Statement for the Record

On behalf of the

American Bankers Association

before the

Task Force on Financial Technology

Of the

House Financial Services Committee

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Chairman Lynch, Ranking Member Emmer, and Members of the Task Force on Financial Technology, the American Bankers Association[1] (ABA) appreciates the Task Force's interest in the role technology has on the financial services industry and respectfully submit this statement for the record for the hearing titled "License to Bank: Examining the Legal Framework Governing Who Can Lend and Process Payments in the Fintech Age."

Today's topic is an important and timely one. Fintech was born in America's banks. Innovation can promote financial inclusion, make it possible to extend credit to many more borrowers, and give customers improved transparency into the financial products they use every day. When banks and technology companies partner, they can deliver customers the best of both worlds: innovative services that customers demand from a partner that they can trust with their financial future.

In recent years we have seen innovation emerging from both the traditional banking sector, from non-bank technology firms, and from partnerships between financial institutions and fintechs. These innovations have the potential to make financial services more convenient, efficient, and accessible but the legacy regulatory framework has created arbitrage opportunities for technology companies to reap the benefits of being "bank-like" without the obligations of being an actual bank. What's more, some have suggested the way to level the playing field and narrow the arbitrage opportunity is to simply give technology companies bank charters even if they do not make loans or take deposits. ABA fundamentally disagrees with this approach. Redefining what constitutes a bank could put consumers and our financial system at risk.

ABA and organizations representing every insured depository institution in the country have raised serious concerns about the Acting Comptroller of the Currency's stated intention to issue non-depository bank charters often referred to as "payments charters." While the intent is to recognize American consumers' increasing interest in a diverse array of financial services, this proposal would have serious unintended

[1] 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.

consequences, creating regulatory gaps that leave consumers exposed and vulnerabilities in the larger banking system.

To be clear, ABA believes in the continued evolution of banking, allowing banks to offer innovative products and leverage third-party innovations that help customers access diverse banking products and services. We support competition in banking and are strong proponents of diversity in financial services as evidenced by the breadth of charters represented in ABA's membership. But we must also ensure that customers receive the protection they deserve wherever they get their banking services through consistent regulation and oversight.

Congress Should Ensure that Regulators Undertake an Open and Transparent Process When Considering New Charters or Applications that Present Novel Risks.

In recent years, regulators have put a focus on promoting innovation in banking. ABA supports these intiatives and believe this is an important step in ensuring that banks are able to meet customer needs and remain competitive. As regulators look to promote innovation within banking, they will inevitably come across business models that challenge our current understanding of what constitutes a bank. In situations where these novel risks are present, Congress should encourage regulators to undertake an open and transparent process, deferring to Congress where appropriate.

Unfortunately, not all banking agencies appear to be taking this consultative, deliberative approach. We have serious concerns around the recent discussion of a payments-focused charter being issued by the OCC. While no formal proposal exists, Acting Comptroller Brian Brooks has stated publicly that he would welcome bank applications from non-depository payments companies.[2]

Despite public calls for an open and transparent process by ABA and six other financial services trades[3] to establish the legal authority and regulatory framework for a payments-only "banks", the OCC has indicated that they do not believe any formal proposal is needed to issue such a charter.[4] The OCC has argued that these companies qualify as banks like any other and plans to consider applications without any proposal subject to public notice and comment.

The banking trades are not alone in the view that the proposed charter represents a serious change in public policy. The Conference of State Banking Supervisors has questioned the OCC's authority to issue such a charter.[5] In a recent op-ed, Karen Shaw Petrou criticized the proposal, noting that "evolution by edict is incompatible with both the rule of law and the proven risks of financial-system 'innovation' outside the reach of prudential and consumer regulation. The OCC can and should lead the way with great ideas, but

[2] https://www.politico.com/news/2020/08/31/currency-comptroller-reshape-banking-406393

[3] https://www.aba.com/-/media/documents/comment-letter/joint-trades-letter-on-proposed-payments-charter.pdf?rev=6c673df60b6e4ea08ba040ec21a3eef3

[4] https://www.wsj.com/articles/fintech-can-come-out-of-the-shadows-11599693184

[5] https://www.americanbanker.com/opinion/congress-not-the-occ-decides-what-is-and-isnt-a-bank

Congress has established an entity-based construct for national banks and the agency cannot and should not alter it by fiat."[6]

Whether you agree or disagree with the thinking behind these charters, the issues being considered have broad and lasting implications for the banking system. Major policy determinations should be made with robust public input and should not be implemented via the approval of an individual charter.

The Market Impact of a Payments Charter Should be Subjected to a Rigorous Cost-Benefit Analysis

Despite the fast pace with which OCC has proceeded since initially broaching the idea of a payments charter, the fundamental question of whether existing charters are insufficient to meet the needs of the marketplace has not been analyzed through any formal methodology. The federal government's increased involvement in the payments marketplace without evidence of a solvable market failure could have unintended consequences.

There have been recent examinations of the structure of the payments ecosystem by leading payments organizations and although they have identified needed improvements, chartering new kinds of institutions has not been among the recommendations of these diverse working groups. For instance, the Faster Payments Task Force coordinated by the Federal Reserve produced a comprehensive report that was ratified nearly-unanimously by financial institutions, retailers, service providers, and consumer groups – but chartering was not identified as an obstacle to faster payments deployment in the United States. The Federal Reserve itself periodically releases payments improvement roadmaps and work plans, and chartering has not been among the issues they have identified as inhibiting payment system efficiency, resiliency, or access.

Against this backdrop of market-driven recommendations for action, the OCC has tendered the payments charter concept as its key payments priority without connecting that new course to data or other evidence. We are skeptical that spontaneous agency actions untethered to the known conclusions of existing, robust, public consultation processes will have broad benefit to the nation.

A rigorous analysis of market need, economic costs associated with this change in policy, and unintended consequences of any regulatory interventions is a precondition of rational government action in this arena. As a foundational element of a transparent policymaking process, OCC or the Government Accountability Office (GAO) should produce an independent, data-driven analysis of relevant issues to ensure that the public interest and private sector efficiency are not adversely impacted by an expansion of the federal government's role in this innovative market segment. Of primary importance in such an analysis is whether the introduction of new uninsured payments counterparties could impose costs on existing market participants or reduce access to customers through necessary additional risk and/or liquidity management practices.

The U.S. Payment System is Working and More Improvements are Coming

The American economy is the world's most productive developer of payments technology. It is not necessary to recite here the many innovations that have come to market at a rapid clip in recent years, nor is it our view that the task of creating a world-class payment system is ever complete.

[6] https://www.americanbanker.com/opinion/occ-chief-goes-too-far-reimagining-national-bank-charter

However, we urge Congress to take account of the ways that America's economic incentive systemhas produced innovations that become the standards around the globe. In virtually every foreign country, American technology is at the core of payments transactions and often a firm based here is facilitating the payment. This is not an example of a lagging part of our economy. Nevertheless, American leadership is not assured: in a highly-competitive world, any action that could undermine our presumed advantages (such as trust, reliability, and counterparty safety) should be approached with due caution.

From the introduction of new real-time payments networks to the speeding up of existing options, consumers and merchants have more options than ever to help ends meet and reduce the incidence of fees such as overdraft. New structural evolutions such as the Federal Reserve's FedNow system were conceived under an expectation that regulators broadly supported a stable framework where a flurry of uninsured, nondepository users would not proliferate. Introducing regulatory disruption into the marketplace now could delay or impair the payment system upgrades that are being rolled out at this time.

While various forms of payments licenses are offered by other jurisdictions that heavily plan their payments system (such as the European Union), it should not be presumed that this path produces the most "competition" or is appropriate for this country. Before taking any action that would upend regulatory certainty in the U.S. payments ecosystem, OCC should enter into dialogue with all interested U.S. stakeholders including (and beyond) financial institutions that currently participate in providing payments to end-users.

Congress Should Ensure that New Charters Are Subject to Consistent Supervision and Oversight
Innovations in banking are only beneficial to the extent that they are delivered responsibly and provide consumers the protections they have come to expect when dealing with banks. As new business models are considered, Congress should ensure that regulations are being applied consistently with those of any other charter.

When the OCC proposed its lending-focused Special Purpose National Bank "fintech" charter in 2016 – and gave two separate opportunities for pubic comment – ABA noted[7] the importance of existing rules and oversight being applied consistent with those for any national bank. We noted that a bank charter is a clear signal to customers that the consumer is dealing with a trusted partner. Any fintech company that is granted a bank charter will receive the instant market and public credibility that comes with being a chartered financial institution. Likewise, any missteps by a fintech operating through a national bank charter will inevitably reflect poorly on all banks.

Through our comments, we have raised questions around how regulations would be tailored to new business models and whether oversight would be consistent to that of other banks. We have not yet seen a clear indication of how these principles would be applied to a narrow-purpose bank, such as a payments charter. Congress should ensure that the OCC clarifies its expectations before proposing any narrow-purpose charters. This is critical to ensuring that regulations and consumer protection are applied evenly; that protections remain in place to preserve the existing separation of banking and commerce; and to ensure even-handed application of OCC policy objectives, including those related to financial inclusion and CRA responsibilities.

[7] https://www.aba.com/advocacy/policy-analysis/occ-charter

Before considering any novel banking charters, regulators should clearly outline how they plan to oversee and address the novel risks posed by such a charter.

Non-depository Business Models Introduce Regulatory Gaps

Many novel charters have centered around non-depository or uninsured[8] business models. A number of banking regulations are triggered by holding deposits and this is one area where we see instances of unintended consequences resulting from new business models.

The applicability of the Bank Holding Company Act (BHCA) is an acute example of a regulatory gap introduced by a non-depository model. Depending on the activities a narrowly focused bank conducts, its holding company may not be considered a bank holding company, subject to the Federal Reserve Board's oversight. The BHCA is triggered if the special purpose national bank is considered a bank under the BHCA definition which is one that either (i) has FDIC insurance or (ii) both accepts demand deposits and makes commercial loans. The OCC payments charter proposal explores the possibility of a narrow purpose bank charter applicant that would not take deposits and, therefore, would not have FDIC insurance, or meet the definition of a bank. While limited purpose charters in the past have a specific exemption from "bank" status under the BHCA, no such specific exemption exists for the charter under consideration by the OCC, and the Federal Reserve Board has not yet publicized its views on the potential application of the BHCA to such a charter.

Through its authority under the BHCA, the Federal Reserve Board serves an important role in supervising banking organizations on a consolidated basis (i.e., banks together with their owners and affiliates). If this kind of oversight matters for full service national banks, that same oversight would be important for a special purpose national bank.

Importantly, the BHCA reflects Congress' policy determinations regarding oversight and supervision of holding companies that engage in activities beyond the bank subsidiary. Any change to this balance would represent a significant policy change. We believe that such a significant policy change should be subject to scrutiny in the public notice and comment process, and not simply by approving a new charter.

Conclusion

The rapid convergence of banking and technology has the potential to improve banking, making it more efficient, convenient and accessible. This potential is only realized to the extent that these innovations are brought to market in a measured and responsible manner. Congress should support policies that bring innovative activities into banking and allow banks to bring their customers the latest technologies. However, as new business models are considered Congress should ensure that regulatory gaps do not emerge that could leave consumers exposed.

ABA believes that a full and open public process is critical to ensuring that any unintended consequences are fully understood in cases where new business models present risks that are not considered by today's regulatory framework. Important policy determinations should not be made through executive fiat or the approval of individual applications. Given the concerns outlined above, ABA opposes efforts by the OCC to

[8] See Kraken's recent approval for Wyoming's Special Purpose Depository Institution https://blog.kraken.com/post/6241/kraken-wyoming-first-digital-asset-bank/

approve a non-depository payments charter and we encourage Congress to actively discharge their oversight prerogatives regarding the legality and administrative processes connected to any such charters.