

# The Bank Charter and Its Would-Be Modernizers

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# THE BANK CHARTER AND ITS WOULD-BE MODERNIZERS

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## ABSTRACT

*The banking charter has become the centerpiece in the argument about what finance should do for the rest of the economy, both in the academy and as a matter of policy. But ambitions for using the charter to reform banking misapprehends the way that charter have been scrutinized – they are hard to get, but those who do not get them fail an announced fit and proper test, or a less announced skepticism over the business plan. In a similar way, proposals for a fintech charter looks less like it will break down the walls between banking and commerce and more like a cautious exploration of a new space for banking services.*

## TABLE OF CONTENTS

Abstract .....	1
Table of Contents .....	1
Introduction .....	2
I. The Role of the Charter.....	5
A. Charters As Throwback Regulations .....	5
B. Banking Versus Commerce.....	8
II. The Case For Constrained Chartering.....	10
A. Supervision Is Constant, But Banks Keep Collapsing .....	10
B. Could Charters Make For A Better Financial System? .....	12
C. The Chartering Debate Is Historic .....	15
D. Bank Charters As An Overlicensing Case Study .....	17
III. Federal Chartering In Law And Practice .....	20
A. The Law of Chartering .....	21
B. The Practice of Chartering .....	24
1. Three Charter Applications Illustrating the Approval Process.....	24
2. Charter Denials .....	33
C. All Applications Analysis .....	34
IV. The Fintech Charter .....	39

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A. The State of Fintech .....	41
B. The Governing Law .....	44
C. History of National Charter Expansion .....	47
D. The Fintech Charter .....	50
E. Policy Implications .....	53
Conclusion .....	55

## INTRODUCTION

One of the consequences of the financial crisis was that it became impossible to start a new bank in the United States. To do that, you need to have deposit insurance and a bank charter. However, stung by the number of relatively young banks that failed during the crisis, the FDIC stopped giving out deposit insurance and the OCC, the main American federal regulator that charters banks, stopped handing out charters.

The end of start-up banking could not last forever, though it has been with us for most of the decade. The FDIC has grudgingly started to do something about charter insurance, and the OCC has cautiously moved towards granting new charters for banks, and even for some nonbanks.

How should the OCC embrace the charter, if it must do so? Academics and regulators have come to entirely different views. A number of banking law scholars have argued that the charter should be given out parsimoniously, and in exchange for a commitment by new banks (and old ones for that matter) to various public goals.

The OCC has taken the opposite view. Rather than using the charter to narrow and direct the banking industry, it has announced that defining “that which we call a bank” should be broadened to make room for financial technology (or “fintech”) companies as well as regular, brick-and-mortar banks.<sup>1</sup> On July 31, 2018, it began accepting applications from fintech firms that wanted bank charters.<sup>2</sup> Joseph Otting, the head of the agency, said

[t]he decision to consider applications for special purpose national bank charters from innovative companies helps provide more

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<sup>1</sup> The quote is from an article by a leading banking scholar and a high-profile financial institutions lawyer. Saule T. Omarova & Margaret E. Tahyar, *That Which We Call A Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113 (2011).

<sup>2</sup> On that day, the OCC issued a supplement to its licensing manual that “provides detail on how the OCC would evaluate applications for a special purpose national bank charter from fintech companies.” OCC, *Licensing Manual Supplement: Considering Charter Applications From Financial Technology Companies* 1, July 2018, <https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-considering-charter-applications-fintech.pdf>.

choices to consumers and businesses, and creates greater opportunity for companies that want to provide banking services in America.<sup>3</sup>

The nascent national fintech charter has bipartisan support from the two Comptrollers of the Currency who preceded Otting, and plenty of opposition.<sup>4</sup>

It has opponents as well, especially those who are concerned that fintech charters could obliterate the traditional distinction between banking and commerce – the largest fintech operations in the country are PayPal, Amazon’s payment system, and Apple and Google’s wallets.<sup>5</sup> Should these firms have bank charters? Senators Sherrod Brown (D-OH) and Jeff Merkley (D-OR) have argued that “[o]ffering a new charter to non-bank companies seems at odds with the goals of financial stability, financial inclusion, consumer protection, and separation of banking and commerce.”<sup>6</sup> State banking supervisors have posited that “an OCC fintech charter is a regulatory train wreck in the making.”<sup>7</sup>

The banking charter has thus become the centerpiece in the argument about what finance should do for the rest of the economy, both in the academy and as a matter of policy.

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<sup>3</sup> OCC, *OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies*, July 31, 2018, <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html>.

<sup>4</sup> See *infra* notes 231-232 (reviewing supportive statements by Comptroller Thomas Curry and Acting Comptroller Keith Norieka).

<sup>5</sup> Or they would be if spun off. PayPal, a subsidiary of eBay, has been recently valued at \$61 billion. Luke Christou, *PayPal Net Worth Has Surpassed Parent Company eBay*, COMPELO, Feb. 1, 2018, <https://www.compelo.com/paypal-net-worth/>. The largest standalone fintechs by estimated market capitalization are Stripe, the payments processor, at \$9 billion, and SoFi, the peer-to-peer lender, at \$4 billion. Sally French, *These Are The Most Valuable Fintech Companies In America*, MARKETWATCH, Nov. 16, 2017, <https://www.marketwatch.com/story/these-are-the-most-valuable-fintech-companies-in-america-2017-11-15>

<sup>6</sup> Lalita Clozel, *OCC Fintech Charter Sparks Opposition From Senate Dems*, AM. BANKER, Jan. 9 2017, <https://www.americanbanker.com/news/occ-fintech-charter-sparks-opposition-from-senate-dems> (quoting statement and reviewing the opposition to the mooted charter).

<sup>7</sup> Conference of State Banking Supervisors, *CSBS Responds to Treasury, OCC Fintech Announcements*, July 31, 2018, <https://www.csbs.org/csbs-responds-treasury-occ-fintech-announcements>. For a collection of opposing perspectives, see Ed Mierzewski, *Leading Groups Oppose OCC Proposal To Charter Fintechs*, U.S. PIRG, Aug. 1, 2018, <https://uspirg.org/blogs/eds-blog/usp/leading-groups-oppose-occ-proposal-charter-fintechs> (collecting statements of opposition and noting that “we joined leading consumer organizations to criticize a proposal by the chief national bank regulator known as the Office of the Comptroller of the Currency”).

The best way to understand the OCC's chartering practice, at least as written, is that it is engaged in "fit and proper" regulation, determining that the promoters of a new bank are sufficiently experienced, adequately capitalized, and disinclined to break the law. Lawyers will tell you that behind the orders there is also a searching inquiry into the quality and viability of the business plan of the agency. But regardless, when evaluating charters, and in particular in rejecting them, the OCC does not suggest that it is making decisions on policy grounds. There is not even a hint of concern about shadow banks or idiosyncratic entrants into the system. Indeed the OCC's interest in developing a fintech charter suggests that it has can tolerate semi-shadow banking.

Even as its leaders raise questions about its suitability, when it comes to the separation between banking and commerce, or the lack thereof, the OCC, rather than committing to the revolutionary promise of the fintech charter, has moved slowly in developing it. Previous special charters also have not exactly transformed the financial industry; they have largely gone to subsidiaries of already extant banks, offering established incumbents the chance to add services like credit cards or trust deposits to their customers.<sup>8</sup> Nor has the OCC dispensed these charters easily or broadly.

The agency's caution is appropriate. The OCC's has been given the power to define what a bank should do – the Supreme Court has held that the "business of banking" is not limited to the enumerated powers" listed in the OCC's governing statute, "and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."<sup>9</sup> But the OCC has never given out charters willy-nilly; it has insisted that its charter holders perform "at least one of the following core banking functions: receiving deposits; paying checks; or lending money."<sup>10</sup>

Licensing the giants of fintech with banking charters really would erase the boundaries between banking and commerce, and is accordingly a matter for Congress, rather than the agency.

In what follows, I first review the recent calls for more constraints on the bank charter, and pair them with a broader critique of licensing that has been spurred particularly by anti-competitive and bureaucratic state occupational licensing components, is having a moment. I then provide first ever empirical account of the actual practice of the OCC when it comes to charter grants using legal, qualitative, and quantitative methods. After

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<sup>8</sup> See *infra*, part III.

<sup>9</sup> *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n. 2 (1995).

<sup>10</sup> 12 C.F.R. § 5.20(e)(1)(i).

that, I turn to the agency's efforts to create a fintech charter, nascent though they are, and conclude with an evaluation of the policy benefits and costs of that charter. A brief conclusion follows.

## I. THE ROLE OF THE CHARTER

### A. *Charters As Throwback Regulations*

A surprising amount of the scholarship critical of the financial industry in the wake of the financial crisis has sought to recast banking from a private sector endeavor to a public sector grant. To these observers, the crisis revealed what we should have known all along: that the provision of finance is essentially a public service only possible because of the public support that undergirds the financial system.<sup>11</sup> The essential publicness of the provision of finance, to these scholars, justifies an intrusive regulatory hand when it comes to supervising banks.<sup>12</sup> In fact, they see the existence of a viable banking system as something that is fundamentally derived from public power.

Banks only work because people believe that they are safe, in this telling, and people only believe they are safe because of the government guarantees provided by deposit insurance, the existence of the Fed as a lender of last resort, and the likelihood that, if all else fails, banks will be bailed out at taxpayer expense.<sup>13</sup> The most important event in a bank's life, then, is the moment that the government agrees to allow it to provide banking services – the day it receives a charter, and with it, the government guarantees that back up the business of banking. Call this the charter standard of bank regulation.

The implications of the charter standard allow for a much larger government role in directing or supervising banks. Some scholars wish to replace the relatively unconstrained charters that national banks currently with more constrained ones that would either encourage banks to follow

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<sup>11</sup> As David Millon has observed,

At least through the mid-19th century, incorporation primarily for private business objectives was relatively unusual. Instead, the typical corporation was chartered to pursue some sort of public function. These corporations included charitable and municipal corporations as well as privately-owned banking, insurance, and public utility enterprises

David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207 (1990).

<sup>12</sup> See e.g., Adam J. Levitin, *Safe Banking: Finance and Democracy*, 83 U. CHI. L. REV. 357, 389 (2016) (“While some measure of the ‘safety’ of ‘safe assets’ comes from private ordering, government intervention is what actually facilitates the ‘safety’ of these assets.”).

<sup>13</sup> See *id.*

government priorities or be strictly policed to weed out shadow banks. Most mortgages and the majority of nonmortgage consumer credit are financed by nonbanks, rather than banks;<sup>14</sup> to Morgan Ricks, the growth of shadow banks is anathema because it allows them to get many of the benefits that chartered banks get (such as the possibility of a bailout) without going through the chartering process, and without the cash or equity cushion to survive a shock to the value of the those mortgages and credit card balances that government requires of banks.<sup>15</sup>

The approach by these academics evinces a sort of market skepticism that posits that the problem with the financial system has been a problem of insufficient regulation.<sup>16</sup> But rather than addressing that regulation through more and better rules, these scholars are turning to the founding document of national banks to do the regulatory work. Building high walls between chartered institutions and the rest of the economy, and permitting only chartered institutions to engage in “money-creation” through the usual financial alchemies of maturity mismatch and leveraged lending, makes the charter grant a serious business. Omarova and Hockett would pair the charter with commitments from the charter holder to pursue other government policies.

The turn to charters to do the job makes everything old new again.<sup>17</sup> Charters and licenses were the principal ways that pre-20<sup>th</sup> century governments raised money or allocated economic resources.<sup>18</sup> But now there is no need for royally chartered trading companies to exploit trade with India or the South Seas, nor to build bridges and turnpikes to be

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<sup>14</sup> Treasury Dep’t, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* 83 (July 31, 2018), <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>.

<sup>15</sup> Kristin N. Johnson, *Macroprudential Regulation: A Sustainable Approach to Regulating Financial Markets*, 2013 U. ILL. L. REV. 881, 910 (2013) (“the challenges that the rise of the shadow banking system creates, the dangers of regulatory arbitrage in the shadow banking system, and the systemic risk concerns that emerge as shadow banks become more significant market participants”).

<sup>16</sup> As Virginia Harper Ho has put it, “regulatory solutions are particularly important in addressing the sources of systemic risk.” Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 458 (2018).

<sup>17</sup> “[H]istorically, corporations were chartered only for public purposes, not just for profit, *Don Mayer, Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 234 (2001).

<sup>18</sup> The history is a long one. “During Queen Elizabeth’s very long reign she oftentimes found herself in need of more money than Parliament had allotted for her use. As a result, she sometimes tried to supplement her subsidy from Parliament by selling royal monopolies.” Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 989 (2013).

financed with tolls in the nineteenth century manner. Instead, after passage of the APA, courts have increasingly urged agencies to prefer broad, prospectively applied rules to individualized treatments of particular firms.<sup>19</sup> The D.C. Circuit in 1970 exulted over the Federal Trade Commission's decision to turn away from its adjudication model of policymaking upon its issuance of an octane labelling rule, observing that "courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication."<sup>20</sup>

Agencies have always used licenses to encourage or discourage behavior, but for regulated industries in ongoing relationships with their regulators, regularly passed rules are the much more common regulatory mechanism, and indeed probably the more modern approach.<sup>21</sup> One of the most important developments in administrative law since the Reagan administration has been the rise and rise of the White House's Office of Information and Regulatory Affairs (OIRA), which reviews major rules before agencies are permitted to promulgate them; that review is generally perceived to be searching and important.<sup>22</sup> The rise of OIRA illustrates the importance of the rule in the modern administrative state, and underscores the independence of the OCC – OIRA does not review its licensing decisions.

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<sup>19</sup> Though one can overstate the differences between 19<sup>th</sup> century administrative law and what we recognize as administrative law today. As Jerry Mashaw has observed, "The national government of the United States was an administrative government from the very beginning of the Republic." Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1366 (2010).

<sup>20</sup> Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681 (D.C. Cir. 1973).

<sup>21</sup> See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383-86 & n.69 (2004) ("To say that there was a debate, however, implies more diversity of opinion than can be found in that literature.... [T]he drift of these articles [in administrative law scholarship] was fairly uniform: agencies should use rulemaking more often than they did."). As Donald Horstein has put it,

the triumph of rulemaking also reflected the growing conviction that the world was better understood and policy better made through the analytical approach of "comprehensive rationality," by which goals and means would be fully specified, compared, and chosen synoptically via techniques such as formal decision theory or cost-benefit analysis, as opposed to a world view shaped "incrementally" through a pattern of case-by-case experimentation and adjustment.

Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1561 (2011).

<sup>22</sup> See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1262 (2006) ("many of the features of OMB review create a profound institutional bias against regulation").



### *B. Banking Versus Commerce*

There is a classic debate about financial regulation that turns on a business model question, that is, whether the business is being operated as a bank or as some other sort of commerce. Would-be banks are entitled to banking charters, while commercial enterprises are not.

This effort to police the divide between banking and commerce goes back to the original federal banking charter statute, which limited eligibility of the charter to those engaged in the “business of banking.”<sup>23</sup> Ever since, the OCC has insisted that national charter holders be “banks;” it has refused to let nonbanks hold national banking charters, while even tough regulators like the FDIC has allowed this in certain limited circumstances.<sup>24</sup> When, after the financial crisis, The OCC was given responsibility over a number of thrifts owned, by quirk of history, by nonbanks, it encouraged these firms to rid themselves of the charter.<sup>25</sup>

At the same time, policymakers have often wondered whether the separation of banking and commerce makes sense. President Trump’s first Acting Comptroller, Keith Norieka, argued that the “recent financial crisis actually demonstrated that there is nothing inherently safer about separating banking and commerce.”<sup>26</sup> He has argued that extending the charter to nonbanks “has the virtue of bringing technology oriented financial companies that provide banking services out of the shadows.”<sup>27</sup> The veteran financial free marketer Peter Wallison is all for erasing the barrier,

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<sup>23</sup> See 12 U.S.C. § 24(Seventh).

<sup>24</sup> See *infra* notes \_\_ and accompanying text.

<sup>25</sup> See *infra* notes \_\_ and accompanying text. Congress was not too enamored of the prospect that non-banks could operate thrift subsidiaries; it forbade holding companies the right to purchase or operate thrifts without first converting to thrift holding companies, which would be subject to supervision by federal regulators, though it permitted firms that already held a single thrift charter to hold on to them Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338; Gramm-Leach-Bliley Act § \_\_, 113 Stat. at 1435 (codified at 12 U.S.C. § 1467a(c)(9)).

<sup>26</sup> Remarks By Keith A. Noreika Acting Comptroller of the Currency Before The Clearing House Annual Conference, 2017, Nov. 8, 2017 <https://www.occ.treas.gov/news-issuances/speeches/2017/pub-speech-2017-134.pdf> at 7. For a more general discussion of the issues, see Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 388–89 (2012) (“separating banking and commerce through the BHCA has caused and exacerbated the precarious structure of modern banking”).

<sup>27</sup> Sylvan Lane, *Bank Regulator Defends National Fintech Charter Plan*, THE HILL, July 9, 2017, <http://thehill.com/policy/finance/342810-bank-regulator-defends-national-fintech-charter-plan>.

and thinks it possible: “[t]hankfully, current policy makes removing the line between banking and commerce, once and for all, relatively straightforward.”<sup>28</sup>

The separation between banking and commerce has never been more contested today. The rise of so-called shadow banks, that provide some of the services of banks without holding bank charters, is the second most consequential development of finance this century, after the financial crisis and its fallout.<sup>29</sup> As Chuck Whitehead has noted, “By 2007, the shadow banking system had total assets of roughly \$6.5 trillion - compared to \$4 trillion for the then five major securities firms and \$6 trillion for the top five U.S. bank holding companies.”<sup>30</sup> John Coffee contends that the “pervasive underregulation of ‘shadow banking,’ which continued for decades, was a leading cause of the 2008 financial debacle and the current economic stagnation.”<sup>31</sup> As Adam Levitin has observed, the shadow banking sector has survived the crisis, and is diverse and growing.

Several distinct but interconnected shadow banking markets have emerged in recent years, including asset-backed commercial paper (ABCP), auction-rate securities (ARS), hedge funds, money market mutual funds (MMMF), repurchase agreements (repos), and credit derivatives like credit default swaps (CDS) and total return swaps (TRS).<sup>32</sup>

Today, the shadow banking component of the global economy has been estimated at \$45 trillion by the Financial Stability Board, a network of regulators.<sup>33</sup>

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<sup>28</sup> Peter J. Wallison, *Why Are We Still Separating Banking And Commerce?* AM. BANKER, July 27 2017, <https://www.americanbanker.com/opinion/why-are-we-still-separating-banking-and-commerce>.

<sup>29</sup> It certainly led to a sea change in the approach to the regulation of the financial sector, as the D.C. Circuit has recognized. “Enacted two years after the financial crisis of 2008, the Dodd–Frank Act spelled a sea change in the regulation of the nation’s financial markets.” *Loan Syndications & Trading Ass’n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016).

<sup>30</sup> Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1, 27 (2010).

<sup>31</sup> John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1079 (2012).

<sup>32</sup> Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 464–65 (2011); *see also* J. Christopher Kojima, *Product-Based Solutions to Financial Innovation: The Promise and Danger of Applying the Federal Securities Laws to OTC Derivatives*, 33 AM. BUS. L.J. 259, 282 (1995) (describing the way that banks have entered in the derivatives market, and how they are regulated there).

<sup>33</sup> For the FSB’s account, *see* <https://www.bloomberg.com/quicktake/shadow-banking>.

The actual practice of OCC here as well is instructive in figuring out how that agency points to deal with shadow banking. Its recent fintech charter practice, which is still very much in the nascent stages, suggests that it will grant charters to nonbanks even with the fintech model that OCC prizes, cautiously.

## II. THE CASE FOR CONSTRAINED CHARTERING

The academic and legal debate over charters can be segmented into contemporary and historical camps. Today, we see a recent spate of banking law scholars arguing that the way the license works justifies turning banks into tools of the state, while government-skeptical observers are worrying about the development of an increasingly intrusive “license raj” in all things, including banking.<sup>34</sup> This maps onto a historical debate that also had two sides. On one side were the free bankers seeking loosened credit and suspicious of the powers of incumbent banks. They sought to broaden access to charters. Others, worried about bank collapses, have tried to limit charter access, meaning that they have been much more demanding in their approach to charter awards.<sup>35</sup>

### A. *Supervision Is Constant, But Banks Keep Collapsing*

The case for constrained chartering turns on the problems unique to banks, but not other businesses.<sup>36</sup> As Lina Khan has observed, the main justifications for preserving the separation between banking and commerce have “included the needs to preserve the safety and soundness of insured depository institutions, to ensure a fair and efficient flow of credit to productive [businesses], and to prevent excessive concentration of financial

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<sup>34</sup> “Between 1950 and 1990, the Indian government imposed a system of strict licensing and ‘red tape’ regulations, commonly referred to as the ‘License Raj,’ to govern business development in India.” Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 U.C. DAVIS L. REV. 1029, 1053 (2011).

<sup>35</sup> The link between modern libertarians and historical free bankers is incomplete partly because free banking gave away charters liberally, but in other ways rather strictly regulated banks. For example, “Because free banking laws also obliged banks to fold upon the first sign of insolvency and tap a sequestered capital reserve, the evidence of bank failure is actually evidence of a simple sort of discipline that is curiously absent from modern banking.” David G. Oedel, *Private Interbank Discipline*, 16 HARV. J.L. & PUB. POL’Y 327, 342–43 (1993).

<sup>36</sup> Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 126 (2013) (“The banking industry, in particular, has constantly addressed the regulatory implications of new ways of conducting the very old business of banking.”).

and economic power in the financial sector.”<sup>37</sup>

Many think that regularly arriving financial crises bespeak a combination of problems, including inadequate controls inside financial institutions, and aggressive entry into new, poorly understood, financial markets.<sup>38</sup> Sometimes, the internal controls miss rogue traders – Nicolas Leeson’s hidden trades, carried out in the Singapore office of one of Britain’s oldest banks, Barings, brought down that firm in 1995.<sup>39</sup> Bruno Iksil’s 2012 unhedged derivatives trades cost JPMorgan \$6.2 billion in losses in 2012, and, following investigations by regulators, \$920 million more.<sup>40</sup> Sometimes the controls miss bad strategies. Lehman Brothers went bankrupt during the financial crisis after six months of a futile hunt for more capital because investors did not believe that the bank was worth betting on in turbulent times.<sup>41</sup>

These are business failures, but they do regulators charged with monitoring financial institutions for safety and soundness little credit. The institutions turned out to be unsafe and unsound, and that fact surprised both managers of the businesses, and the government agencies who oversaw them. A search has unsurprisingly gone on for better mechanisms of supervision. Some scholars have turned to the bank charter as a basis for a

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<sup>37</sup> Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 794 (2017).

<sup>38</sup> Consider for example Robert F. Weber, *Structural Regulation As Antidote to Complexity Capture*, 49 AM. BUS. L.J. 643, 705–06 (2012) (criticizing the regulatory architecture designed to address banker incentives and calling instead for structural regulation, or “restrictions on firm size or the scope of activities in which firms are permitted to engage that have the effect of removing the incentives for undesirable behavior”).

<sup>39</sup> As Charles Samuelson has explained, “Leeson disappeared from Singapore on February 23, 1995. By the end of the following day, the 227 year-old bank did not have enough assets to meet its short-term obligations.” Charles A. Samuelson, *The Fall of Barings: Lessons for Legal Oversight of Derivatives Transactions in the United States*, 29 CORNELL INT’L L.J. 767 (1996).

<sup>40</sup> See *In re JPMorgan Chase & Co. Sec. Litig.*, No. 12 CIV. 03852 GBD, 2014 WL 1297446, at \*3 (S.D.N.Y. Mar. 31, 2014) (describing the so-called London Whale affair in dismissing shareholder litigation over the losses sustained); Simone M. Sepe & Charles K. Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, 100 CORNELL L. REV. 655, 656 (2015) (“Bruno Iksil, nicknamed the “London Whale” for the size of his trading portfolio, was a JPMorgan proprietary trader in his late thirties who realized losses of up to \$6.2 billion in 2012.”); Dominic Rushe, *Whale Of A Fine: After Blowing \$6bn, JP Morgan’s Trader Costs Another \$920m*, THE GUARDIAN, 19 Sep 2013, <https://www.theguardian.com/business/2013/sep/19/jp-morgan-london-whale-fine-blow> (describing the fine).

<sup>41</sup> The messy fall of Lehman Brothers is reviewed in Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 473–512 (2009).

different kind of supervision, or as a substitute for the sort of supervision gone wrong that bedeviled the supervisors who presided over the failures above. Strict constraints on the business of charter holders might help.

Unlike other corporations, which are entitled to a corporate charter essentially on demand, bank charters have traditionally been granted more parsimoniously.<sup>42</sup> While corporate charters today permit corporations to operate for “any lawful purpose,” bank charters have only been granted for more circumscribed reasons.<sup>43</sup> As Bob Hockett and Saule Omarova put it, “Bank organizers are required to submit detailed financial information, business plans, and performance projections in order to convince chartering authorities of their ability to provide banking services in a safe and sound manner.”<sup>44</sup>

### *B. Could Charters Make For A Better Financial System?*

Recent financial regulatory scholars have tried to do more with chartering. Omarova and Hockett would use the charter as the legal and conceptual basis for imposing a broader set of responsibilities on banks.<sup>45</sup> Morgan Ricks would heighten the policing of chartering, regulating banks, defined as money creators (who create money by making loans), and forbidding shadow banks from occupying any space like it – he would defend the charter wall.<sup>46</sup> Claire Hill and Richard Painter make the case for “covenant banking,” which would expose managers to liability to shareholders for risky practices; this would modify the charter to manifest this new business relationship between shareholders and risk committees at the director level.<sup>47</sup> This section reviews both these proposals in turn; they make the case for intensive regulation through charters, and thus pose a

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<sup>42</sup> Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits*, 1983 DUKE L.J. 580, 608 (1983) (discussing the policy implications of charter approval, including that “in the broader social view, the decision whether to have one hundred or one thousand decisionmakers controlling access to credit seems important”).

<sup>43</sup> The OCC’s rules may be found at 12 C.F.R. § 5.20.

<sup>44</sup> Robert C. Hockett, Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1149 (2017). For a government explanation of the requirements, see Board of Governors of the Federal Reserve System, *FAQ: How Can I Start a Bank?* [https://www.federalreserve.gov/faqs/banking\\_12779.htm](https://www.federalreserve.gov/faqs/banking_12779.htm); see also Anna Gelpern, Erik F. Gerding, *Inside Safe Assets*, 33 YALE J. ON REG. 363, 394 (2016) (“a firm cannot simply call itself a bank and start selling demand liabilities to the public”).

<sup>45</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>46</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>47</sup> CLAIRE HILL & RICHARD PAINTER, *BETTER BANKS, BETTER BANKERS*, <https://press.uchicago.edu/ucp/books/book/chicago/B/bo21263462.html> (2015).

question: could the OCC provide this sort of intensive regulation?

Hockett and Omarova have called the chartering process the operative feature of the “finance franchise,” arguing that the traditional public interest component of bank charters could be used to justify some ends-based oversight of banks, requiring them to align their business models with policies designed to foster the overall efficiency of the economy.<sup>48</sup>

They have argued that finance is best understood as a “public-private franchise system,” in which banks are licensed to engage in the creation of credit-money, ultimately backed by the sovereign.<sup>49</sup> In their view, this makes banks quasi-public institutions, providing a public good – access to credit. The analogy is to utilities and railroads, who are sometimes owned by the state, and when privatized, subject to regulation of prices, activities, and the like.<sup>50</sup> The charter is the mechanism through which much of this control is realized.<sup>51</sup> It is, in their view, a basis to put banks to the service of industrial policy. McDonald’s franchisees, after all, control almost nothing about the businesses they run.<sup>52</sup> Instead, McDonald’s corporate headquarters produces each uniform, menu item, store design, and equipment.<sup>53</sup> By analogy, the franchisees who help the government generate and underwrite sufficient amounts of credit to support the economy could be regulated just as intensively, possibly towards

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<sup>48</sup> Robert C. Hockett, Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1149 (2017) (arguing that “redefining the financial system’s core dynamics along the proposed lines allows for more accurate, less superficial diagnoses of that system’s present dysfunctions, which fundamentally constitute manifestations of an underlying failure on the part of the franchisor to modulate and oversee the allocation of credit”).

<sup>49</sup> *See id.*

<sup>50</sup> As they have explained, the category of such institutions “included telegraph, railroad, gas, and then electric lighting firms, as well as banks, insurance companies, and mutual loan firms.” *Id.* at 1149-50.

Robert C. Hockett, Saule T. Omarova, “*Special, Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation-and Vice Versa*,” 39 SEATTLE U. L. REV. 453, 468–69 (2016).

<sup>51</sup> Robert C. Hockett, Saule T. Omarova, “*Special, Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation-and Vice Versa*,” 39 SEATTLE U. L. REV. 453, 475 (2016).

<sup>52</sup> As the mayor of Seattle has said, “[f]ranchise restaurants have menus that are developed by a corporate national entity, a food supply and products that are provided by a corporate national entity, training provided by a corporate national entity, and advertising provided by a corporate national entity.” *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 97 F. Supp. 3d 1256, 1270 (W.D. Wash.), *aff’d but criticized*, 803 F.3d 389 (9th Cir. 2015) (quoting the mayor).

publicly beneficial ends, such as the direction of investment towards public priorities.<sup>54</sup> Ultimately, this would use the charter to enact a form of industrial policy, a controversial thing to do among economists who trust laissez-faire and free markets more than dirigiste direction from the state.<sup>55</sup> Hockett and Omarova believe that banks are agents of the state, serving the traditional state function of money creation, and therefore should be thought of not as private businesses, but rather as something more like government contractors performing a government function – private prison operators, perhaps.

Anna Gelpern and Erik Gerding also have a government-centered view of assets – they argue that “the law can label assets as absolutely or relatively safe, encouraging market participants to buy them. Regulation marks entire categories of assets as permitted or off-limits.”<sup>56</sup> Accordingly, when it comes to financial contracts, the key mover in satisfying market demand for safe assets is government decree, which it can use in, among other things, the process of chartering banks, which labels deposits in those institutions, because of the promise of deposit insurance, as safe. Access to the lender of last resort would make the banks that house the deposits guaranteed safe, which in all means that the grant of a charter makes financial contracts with these institutions safe.<sup>57</sup> The idea is that once again, the role of banks in credit intermediation is really a function of a government decisionmaking, and although chartering is not their particular focus, Gerding and Gelpern view what banks do as relatively subordinate to what government does – the “safe assets” decision makes banks epiphenomenal, which in turn suggests that the government can treat them however it wishes when it comes to chartering – it can use them to make assets safe, or it can disregard them, in which case they would be irrelevant to investors who above all, desire safety in their investment decisions.

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<sup>54</sup> Hockett, Robert C. and Omarova, Saule T., *Private Wealth and Public Goods: A Case for a National Investment Authority* (March 22, 2017). *Journal of Corporation Law*, Vol. 43, 2018.

<sup>55</sup> Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1, 4 (1997) (discussing the balance between free trade and industrial policy). Hockett and Omarova know this, of course. They have argued, explicitly against laissez-faire economists that “[o]ur government is more than merely a market overseer and regulator--it is also a direct market participant, acting not only to correct market failures or to provide vital public goods but also to create, amplify, and guide private markets in ways that enhance these markets' potential to serve important long-term public interests.” Robert C. Hockett; Saule T. Omarova, *Public Actors in Private Markets: Toward A Developmental Finance State*, 93 WASH. U.L. REV. 103, 105 (2015).

<sup>56</sup> Anna Gelpern, Erik F. Gerding, *Inside Safe Assets*, 33 YALE J. ON REG. 363, 369 (2016).

<sup>57</sup> *Id.* at 387.

Ricks has also focused on the charter; he thinks it should be carefully policed to eliminate shadow banking (or at least any government guarantee backing institutions providing bank-like services without a bank charter). In his view, “entry restriction” through charter protection is a critical component of well-done financial regulation.<sup>58</sup> As he has argued, “financial and macroeconomic instability, monetary control, and private seigniorage[] supply a compelling justification for entry restriction.”<sup>59</sup>

In Ricks’s view, the control of the bank chartering process has financial stability advantages because it establishes a clear government role over insured depositary and loan-making institutions, and a clear delineation from other forms of financial intermediation (which, if they involved the expansion of the monetary supply, would not be permitted).

The implication of Ricks’ theory of money creation could lead to prohibitions of various sorts of shadow banking ways to raise capital, including money market funds, securities lending businesses, and commercial paper – multi-billion dollar businesses that would be under regulatory threat. By the same token, the fintech businesses that make loans – Amazon extending credit to vendors on its site, peer to peer lenders – would likely be under serious regulatory threat.

### C. The Chartering Debate Is Historic

The view that financial institutions are essentially providing a public service, and should be treated as quasi-arms of the government is controversial, though, as we have seen, fair game these days. But treating bank charters as different and more precious than corporate charters is a view that has plenty of historical and contemporary support. No less than the American Bankers Association has observed that “[t]he seal of approval conferred by the OCC when it charters a national bank is an important marker of trust to customers,” suggesting that bankers, at least, think it is something special.<sup>60</sup>

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<sup>58</sup> Ricks, Morgan, *Money as Infrastructure* (November 3, 2017). Vanderbilt Law Research Paper No. 63. Available at SSRN: <https://ssrn.com/abstract=3070270> or <http://dx.doi.org/10.2139/ssrn.3070270>.

<sup>59</sup> Ricks, Morgan, *Entry Restriction, Shadow Banking, and the Structure of Monetary Institutions* (July 12, 2016). Forthcoming, *Journal of Financial Regulation* (Panorama); Vanderbilt Public Law Research Paper No. 16-37. Available at SSRN: <https://ssrn.com/abstract=2808700>; see also MORGAN RICKS, *THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION* 2 (2016).

<sup>60</sup> American Bankers Ass’n, Comment Letter, *Exploring Special Purpose National Bank Charters for Fintech Companies*, Jan. 17, 2017 <https://www.occ.treas.gov/topics/responsible-innovation/comments/comment-amer->



Historically, that seal of approval has almost always been tightly controlled. The first state banks were usually chartered by a special bill of the legislature.<sup>61</sup> The National Bank Act of 1864, which created a federal charter for banking, as well as the OCC, was a theory of bank regulation premised on the importance of a controlled charter, even as it copied some aspects of state free banking statutes.<sup>62</sup>

Loosening the constraints on access to bank charters has a long pedigree as well, though, and the question as to whether banks are special, and should be subject to special charter constraints, or whether they ought to be treated like other corporations is not only being debated today. In the mid-19<sup>th</sup> century there was a great deal of attention paid to the promise of "free banking."<sup>63</sup>

As Kenneth Scott has explained, many bank regulators and state legislators thought that charters "should be readily available to anyone who complied with relatively simple and specific statutory requirements, rather than be granted special privilege by the legislature."<sup>64</sup> New York and Michigan passed free banking laws in the 1830s, and by the 1860s half of the states had adopted similar policies.<sup>65</sup> Free banking was designed to create credit access in a time when banks were viewed with suspicion and

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bankers-assn.pdf.

<sup>61</sup> As Franklin Jones observed in 1926, "[m]ost of the original thirteen colonies were founded by commercial companies, which secured trade monopolies and concessions as to taxes in their charters from the king." Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42 (1926). See also Thomas C. Martin, *Haunted by History: Colonial Land Trusts Pose National Threat*, 48 WM. & MARY L. REV. 303, 321 (2006) ("With this vision of the economic potential of the Americas, King James granted charters to various companies of investors, allowing them to colonize the Americas as financial ventures.").

<sup>62</sup> The control was provided by regulators, as well as legislators. As Art Wilmarth has put it, "[t]he absence of any general provision in the National Bank Act authorizing national banks to establish branches reflected Congress' decentralized approach in the 1860s." Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 972 (1992). But the comptroller then interpreted the congressional lacuna to mean that national banks could not branch, limiting their size and risk – but also their ability to grow. For a discussion, see Christian A. Johnson & Tara Rice, *Assessing A Decade of Interstate Bank Branching*, 65 WASH. & LEE L. REV. 73, 80 (2008).

<sup>63</sup> Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, KAN. J.L. & PUB. POL'Y, Win. 1996, at 59, 62 ("Free banking, as previously noted, meant a system that eliminated the need to obtain a special charter from a state government to organize a bank.").

<sup>64</sup> Kenneth Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235, 238-40 (1975).

<sup>65</sup> *Id.* at 239.

desire to create competition in the sector was strong. It also appealed to states to develop a close-to-home financing channel that could be regulated with branch restrictions, capital ratios, and interest rate oversight.<sup>66</sup> At the same time, the free banking era featured unstable banks and wildcat start-ups that have led some to conclude that the era was a financially chaotic one.<sup>67</sup>

In many ways the impulse towards free banking, and the recent academic interest in constraints on the availability of the federal charter, have played out in a way that affects idiosyncratic entrance into the banking system. These trends have come to a head with the rise of shadow banking, which, as the name implies, is sometimes defined explicitly with reference to chartered banking.

Gorton and Metrick define shadow banking with reference to three factors: a business relying on (i) short-term liabilities (ii) backing potentially illiquid assets, (iii) when the traditional restrictions and backstops of bank regulation are not present.<sup>68</sup> In their relatively popular view, shadow banks are by definition not regulated like banks, but provide financing like banks; in the past decades the shadow banks have taken market share from conventional institutions.<sup>69</sup> These shadow banks include money market funds that finance the day-to-day operations of large firms with their appetite for commercial paper, venture capital funds that finance and develop new businesses, business development corporations that invest in small and midsize firms, and hedge funds that can take on any of these functions, along with others.<sup>70</sup>

#### *D. Bank Charters As An Overlicensing Case Study*

If the history shows that restrictive banking licenses have long been a part of banking, one might take the free banking critique further and

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<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See Gary Gorton & Andrew Metrick, *Regulating the Shadow Banking System* (Brookings Papers on Economic Activity No 2, Oct 18, 2010), archived at <http://perma.cc/4JCS-8CN6>. See also Zoltan Pozsar, et al, *Shadow Banking*, 19 FED. RESERVE BANK N.Y. ECON. POL. REV. 1, 1-3 (Dec 2013); JOHN ARMOUR, ET AL, *PRINCIPLES OF FINANCIAL REGULATION* 445-48 (Oxford 2016).

<sup>69</sup> See Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 691 (2013) (“Partially as a result of private exchanges and dark pools, a ‘shadow banking’ infrastructure now casts a large penumbra over the financial system.”).

<sup>70</sup> See Edward McBride, *Shadow and Substance*, *ECONOMIST* (May 10, 2014), <http://www.economist.com/news/special-report/21601621-banks-retreat-wake-financial-crisis-shadow-banks-are-taking-growing> (reviewing the various sorts of firms that can be characterized as shadow banks and the sort of services they provide).

broad. Licensing is ubiquitous in the federal administrative state, and has come under criticism for being overly burdensome.<sup>71</sup> One way to take the measure of licensing is to look at financial regulation, which is a place where the propriety of charter regulation is largely uncontroversial, accepted by both liberal skeptics of state capture, and by conservative free market economists.<sup>72</sup>

The idea of special charters and special responsibilities for businesses as often unconvincing in many contexts. It is one thing if a business is engaged in particularly dangerous activities; then professional licenses make sense.<sup>73</sup> Licenses might also make sense for professions where public service is a component of the job – doctors, with their public health mission, and lawyers, with their responsibility to serve as officers of the court – might be examples of this.<sup>74</sup> And some sort of mechanism of professional discipline probably must exist if an industry is required to put the interests of its clients ahead of its own – as is the case for investment advisors and other sorts of professionals.<sup>75</sup>

But financial firms occupy places in this set of concerns uneasily. It is true that financial firms are dangerous. Runnable financial firms count as risky, with the prospect of contagion, and should be regulated. They are not exactly fiduciaries, especially when they are making markets or selling financial products, or even making plain vanilla commercial loans.

More generally, licensing has become a source of real controversy, especially as, at the state and local level, it has expanded beyond the professions to the trades, where a straightforward story about economic protectionism that can be told. Louisiana has tried to shut down some monks who dared to sell funeral caskets without a license.<sup>76</sup> Utah has

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<sup>71</sup> “While libertarians have challenged licensing laws for years, political progressives (including the Obama administration) are joining the calls for reform.” John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 UCLA L. REV. 844, 847–48 (2017).

<sup>72</sup> See, e.g., John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 888 (2015); John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S71 (2014).

<sup>73</sup> Even the night-watchman state advocate Philip Hamburger admits this. “The government could even (within its enumerated powers) license dangerous activities, as it does with the distribution and development of pharmaceuticals.” Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 312–13 (2004).

<sup>74</sup> Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. CORP. L. 559, 563 (2017).

<sup>75</sup> See Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. CORP. L. 559, 564 (2017).

<sup>76</sup> *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (refusing the enforcing the requirement against the monks on rational basis review).

required hair-braiders to obtain cosmetology licenses, meaning, as one judge put it, that a hair-braider “cannot legally braid hair for money unless she spends thousands of dollars for hundreds of hours of classes that have nothing to do with her occupation of natural braiding.”<sup>77</sup> There has been litigation over District of Columbia tour guide licensing.<sup>78</sup> The literature is openly skeptical that this sort of licensing is doing much good, and there is no shortage of other outlandish examples at which to point.<sup>79</sup>

All of this has motivated free market types to take an especially close look at licensing – it is regulation, after all, and a heavy handed sort at that, creating barriers to entry. Reputable economists dating back to Milton Friedman, have argued that there ought to be no licensing at all – that surgeons should not be required by the government to attend medical school, that scuba divers should not be certified, and so on.<sup>80</sup>

And the case against licensing can go even further. Doing something about licensing abuses might not only lead to less regulated markets, it would give courts a greater role in policing the substance of economic regulations, a role they have stayed out of since *Lochner v. New York*.<sup>81</sup> Libertarians confident in the wisdom of judges might want that.

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<sup>77</sup> *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1213 (D. Utah 2012) (holding the requirement as unconstitutional for being unrelated to a rational government interest).

<sup>78</sup> As the DC Circuit put it, “In Washington, D.C., it is illegal to talk about points of interest or the history of the city while escorting or guiding a person who paid you to do so—that is, unless you pay the government \$200 and pass a 100-question multiple-choice exam.” *Edwards v. D.C.*, 755 F.3d 996, 998 (D.C. Cir. 2014) (holding the requirement to be a free speech violation). For a discussion, see Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 152 (2016).

<sup>79</sup> See, e.g., MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 20-21 (2006); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. PA. L. REV. 1093, 1101 (2014) (arguing for “stopping cartel-like abuses of antitrust immunity” by subjecting licensing boards to constrained antitrust).

<sup>80</sup> A particular opposition to medical licenses animated Milton Friedman. MILTON FRIEDMAN, CAPITALISM & FREEDOM 36, 37, 130 (1962) (listing “some activities currently undertaken by government in the U.S., that cannot, so far as I can see, validly be justified” including “[l]icensure provisions in various cities and states which restrict particular enterprises or occupations or professions to people who have a license” meaning that, inter alia, “licensure should be eliminated as a requirement for the practice of medicine”); See also Berk, Jonathan and van Binsbergen, Jules H., Regulation of Charlatans in High-Skill Professions (August 4, 2017). Stanford University Graduate School of Business Research Paper No. 17-43. Available at SSRN: <https://ssrn.com/abstract=2979134> (licensing for doctors, lawyers, and financial professionals increases costs); <https://economix.blogs.nytimes.com/2013/10/11/the-dubious-case-for-professional-licensing/>.

<sup>81</sup> 198 U.S. 45 (1905); see also Joseph Sanderson, *Don't Bury the Competition: The Growth of Occupational Licensing and A Toolbox for Reform*, 31 YALE J. ON REG. 455,

And so might some banking regulators of a particular bent. In 2017, Acting Comptroller Noreika questioned the merits of a strict separation between banking and commerce as evidenced by the ownership criteria that the agency applied to would be bankers. It made licensing decisions too strict, he thought, because “we should talk to any company interested in becoming a bank and that commercial companies should not be prohibited from applying,” but had elected not to do so because the licensing process ruled out any non-bankers interested in owning banks.<sup>82</sup> Noreika argued instead that the chartering “narrative persists to keep commercial interests from owning or having controlling interest in banks, in part, because many view them as ‘public interests’ rather than the ‘private businesses’ they are,” he concluded.<sup>83</sup> In the wake of the financial crisis, some academics have also questioned whether the licensing requirements of the agency rule out to many potentially beneficial owners.<sup>84</sup>

In this way, the long accepted licensing requirements of banking offers something of a test case for the claims of overlicensing that have marked other, different areas of regulation. In banking, where licensing has generally been accepted to be appropriate, there is some indication of a desire for somewhat less rigor, at least when it comes to ownership, and as we will see in part four of this paper, perhaps also in business model as well.

### III. FEDERAL CHARTERING IN LAW AND PRACTICE

This part of the article reviews how the OCC comes by and exercises its charter authority in practice. It is based on a review of all the charter denials by the agency since 2003, no particularly difficult task, given what turned out to be a tiny number of denials over that period. Although what goes into a denial is the most interesting way to analyze OCC’s charter parsimony, the charter grant orders were reviewed as well as the agency’s applications materials and guidances. Lawyers who had

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457 (2014) (describing the prospect of judicial review of protectionist licensing as “a return to *Lochner*-esque intensive judicial review of economic regulation”).

<sup>82</sup> Elizabeth J. Upton, *Chartering Fintech: The OCC’s Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1434 (2018).

<sup>83</sup> *Acting OCC Chief Says Time To Revisit Separation Of Banking And Commerce*, 2017 WL 5166575.

<sup>84</sup> See, e.g., Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 389 (2012) ((outlining “possible alternatives to the strict separation of banking and commerce, such as commercial ownership of traditional banks”).

successfully applied for charter were also interviewed.

In practice, the OCC, makes obtaining a charter costly by insisting on a searching application process, but once that process is concluded, it awards bank charters almost whenever it can, suggesting that the charter is not an instrument of government control, at least, not because of the charter decision itself. In fact, the challenging effort to get deposit insurance for newly chartered bank involves and FDIC review of an application that ends the moment that the application is granted or denied — that agency engages in precisely no ongoing supervision of the banks that received deposit insurance from it. For its part, the OCC's ordinary supervision of an existing bank is without question rigorous, and can be used to and sent banks towards particular causes and to keep them out of certain businesses. But there is little indication that any of this is related to the chartering decision itself.

#### A. *The Law of Chartering*

The OCC's authority to grant charters comes from the National Banking Act, which outlines the agency's powers, and the Federal Deposit Insurance Act, which requires banks seeking deposit insurance to obtain a charter.<sup>85</sup> The agency's practice for assessing charter applications follows two steps.<sup>86</sup> First, it considers whether to grant preliminary conditional approval for organizers who seek to create a new bank.<sup>87</sup> Second, final approval requires that the organizers establish over the course of a year that they have met the standards of the OCC, as set forth in its regulations, and the conditions imposed in the conditional approval order, if any.<sup>88</sup> Final approval means that the bank can begin to conduct banking business.<sup>89</sup> Preliminary approval allows the organizers of would-be bank to raise capital and to begin to meet the Comptroller's regulatory requirements.<sup>90</sup>

The OCC has said that in evaluating a charter application, it considers whether the organizers are familiar with OCC regulations, are competent and have created a board of directors with the ability to understand the types of services that the bank seeks to provide, and that the bank has provided for sufficient capital to meet the requirements of the

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<sup>85</sup> See, e.g., 12 U.S.C. §§ 21, 24, 22, 26, 27; 12 U.S.C. § 1814.

<sup>86</sup> OCC, *Comptroller's Licensing Manual: Charters* 3, Sept. 2016, <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

organizers' business plan.<sup>91</sup> It rejects applications where there is a risk of immediate recourse to the Federal Deposit Insurance Fund.<sup>92</sup> More controversially, it also is required to consider the “convenience and needs of the community to be served.”<sup>93</sup>

The most important factors for the agency — both as evidenced in orders and application materials, and as intuited by would-be applicants — concern the business plan of the bank and the experience of the promoters behind it. Unlike the case with corporate chartering, where anyone can create a corporation for any lawful purpose, the OCC expects that the organizing group behind a bank charter application to include promoters with diverse business and financial interests and even a degree of community involvement.<sup>94</sup> Factors that may be considered in assessing the quality of the application include size of the organizing group, the history of that group and the choice of that group about the chief executive officer.<sup>95</sup>

In all, the OCC's licensing manual on charters amounts to 131 pages of requirements that banks must meet, making it fair to say that the ability to create a bank is considerably more constrained than the ability to create a non-bank corporation.<sup>96</sup> And, of course, the manual is no checklist — would-be charter holders must meet with OCC officials and present their case for the chartering application. Feedback will be given, making the application process a meeting oriented and iterative one. Moreover, received applications are opened for a period of public comment, meaning that potential competitors can weigh in with criticism of the application.<sup>97</sup>

Judicial review is available of the OCC's denial of a charter, though that review has traditionally been quite deferential.<sup>98</sup> As the Eighth Circuit has explained,

the trend is for courts to grant some type of judicial review in many of these administrative type proceedings which concern the granting of licenses ... a brand of limited judicial review. The action of the

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<sup>91</sup> See *id.* For a discussion, see MICHAEL P. MALLOY, *BANKING LAW AND REGULATION* § 2.02 (2nd Edition 2018-1 Supplement).

<sup>92</sup> OCC, *Comptroller's Licensing Manual: Charters* 3, Sept. 2016, <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

<sup>93</sup> 12 U.S.C. § 1816, as amended. See also 12 C.F.R. § 5.20(h)(5)(i).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> *Id.*

<sup>97</sup> OCC, *Comptroller's Licensing Manual: Charters*, <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf> at 65.

<sup>98</sup> *Camp v. Pitts*, 411 U.S. 138 (1973).

Comptroller [to deny a charter application] would seem to fall into the general commercial area where discretionary actions are subject to limited review.<sup>99</sup>

The Eighth Circuit has also upheld a Comptroller chartering decision that was “certainly not without some support in the record.”<sup>100</sup> Other courts have concluded that “the Comptroller’s decision is entitled to a presumption of regularity.”<sup>101</sup> Pre-*Chevron* courts, in sum, concluded that although chartering decisions were reviewable, the review would be limited.<sup>102</sup>

Post-*Chevron* courts have taken a similar view, though adverse chartering decisions are appealed so rarely that squarely on point precedent is difficult to find. The Supreme Court has given the OCC *Chevron* deference on its interpretations of the National Banking Act.<sup>103</sup> The D.C. Circuit has also counselled “deferring to the ‘expert financial judgment’ of the Comptroller” on similar sorts of interpretations.<sup>104</sup>

Litigation risk in chartering decisions by the OCC is, it is fair to say, low.<sup>105</sup> All told, this record of administrative law deference to the OCC, which is if anything, expressed as almost super-deference, has led some disgruntled banks to pursue constitutional claims against the agency, in lieu of administrative law arguments.<sup>106</sup> But even in that field, the OCC has done well. A number of courts have held that the Constitution’s Supremacy

<sup>99</sup> *Webster Groves v. Saxon*, 370 F.2d 381, 386-87 (8th Cir. 1966).

<sup>100</sup> *First Nat. Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974).

<sup>101</sup> *First Nat. Bank of Southaven v. Camp*, 333 F. Supp. 682, 686 (N.D. Miss. 1971), *aff’d sub nom. First Nat’l Bank of Southaven v. Camp*, 467 F.2d 944 (5th Cir. 1972)

<sup>102</sup> *See also Camp v. Pitts*, 411 U.S. 138 (1973) (reaffirming the judicial reviewability of OCC decisions, but doing so very deferentially).

<sup>103</sup> *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (holding that the National Banking Act is consistent with permitting a bank to sell annuities). In *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388 (1987), the Court observed that the statutory phrase “the general business of each national banking association” was ambiguous, warranting deference to regulatory interpretations of the statute. 479 U.S. at 403-04. As the Court observed in *Clarke*, national banks engage in many activities, 479 U.S. at 406-09. It was accordingly reasonable for OCC to conclude that incidental services that national banks could be authorized to provide to be interpreted by the agency to include new sorts of services. 479 U.S. at 409.

<sup>104</sup> *Am. Ins. Ass’n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (concluding that the municipal bond insurance business was part of the business of banking).

<sup>105</sup> As Michael Malloy has observed, “*Camp v. Pitts* has been widely interpreted as severely limiting judicial review of the Comptroller’s decisions.” MICHAEL P. MALLOY, *BANKING LAW AND REGULATION* § § 1B.02 (2nd Edition 2018-1 Supplement).

<sup>106</sup> *See, e.g., Conference of State Bank Supervisors v. Office of Comptroller of Currency*, No. CV 17-0763 (DLF), 2018 WL 2023507 (D.D.C. Apr. 30, 2018); (making a Tenth Amendment argument that the court declined to address as premature). *Vulo v. OCC*, 2017 WL6512245, (SDNY 2017) (same).



Clause, supports the National Bank Act's preemptive provision overriding state rules that prevent or significantly interfere with national bank powers, regardless of the state-protective ambit of the Tenth Amendment.<sup>107</sup>

The law of chartering, in sum, give the OCC a great degree of latitude in defining the charter, a fact that has not led the agency to take a "long-arm" or "wildcat" view of its powers. It bestows charters unwillingly, despite the flexibility it has been given to do so. The barriers it has created to application mean that the lack of denials are not the only story that matters when it comes to understanding the agency's practice.

### *B. The Practice of Chartering*

The odd result of the OCC's searching charter application requirements is that while navigating the OCC's approval process is no easy thing, the office rarely denies applications for bank charters.

When it denies applications, the denials come in short letters with little reference to the law, and somewhat routine conclusions. Charter approvals look quite similar to rejections – two to five page letters, generally, reciting a rote set of facts, the occasional legal reference, and an indication that the application has been approved or denied.<sup>108</sup> If anything, charter approvals and merger approvals are more elaborate than the denials, as the agency often describes the proposed business in detail and outlines some conditions for approval, where appropriate. Nonetheless, even with grants, the discussion section of approval letters can be only a paragraph long.<sup>109</sup>

#### 1. Three Charter Applications Illustrating the Approval Process

<sup>107</sup> See, e.g., *Barnett Bank of Marion Co. v. Nelson*, 517 U.S. 25 (1996); *Franklin Nat'l Bank v. New York*, 347 U.S. 25 (1954); *Smiley v. Citibank (South Dakota)*, 517 U.S. 735 (1996); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). Moreover, for what it is worth "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007).

<sup>108</sup> For some approvals, see [https://occ.gov/OCCSearch/Search.aspx?output=xml\\_no\\_dtd&client=OCC\\_Main&proxystylesheet=OCC\\_Main&entqtr=0&ud=1&sort=date%3AD%3AL%3Ad1&site=All\\_OCC%7COCC\\_Careers%7CHelpWithMyBank&ie=UTF-8&oe=UTF-8&filter=0&getfields=\\*%26proxystoreload=1&q=occ+charter+approvals&Submit=Go](https://occ.gov/OCCSearch/Search.aspx?output=xml_no_dtd&client=OCC_Main&proxystylesheet=OCC_Main&entqtr=0&ud=1&sort=date%3AD%3AL%3Ad1&site=All_OCC%7COCC_Careers%7CHelpWithMyBank&ie=UTF-8&oe=UTF-8&filter=0&getfields=*%26proxystoreload=1&q=occ+charter+approvals&Submit=Go).

<sup>109</sup> See, e.g., OCC, Corporate Decision, 2015 WL 1530329, at \*1–2 (<https://www.occ.gov/topics/licensing/interpretations-and-actions/2015/cd15-02.pdf>) (discussion section amounts to one paragraph plus one sentence, and 160 words, in approving charter conversion).

The OCC divides its charter applicants into two groups. De novo applications are for start-up banks, while charter conversion applications seek to change state-chartered banks or state or federally chartered thrifts or credit unions, into nationally chartered banks. The lawyers who have recently represented clients approved for national charters have often been sophisticated, including those from the financial regulatory groups of Wachtell, Lipton, and Sullivan & Cromwell. Because these firms are expensive, and would be unlikely to be hired for easily obtainable licenses, their presence in the application process suggests that navigating charter approvals at the federal level is complex, that bank charters are valuable, or both.

One way to make sense of how the agency handles these sorts of applications is to walk through three such approvals – one for a de novo bank, one for a charter conversion, and one for a charter exit. The de novo application is still pending, and would be the first federal charter awarded to an online only bank.

a. Varo Money

Varo Money is an online only lender that may serve as an example of how de novo charters are sought, as well as an example of a fintech shadow bank that hopes to come out of the shadows.

Varo's business model, as the bank put it in a press release, is to be the "first national bank in American history designed for people who want banks on their smartphones."<sup>110</sup> The firm seeks to provide a fully panoply banking services to customers comfortable with banking without ever visiting a bank branch; it has already built up a customer base by partnering with a duly chartered bank through which it could route deposits.<sup>111</sup>

Varo is a start-up supported by private equity – former Treasury Secretary Timothy Geithner's private equity firm Warburg Pincus has led the fundraising for the would-be bank.<sup>112</sup> Varo's second financing round, in which it raised \$45 million of the \$78 million in capital it had obtained at the point in which it applied for the banking charter, was premised on the pending application by the bank for a national bank charter, as it noted in its

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<sup>110</sup> Connor McSheffrey, Varo Bank, N.A. applies for national bank charter, Varo Money, November 15, 2017, [https://www.varomoney.com/press\\_release/varo-bank-n-applies-national-bank-charter/](https://www.varomoney.com/press_release/varo-bank-n-applies-national-bank-charter/).

<sup>111</sup> Katie Roof, *Varo Money Raises \$45 Million From Mobile Banking Without Fees*, TECHCRUNCH, Jan. 18, 2018, <https://techcrunch.com/2018/01/18/varo-money-raises-45-million-for-mobile-banking-without-fees/> ("Varo offers an FDIC-backed bank account backed by The Bancorp Bank.").

<sup>112</sup> Telis Demos, *Silicon Valley Looks at Something New: Starting a Bank*, WALL ST. J., May 1, 2016, <https://www.wsj.com/articles/silicon-valley-looks-at-something-new-starting-a-bank-1462146047> (describing Varo Money's model).

announcement closing the financing round.<sup>113</sup>

As Colin Walsh, the CEO of the company, has said, the foundational banking products that we offer are the checking account, the interest bearing savings account, a form of short term sort of revolving credit and installment loans and those make up kind of the core of the banking products...because we're in a mobile platform, we don't own branches, we have a partnership on our ATM networks as opposed to having our own ATMs, we don't do expensive cash handling, we don't have legacy technology; we're able to offer our products at very low cost.<sup>114</sup>

But Varo has suggested that a charter offers the promise of potential expansion abroad, as well as at home, as well as regulatory simplicity,<sup>115</sup> “as opposed to having deposits sitting with a sponsor bank and having lending through a series of state lending licenses and in effect, we have 21 regulators right now,” as the CEO has put it<sup>116</sup> If the OCC approves its charter application, it will probably only have one – the national charter preempts most state consumer protection laws and all money transmitter requirements and usury limits.<sup>117</sup>

Obtaining a charter for Varo has proven to be a lengthy process, and, at the time of writing, it is still ongoing. The pre-filing contact with the agency began in 2017, with an application for a provisional charter filed on July 21, 2017, after which a 30 day comment period began – Varo got a positive comment from a Salt Lake City resident, and a nine-page long negative comment from the National Community Reinvestment Coalition, speculating that the bank would not meet Community Reinvestment Act priorities.

The application process for a national charter, which requires approval from both the OCC (for the charter) and FDIC (for the deposit insurance the bank must obtain if it is to take deposits), has been described by Varo's officers as a “high hurdle” that “is incredibly demanding and complicated,” because of the novelty of the business model.<sup>118</sup> “The OCC is not going to

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<sup>113</sup> Varo, Varo Money closes \$45 million Series B financing round, Varo Money, January 18, 2018, <https://www.businesswire.com/news/home/20180118005410/en/Varo-Money-Closes-45M-Series-Financing>.

<sup>114</sup> Podcast with Colin Walsh, <https://www.lendacademy.com/wp-content/uploads/2018/03/Podcast-142-Colin-Walsh.pdf>, at 2-3.

<sup>115</sup> Podcast with Colin Walsh, <https://www.lendacademy.com/wp-content/uploads/2018/03/Podcast-142-Colin-Walsh.pdf>, at 6.

<sup>116</sup> *Id.*

<sup>117</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>118</sup> Lalita Clozel, *Mobile-Only Fintech Makes Play For (Regular) Bank Charter*, AM. BANKER, July 25 2017, <https://www.americanbanker.com/news/mobile-only-fintech->

relax their standards, so it's been a rigorous process. They're definitely not just sitting on it. We speak regularly," Varo's Walsh told the American Banker in January, 2018.<sup>119</sup>

No online-only banks have yet received charter approval from the OCC or FDIC.<sup>120</sup> In fact, the most high-profile recent effort to obtain such a charter, by the peer to peer lender SoFi, concluded with a withdrawn application after its CEO resigned in a sexual harassment scandal.<sup>121</sup>

Varo's application for a national charter was filed by Sullivan & Cromwell, a well-known New York law firm with plenty of banking expertise, on July 21, 2017.<sup>122</sup> The 88 page application, including exhibits, with an even larger confidential appendix attached (but not released to the public), follows a template, consisting a responses to a series of questions set forth on an OCC form. The questions range from the fundamental to the obscure, from how the bank expects to obtain sufficient capital to whether the bank's physical manifestations would be handicap accessible or would be located in historically significant buildings (in the case of Varo – a mobile only bank that would have only a headquarters in Salt Lake City and a business office in San Francisco – the requirements would only apply to its headquarters and business offices).<sup>123</sup>

All told, the form application included 25 pages of responses to preset OCC inquiries, with seven of those pages being devoted to the largest single response category, the management and ownership of the bank.

Attached with the application were a number of public exhibits including the bank's bylaws, its plan to comply with the Community

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[makes-play-for-regular-bank-charter](#) ("it remains to be seen whether regulators — particularly the FDIC, which has granted deposit insurance to just a trickle of new banks since the crisis — are ready for a mobile-only bank").

<sup>119</sup> Penny Crosman, *Mission-Driven Varo Money Secures \$45 Million From Investors* AM. BANKER, Jan. 18 2018, <https://www.americanbanker.com/news/mission-driven-varo-money-secures-45-million-from-investors> (observing that "charter would give Varo the ability to offer deposits and thereby gain low-cost funds, and it would enable it to report to one regulator rather than myriad state and national agencies").

<sup>120</sup> Anna Irrera, *SoFi Withdraws U.S. Banking Application, Citing Leadership Change*, REUTERS, Oct. 13, 2017, <https://www.reuters.com/article/us-sofi-future/sofi-withdraws-u-s-banking-application-citing-leadership-change-idUSKBN1CI2XC>

<sup>121</sup> *See id.* (The CEO's "departure in September had complicated SoFi's banking application, a source familiar with the matter told Reuters earlier this month, because regulators assess whether a company has a capable CEO before allowing it to accept deposits").

<sup>122</sup> *Application of Varo Money to the OCC*, July 21, 2017. The application may be found in the agency's FOIA reading room. <https://foia-pal.occ.gov/App/ReadingRoom.aspx>. There is also a copy on file with the author.

<sup>123</sup> *See id.* at 18, 23.

Reinvestment Act, and other forms of paperwork. A larger set of confidential exhibits listed Varo's shareholders, its business plan, its management policies, and its prefiling financial statements – Varo began its application with two pages making the case for the confidential treatment of this information.<sup>124</sup>

After receiving the submission, the OCC published the non-confidential components of the application, the fact that the filing had been made, and invited comments for a 30-day period. Despite the concerns that regulators and potential competitors have with expressed with fintechs receiving bank charters, no comments were received (partly this may be explained by the fact that Varo is seeking a standard national bank charter, rather than the special purpose charter that state regulators have argued is beyond the power of the OCC to offer).

Varo may have decided to apply when it did on the basis of a speech by the OCC's acting comptroller encouraging fintechs to apply for national bank charters.<sup>125</sup> The decision to apply was wise as to one regulator, and unfortunate as to another. Varo received conditional approval from the OCC in a five-page letter that addressed, but ultimately dismissed, the comments that the bank would failed to meet its CRA obligations.<sup>126</sup> As is usual for grant letters, the references to legal authority were limited, but conditions were imposed on Varo, most significantly that it would be required to raise \$104 million in capital to obtain final approval for the charter.<sup>127</sup> However, Varo was unable to obtain deposit insurance from the FDIC, and ultimately withdrew its application in September, 2018, before that agency could render a decision on its request.<sup>128</sup>

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<sup>124</sup> As Varo said in its application,

Disclosure of this information would reveal to competitors the internal strategies, future plans and competitive position of the applicants and Wood Place the applicant at a competitive disadvantage with respect to their competitors who do not publicly reveal such information.

*Id.* at 2-3.

<sup>125</sup> Richards Kibbe and Orbe, Vincent Basulto discusses Varo Money, Inc. application for national bank charter in a memorandum that may be found at <https://www.rkollp.com/newsroom-news-607.html> (“Varo instead opted to apply for the traditional national bank charter through the OCC and the Federal Deposit Insurance Corp. - a step some attorneys view as a direct result of the OCC acting comptroller's July 19 speech to the Exchequer Club in Washington, D.C., that encouraged fintechs to act as banks.”).

<sup>126</sup> Preliminary Conditional Approval Of The De Novo Charter Application Of Varo Bank Of Salt Lake City, Charter Number 25147, file:///C:/Users/zaring/Downloads/Varo%20Decision%20Letter%20(1).pdf

<sup>127</sup> *See id.* at 5.

<sup>128</sup> <https://www.americanbanker.com/news/why-this-fintech-pulled-its-fdic-charter->

Varo accordingly remains unlicensed, and depends on its correspondent bank for banking services while it reassesses its path towards a national charter.

b. MetLife's Bank

Bank mergers often require a charter conversion, with the acquiring bank likely to convert the target bank's charter to one offered by a regulator with which it is familiar.<sup>129</sup>

Two unrandomly chosen, but interesting approvals were filed by one experienced lawyer, one in 2012, and the other in 2018. The lawyer spent a number of years evaluating mergers at the Federal Reserve Board before joining the New York law firm Wachtell, Lipton in 2011.<sup>130</sup> In 2012, she shepherded MetLife – the nation's largest insurer – through the process of ridding itself of a small subsidiary bank based in New Jersey that a national charter.<sup>131</sup>

In the wake of the financial crisis, many institutions sought to simplify their organizational charts, partially because of regulatory risks.<sup>132</sup> Regulators wanted simpler structures from their financial institutions; Dodd-Frank required large banks, for example, to devise “living wills” that would track their various subsidiaries and include a plan to wind them up in case of insolvency.<sup>133</sup> MetLife had reason to worry that it might be

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application

<sup>129</sup> There are some limitations on the ability to convert charters. In 2012, the OCC released a statement, in conjunction with other financial regulators, which

describes the general prohibition on charter conversions by certain insured depository institutions. This prohibition occurs when the institution is subject to a cease-and-desist order or other formal enforcement action issued by, or a memorandum of understanding entered into with, its current federal banking agency or state bank supervisor concerning a significant supervisory matter.

*Conversions Of Depository Institutions Description: Interagency Statement On Section 612 Of The Dodd-Frank Act: Restrictions On Conversions Of Troubled Banks*, 2012 WL 5994962, at \*1.

<sup>130</sup> For a biography of the lawyer, see <http://www.wlrk.com/PARobinson/>.

<sup>131</sup> As the OCC observed, “The Bank represents a very small part of MetLife's business.” Conditional Approval No. 1037, 2012 WL 8170100, at \*1 (June 20, 2012).

<sup>132</sup> This includes the risk of enforcement, which famously was muted in the wake of the crisis. See, e.g., David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1407 (2014) (discussing the record of nonenforcement); Don Mayer et. al., *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515, 519 (2014) (concluding that “the lack of accountability for antisocial acts of financial fraud may become a permanent and disabling feature of our economy”).

<sup>133</sup> Dodd-Frank Act sec. 165(d). As then Fed governor Dan Tarullo explained, “the information requirements of living wills and the need to measure and manage risks at the legal entity level can help create the right incentives for firms to simplify their structures.”

designated as a “systemically important financial institution,” a designation which would subject it to supervision by the Federal Reserve Board, a novel and worrying thing for an insurance company that had never been subjected to bank supervision.<sup>134</sup> (In fact, MetLife would be designated, along with three other financial firms, in 2014.<sup>135</sup>) In 2012, however, designation was not certain, giving MetLife good reasons to look as little like a bank as possible.

The decision to divest itself of the bank also created a schedule for getting the insurance company out of the business of worrying about a consent order that the banks entered into with the OCC “addressing certain deficiencies and unsafe or unsound practicing residential mortgage servicing from the bank’s initiation and handling in foreclosure proceedings” – the MetLife’s bank’s record before the financial crisis, in other words, had been poor, and the insurance company was interested in separating itself from that record.<sup>136</sup>

For these and other reasons, MetLife sought to dispose of all of its banking assets, and on June 20, 2012, the OCC granted provisional approval for the application to rid itself of its bank subsidiary. The four page letter to MetLife’s counsel indicated its understanding that MetLife was “expected to proceed diligently to sell or dispose of its assets and wind down its operations at the bank in particular, the bank was expected to dispose of other businesses.”<sup>137</sup> However, consistent with federal policy, MetLife would be required to hold on to the parts of the bank subject to the consent order until it had fully complied with that order. Then it would “reach the point at which its remaining business is generally limited to activities needed to comply with the consent order as soon as possible.”<sup>138</sup>

All administrative orders follow a template, and those from the OCC are

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Dan Tarullo speech, 2009 WL 3758936 (Nov. 10, 2009). More generally, MetLife decided that it did not want to comply with “regulations written for banking institutions,” *Reg Burden Prompts Another Insurer to Give Up on Banking*, AM. BANKER (Jan. 7, 2013).

<sup>134</sup> For a discussion of the designation process, see Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. Chi. L. Rev. 1813, 1834 (2017).

<sup>135</sup> See Financial Stability Oversight Council, *Basis for the Financial Stability Oversight Council’s Final Determination regarding MetLife, Inc.* (Dec 18, 2014), archived at <http://perma.cc/K2V2-MVK4>.

<sup>136</sup> In *The Matter Of: MetLife Bank, N.A. Bridgewater, New Jersey*, 2011 WL 6941539, at \*1 (OCC 2011) (“The OCC has identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank’s initiation and handling of foreclosure proceedings. The OCC has informed the Bank of the findings resulting from the examination.”).

<sup>137</sup> Conditional Approval No. 1037, 2012 WL 8170100, at \*1 (OCC 2012).

<sup>138</sup> *Id.*

no different. MetLife's divestment approval order began with the approval, briefly discussed the facts of the application, and then set forth the conditions the agency expected to be met in order to extinguish the charter.

The order, like most OCC charter orders, looked more like a letter than a legal brief – little law was cited, there were no headings or arguments (in enforcement actions by other financial regulators, both are customary<sup>139</sup>), although the OCC did review its regulatory authority to both impose consent decrees on the financial institutions and to review proposals for fundamental changes in asset composition. The order concluded with boilerplate language on the timing and nature of the effectiveness of the order, and identified some regulators who could be contacted to establish that the order had been complied with.

c. Brown Deer Mutual

The same Wachtell, Lipton lawyer served as the contact on a merger approval order issued on January 4, 2018.<sup>140</sup> The firm sought approval for an acquisition of a small federally chartered thrift headquartered in Brown Deer, Wisconsin, with 58 branches by a somewhat larger Green Bay, Wisconsin, bank with 225 branches and \$30 billion in assets.<sup>141</sup> By banking standards, neither institutions qualifies as a very important one – federal banking regulators apply “systemically important” criteria – that is, concerns that the bank, if it ran into trouble, could disrupt the rest of the financial system – only to banks with more than \$250 billion in assets.<sup>142</sup> It underscores how seriously small banks take the chartering process, given

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<sup>139</sup> David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016) (At the SEC, for example, “A short opinion revoking the registrations of companies might still produce almost 1,800 words, about the length of two op-ed columns. A longer opinion might reach over 48,000 words, the length of a short book.”).

<sup>140</sup> CRA Decision No. 187, 2018 WL 1182911, at \*1 (OCC 2018).

<sup>141</sup> *Id.* (“Application for the merger of Bank Mutual, Brown Deer, Wisconsin into Associated Bank, National Association, Green Bay, Wisconsin”).

<sup>142</sup> Or so Congress has recently required. Fed supervisory chair Randall Quarles has explained that

In applying enhanced prudential standards for firms with total assets of more than \$100 billion, the Congress requires the Board to consider not only size but also capital structure, riskiness, complexity, financial activities, and any other factors the Board deems relevant. While we use similar factors to calibrate the largest firms' G-SIB surcharges, we have not used them more holistically to tailor the overall supervision and regulation of large banks that do not qualify as G-SIBs. Further, consistent with the legislation's tailoring requirements, the Board must proactively consider how firms with more than \$250 billion in assets that do not qualify as G-SIBs may be more efficiently regulated by applying more tailored standards.

Randal Quarles, Speech, *Getting It Right - Factors For Tailoring Supervision And Regulation Of Large Financial Institutions*, July 18 2018, <https://www.bis.org/review/r180719j.htm>.



the high-level legal talent used to obtain the regulatory approvals for the relatively modest merger.

The decision to approve the merger, and thereby extinguish Brown Deer's thrift charter, was rendered in a 9-page order that reviewed the law more thoroughly than was the case in the MetLife order; the OCC's legal authority for merger authorizations and the requirements of the Bank Merger Act were reviewed. For example, the OCC

reviewed the proposed merger transaction under the criteria of the Bank Merger Act (BMA), 12 USC 1828(c), and applicable OCC regulations and policies. Under the BMA, the OCC generally may not approve a merger that would substantially lessen competition. The BMA also requires the OCC to take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions. 12 USC 1828(c)(5). The OCC must also consider the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities. 12 USC 1828(c)(11). Furthermore, the OCC must consider the risk of the transaction to the stability of the U.S. banking or financial system. 12 USC 1828(c)(5). The OCC considered these factors and found them consistent with approval of the Application.<sup>143</sup>

The most interesting thing about the merger turned on the fact that the target thrift owned subsidiaries that were not engaged in the business of banking – they were not making loans, taking deposits, or providing credit. The meat of the order accordingly permitted the acquiring bank to operate the nonbank subsidiaries for up to two years – provided that it used its grace period to liquidate and dissolve all of them. As the agency put it:

A national bank resulting from a merger may, with OCC permission, retain for a reasonable time period, usually not more than two years, assets that are not generally permissible for national banks, in order to provide time to divest of the assets or bring them into conformance in an orderly manner. The OCC approves the bank's request to retain the nonconforming assets for up to two years to conform or divest them.<sup>144</sup>

The Brown Deer acquisition order included some cut and paste bureaucratic verbiage, as well as a bespoke analysis. The remainder of the order proceeded along the sort of standard template that the agency uses for charter consolidations. The OCC reviewed the target company's performance under the Community Reinvestment Act over the course of two pages (it was found to be acceptable) and responded to four comments made once the merger was announced, all of which opposed the merger, in

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<sup>143</sup> CRA Decision No. 187, 2018 WL 1182911, at \*2 (OCC 2018).

<sup>144</sup> *Id.*

three pages, as administrative agencies tend to do under the notice and comment approach created by the APA.<sup>145</sup> The order's conclusion included some standard language about how it expected the acquisition to go, along with contact information for the regulators.<sup>146</sup>

## 2. Charter Denials

A review of every charter denial by the agency since 2003 is a straightforward recounting of the application of a fit and proper standard, but with teeth, to would be bankers who appear to be inexperienced, criminal, or some combination of both describes the entirety of the agency's denial oeuvre.

The OCC does not make overt policy choices with its denials, regarding, say, an oversupply of banking, or the failure to serve a needed growth industry seeking funding, but rather objects to the experience or quality of the team behind the application, or the prospects of their business plan.<sup>147</sup> For example, it told one would-be California bank that it would deny a charter application because of a "lack of banking experience on the proposed board of directors" and because "the two most senior members of the management team do not meet our standards for approval of the charter application."<sup>148</sup> It told another that the management team was not "sufficiently strong," which warranted rejection of the charter application.<sup>149</sup> Sometimes it does not explain the reasons for its denial.<sup>150</sup>

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<sup>145</sup> As the D.C. Circuit has put it, although an agency "need not address every comment" made during the notice and comment period, "it must respond in a reasoned manner to those that raise significant problems." *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003); *see also* *Am. Coll. of Emergency Physicians v. Price*, 264 F. Supp. 3d 89, 94 (D.D.C. 2017) (collecting cases to the same effect).

<sup>146</sup> As the agency explained,

OCC Central District Licensing Office staff must be advised in writing at least 10 days in advance of the desired effective date of the merger so that it may issue the necessary certification letter. If the transaction is not consummated within six months from the date of this letter, the approval shall automatically terminate unless an extension is granted.

CRA Decision No. 187, 2018 WL 1182911, at \*7 (OCC 2018).

<sup>147</sup> *See, e.g.*, Office of the Comptroller of the Currency, Corporate Decision No. 2003-8, *Rock Asia Capital Bank, National Association*, Arcadia, California OCC Control Number: 2003-WE-01-0003 ("we concluded that the management team was not sufficiently strong because the members lacked demonstrated and relevant experience").

<sup>148</sup> Office of the Comptroller of the Currency, Corporate Decision No. 2004-4, *Signature Bank of California, National Association (Proposed)* Glendale, California OCC Control Number: 2003-WE-01-0006

<sup>149</sup> Office of the Comptroller of the Currency, Corporate Decision No. 2003-8, *Rock Asia Capital Bank, National Association*, Arcadia, California OCC Control Number: 2003-

Underlying these sorts of objections is often a sense that the applicants are naïve, or, possibly, up to no good. In a South Dakota case, the agency objected to the proposal by an acquiring bank to transition into a subprime credit card business. As OCC explained, the “proposed business plan for the Bank to become an issuer of general purpose credit cards represents not only a significant change to the Bank's previous business, but also a shift to an intensely competitive segment of the credit card market, in which the Bank ...[has] no discernable experience.”<sup>151</sup> When ExTran Bank sought a federal charter in Florida, the OCC rejected the application, in perhaps its longest denial letter, amounting to 1710 words, or 3.5 pages, because it believed that “the nature of the proposed activities .. pos[ed] particularly high supervisory and regulatory risks, including risks surrounding Bank Secrecy Act and anti-money laundering.”<sup>152</sup> Moreover there was “no indication” that “proposed level of staffing of the compliance department would be sufficient given the high supervisory and regulatory risks raised by the application.”<sup>153</sup> The agency apparently thought that ExTran might suborn criminal activity.

### C. All Applications Analysis

State charter holders have found that they are generally able to access the broader national market when it comes to obtaining clients and depositors,<sup>154</sup> meaning that what the OCC offers them amounts to either

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WE-01-0003.

<sup>150</sup> This appears to be the case with the proposed Western Development Bank of Fresno, whose denial was published in a chart in 2004, and nowhere else that I could find. *Applications For New, Limited-Purpose National Bank Charters, Approved And Denied, By State, July 1 To December 31, 2004*, 24 OCC Q.J. 94, 2005 WL 1749815; see also [http://apps.occ.gov/CAAS\\_CATS/CAAS\\_Details.aspx?FilingTypeID=2&FilingID=93318&FilingSubTypeID=1101](http://apps.occ.gov/CAAS_CATS/CAAS_Details.aspx?FilingTypeID=2&FilingID=93318&FilingSubTypeID=1101).

<sup>151</sup> Office of the Comptroller of the Currency, Corporate Decision No. 2003-11, Application by CompuCredit Corporation of its Intent to Acquire a Controlling Interest in Axsys National Bank, Sioux Falls, South Dakota

<sup>152</sup> Office of the Comptroller of the Currency, Corporate Decision No. 2008-10, Charter Application Submitted for ExTran International Bank, N.A. (Proposed), Fort Lauderdale, Florida OCC Control Number: 2008-SO-01-0009.

<sup>153</sup> *Id.*

<sup>154</sup> For example, “Prior to 1980, state-chartered banks were not able to export interest rates across state lines like their nationally chartered competitors. Concerns about competitive equity caused Congress to provide state banks with equal powers.” Brian Knight, *Why State-by-State Fintech Oversight Doesn't Work*, AM. BANKER, Sep. 6 2016, <https://www.americanbanker.com/opinion/why-state-by-state-fintech-oversight-doesnt-work>.

high quality supervision or low touch regulation.<sup>155</sup> OCC examination fees tend to be higher than state fees, meaning that state charters usually have a cost advantage.<sup>156</sup> Perhaps for this reason, since 2003, most bank start-ups have obtained state charters, which has led to outright worry by the OCC, which depends upon examination fees to fund its budget; since the financial crisis, almost no institutions have sought a national bank charter.<sup>157</sup>

Between 2003, the year during which the OCC first indicated its willingness to consider special purpose charters, and 2010, the OCC received 236 new charter applications and approved or conditionally approved 190 of those applicants. From 2011 to 2017, charter applications declined dramatically – less than ten were received for those six years.<sup>158</sup> For applications for charters between 2003 and 2017, only four were denied, and three of those were in 2003 and 2004.<sup>159</sup> In sum, so called “de novo” charter applications, for banks starting from scratch, have all but disappeared, as table 1 below indicates.<sup>160</sup>

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<sup>155</sup> For a discussion, David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 209 (2010) (reviewing the closeness of the relationship between banks and their regulators, which means, among other things, that banks rarely sue under the APA, for fear that the regulators will retaliate).

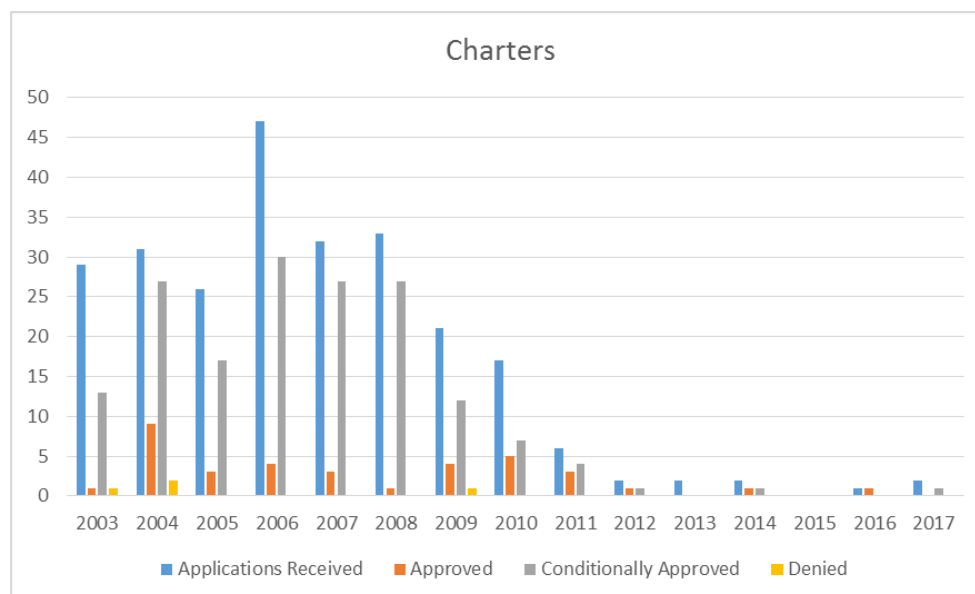
<sup>156</sup> As two FDIC economists have put it, “the assessments for supervision paid by state-chartered banks are significantly less than those paid by comparably sized OCC-supervised banks.” Christine E. Blair and Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, <https://www.fdic.gov/bank/analytical/banking/2006mar/article1/article1.pdf> (2006); see also OCC, *Assessments and Fees Schedule*, <https://www.occ.treas.gov/topics/examinations/assessments-and-fees/index-assessments-fees.html>.

<sup>157</sup> Gary W. Whalen, *Why Do De Novo Banks Choose a National Charter?* OCC Economics Working Paper 2010-2, <https://www.occ.treas.gov/publications/publications-by-type/occ-working-papers/2012-2009/wp2010-2.pdf> (2010).

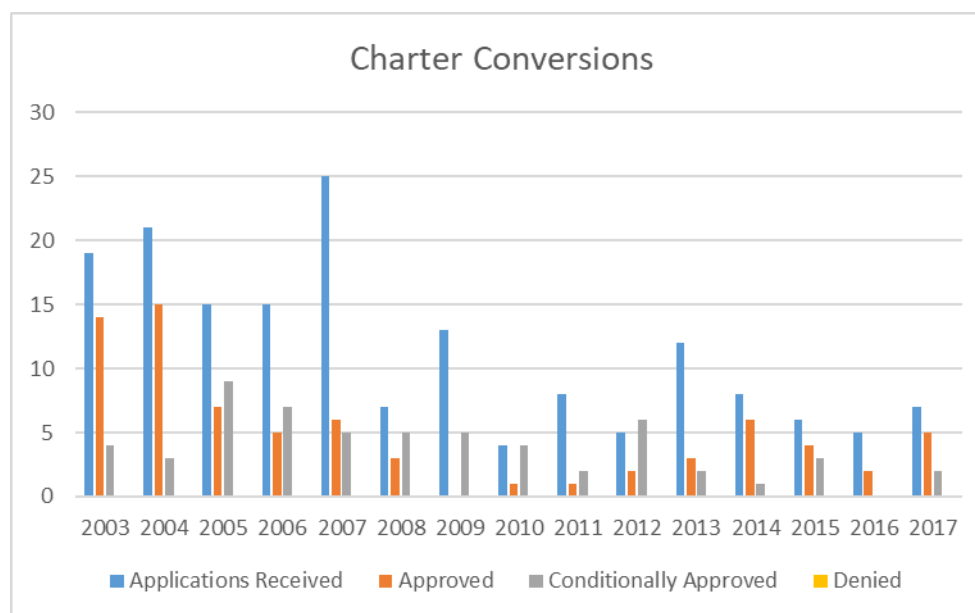
<sup>158</sup> See *infra* tables 1 and 2.

<sup>159</sup> See *id.*

<sup>160</sup> The sources for table 1 are OCC’s annual reports.



Nor has the situation been alleviated by charter conversions. Charter conversions also show a steep decline since the financial crisis, at table 2, below, establishes.<sup>161</sup> For charter conversion, no applicants were denied between 2003 and 2017.<sup>162</sup>



<sup>161</sup> The sources for table 2 are OCC's annual reports.

<sup>162</sup> See *id.* at table 2.

The comparative vibrancy of charter conversions is probably related to the disappearance of de novo applications for charters; because of the banks that have struggled through the financial crisis, there are existing charters for essentially shell banks that are available for conversion at an inexpensive rate.

The paucity of new entrants into the banking system prompted the 2017 approval of a national charter for a de novo bank but be greeted with hosannas from the acting comptroller himself, who pronounced himself “encouraged that we are seeing increasing interest in becoming new banks and that de novo activity appears to be thawing slowly as the economy warms.”<sup>163</sup> The comptroller praised the bank – a relatively small institution based in Winter Park, Florida – for obtaining a charter, but cautioned that “de novo banks are still exceedingly rare.”<sup>164</sup> He recommended deregulation: “[m]aking the process of establishing de novo banks more efficient can only accelerate the recent positive trend and create more economic opportunity for consumers, businesses, and communities across the nation.”<sup>165</sup>

Nor are de novo banks alone; since the financial crisis applicants for ILC charters have all but stopped entirely.<sup>166</sup> The FDIC essentially ceased approving applications from de novo industrial loan companies (ILCs) in 2008 and glanced a relatively skeptical eye on those applications from 2000 to 2007.<sup>167</sup> In addition to obtaining a charter from the OCC, the FDIC also needs to approve charters for depositary institutions; its willingness to do so is also a constraint, and the application process for deposit insurance is

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<sup>163</sup> *Federal Banking Law Reports Letter No. 2744*, FED. BANK. L. REP. 5159903, 2017 WL 5159903 (Nov. 7, 2017).

<sup>164</sup> *Id.* Since then, a small bank headquartered in Hollywood Florida has also won conditional approval to hold a national charter – a development that suggests that the OCC is still acting parsimoniously when it comes to de novo applications. OCC, Conditional Approval No. 1197, 2018 WL 3730354, at \*1, <https://www.occ.treas.gov/topics/licensing/interpretations-and-actions/2018/ca1197.pdf>

<sup>165</sup> *Id.*

<sup>166</sup> As Aaron Klein has explained, “While the FDIC between 2000 and 2008 approved 28 new ILCs, none have been approved since then. Between 2011 and 2016 there were no applications to the FDIC to create new ILCs.” Aaron Klein, *FinTechs, Lending and Banking: Can All Three Co-Exist?* 20 No. 5 FINTECH L. REP. NL 1 (Sept./Oct. 2017). Recently, two fintech firms have announced that they intend to apply for ILC charters. *See id.* For this reason, some observers have searched for alternatives. “The industrial bank charter is not the only option for the FinTech firms that seek to engage in the business of banking,” Cinar Oney, *Fintech Industrial Banks and Beyond: How Banking Innovations Affect the Federal Safety Net*, 23 *Fordham J. Corp. & Fin. L.* 541, 544 (2018).

<sup>167</sup> Arnold & Porter, *The Reemergence of De Novo Bank Charters*, Oct. 4, 2017, <https://www.arnoldporter.com/en/perspectives/publications/2017/10/the-reemergence-of-de-novo-bank-charters>.

intensive and document-heavy.<sup>168</sup> The Federal Deposit Insurance application, which is coterminous with the OCC's charter application, is a 43-page-long document with a list of requirements, including requests for information about management, capital, the needs of the community, the assets held by the financial institution, its information systems, and a set of certifications and pledges by the promoters of the institution, including oaths that must be taken by the director of the bank, that they will see to their "legal responsibility and a fiduciary duty to shareholders to administer the depositary institutions faithfully and to oversee its management."<sup>169</sup> All of this is submitted to the FDIC, and is in some ways duplicative of the charter application – but there is no question that, although this paper is concerned with the bank charter, any would be national bank has two hurdles to surmount – charter approval and deposit insurance approval.

Between 2000-07, in the years leading up to the financial crisis, the FDIC received 1200 de novo charter applications for deposit insurance, and granted approximately 75% of the applications.<sup>170</sup> But the crisis meant that applications, and grants, ground to a halt. Between January 2011 and July 2016, the FDIC received only 10 applications for deposit insurance for de novo institutions, of which it approved three (all of which were state-chartered institutions).<sup>171</sup>

These numbers, which illustrate a stark decline in the success of *de novo* insured-bank charter applications, do not capture the latent demand for charters, because applicants have been deterred from applying in their preliminary discussions with the FDIC. The agency is been able to point to its recent practice to show its unwillingness to grant charters to new financial institutions after the financial crisis, in which younger banks failed at a much faster rate than did older ones. In keeping with its chartering

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<sup>168</sup> The FDIC's recent caution on approving charters has led to some consternation in Congress: "since 2011, the FDIC has only approved three de novo bank applications and no industrial loan company applications. The agency approved only one of two new bank applications in 2015. Ten years earlier, in 2005, the FDIC approved 237 of 299 de novo applications." *House Republicans, FDIC chief spar over dearth of new banks*, 2016 WL 3751710

<sup>169</sup> FDIC, *Interagency Charter Application*, available at <https://www.fdic.gov/formsdocuments/interagencycharter-insuranceapplication.pdf>, at 16.

<sup>170</sup> Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation on De Novo Banks and Industrial Loan Companies before the Committee on Oversight and Government Reform; U.S. House of Representatives, July 13, 2016, <https://www.fdic.gov/news/news/speeches/spjul1316.html>.

<sup>171</sup> Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation on *De Novo Banks and Industrial Loan Companies before the Committee on Oversight and Government Reform*; U.S. House of Representatives, July 13, 2016, <https://www.fdic.gov/news/news/speeches/spjul1316.html>.

record, from 2000 to 2007, the FDIC approved 47% of the 57 applications for deposit insurance for *de novo* ILCs. But from 2008 to 2010, only one of seven applications (14%) was approved—and from 2011 through July 2016, zero applications were filed with the FDIC for deposit insurance for a *de novo* ILC.<sup>172</sup>

National bank charters have thus become, since the financial crisis, and perhaps since 2003, something that increasingly few financial institutions desire to take on, a fact that presumably drives the agency's interest in expanding the pool of potential applicants for national bank charters with all their preemptive powers to fintech companies.

But the agency certainly not doing with the charter reformers would like it to do. The agency spends no time evaluating the public interest in a new bank, or nudging a bank towards policy priorities of the government. Instead, it takes the measure of the management team, using a complex application and an ultimately low bar, and grants those applications that have managed their way through the process and met that bar.

#### IV. THE FINTECH CHARTER

Online providers of financial services, ranging from exchanges matching buyers and sellers of cryptocurrencies to peer-to-peer lenders, also provide bank-like services without holding bank charters are all the rage in the industry. They are, in this way, examples of shadow banks, even if they do not in every case fit the Gorton and Metrick borrow short to lend long model in every particular.<sup>173</sup> The exchanges can hold money for clients who wish to trade cryptocurrencies (or anything else), which looks a bit like the taking of deposits. Social lenders take money from individuals and firms, and match them with borrowers. They are extending credit. So are online platforms like Amazon and Alipay that make loans or extend trade credit to vendors on their sites. The OCC has observed that the startups are doing the things that banks do: “discounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically are the modern equivalent of paying checks.”<sup>174</sup> The BIS has speculated that

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<sup>172</sup> <https://www.fdic.gov/news/news/speeches/spjul1316.html>

<sup>173</sup> See Gary Gorton & Andrew Metrick, *Regulating the Shadow Banking System* (Brookings Papers on Economic Activity No 2, Oct 18, 2010), archived at <http://perma.cc/4JCS-8CN6>.

<sup>174</sup> Office of the Comptroller of the Currency, *Exploring Special Purpose National Bank Charters for Fintech Companies*, 4 (Dec. 2016),



fintech credit market in 2016 amounted to \$286 billion, up from \$11 billion in 2013.<sup>175</sup> If these platforms are making loans and holding money, they are performing some of the features of the business of banking.<sup>176</sup> The OCC has proposed that they be awarded a banking charter for these reasons — creating a controversy.

While the Obama administration’s comptroller Thomas Curry is the agency head who began consideration of the special purpose fintech charter, it is the Trump administration’s Joseph Otting who helmed the agency when it “announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking” on July 31, 2018.<sup>177</sup> The agency observed that its decision to accept applications was “consistent with bipartisan government efforts at federal and state levels.”<sup>178</sup> That interest includes the current Treasury Department, which, also in July 2018, recommended that “the OCC move forward with prudent and carefully considered applications for special-purpose national bank charters.”<sup>179</sup>

In this part of the article, I consider the OCC’s halting progress towards adopting a new charter that would apply to fintech firms — it represents the charter liberalization that could extend the banking license to the type of firms that Ricks, at least, would find wanting.<sup>180</sup>

I first examine the agency’s practice when it comes to special charters. I then evaluate the costs and benefits of a fintech charter. National charters offer the promise of a single regulator, with the preemption of state banking and usury laws, and the possibly of a technically superior, if more

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<https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>.

<sup>175</sup> [https://www.bis.org/publ/qtrpdf/r\\_qt1809e.htm](https://www.bis.org/publ/qtrpdf/r_qt1809e.htm)

<sup>176</sup> The OCC’s own interpretation as to what counts as the “business of banking” is set forth in OCC, *2011 Activities Permissible For A National Bank* 3 (2011), at [www.occ.treas.gov/corpapps/BankAct.pdf](http://www.occ.treas.gov/corpapps/BankAct.pdf). For a discussion of the OCC’s flexibility when it comes to interpreting the “business of banking,” see Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the “Business of Banking”*, 63 U. MIAMI L. REV. 1041, 1077 (2009) (criticizing “the infinitely elastic concept of the “business of banking” that emerged from the OCC’s recent interpretations”).

<sup>177</sup> OCC, *OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies*, July 31, 2018, <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html>.

<sup>178</sup> *Id.*

<sup>179</sup> Treasury Dep’t, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* 73 (July 31, 2018), <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>.

<sup>180</sup> See *supra* note \_\_\_ and accompanying text.

expensive, form of supervision. But that promise is only open to firms engaged in the business of banking.

### A. *The State of Fintech*

The question posed by a fintech charter is complicated by the broad array of technology companies who are moving into some aspect of the business of banking, ranging from tech companies that could offer their massive user bases banking services, to financial companies who want to extend credit on the internet.

Fintechs vary in their engagement with the credit system as regulated in the United States. Some fintechs are money transmitters like Western Union – they do not take deposits or make loans, but do hold money for customers.<sup>181</sup> Others are payment processors like PayPal.<sup>182</sup> Others are online lenders like SoFi, and still others partner with chartered banks to provide banking services, including (for now) Varo.<sup>183</sup> Finally, there are all that technology firms associated with cryptocurrencies, including exchanges, hedge funds and would-be wallets. Online lending by companies such as SoFi, Prosper, Lending Club, and other “peer-to-peer” or teched up lenders is essentially nationwide, and could easily become a global activity. As a matter of technology, these online lenders need not distinguish between any states in making lending decisions – they exist on the internet, and can serve anyone with internet access.<sup>184</sup>

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<sup>181</sup> See Corinne Abrams, *Fintech Startups Seek to Shake Up Money-Transfer Industry*, WALL ST. J., Dec. 19, 2017, <https://www.wsj.com/articles/fintech-startups-seek-to-shake-up-money-transfer-industry-1513679401> (describing the money transfer industry, which enjoys some regulatory barriers to entry). “Money transmitter laws are essentially ‘safety and soundness’ laws aimed at protecting consumers from suffering losses, and have traditionally governed money transfers services like Western Union.” Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 82 (2013).

<sup>182</sup> Though, to be sure, “PayPal is regulated by numerous states as a money transmitter or money service business.” 10A HAWKLAND UCC SERIES § 6:51 (2018). A review of these electronic payment services may be found in Eric Pacifici, *Making Paypal Pay: Regulation E and Its Application to Alternative Payment Services*, DUKE L. & TECH. REV., March 31 2015, at 89, 95 (describing them as “designed to allow consumers to send payments from account to account securely via email, text message, over the web and sometimes by social media”).

<sup>183</sup> See *supra* notes \_\_\_ and accompanying text. “The global market for peer-to-peer lending, which the SEC defines as using websites that help borrowers and lenders find one another, surged 145 percent in 2013 to \$2.8 billion” *International Warning Issued on Crowdfunding Risks*, 8 WGL-ACCTALERT 26 (2013).

<sup>184</sup> For this reason, the Community Reinvestment Act, which requires banks to consider the community in which they operate, would be tricky to apply to social lenders. 12 U.S.C. §§ 2901-2908. As Michael Barr has explained, the “CRA encourages federally

All of these institutions might benefit from a national charter preempting the need to register in all 50 states for the sort of business they're doing, and many will be uninterested in taking deposits, meaning that they would not need deposit insurance.

Complying with varying state charter requirements poses challenges for fintech firms. Some states require a brick and mortar presence before a state banking charter can be obtained, but fintech lenders have business plans premised on the ability to avoid these sorts of institutional investments. Moreover, for a firm that is doing business across state lines, compliance with varying rules concerning interest rates, payment terms, and other consumer protection oriented services poses problems. An OCC fintech charter would preempt these various state laws, conditional on the limitations created by Dodd-Frank on federal preemption.<sup>185</sup>

The most serious disrupters of the business of banking – potentially Amazon, Apple, Facebook, and Google – are firms that would combine commerce and finance, a combination that has not been permitted by regulators or legislatures for decades.<sup>186</sup>

Amazon Loans, for example, extends short term credit to businesses selling on its marketplace and has lots of data on how those businesses are doing allowing it to make smart loan decisions.<sup>187</sup> Apple and Google are handling payments; Google has set up a mobile wallet in India that lets users link phones to bank accounts to pay for goods in stores and online, and to make person-to-person money transfers.<sup>188</sup> Facebook is installing person-to-person PayPal payments into its Messenger app, and Apple is doing something similar with its own instant message program.<sup>189</sup> These

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insured banks and thrifts to meet the credit needs of the entire communities that they serve, including low-and moderate-income areas, consistent with safe and sound banking practices.” Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 517 (2005).

<sup>185</sup> Under that statute, consumer protection laws are generally not preempted, and preemption of such laws may be done on a case by case basis. See 12 U.S.C. § 25b.

<sup>186</sup> The competition risks for banks from commercial entrants are longstanding. “The entry of nonbank competitors into the field of banking is not new either. Western Union leveraged its telegram business to introduce money transfers in the nineteenth century. Securities firms are active lenders and provide numerous deposit products through their money market funds and other offerings.” John L. Douglas, *New Wine into Old Bottles: Fintech Meets the Bank Regulatory World*, 20 N.C. BANKING INST. 17, 20 (2016).

<sup>187</sup> *Amazon Loans Just The Start For Tech Banking*, FIN. TIMES, June 11, 2017, <https://www.ft.com/content/4d357d36-4d0c-11e7-919a-1e14ce4af89b>.

<sup>188</sup> *Google Debuts Tez, A Mobile Payment App For India That Uses Audio QR To Transfer Money*, TECHCRUNCH, Sep. 17, 2017, <https://techcrunch.com/2017/09/17/google-debuts-tez-a-mobile-wallet-and-payments-app-for-india/>.

<sup>189</sup> John Detrixhe, *Big Tech Firms Like Amazon Are Eager To Eat The Banking*

internet platforms have enormous balance sheets and could fund financing operations with other revenue generating arms, making them both commercial firms who sell eyeballs to advertisers and financial service providers who hold money (albeit often only for very brief periods) and make loans.

Amazon and Google are doing much more with money, but they are nothing compared to their Chinese peer, Ant Financial, which has almost instantly become an enormous financial firm largely by processing payments for Alibaba, the Chinese online retailer, but also by offering consumers almost all of the financial services that the internet can make possible.<sup>190</sup> Ant originates loans, manages money, and owns a money market fund with assets that amounted to \$228 billion in 2017.<sup>191</sup> It also offers consumer loans to millions of users on Alibaba's e-commerce platforms; it does not yet take deposits, but will when the Chinese central bank grows comfortable with electronic compliance with know your customer requirements – Chinese regulators have already given the firm an online banking license.<sup>192</sup> It is, as the Wall Street Journal has put it, “the world’s biggest unicorn,” with an equity value of \$150 billion – a level that would qualify it as “systemically important”- that is, potentially too big to fail – if it were located in the United States.<sup>193</sup>

A variety of tech firms have considered applying for a special charter, but the Treasury Department has forecasted that two sorts might be

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*Industry's Lunch*, QUARTZ, Oct. 26, 2017, <https://qz.com/1112460/banks-are-under-threat-from-big-tech-firms-like-apple-amazon-and-facebook-according-to-mckinsey/>.

<sup>190</sup> *Ant Financial's \$100 Billion Valuation Would Put It In The Same League As The World's Biggest Banks*, QUARTZ, Feb. 10, 2018, <https://qz.com/1204717/chinas-ant-financial-plans-to-raise-5-billion-reportedly-at-a-valuation-of-100-billion/> (“investors think prospects for next-generation companies like Ant Financial are comparable to top-tier institutions like Goldman Sachs, which had a \$94 billion market cap at the time of writing”).

<sup>191</sup> Shuli Ren, *Ant's Quiet Kingpin in the Storm*, BLOOMBERG, Dec. 26, 2017, <https://www.bloomberg.com/gadfly/articles/2017-12-27/lucy-peng-must-bend-with-the-wind-to-get-ant-financial-its-break>.

<sup>192</sup> Shuli Ren, *Ant's Quiet Kingpin in the Storm*, BLOOMBERG, Dec. 26, 2017, <https://www.bloomberg.com/gadfly/articles/2017-12-27/lucy-peng-must-bend-with-the-wind-to-get-ant-financial-its-break>. For a discussion of the issues surrounding developing world fintechs, see Douglas W. Arner et. al., *The Evolution of Fintech: A New Post-Crisis Paradigm?*, 47 GEO. J. INT'L L. 1271, 1296 (2016).

<sup>193</sup> Julie Steinberg, *Jack Ma's Ant Financial to Raise \$9 Billion, Become World's Biggest Unicorn*, WALL ST. J. Apr. 10, 2018, <https://www.wsj.com/articles/jack-mas-ant-financial-to-raise-9-billion-become-worlds-biggest-unicorn-1523353351>; see also Shuli Ren, *An Ant Financial IPO? Not So Fast*, BLOOMBERG, Feb. 2, 2018, <https://www.bloomberg.com/gadfly/articles/2018-02-02/an-ant-financial-ipo-got-you-excited-not-so-fast>.

particularly interested in the license. Marketplace lenders, including peer-to-peer and other unorthodox lenders, might be “attracted to an OCC special purpose national bank charter because it would reduce licensing and regulatory costs by consolidating supervision under one primary national regulatory structure.”<sup>194</sup> Payments companies like PayPal and Venmo might “look to the charter to obviate the need to obtain money transmission licenses in all 50 states.”<sup>195</sup> As Faisal Khan has observed, “Obtaining money transmitter licenses is no easy feat. It involves a large amount of paperwork, money and time. It can take up to 2 years to amass all 50 state licenses.”<sup>196</sup> Money transmitters “touch” money that is exchanged between two private parties, so a bill paid by a consumer to a cable company through a direct deposit bank account would require a money transmission license, as would a mortgage payment to any firm to which a mortgage originator had sold the mortgage.<sup>197</sup>

### B. The Governing Law

There is already competition for charters in the fintech space – both New York and Utah are offering licenses that may meet the needs of fintech firms.<sup>198</sup> Two virtual currency exchanges – Gemini, owned by the

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<sup>194</sup> Treasury Dep’t, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* 71 (July 31, 2018), <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>.

<sup>195</sup> *See id.*

<sup>196</sup> *How to Get Money Transmitter License for Your Coverage for Your Startup?*, BLOG FAISAL KHAN, Sep. 9, 2016, <https://blog.faisalkhan.com/money-transmitter-license-application-d9dd32286871>.

<sup>197</sup> For a definitive account of the problems of electronic payment transmission see Kevin Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 86 (2013) (“any person engaging in an activity that constitutes “money transmission” must be licensed under state law and comply with a host of regulatory requirements involving financial security, recordkeeping, reporting, and examination.”).

<sup>198</sup> Lalita Clozel, *Fintech Firms Look to Enter Banking Via Century-Old Tactic*, WALL ST. J., Feb. 8, 2018, <https://www.wsj.com/articles/fintech-firms-look-to-enter-banking-via-century-old-tactic-1518085801> (“The industrial loan company charter, available in a handful of states and particularly popular in Utah, allows nonfinancial companies to enter the banking sector without being subject to many of its restrictions, including oversight by the Federal Reserve.”); Press Release, *DFS Superintendent Vullo Submits Comment Letter To Occ In Opposition Of Proposed Special Purpose National Bank Charter For “Fintech” Companies*, Jan. 17, 2017, <https://www.dfs.ny.gov/about/press/pr1701171.htm> (“DFS, as successor to the New York State Banking Department, for decades has licensed nonbank financial services companies, including money transmitters, online lenders, and virtual currency exchanges under state law.”).

Winklevoss twins involved in the founding of Facebook, and itBit – have obtained New York State trust company charters and hope to operate their firms through that regulatory channel.<sup>199</sup> The credit card payments processor, Square, the small-business focused payment processor, has said that it intends to apply for an ILC charter, in order to get direct access to the payments system.<sup>200</sup> SoFi, a peer-to-peer lending business, has asked the FDIC to approve its application for an ILC charter, in which it has raised the possibility that its business that would offer credit cards and take demand deposits – which really would begin to look like banking, though it late withdrew its application.<sup>201</sup>

State regulators have already sued to keep federal regulators from issuing a special fintech banking charter as something beyond the authority of the OCC.<sup>202</sup> The suit is the latest challenge to the not-so-neat boundary between banking and commerce, which both state and federal regulators take quite seriously. The government did not let the commercial giant Walmart get into banking in 2005, though Walmart customers might have appreciated the ability to do their banking where they did their shopping.<sup>203</sup>

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<sup>199</sup> Lalita Clozel, *Are Trust Charters the Key to Simplifying Fintech Regulation?* AM. BANKER, Nov. 8 2016, <https://www.americanbanker.com/news/are-trust-charters-the-key-to-simplifying-fintech-regulation>

<sup>200</sup> Catherine Shu, *Square Will Apply For An Industrial Loan Company License This Week*, TECHCRUNCH, Sep. 7, 2017, <https://techcrunch.com/2017/09/06/square-will-apply-for-an-industrial-loan-company-license-this-week/>. It currently works through a bank, which charges for the service. For a discussion, see Aaron Klein, *FinTechs, Lending and Banking: Can All Three Co-Exist?* 20 No. 5 FINTECH L. REP. NL 1 (Sept./Oct. 2017).

<sup>201</sup> Brena Swanson, *Will Sexual Harassment Claims Cost Sofi Its Bank Charter?* HOUSINGWIRE, Sep. 18, 2017, <https://www.housingwire.com/articles/41330-will-sexual-harassment-claims-cost-sofi-its-fdic-bank-charter>.

<sup>202</sup> See *Conference of State Bank Supervisors v. Office of Comptroller of Currency*, 313 F. Supp. 3d 285 (D.D.C. 2018); *Vullo v. Office of Comptroller of the Currency*, No. 17 CIV. 3574 (NRB), 2017 WL 6512245 (S.D.N.Y. Dec. 12, 2017).

<sup>203</sup> Mehrsa Baradaran, *The ILC and the Reconstruction of U.S. Banking*, 63 SMU L. REV. 1143, 1143–44 (2010) (“The ILC, which is the only banking charter that a commercial firm can operate and is authorized by only a few states, came under intense scrutiny in 2005 when Wal-Mart applied for an ILC charter and attempted to enter the banking industry.”). For discussions, see Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?* 56 AM. U. L. REV. 515, 524 (2007) (“with the likes of Wal-Mart pushing for its own industrial loan corporation, fringe lenders with a history of predatory lending seeking the same thing may have an extremely powerful ally”); Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 Conn. L. Rev. 1539 (2007) (“commercial ownership of ILCs conflicts with the policy of separating banking and commerce, which has been generally followed in the United States since 1787”). Wal-Mart had considered seeking a banking subsidiary for some time. For a discussion, see Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation*



It has made it difficult for insurance and other financial companies to hold federal thrift charters as well.<sup>204</sup> Recently it encouraged commercial entities like General Electric and insurers like MetLife with longstanding lending arms to divest or restructure them.<sup>205</sup> And, more broadly, the government has fallen back in love with the traditional activity restriction, the original form of banking regulation, exemplified by the congressionally required promulgation of the Volcker Rule precluding banks from engaging in hedge-fund-like proprietary trading.<sup>206</sup>

And yet, during this period, the rise of so-called “shadow banks,” or

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*Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 604 (2004) (“Wal-Mart also applied to acquire a thrift, but its application arrived after the deadline for closing the unitary thrift loophole set by Gramm-Leach-Bliley”).

<sup>204</sup> In particular, it forbade commercial firms from holding thrift charters in 1999, unless they held one already. As Art Wilmarth has explained, “federal legislation has closed both loopholes to any new entry, but leading securities firms and life insurers retain control of grandfathered depository institutions.” Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215, 424–25 (2002). For a discussion, see Dain C. Donelson & David Zaring, *Requiem for A Regulator: The Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1793 (2011). In the Dodd-Frank Wall Street Reform Act, the regulation of these financial companies that owned banks changed, in a way that some have found discouraging. As one treatise author has put it,

insurance companies that raced to obtain unitary thrift holding company status and those that acquired small thrifts so that they could obtain TARP funds found that there was consideration to be paid for the goodies. They found themselves under the supervision of the Federal Reserve and subject to what they claimed were ‘impossible’ capital requirements, financial statement requirements and other regulatory burdens, including the Volcker Rule.

KAROL K. SPARKS, INS. ACTIVITIES BANKS (2018) § 5.04. For example, the CEO of Thrivent Financial explained that “In the past, Thrivent was regulated by the Office of Thrift Services (OTS), which got absorbed into the OCC, so today the bank is regulated by the OCC. At the same time, at the holding company level it went from the OTS to the Federal Reserve. And there are additional costs and a burden associated with dealing with two regulators.” Ruth McCambridge, *Thrivent Financial Bank Applies to Become Credit Union: Very Rare but Will it Catch On?* NON-PROFIT Q. Jan. 18, 2012, <https://nonprofitquarterly.org/2012/01/18/thrivent-financial-bank-plans-to-become-credit-union-very-rare-but-will-it-catch-on/>. Thrivent accordingly gave up its thrift charter and exchanged it for a credit union charter. See *id.*

<sup>205</sup> See *GE Dismantles GE Capital*, USA TODAY, April 10, 2010, <https://www.usatoday.com/story/money/business/2015/04/10/ge-selling-real-estate-assets/25564855/>; It did so in part by designating GE Capital as systemically significant, a warning to other commercial financing firms, and an incentive for GE Capital to restructure itself. For a discussion, see Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1834 (2017).

<sup>206</sup> Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1834 (2017).

institutions that offer the same sorts of services as banks, but that do not hold bank charters, has exploded – firms and even individuals can obtain financing from money market funds, mutual and hedge funds, the commercial paper market, or from peer to peer lenders over the internet.<sup>207</sup>

### *C. History of National Charter Expansion*

The OCC charter extension model is best understood as one that cautiously enables established financial institutions to obtain licenses for new lines of business that do not fit within the agency's regulatory model. Credit cards, trust holdings, and shelf charters represent a relaxation of regulatory requirements for already trusted investors or banks who wish to expand their banking businesses. Rather than a testament to the agency's regulatory innovation, the special charters of the OCC look more like an effort to get along with established financial institutions that might like to innovate. The fact that there are so few special charters suggests that the agency views its get along obligations with some suspicion.

OCC claimed authority for special purpose banks in a regulation promulgated in 2003, which provides:

The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 et seq. The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities must conduct *at least one* of the following three core banking functions: Receiving deposits; paying checks; or lending money.<sup>208</sup>

This invocation of core banking functions has a long tradition in OCC regulation; the agency has insisted on participation in the “business of banking” as a criterion for charter eligibility since its founding. Its special purpose charters have reflected this insistence.

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<sup>207</sup> “Shadow banks that are not regulated like banks, but provide financing like banks, have taken market share from conventional institutions.” Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. CORP. L. 559, 564 (2017).

<sup>208</sup> 12 C.F.R. § 5.20(e)(i)(1) (emphasis added). For a discussion of this regulation, which was surprisingly never challenged in court, see Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 70122 (Dec. 17, 2003) (adopting the regulation); Conference of State Bank Supervisors v. Office of Comptroller of Currency, No. CV 17-0763 (DLF), 2018 WL 2023507, at \*2 (D.D.C. Apr. 30, 2018) (discussing the rule, and observing that pursuant to the regulation, “the OCC could charter a special purpose bank that does not receive deposits, so long as the bank pays checks or lends money”).



Its oldest special charter has been used by the subsidiaries of ordinary banks that want to offer their customers credit cards in addition to the usual deposit and loan offerings. Credit card banks were permitted to obtain federal charters if they engaged only in credit card operations and did not accept deposits, meaning that they would need to obtain deposit insurance from the FDIC and be subject to its regulations.<sup>209</sup> The credit card bank usually exists as a bank affiliate that can get around state usury laws, which set maximum rates of interest for loans, rates that credit card issuers are capable of exceeding; the OCC's national preemption power makes this possible.<sup>210</sup> As of January 2018, only nine banks had taken the opportunity to become credit card banks, and most of these are affiliates of other OCC-regulated banks.<sup>211</sup>

More popular has been the special trust charter – although it had not been much more popular. Fifty-five banks hold the trust charter; again, these are usually affiliates of other banks.<sup>212</sup> Trust banks are special purpose entities designed to hold assets identified in a contract between two private parties (in this way they “take deposits” and are thus engaged in the business of banking).<sup>213</sup> Their profits come from fees charged to manage the assets held in trust; trust companies have a fiduciary obligation to put the interests of the beneficiaries of the trust ahead of their own. Trust banks are not insured by the FDIC in most cases, a fact that may have induced the OCC to stop chartering trust banks for years, worried about the prospect of being on the hook for their failure.<sup>214</sup> The real advantage for trusts, as with federal credit card companies, is that the national charter preempts many

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<sup>209</sup> Federal Bank Holding Company Law 2-27. For a guide on the supervision that credit card banks face, see <https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/credit-card-lending/pub-ch-credit-card.pdf>.

<sup>210</sup> “BHCs have historically used specialized credit card banks to ‘seek relief from onerous usury restrictions’ in their home state.” Saule T. Omarova & Margaret E. Tahyar, *That Which We Call A Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 170 (2011).

<sup>211</sup> For the current list of credit card banks, see <https://www.occ.treas.gov/topics/licensing/national-banks-fed-savings-assoc-lists/index-active-bank-lists.html>.

<sup>212</sup> For the current list of national trust banks, see <https://www.occ.treas.gov/topics/licensing/national-banks-fed-savings-assoc-lists/index-active-bank-lists.html>.

<sup>213</sup> As Omarova and Tahyar have put it, “[t]rust companies generally engage in the business of holding and managing money in a fiduciary or representative capacity.” Saule T. Omarova & Margaret E. Tahyar, *That Which We Call A Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 173 (2011).

<sup>214</sup> For the FDIC's approach to trust banks, see [https://www.fdic.gov/regulations/examinations/trustmanual/section\\_10/section\\_x.html](https://www.fdic.gov/regulations/examinations/trustmanual/section_10/section_x.html).

state banking laws, enabling the trust to operate essentially nationwide.<sup>215</sup>

The OCC has occasionally evinced a willingness to charter “bankers’ banks,” and has asserted the power to do so, though no such banks have yet received a federal charter.<sup>216</sup> A banker’s bank is like a nineteenth century clearinghouse, in that it is owned by the banks and is intended to make cross-bank payments easier, and to serve as a backstop for banks that find themselves illiquid, but not insolvent.<sup>217</sup>

Finally, in the wake of the financial crisis, the OCC created a “shelf charter,” allowing investor groups to prequalify for a national bank charter, so that the group could compete in an auction for a failed bank, “assured that the group already has preliminary approval for a national charter into which it could fold the acquired entity,” as Michael Malloy has put it.<sup>218</sup>

The shelf charter, like the other special charters issued by OCC, did not enjoy much take-up, perhaps because OCC made obtaining a shelf charter quite difficult – managing officers of the would be bank had to be identified and available, and shelf charter applicants underwent rigorous oversight.<sup>219</sup> Nonetheless, in 2010, the agency allowed Bond Street Bank to acquire two failing Florida banks via a shelf charter.<sup>220</sup> The OCC authorized another shelf-chartered bank to acquire two small banks in

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<sup>215</sup> See 12 U.S.C. § 1841(c).

<sup>216</sup> OCC, *Comptroller’s Licensing Manual: Charters*, <https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf> (“New banks may be chartered for full-service or special purpose operations, such as .. bankers’ banks”).

<sup>217</sup> 12 C.F.R. § 5.20 (“Bankers’ bank means a bank owned exclusively (except to the extent directors’ qualifying shares are required by law) by other depository institutions or depository institution holding companies (as that term is defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813), the activities of which are limited by its articles of association exclusively to providing services to or for other depository institutions.”).

<sup>218</sup> MICHAEL P. MALLOY, *BANKING LAW AND REGULATION* § 2.02 (2d ed, 2018-1 Supplement). The agency also permitted “inflatable charters,” whereby a very small national bank would be acquired with the presumption that it would acquire other failing institutions; both the shelf charter and the inflatable charter (which is less easy to track, as the agency does not announce the awarding of it) are designed to make it easier for private equity firms to take over failing financial institutions. Office of the Comptroller of the Currency, *Annual Report, Fiscal Year 2010* at 43.

<sup>219</sup> Thomas P. Vartanian & Gordon L. Miller, *2009 Developments in FDIC Failed Bank Resolutions*, A.B.A. BUS. L. NEWSL., Nov. 2009, at 1, 3, available at <http://www.abanet.org/buslaw/newsletter/0089/materials/pp2b.pdf>.

<sup>220</sup> OCC, *OCC Approves First Use of “Shelf Charter” to Acquire Failed Bank*, Aug. 8, 2010, <https://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-8.html>; OCC, *OCC Approves Premier American Bank, National Association To Acquire Second Failed Bank*, Jan. 16, 2010, <https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-12.html>.

Florida and one in South Carolina that year as well.<sup>221</sup> These shelf charters assisted federal regulators with their crisis cleanup, and were essentially the last new-ish charters given out by the agency for years.

These modest success stories aside should not obscure a pattern and practice that disfavors unconventional charters. The OCC has met the needs of credit card banks and trust banks, or, more accurately, the need of nationally chartered banks to operate credit card or trust affiliates, and the market for those needs is admittedly not large – but it has not waded into shadow banking with charters available to all who wish, suggesting that it is unlikely to change things with the special purpose fintech charter.

#### *D. The Fintech Charter*

On July 31, 2018, the OCC invited fintech firms to apply for a special purpose fintech charter. In evaluating applications, the OCC indicated that it “will use its existing chartering standards and procedures for processing applications,” but that it would not require fintech charter applicants to take deposits and obtain deposit insurance.<sup>222</sup>

The decision by the agency to accept charters has been one of long gestation. In 2013, Comptroller Thomas Curry indicated that he was interested in using the special purpose charter to offer fintech companies federal banking oversight. In 2016, the OCC published a white paper on the possibilities, in which it indicated that it saw three potential advantages for fintech companies in obtaining a charter.<sup>223</sup> The first was reassurance – “applying a bank regulatory framework to fintech companies will help ensure that these companies operate in a safe and sound manner so that they can effectively serve the needs of customers.”<sup>224</sup> Second, was the advantage of the nationwide preemption of state banking laws, which simplifies regulation, and, as the OCC put it, “will help promote consistency in the application of law and regulation across the country and ensure that

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<sup>221</sup> OCC, *OCC Approves Use of Second Shelf Charter to Acquire Three Failed Banks*, July 16, 2010, <https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-82.html>.

<sup>222</sup> *Policy statement on financial technology companies eligibility to apply for national bank charters*, July 31, 2018, at 3; Comptroller’s Licensing Manual Supplement at 2 (July 2018) (considering applications by non-deposit taking fintech firms).

<sup>223</sup> Office of the Comptroller of the Currency, *Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective*, (Mar. 2016), <https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf>.

<sup>224</sup> *Id.* at 2.

consumers are treated fairly.”<sup>225</sup> Third, the agency thought that new charterholders, with their different business models, might be good for banking and the cause of banking innovation, which could “make the federal banking system stronger.”<sup>226</sup> The OCC mused in the white paper about which fintech firms might be eligible for licenses – they would have to be engaged in one aspect of the business of banking – and how they agency might modify its capital, business plan, and other regulatory requirements to suit the specialized charter market.<sup>227</sup> The agency requested comments on the white paper.<sup>228</sup>

The OCC then proposed a rule indicating that it “may charter other special purpose banks with business models that are within the business of banking,” and that “as part of the agency’s initiative on responsible innovation in the Federal banking system, the OCC is considering how best to implement a regulatory framework that is receptive to responsible innovation, such as advances in financial technology.”<sup>229</sup>

It also sought comments from the public as to “whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company.”<sup>230</sup> The OCC explained that it was considering various categories of fintech companies, including marketplace lenders that provide loans to consumers and small businesses, companies that provide payment-related services, businesses that engage in digital currencies and distributed ledger technology, and companies that provide financial planning and wealth management products and services. For his part, Comptroller Curry waxed enthusiastic: “[w]e will be issuing charters to fintech companies engaged in the business of banking because it is good for consumers, businesses, and the federal banking system.”<sup>231</sup>

Curry’s successors have agreed. One of them has said that using the special purpose charter for fintech companies would be a “good idea.”<sup>232</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 5-14.

<sup>228</sup> *Id.* at 14-15.

<sup>229</sup> Receiverships for Uninsured National Banks, 81 Fed. Reg. 62,835, 62,837 (Sept. 13, 2016).

<sup>230</sup> Office of the Comptroller of the Currency, *Exploring Special Purpose National Bank Charters for Fintech Companies*, (Dec. 2016), <https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf>.

<sup>231</sup> Remarks by Thomas J. Curry, Comptroller of the Currency, at LendIt USA 2017 at 5 (Mar. 6, 2017).

<sup>232</sup> Remarks by Keith A. Noreika, Acting Comptroller of the Currency, before the Exchequer Club (July 19, 2017) (“Exchequer Speech”), p. 5 (“[C]ompanies that offer banking products and services should be allowed to apply for national bank charters so that

Acting Comptroller Noreika said that fintech charter holders would not be subject to the Bank Holding Company Act, which means that they would not be subject to supervision by the Fed.<sup>233</sup> His successor, Joseph Otting, has said that although he was “not sure what it looks like and how it’s funded,” for fintech charters “there’s a space there that a technology solution can solve.”<sup>234</sup>

Whether it will be permitted to do so will require the resolution of lawsuits by state banking examiners opposing the creation of the special purpose charter – the state supervisors believe that OCC does not have the power to issue the charters. So far, those lawsuits have been dismissed as premature.<sup>235</sup> We have already seen the deference that courts have afforded chartering decisions and broader interpretations of the National Banking Act deference, but there are some modest precedent for the idea that charter expansion could be actionable.<sup>236</sup> A New Jersey district court once held that “the core of the business of banking as defined by law and custom is accepting demand deposits and making commercial loans.”<sup>237</sup> Another federal case held that an institution that did not make loans and accepted deposits could not be chartered as a national bank because it was not engaged in the business of banking.<sup>238</sup>

The agency then invited fintech firms interested in obtaining a special purpose charter to “maintain an open dialogue” with the OCC

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they can pursue their businesses on a national scale if they choose, and if they meet the criteria and standards for doing so.”)

<sup>233</sup> *Why Are Amazon, PayPal, Meeting with Bank Regulators?* AM. BANKER, MAY 18, 2018, <https://www.americanbanker.com/news/why-are-amazon-paypal-meeting-with-bank-regulators> (a fintech charter holder “wouldn’t be a bank for purposes of the Bank Holding Company Act”).

<sup>234</sup> Dan Cohen, *Comptroller Otting: A New Ally For A Fintech Charter?* FINTECHLAWBLOG, Jan. 10, 2018, <https://www.fintechlawblog.com/2018/01/comptroller-otting-a-new-ally-for-a-fintech-charter/>.

<sup>235</sup> *Conference of State Bank Supervisors v. Office of Comptroller of Currency*, No. CV 17-0763 (D.L.F.), 2018 WL 2023507, at \*6 (D.D.C. Apr. 30, 2018); (“The OCC’s national bank chartering program does not conflict with state law until a charter has been issued.”); *Vulo v. OCC*, 2017 WL6512245, (SDNY 2017) (same).

<sup>236</sup> For the deference cases, see *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (holding that the National Banking Act is consistent with permitting a bank to sell annuities); *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 403 (1987) (“the general business of each national banking association” found to be ambiguous, warranting deference).

<sup>237</sup> *National State Bank of Elizabeth, NJ v. Smith*, No. 76-1479 (D.N.J. Sept. 16, 1977), *rev’d as superseded by statute*, 591 F.2d 223 (3d Cir. 1979).

<sup>238</sup> *Independent Bankers Association of America v. Conover*, 1985 U. S. Dist. Lexis 22529 at \*34-\*36 (M.D.Fl. Feb. 15, 1985).

beginning with exploratory pre-charter meetings.<sup>239</sup> It considered a “regulatory sandbox,” or pilot program waiving certain regulations that would permit some banks to explore some fintech applications in a “safe harbor” from regulatory enforcement.<sup>240</sup> The OCC ultimately rejected the idea that fintech might be exempted from the most serious requirements that normal banks have.

Amazon, Google, and Apple have been taking those meetings, and have banded together to form a Washington lobbying group, Financial Innovation Now, which is on the record as supporting the fintech charter.<sup>241</sup>

In a draft supplement to its licensing manual designed to handle new special charters, the OCC indicated that firms that might be eligible for the fintech charter could not “inappropriately commingle banking and commerce.”<sup>242</sup> The OCC has indicated that the special purpose charter will not be available to fintechs that seek to take deposits.<sup>243</sup> The Treasury Department agrees that this should not be the case, as fintechs “should not be permitted to accept FDIC’s insured deposits, to reduce the risk to taxpayers.”<sup>244</sup>

### *E. Policy Implications*

The OCC is funded by fees assessed on charter holders, and so the agency always has an incentive to grow its charter and customer base, but regulatory budget-building is not the only reason for fintech charters. In an era where regulators worry about the growing importance of “shadow banking,” or firms that offer bank-like services without actually holding a bank charter, the idea of bringing fintech lenders into the fold has regulatory

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<sup>239</sup> See OCC, *Licensing Manual Supplement*, July 31, 2018, available at [www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manualsupplement.pdf](http://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manualsupplement.pdf) at 3.

<sup>240</sup> Sara Merken, *OCC Fintech Pilot Goes On After Curry Makes Way for Trump Team*, BNA, Aug. 25, 2017, <https://www.bna.com/occ-fintech-pilot-n73014463724/>.

<sup>241</sup> *Why Are Amazon, Paypal, Meeting with Bank Regulators?* AM. BANKER, MAY 18, 2018, <https://www.americanbanker.com/news/why-are-amazon-paypal-meeting-with-bank-regulators>; <https://www.crowdfundinsider.com/2017/01/94847-financial-innovation-now-support-occ-fintech-charter/>.

<sup>242</sup> See OCC, *Licensing Manual Supplement*, July 31, 2018, available at [www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manualsupplement.pdf](http://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manualsupplement.pdf) at 6.

<sup>243</sup> See *supra* note \_\_ and accompanying text.

<sup>244</sup> Treasury Dep’t, *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation* 73 (July 31, 2018), <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>.

appeal. Capital requirements could be imposed on these firms, making them capable of surviving an economic or other shock. Also, enabling new entries into the financial system should increase competition and impose market discipline on financial firms, long a regulatory policy, and one espoused by all regulators who, like OCC, signed on to the second version of the Basel Capital Adequacy accord, which made “market discipline” one of the three pillars on which it based market supervision.<sup>245</sup>

Obtaining whatever licenses are necessary to operate across state lines offers the prospect of regulatory complexity, meaning that these sorts of fintech firms might want a federal charter to essentially swap many regulators for one. Although it would be inaccurate to call OCC regulation particularly “light touch,” it is the case that the comptroller does not have a maximum interest rate or the sort of usury provisions that many state regulators do impose. Moreover, a charter could come with (though it need not) access to the Fed’s payment systems, which might offer efficiencies for fintech lenders. Currently, fintech firms rely on partnerships with suitably chartered banks to access the national payments system managed by the Fed; the firms may wish to cut out the middleman.<sup>246</sup>

It hasn’t been the case that the unavailability of a fintech charter has hampered innovation or market entry, though it is always difficult to know what would have happened if the OCC had gotten into the space earlier. As the agency indicated in one of its white paper, there were more than 4,000 fintech companies in the US and UK by 2015, with \$43 billion being invested in fintech since 2010.<sup>247</sup> With all of these reasons to proceed, perhaps the surprising thing is that the agency has been so cautious.

The facts on the ground appear to indicate that the OCC is going to be a second mover in the race to regulate fintech, and the early charter interest still leave open the question about what to do with Amazon’s payments processor, and Google and Apple’s wallet payment processors.

The real change the fintech could make to the business of banking would involve a change in the traditional separation of banking and commerce, which as the Acting Comptroller said in 2017, “reaches back to the origins in banking in the United States.”<sup>248</sup> The Comptroller indicated that he may be willing to rethink this very traditional separation because

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<sup>245</sup> For a discussion of Basel II, see <https://www.bis.org/publ/bcbsca.htm>.

<sup>246</sup> Varo is an example. See *supra* Part II.B.1.a.

<sup>247</sup> Office of the Comptroller of the Currency, Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective at 3 (Mar. 2016), available at <https://www.occ.gov/publications/publicationsby-type/other-publications-reports/public-responsible-innovation-banking-system-occ-perspective.pdf>.

<sup>248</sup> Remarks by Keith A. Noreika, Acting Comptroller of the Currency, before the Exchequer Club (July 19, 2017) (“Exchequer Speech”), p. 3.

"mixing banking and commerce can generate efficiencies that deliver more value to customers and can improve banking and commercial company performance with little additional risk."<sup>249</sup> Community banks have feared the entrance of non-bank commercial businesses into the business of banking, and although the agency is not committed itself to offering a fintech charter to a non-banking company, underlying some of the debate over fintech chartering is this central question of whether banking should continue to be so separate from commerce, given that in the technology space commercial firms are increasingly doing things that banks used to do.

The caution is consistent with its general views on chartering, which it does willingly enough, but rarely. Because fintech firms offer the prospect of payment system improvement, OCC may regret the decisions of some firms to stop waiting for the agency to develop the fintech charter that would make nationwide operations relatively seamless.

It should not, however, leap to give charters to any fintech firm, which would demolish the boundary between commerce and banking in a way that would be ill-considered and insufficiently democratic. It would challenge that constraint on regulators that is not always covered by their legal obligations, in that it would upend the settled expectations of regulated industry in a relatively dramatic fashion. Once regulatory initiatives have been institutionalized in a way that has affected investments, it is often better for Congress to do the upending, with its political accountability, than it is for regulators to change everything.

#### CONCLUSION

Reform of the financial charter in the United States is on the table. Some, seemingly including the OCC itself, wish to expand access to national charters for irregular financial firms. Others hope that the charter could be used as a basis for the imposition of real constraints on firms that hold it, as well as on the investment decisions they make. The actual practice of the agency that makes national charter grants suggests that neither policy will be easy to realize. And charter innovation, in particular through the fintech charter, might bite off more than the agency can and should chew.

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<sup>249</sup> *Id.* at 10.



