

October 24, 2016

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th St. SW, Suite 3E-218
Washington, DC 20219

RE: Docket ID OCC-2016-0017

To Whom it May Concern:

The undersigned community, consumer, and civil rights groups would consider supporting the proposal of the Office of the Comptroller of the Currency (OCC) to implement receivership authority regarding uninsured financial institutions seeking a national charter only if the OCC does not preempt strong state law and establishes vigorous supervision and regulation for the newly chartered institutions. The new charter and receivership authority for uninsured institutions, primarily financial technology companies (fintechs), has the potential to benefit consumers and communities only if accompanied by rigorous Community Reinvestment Act (CRA)-like obligations in addition to supervision and examination of the fintechs' compliance with fair lending and consumer protection laws. Safety and soundness reviews must also be stringent.

Our comments address the OCC's question #1 in the request for comments asking if the National Banking Act's (NBA) legal framework for receivership raises unique considerations. The detailed comments below assert that if receivership authority is not accompanied by vigorous supervision of fintechs, the results will be dire for communities, the banking industry, and the OCC itself.

In the years preceding the financial crisis, our organizations witnessed first-hand how uneven regulation was a major contributor to the crisis as large, subprime independent mortgage companies originated large volumes of abusive and fraudulent loans financed by Wall Street investment banks outside the purview of regular oversight. The OCC must diverge from the regulatory approach of "benign neglect" that welcomed the relatively new and large scale subprime lenders in the early to mid-2000s. In this case, the new upstarts are fintechs that trumpet the benefits of technology. But technology will be beneficial only if the OCC implements rigorous oversight of fintechs.

The years preceding the financial crisis offered a controlled experiment of sorts demonstrating the benefits of regulation. Banks covered by CRA issued responsible loans; Federal Reserve research documented that only six percent of bank loans considered on CRA exams were high-cost and that bank loans were about half as likely to default as those issued by non-CRA-covered independent mortgage companies.¹ This recent history teaches us that there must be a uniform

¹ Elizabeth Laderman and Carolina Reid, Federal Reserve Bank of San Francisco, "CRA Lending during the Subprime Meltdown in Revisiting the CRA: Perspectives on the Future of the Community Reinvestment Act," a Joint Publication of the Federal Reserve Banks of Boston and San Francisco, February 2009,

regulatory regime covering all financial institutions, including and especially fintechs seeking an OCC charter.

The OCC must proceed with extreme care in instituting a fintech charter and receivership authority. Currently, there are about 52 uninsured trust banks that are supervised by the OCC. These trust banks have limited and predictable activities such as overseeing investments of wealthy individuals. Most of them do not pose liquidity and credit risk. In contrast, several of the new fintech companies present much different risk profiles. They are far flung lending operations using a financing approach, underwriting techniques, and marketing campaigns that are new and have not been tested during periods of recession and economic distress. Fintechs cannot be regulated like a limited purpose trust bank. Instead, the examination cycle and the application of laws to fintechs must be the same or very similar to those used for the most sophisticated and riskiest of the large banks.

If the OCC adopts a vigorous oversight regime, it will not need to use its receivership authority very often. On the other hand, if the OCC takes a hands-off approach, it may find itself invoking receivership authority too often, to the detriment of itself as a regulator, to consumers, and to the economy as a whole. Any new framework that the OCC contemplates for fintechs must have an aggressive oversight regime as its central component. The components of a framework for fintechs must include rigorous CRA-like obligations, fair lending reviews coordinated with the CFPB, consumer compliance reviews, and safety and soundness reviews.

CRA-like Obligations

The OCC has hinted that it is contemplating CRA-like obligations for fintechs. In a recent Bloomberg article an OCC spokesperson is quoted as saying, “The OCC has the ability to condition approvals (of nonbank charters) to require compliance and activities consistent with laws like the CRA.”²

The undersigned groups agree with the OCC and believe that the National Banking Act (NBA) provides the OCC with authority to implement CRA-like obligations for non-depository fintech companies. The NBA describes the procedure for chartering new banks and financial institutions, including the criteria to which the proposed charter must adhere.

The implementing regulations of the NBA, 12 CFR § 5.20, describe a number of community reinvestment and fair access considerations and requirements. In a subsection called “requirements,” the OCC states that it will assess if a need exists for the proposed institution in the community to be served and “whether there is a reasonable probability” of the institution’s “usefulness.” Whether a company is useful could be judged in part on the extent to which it will serve community credit needs. Another subsection (f) of § 5.20 called “policy” makes the reference to serving the community rather explicit. It states that a chartering consideration is

http://www.frbsf.org/publications/community/cra/cra_lending_during_subprime_meltdown.pdf. Also, see Governor Elizabeth A. Duke, at the Revisiting the CRA Policy Discussion, Washington, D.C., February 24, 2009 *CRA: A Framework for the Future*, <http://www.federalreserve.gov/newsevents/speech/duke20090224a.htm>

² <http://www.bna.com/fintech-federal-charter-n57982077698/>

whether the proposed institution will provide “fair access to financial services by helping to meet the credit needs of its entire community,” and whether the institution would promote “fair treatment of customers.”³

The institution seeking a charter must also propose a business plan that indicates the “organizing group’s knowledge of and plans for serving the community. The organizing group shall evaluate the banking needs of the community, including its consumer, business, and nonprofit, and government sectors.” Moreover, the plan must demonstrate how the institution will respond to the needs consistent with safety and soundness. Finally, the institution must indicate how it will attract and maintain community support.⁴

The NBA and its implementing regulations provide a framework enabling the OCC to establish comprehensive CRA-like obligations for fintechs. During the OCC’s consideration of an application for a fintech charter, the OCC must allow for the customary public comment period during which members of the public can critically evaluate the proposed institution’s business plan for meeting community credit needs and ensuring fair access to credit. The OCC must require a business plan with measurable goals and timelines for meeting needs and achieving community benefits.

If a fintech is granted a charter, the OCC must then establish a regular and periodic examination cycle that includes CRA-like evaluations and ratings similar to those for banks. The OCC must eschew limited purpose or wholesale charters for fintechs that have significant retail lending operations and, instead, implement lending tests resembling those for large banks. These lending tests must include measurable performance standards and review home, small business, and/or consumer lending that is offered by the fintechs. In addition, the fintechs must be subjected to investment and service tests that evaluate the quantity and responsiveness of their investments/grants, community development services, and any retail service products that the fintechs offer.

Assessment area procedures for fintechs must be developed carefully. Since most fintechs do not have deposit-taking branches, the existing CRA assessment area procedures for banks based on distribution of branches and ATMs cannot be readily applied. An approach promoted by NCRC and our members over the years has been to designate assessment areas in geographical areas in which an institution has a market share of more than one half of one percent of the loans issued in the locality.⁵ While this may seem like small market share, it usually amounts to at least a few hundred loans, which is commensurate with loan volume in local markets of regional and national-level banks. Certainly, assessment areas should constitute areas where any concentration of a fintech’s loans occurs. If there are cases in which fintech lending is dispersed across the country and lending in geographical areas do not exceed a certain threshold, the CRA procedure applied to military banks could be applied. This procedure considers the military bank’s

³ See 12 CFR § 5.20 available via <https://www.law.cornell.edu/cfr/text/12/5.20>

⁴ 12 CFR § 5.20 (h) Business plan or Operating plan

⁵ The market share would be based on the major line of business of the fintech, which could be home, small business, or consumer lending.

customer base as constituting the assessment area, meaning that a national-level analysis of lending is applied.⁶

Allowing fintechs to obtain OCC charters without requiring comprehensive CRA-like obligations would be unfair to both communities and traditional banks. That would be an abdication by OCC of its responsibilities to ensure that fintechs would be useful to communities and would help to achieve fair access to credit. Without requiring CRA-like obligations as a condition of a fintech charter, unmet needs indicated by high numbers of underbanked and unbanked consumers relying on payday and other high-cost, small dollar loans would likely remain. In addition, the fintechs would be less likely to adhere to their fair lending and consumer compliance obligations unless the OCC institutes regular CRA-like exams that are accompanied by fair lending and consumer compliance reviews.

Fair Lending and Consumer Compliance Reviews

Fintechs pose significant fair lending concerns by the very nature of their business operations. They have developed unorthodox underwriting approaches using automation and algorithms that are often opaque. These algorithms pose possible disparate impacts if they implement seemingly objective criteria that nevertheless result in disproportionately rejecting applications of credit for minorities, women, or other protected classes. The OCC and the Consumer Financial Protection Bureau (CFPB) must coordinate on fair lending reviews and clearly discuss any novel issues and how they investigated such issues.

It would be our preference that one agency, the CFPB, conduct all fair lending and consumer compliance reviews so that these reviews would be consistently rigorous. The CFPB should designate any non-depository fintech significant enough to warrant a national bank charter as a larger participant subject to CFPB supervision. In the absence of such a designation, unless the fintech operates in a market the CFPB already supervises, the OCC will have sole responsibility for fair lending and consumer compliance examinations. In this case, the OCC should share with the CFPB the fair lending review methodology and results for any fintechs they examine. In this manner, both agencies can develop a common approach to fair lending oversight of fintechs.

Consumer compliance reviews must also be comprehensive. Recently, several agencies, including the OCC, requested comment regarding reforms to the consumer compliance rating system. In our comments, NCRC and other community groups advocated for public input to examiners conducting compliance reviews and for the public release of ratings. The ratings could then be key for considering applications by non-banks (including fintech companies) for OCC charters. Only fintech companies and other non-bank entities with the highest proposed rating (a proposed “1”) should be allowed to acquire a national charter from the OCC.⁷

⁶ See §25.41 Assessment area delineation of the CRA regulation available via <http://www.ffiec.gov/cra/regulation.htm>

⁷ Some non-bank entities such as mortgage companies or fintechs that issue home loans are regulated and would receive consumer compliance ratings.

In addition, the OCC must insist, as a condition of any charter, adherence to the 36 percent rate cap, the same rate employed by the federal Military Lending Act. The OCC must also require strong protections for consumer and small business borrowers.

After a fintech has acquired an OCC charter, subsequent compliance reviews must ensure that the fintechs provide clear disclosures regarding loan terms and conditions. As detailed in comments on the OCC “Responsible Innovation” white paper from several of the undersigned organizations, consumer and small business borrower satisfaction with fintechs is currently low because of opaque and unclear disclosure of loan terms and conditions and high costs. Accion Chicago, a Community Development Financial Institution in Chicago, reports that 20 percent of its customers are seeking relief from problematic loans, many of which were made by fintechs. Likewise, Opportunity Fund (based in California) found that a large sample of loans from fintech lenders featured high Annual Percentage Rates (APR) and unaffordable monthly payments.⁸

Another essential element of consumer compliance reviews is the use of forced arbitration clauses and class action waivers in customer and employee contracts. The Wells Fargo scandal exposed that Wells required forced arbitration of disputes without recourse to a court, even for cases regarding the two million fraudulent accounts that Wells employees opened without customer authorization to meet sales quotas. The CFPB has proposed prohibitions against waivers of class action recourse. Once finalized, the CFPB and the OCC should enforce this rule to protect borrowers from unfair and capricious denial of their right to a court trial.⁹

Preemption

In many instances, state law provides additional protections against unfair and deceptive lending practices. Advocates in Illinois and elsewhere are promoting legislation and regulation that would require fintechs making loans to small businesses to adhere to an ability-to-repay standard. It would be counterproductive and harmful if the OCC were to establish a charter for fintech that preempts current and new state consumer protection laws and parallel protections for small businesses. The OCC must establish any fintech charter and framework for fintechs as a floor, not a ceiling, for fair lending and consumer protection rules, including state interest-rate caps.¹⁰

Conclusion

The OCC proposal to establish receivership authority for uninsured institutions including fintechs is unworkable and incomplete unless the OCC refrains from preempting state law and mandates comprehensive CRA-like requirements and vigorous fair lending and consumer compliance reviews. Establishing a comprehensive examination regime for CRA-like, fair lending, and consumer compliance reviews would also help ensure that any new charters operate

⁸ Eric Weaver, Gwendy Donaker Brown, Caitlin McShane, “Unaffordable and Unsustainable: the New Business Lending on Main Street,” Opportunity Fund, May 2016

⁹ Letter from Minnesota Attorney General to Wells Fargo CEO, http://kstp.com/kstpImages/repository/cs/files/1917_001.pdf

¹⁰ This letter has focused on CRA, fair lending, and consumer protection law. We also oppose preemption and support the group sign on letter regarding the importance of state law.

in a responsible, safe, and sound manner, and thereby minimize the need to liquidate OCC-chartered financial institutions.

Thank you for the opportunity to comment. If you have any questions, please contact John Taylor, President and CEO of NCRC, on 202-628-8866.

Sincerely,

Affordable Homeownership Foundation Inc., FL
Alabama NAACP, AL
Alabama Small Business Development Initiative
Antioch Baptist Church, OH
Asian Economic Development Association, MN
Atlanta Neighborhood Development Partnership, Inc., GA
Association for Neighborhood and Housing Development, NY
Baltimore Neighborhoods, Inc., MD
Bensconnect, AL
Birmingham Business Resource Center, AL
Building Alabama Reinvestment, AL
California Coalition for Rural Housing, CA
California Reinvestment Coalition, CA
CDC Small Business Finance, CA
Center for NYC Neighborhoods, NY
Central Baptist CDC, DE
Clarifi, PA
Chattanooga Organized for Action, TN
Community Action Committee of the Lehigh Valley Inc., PA
Community and Shelter Assistance Corporation, OR
Community Business Partnership, VA
Community First, WI
Community Service Network Inc., MA
Community Housing Fund of Beaverton OR, OR
Consumer Action
Dayton Human Relations Council, OH
Delaware Community Reinvestment Action Council, Inc., DE
Edgemoor Revitalization Cooperative, DE
Empire Justice Center, NY
Fair Housing Center of Metropolitan Detroit, MI
Fair Housing Center of Northern Alabama, AL
Financial Justice Coalition of SE Michigan, MI
Fresno CDFI, CA
Great Rivers Community Capital CDFI, MO
Hamilton County Community Reinvestment Group, OH
Henderson & Company, NC
Home Repair Resource Center, OH
Housing for All, NY
Jewish Community Action of St. Paul MN, MN

Justine Peterson, MO
Lakewood Alive, OH
Latino Economic Development Center, DC
Long Island Housing Services, Inc., NY
Manna, Inc., DC
Maryland Consumer Rights Coalition, MD
Metropolitan Milwaukee Fair Housing Council, WI
Metro St Louis Coalition for Inclusion and Equity, MO
Metropolitan St. Louis Equal Housing and Opportunity Council, MO
MHANY Management Inc., NY
Michigan Community Reinvestment Coalition, MI
Mustard Seed Community Development Corporation, OH
National Community Reinvestment Coalition
National Trust Community Investment Corporation, NC
Neighborhood Concepts Inc., AL
Neighborhood Development Foundation, LA
Neighborhood Housing Services of Davenport, IA, IA
Neighborhood Housing Services of Greater Cleveland, OH
New Frontier CDC, NC
New Jersey Citizen Action, NJ
New Jersey Community Capital, NJ
New Orleans Neighborhood Development Foundation, LA
Northwest Side Housing Center, IL
Northwest Indiana Reinvestment Alliance, IN
Norwood Resource Center, AL
Ohio Fair Lending Coalition, OH
Opportunity Fund, CA
Our Casas Resident Council Inc., TX
Our Communities Our Children, NY
PathStone Enterprise Center, NY
Pathways, AL
Partners In Community Building, Inc. (PICB), IL
Peoples' Self-Help Housing, CA
Pittsburgh Community Reinvestment Group, PA
Puentes, LA
Ready Aim Advocate, MO
Rebuild Durham Inc. NC
REVA Development Corporation, FL
South Dekalb Improvement Association, GA
Southwest Economic Solutions, MI
Southwest Neighborhood Housing Services, NM
Spanish Coalition for Housing, IL
STAND, CA
The Greenlining Institute, CA
The New Legacy Project Inc., MD
The Southern Regional Asset Building Coalition, AL

Toledo Fair Housing Center, OH
Vision of Restoration, IL
Western New York Law Center, NY
Wisdom, WI
Woodstock Institute, IL