banking system by making it harder for consumers to access safe, convenient and affordable solutions to meet their financial needs in one place.

In recognition of these concerns, NAFCU urges the OCC to present its chartering ideas in the context of a transparent rulemaking process so that all industry participants are able to provide their perspectives on what degree of supervision and regulation is appropriate for fintech companies. In addition, the OCC should wait until disputes over the legality of its existing fintech charter are resolved before proceeding with additional variants of a special purpose national bank charter.

Conclusion

Credit unions are committed to providing access to safe and affordable products and services for their members. In response to the growing importance of financial technology, credit unions, like banks, have invested heavily in innovative solutions to better meet the financial needs of their membership. Many have embraced partnerships with fintech companies. However, the core business of banking has remained unchanged; cultivating trust, treating members fairly, and understanding the financial needs of current and potential customers. These factors have always determined success. Existing supervisory models for chartered institutions are meant to reinforce those objectives, but whether specialized charters will accomplish the same remains unknown. Accordingly, the OCC must present its chartering ideas transparently and devote careful thought to how disaggregating critical banking services will impact consumer protection, privacy, and the safety and soundness of the financial system as a whole.

The OCC must also work with other FFIEC member agencies to ensures that plans for specialized charters do not impair overall sector stability, whether in terms of consumer protection or safety and soundness. The input of all prudential regulators is necessary to inform this analysis, which must be regarded as an essential part of any rulemaking. Lastly, we caution the OCC against proceeding with new fintech charter variants at a time when legal uncertainty casts doubt on its ability to provide such a license.

NAFCU appreciates the opportunity to comment on the OCC's advanced notice of proposed rulemaking regarding the digital activities of banks. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2266 or amorris@nafcu.org.

Sincerely,

Andrew Morris

Andrew Morris
Senior Counsel for Research and Policy