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December 7, 2020

Via Electronic Mail

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

Re: Figure Bank, N.A. Charter Application

Dear Mr. Gittleman:

The Independent Community Bankers of America (ICBA)[1] appreciates this opportunity to provide comment to the Office of the Comptroller of the Currency (OCC) regarding the de novo bank charter application by Figure Bank, National Association (Applicant) dated November 6, 2020. ICBA strongly encourages the OCC to delay consideration of the application until after it has solicited and evaluated further public comments and addressed the policy concerns expressed in this letter.

Background

Applicant is proposing a fully digital, branchless, de novo national bank that would be headquartered in Reno, Nevada and would be a wholly owned subsidiary of Figure Technologies, Inc. (FTI) with its principal place of business in San Francisco, California. Applicant intends to offer a wide range of consumer lending products including originating, selling, servicing and securitizing home equity loans (HELOCs), student loan refinance loans, and residential mortgage refinance loans. By leveraging a blockchain platform that was developed by FTI, Applicant intends to lower its technology costs and reduce the application-to-funding processing time for HELOC loans from an industry average of thirty days to five days as well as reduce HELOC costs by 100 basis points. Figure Group is one of the largest HELOC providers in the country with over $1 billion in loans originated, serviced and sold using a proprietary blockchain technology.

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $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. For more information, visit ICBA's website at www.icba.org.

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Besides consumer lending, Applicant intends to offer custodial and payment processing services as well as a limited amount of deposit products. However, it does not intend to offer insured deposits or commercial loans.

OCC Should Delay Consideration of the Application Until Further Public Information Is Disclosed

ICBA believes there are so many substantive deficiencies in the public portion of Applicant's application that the OCC should delay any decision until further disclosures are made and the public has a better understanding of how the new bank would operate if the charter was approved. The OCC's decision to keep nearly all the substantive portions of the Applicant's application confidential means that the public has little understanding of Applicant's proposed activities and therefore cannot adequately comment on them.

For example, Applicant's disclosures about its proposed deposit-taking activities are difficult to understand and leave out many substantive details, calling into question the transparency of the OCC charter application review process. A search of the term "deposit" in the public portion of the application eventually directs you to the supplemental part of the application entitled "Financial Inclusion Framework." There, Applicant indicates that it intends to offer a mobile application that provides access to low-fee deposit accounts with payment capabilities, including debit cards. But since Applicant will not be a depository insured by the Federal Deposit Insurance Corporation (FDIC), it is unclear where this low-fee deposit account will reside on the Applicant's books and whether it will be FDIC-insured. Based on some public statements, it appears that Applicant may partner with a bank or credit union to provide these accounts. If so, will the Applicant merely serve as an intermediary in this deposit taking activity and hold a master account at a partner institution where the deposit will reside? Will the partner institution be FDIC-insured, insured by the National Credit Union Share Insurance Fund, or uninsured? Why is the Applicant purposely taking deposits but refusing to be an insured depository institution? In order for a stakeholder to adequately assess Applicant's safety and soundness and its risks to the payments system, the public part of the Application should clearly describe what the deposit taking activities of the Applicant will be, where the deposits will reside, and whether those deposits will be insured.

Other public statements that Applicant has made also indicate that it intends to offer deposit accounts to accredited investors even though it will not be an insured depository institution. If so, the public part of the application should clearly explain how this product will work, what will be the range of maturities and interest rates paid on the notes that are issued, whether these accounts will be classified as deposit liabilities or other types of liabilities, and whether they will be exempt under the Securities Act. Furthermore, Applicant should disclose why it is taking these kinds of deposits from high-net-worth individuals in lieu of offering insured deposits to the public. Similarly, on the loan side, Applicant indicates that it will offer point-of-sale low-value installment loans but does not disclose any details about the product. ICBA believes that this

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information must be disclosed clearly in the public portion of the application so that the public can adequately assess the Applicant and its banking products.

National Banks That Receive Deposits Must Be Insured

On July 30, 2020, ICBA filed an amicus brief in the OCC special purpose national bank charter case supporting the position of the Superintendent of the New York State Department of Financial Services (NYSDFS) in OCC's appeal to the U.S. Court of Appeals for the Second Circuit.[2] In our brief, we agreed with the NYSDFS' position that, based on the interpretation of the National Bank Act and Congressional intent, the OCC had exceeded its authority under the Act when it established a special purpose national bank or "fintech charter" for so-called banks that do not take deposits. We also agreed with the lower court's decision that deposit-taking is a central function of a national bank and therefore any new national bank charter that allows a national bank only to lend without taking deposits is not authorized by the National Bank Act.[3]

In addition to the requirement that a national bank must take deposits, Section 2 of the Federal Reserve Act requires a national bank that takes deposits to be an insured depository institution. 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. As we made clear in the joint comment letter dated December 7, 2020 that ICBA signed with several other trade associations concerning Applicant's charter application, 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.

Furthermore, Congress had a chance to change Section 2 in 1995 but did not do it. Then Comptroller Eugene Ludwig urged the Subcommittee on Financial Institutions and Regulatory Relief to amend Section 2 to terminate the independent requirement that a national bank obtain deposit insurance. Congress failed to make that change, confirming that Section 2 indeed requires a national bank that takes deposits to be an insured depository institution.

Approval of Applicant's Application Would Jeopardize the Banking System and Create and Uneven Playing Field

By limiting its deposit-taking activities to uninsured deposits, Applicant appears to be deliberately evading the requirements of (1) the Bank Holding Company Act of 1956 (BHCA), (2) the Community Reinvestment Act (CRA) and (3) many regulations under the Federal Deposit

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[2] Brief for the Independent Community Bankers of America for the U.S. Court of Appeals for the Second Circuit as Amicus Curiae in Support of Appellee, Linda A. Lacewell in her official capacity as Superintendent of the New York State Department of Financial Services vs. the Office of the Comptroller of the Currency, Joseph M. Otting in his official capacity as the U.S. Comptroller of the Currency, on appeal from the U.S. District Court for the Southern District of New York. Brief No. 19-4271 dated July 30, 2020.
[3] See the decision of the United States District Court for the Southern District of New York dated October 21, 2019; Vullo v. Office of Comptroller of Currency, 378 F. Supp.3d 271, 300 (S.D.N.Y. 2019)

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Insurance Act. These statutes and regulations ensure the safety and soundness of banks and that banking services are delivered fairly. **If the OCC were to approve the Applicant as a national bank, not only would this new bank and charter endanger the financial system and jeopardize the goals of the BHCA and CRA, the OCC would be creating an uneven regulatory playing field, giving this new charter an advantage over traditional bank charters.**

Since Applicant would not be an insured depository institution nor engage in commercial lending activities, it would be exempt from the BHCA. Regulation under the BHCA entails consolidated supervision of a bank's holding company by the Federal Reserve and restricts the activities of the holding company and its affiliates to those that are closely related to banking, or financial in nature. As a result, not only the Applicant's parent company but affiliates of the Applicant will be able to engage in non-banking commercial activities and not be subject to consolidated supervision.

In our comment letters to the banking agencies concerning both industrial loan companies and fintech charters,[4] ICBA has clearly argued that these chartered institutions should be subject to the BHCA to maintain the separation of commerce and banking. **To preserve the character and safety of our economy and to uphold consumer and business confidence in our banks, commercial companies must not be allowed to own banks.** As independent and neutral arbiters of commercial and consumer credit, banks assess risk and create fair and equitable access to credit based on the power of an idea, the track record of management, the current marketplace, and economic potential, not on whether the granting or denial of credit will impact the competitive position of the bank's holding company or affiliates. That critical role would be jeopardized if commercial firms were allowed to own or control specially chartered banks or their functional equivalents.

According to Applicant's application, FTI and its affiliates will have a close working relationship with Applicant. Since Applicant will only have one regulator—the OCC—and will not be subject to consolidated supervision under the BHCA, neither FTI nor any of its affiliates will be examined for safety and soundness, nor subject to capital adequacy regulation. One of the key reasons for BHCA regulation is 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 the OCC may look closely at transactions between Applicant and its parent companies and its affiliates and may even look at the parent company's financial statements, the supervision and examination of affiliates will not be nearly as comprehensive or as thorough as the Federal Reserve would perform if the Applicant was subject to consolidated supervision.

As an uninsured depository institution, Applicant would not be subject to the CRA. Applicant acknowledges that it has a responsibility to provide products and services to low- and moderate-

[4] For instance, see our comment letter regarding the FDIC deposit insurance application of Rakuten Bank America at https://www.icba.org/news/news-details/2020/06/25/comment-letter-to-the-fdic-on-rakuten

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income individuals and communities and includes a special section in its de novo bank application entitled "Financial Inclusion Framework" which outlines Applicant's intentions to comply with financial inclusion goals.

However, it is unclear what CRA-like standards the OCC will establish for Applicant nor how it will enforce financial inclusion goals. In the case of the fintech charter, the OCC did specify a set of financial inclusion standards for these types of charters. But since it is unclear whether those standards would be applied to this bank, we do not know if the financial inclusion standards for Applicant will be significantly less restrictive or more restrictive than those that are applied to other banks.

Finally, by being an uninsured depository institution, Applicant would also avoid FDIC oversight and avoid many of the regulations that apply to insured depository institutions under the Federal Deposit Insurance Act. 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.

Congressional Authority is Needed Before the OCC Can Act on this Charter Application

Just as we indicated in our comment letters regarding the fintech charter[5], in the absence of congressional authority, OCC cannot approve Applicant's charter application. Granting a national bank charter to an uninsured depository institution would violate the Federal Reserve Act and represent an unprecedented policy shift in banking regulation. It would also imply that Congress granted the OCC the authority to decide whether a bank can have deposit insurance or not, overriding the authority and jurisdiction of the FDIC. **In the absence of an explicit Congressional determination to provide such authority, OCC does not have the legal right to take such action.**

ICBA is also concerned that if this charter were approved without explicit Congressional authorization, it would provide a roadmap for other companies to follow, including big tech companies that are interested in establishing a fintech charter. Particularly if the Second Circuit Court of Appeals confirms that the fintech charter is illegal, we would predict a lot of interest in this new charter from large technology companies as a way to own a national bank, gain access to the payments system, and preempt state consumer regulatory restrictions. If the only difference between Applicant's charter and a fintech charter is that Applicant's charter allows the acceptance of uninsured deposits from accredited investors, this would be a relatively easy work around for the biggest tech companies interested in pursuing a bank charter.

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[5] See for instance ICBA letter to Comptroller Thomas J. Curry (Apr. 12 2017) (providing feedback on OCC's draft supplement to its licensing manual to cover nonbank charters), *available at* https://www.icba.org/docs/default-source/icba/advocacydocuments/ letters-to-regulators/2017/cl041217.pdf.

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As we indicated in our comment letter to the FDIC regarding the deposit insurance application of Rakuten Bank America,[6] the integration of big tech with banking would not only result in an enormous concentration of financial and technological assets, it would also pose significant privacy concerns. What would happen when social media giants like Google or Facebook extend their reach into our financial lives? Big data already tracks our movements, our friends, families, and associates, our religious and political affiliations and views, our internet browsing and shopping history. This data is being used for marketing products and services and for targeted political messages—sometimes by foreign or other nefarious actors. Adding personal, financial data—monthly paycheck direct deposits, account balances, expense patterns, political contributions, history of late fees, transaction records, etc.—would take targeted marketing to a whole new level. Moreover, this could erode consumer privacy and expose consumers to unfair market treatment.

Furthermore, without proper Congressional authorization and vetting of the charter, we believe the OCC should more seriously consider the consequences to the banking system if an uninsured national bank like the Applicant were to fail. Particularly if there were other charters like Applicant's in existence, the risk of a spill-over to the rest of the insured banking system could be material with consequences similar to what happened to the banking system in the 1980s when we experienced the thrift crisis and federally uninsured state banks failed. Furthermore, the OCC as the receiver may not have the resources and the expertise of the FDIC if an uninsured national bank failure occurs.

Conclusion

ICBA urges the OCC to delay consideration of Applicant's application until after it has addressed the policy considerations in this letter and solicited and evaluated further public comments. The OCC should make available further disclosures about the application before soliciting comments so that the public has a better understanding of how the new bank would operate if the charter is approved.

Section 2 of the Federal Reserve Act requires a national bank that takes deposits to be an insured depository institution. Therefore, the OCC would be violating that statute if the charter were approved. Applicant also appears to be deliberately evading the requirements of the BHCA, the CRA and many regulations under the Federal Deposit Insurance Act. If the OCC were to approve the Applicant as a national bank, not only would this new bank and charter endanger the financial system and jeopardize the goals of the BHCA and the CRA, but the OCC would create an uneven regulatory playing field, giving this new charter an advantage over traditional bank charters.

In the absence of Congressional authority, OCC cannot approve Applicant's charter application. ICBA is also concerned that if this charter were approved without explicit Congressional

[6] See footnote 4 above.

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authorization, it would provide a roadmap for other companies to follow, including big tech companies that are interested in the business of banking, with many undesirable consequences.

ICBA appreciates the opportunity to comment on this charter application. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 659-8111 or Chris.Cole@icba.org.

Sincerely,
/s/Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel

cc: Acting Comptroller of the Currency Brian Brooks