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Western District Office
Director for District Licensing
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RE: Figure Bank, N.A, Charter Application, 2020-WE-Charter-317593

Dear Sir/Madam:

I write to oppose the charter application of Figure Bank, N.A., 2020-WE-Charter-317593.

The basis for my opposition is manifold. First, the application fails to contain adequate information about the proposed bank's activities to enable informed public comment as required by OCC regulations. *See* 12 C.F.R. § 5.10. While the regulations do not expressly require adequate information for informed public comment, without such adequate information the public's right to provide comment requirement would be a meaningless formality.

Second, it appears that Figure Bank is proposing offering individual consumers uninsured deposit accounts, but all national banks other than trust banks are required to become FDIC insured banks. All national banks other than trust company banks are required to have federal deposit insurance.

Third, the OCC is required to ensure the "safety and soundness" of the national banking system and the "fair treatment of consumers." Figure's application is inconsistent with safety-and-soundness and fair treatment of consumers because it anticipates a bank that has solely uninsured deposits.

Fourth, any bank chartering must comply with the procedural requirements of 12 U.S.C. § 25b because it has the effect of preempting state consumer financial protection laws. The OCC has not complied with section 25b's procedural requirements for Figure's charter application.

Finally, the granting of the charter would violate fundamental public policies in banking regulation. The OCC should not be issuing charters that undercut numerous core bank regulation policies.

Qualifications

I am the Anne Fleming Research Professor and Professor of Law at Georgetown University Law Center, where I teach courses in Financial Regulation and Consumer Finance. I have also previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School and on the Consumer Financial Protection Bureau's Consumer Advisory Board.

I. The Application Fails to Contain Adequate Information

The Figure Bank charter application is deficient because it does not adequately explain the activities that Figure Bank intends to undertake and the services the bank proposes to provide. In particular, the application refers to provision of "low-fee deposit accounts with payment capabilities" (Exhibit 5, p.2) and says that consumers will have access to "Figure Pay Deposit Accounts" (Exhibit 5, p.3), but at the same time the application states that the bank "will not be an insured depository institution" (Exhibit 5, p.8).

It is not clear from this description what type of bank Figure Bank intends to be and therefore how it is going to serve its community. It may well be that Figure Bank is seeking to be a "special purpose bank," under 12 C.F.R. § 5.20(e)(1), but if so, there is no indication in the application. As I am sure you know, the OCC's authority to charter "special purpose banks" is controversial and in fact the subject to litigation, and the OCC has not, to my knowledge, previously issued a charter to a special purpose bank. I do not here take issue with the OCC's authority to charter special purpose banks. Instead, my concern is that if the Figure Bank charter application is for a special purpose bank that it be clearly indicated in order to facilitate public comment.

If the charter application clearly indicated that this was the type of charter being sought, there would likely be increased public comment, and the nature of such comment would likely be different. I myself would submit substantially different comments if it were clear that this is a special purpose banking charter application rather than a run-of-the-mill national bank charter application. Without clarity about the nature of the charter being sought and the nature of the services that Figure Bank proposes to provide and activities it proposes to undertake, however, I am unable to provide meaningful comment.

II. All National Banks Other Than Trust Banks Are Required to Obtain FDIC Insurance

As noted above, the application indicates that Figure Bank will be taking deposits, but will not be an insured depository. All national banks are required to become FDIC-insured depositories within 90 days of commencing operations under 12 U.S.C. § 222. If they fail to do so, they forfeit their charters under 12 U.S.C. § 501a. This requirement has been in place since 1933. Indeed, it is reflected in the structure of the Consumer Financial Protection Act, as only *insured* depositories with less than \$10 billion in assets are subject to supervision for consumer financial protection purposes by their prudential regulators. 12 U.S.C. § 5516. The creation of an uninsured depository would create an absurd gap in regulation.

Because of section 222, the OCC has since 1913 never approved a national banking charter for an entity that will accept only uninsured deposits except for trust company national banks, which are specifically authorized under 12 U.S.C. § 27(a).

III. Chartering an Uninsured National Bank Is Contrary to the OCC’s Charges of Assuring “Safety and Soundness” for National Banks and the “Fair Treatment of Consumers”

The OCC may not charter an uninsured national bank (other than a trust company bank) because such a charter would violation the OCC’s missions charge of “assuring safety and soundness” of national banks and ensuring “fair treatment of consumers”. 12 U.S.C. § 1(a).

A bank that relies on uninsured deposits is not safe and sound because it is subject to the risk of runs and the risk that it cannot rollover its funding when depositors flee to insured deposits in times of economic stress. The threat to safety-and-soundness is not limited to the uninsured bank itself. Chartering uninsured depositories also poses a threat to the safety-and-soundness of the entire banking system. Because consumers do not distinguish between insured and uninsured depositories, the failure of an uninsured depository is likely to trigger runs on insured depositories.

Moreover, an uninsured, deposit-taking national bank poses a grave threat to consumer protection and ultimately to consumer confidence in the entire banking system. (I note that this concern has nothing to do with the special purpose bank charter issue; a special purpose bank that does not accept deposits does not raise the deposit insurance issue.)

Because virtually every depository institution in the United States is insured, consumers assume the presence of FDIC insurance and are therefore unlikely to distinguish between insured and uninsured banks. This means that consumers will inadvertently assume greater risk than intended when dealing with an uninsured bank because they will mistakenly assume that it is in fact insured. Disclosures are unlikely to remedy this situation because the assumption of deposit insurance is so ingrained in post-Depression American consumers. Allowing an uninsured depository that is not a trust bank would be issuing a license for the bank to take advantage of consumers’ reasonable expectations.

The OCC believes that section 1 of the National Bank Act is an actionable provision, as shown by the OCC’s reliance on it in its recently proposed “Fair Access to Financial Services” rulemaking. 85 Fed. Reg. 75261 (Nov. 25, 2020). While I disagree with the OCC’s legal analysis in that proposed rule, if section 1 is an actionable provision, then Figure’s application cannot be approved as it is incompatible with safety and soundness for the national banking system and fair treatment of consumers. But even if I am right and section 1 is not an actionable provision, Figure’s charter application would still be inconsistent with the OCC’s safety and soundness and consumer protection missions and the interests of the communities served by banks.

IV. The OCC Must Comply with Section 25b of the National Bank Act Before It Can Approve Figure’s Application, and OCC Has Not Done So.

The OCC may not approve Figure’s application for a National Banking charter unless it complies with the procedures set forth in section 25b of the National Bank Act. Section 25b requires the OCC to undertake certain procedural steps prior to undertaking any action that preempts state consumer financial protection laws. Section 25b is not limited to formal Administrative Procedures Act rulemakings by the OCC, but covers any OCC activity that has preemptive effect.

There is no precedent for the OCC granting a charter application similar to Figure’s, and an order from the Comptroller issuing a national bank charter would necessarily preempt state licensing, examination, and other consumer protection laws that would otherwise apply to Figure if Figure operated without such a charter. The OCC has not undertaken the necessary procedural steps required by section 25b. The Comptroller has not made a specific finding, supported by substantial evidence

that the preemption of any law of any state consumer financial law is consistent with the legal standard of the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996). Accordingly, the Comptroller may not issue such a charter, and if it were to issue such a charter, Figure would continue to be subject to state regulation.

V. The OCC Should Not Issue National Bank Charters That Facilitate Evasion of Compliance with Fundamental Statutory Policies

Figure's application appears designed to produce a national bank that will not be treated as a "bank" under the Bank Holding Company Act, 12 U.S.C. 1841(c). Moreover, by eschewing deposit insurance, Figure will also not be required to comply with safety and soundness requirements and public interest standards, including the Community Reinvestment Act, that apply to FDIC-insured depositories. Figure's application is almost certainly a stalking horse for big tech firms and other commercial enterprises that would be eager to acquire uninsured national banks under the same conditions. Figure is the camel's nose under the tent for a much broader evasion of core statutory policies of bank regulation. As a matter of policy, the OCC should not be issuing national banking charters that facilitate evasion of fundamental statutory policies and to undermine the separation of banking and commerce.

Conclusion

For the forgoing reasons, I request that the OCC deny the charter application of Figure Bank.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam J. Levitin". The signature is fluid and cursive, with the first name "Adam" and last name "Levitin" clearly legible.

Adam J. Levitin