



December 7th, 2020

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

RE: Figure Bank, National Association: Charter application

Dear Director Gittleman:

Please accept this comment from the National Community Reinvestment Coalition, the National Consumer Law Center® and the Center for Responsible Lending opposing the application from Figure Technologies for a national bank charter and to establish Figure Bank.

The **National Community Reinvestment Coalition (NCRC)** consists of more than 600 community-based organizations, fighting for economic justice for almost 30 years. Our mission is to create opportunities for people and communities to build and maintain wealth. NCRC members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, fair housing and civil rights groups, minority and women-owned business associations, and housing counselors from across the nation. NCRC and its members work to create wealth opportunities by eliminating discriminatory lending practices, which have historically contributed to economic inequality.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC joins these comments on behalf of its low-income clients.

The **Center for Responsible Lending (CRL)** is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 40 years, Self-Help has provided over \$9 billion in financing through 172,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 154,000 mostly low-income members through 62 retail credit union locations in North Carolina, California, Florida, Illinois, South Carolina, Virginia and Wisconsin.

The OCC must reject this application. The OCC does not have the authority to charter a non-depository or a depository that does not accept insured deposits. In addition, it is clear that the proposed structure of Figure Bank is uniquely designed to carry out a full range of banking activities and gain the benefits of preemption while evading state consumer protections and avoiding any obligation to meet the convenience and needs of the communities in which it will accept deposits under the Community Reinvestment Act. If approved, this application will usurp Congressional authority to determine banking activities permissible under the national bank charter and set a dangerous precedent for other entities seeking to avoid consumer and community obligations.

I. The proposed bank is structured to gain the benefits of a national bank charter with none of the responsibilities

Figure Technologies, Inc. (FTI) has applied for a national banking charter for Figure Bank (Figure). In the application, Figure says it will not apply for deposit insurance. Figure is a wholly-owned subsidiary of FTI; Figure Payments Corporation and Figure Lending will be merged into Figure. Figure's business model involves three categories of activities:

1. *A transaction account:* Figure Pay will be a network-branded demand deposit bank account, with a debit card and a corresponding mobile payment app issued through a partnership with a different bank. Figure will approve some Figure Pay account holders for an additional point-of-sale small-dollar line of credit. Figure will act as the non-bank program manager for Figure Pay accounts and Figure Bank will not hold deposits for Figure Pay or provide insurance for those deposits under its national bank charter.
2. *Retail loan products:* Figure plans to offer home equity lines of credit (HELOCs), mortgage refinances, student loan refinances, and personal loans.
3. *Investment services:* Figure will auction loans and loan participations to investors, hold assets under management, and provide certain investment products. All activities, from origination to servicing, will occur on the Provenance blockchain.

The defining feature, for the purposes of this application, is the consideration of uninsured deposits for the purposes of qualifying for a national bank charter and status as a member bank in the Federal Reserve Bank system. Without insured deposits, the Figure Bank should be considered a non-depository, and, as a result, the OCC lacks the authority to approve its application for a national bank charter.

II. The OCC does not have the authority to charter non-depositories

A. Existing law is clear: the business of banking includes accepting insured deposits

Deposit-taking is a bank's unique power, as under federal law, only banks and other chartered depositories can take deposits.¹ Granting a national charter to a non-insured depository runs counter to the National Bank Act (NBA), the Federal Deposit Insurance Act (FDIA), the Federal Reserve Act (FRA), and legal precedent. Section 24 of the National Bank Act describes "receiving deposits" as an essential activity that must be a part of "the business of banking."²

¹ 12 U.S.C. § 378(a)

² 12 U.S.C. § 24

After 1934, the business of banking for a national bank necessarily required that those deposits would be insured. The Federal Reserve Act clearly states that every national bank must be an insured bank:

Every national bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located, become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this chapter and shall thereupon be an insured bank under the Federal Deposit Insurance Act, and failure to do so shall subject such bank to the penalty provided by section 501a of this title.³

Granting a national bank charter to a bank that would take uninsured deposits would run counter to the FRA, which states that all national banks must have Federal Reserve membership and that all Federal Reserve Member Banks must have deposit insurance.⁴ The FDIA maintains the same framework requiring deposit insurance for national banks.⁵ No revision to the law has occurred relating to the mandatory nature of deposit insurance; therefore, it is impossible for such a change to occur outside of Congressional action.

Logically, if a national bank takes uninsured deposits, but the law states that deposits held by a national bank must be insured, then the national bank is not a depository – and as stated in the FRA⁶ and the FDIA,⁷ a national bank cannot be a non-depository. Courts have affirmed the idea that taking deposits is an essential element of "the business of banking" many times: that "the ordinary conception of a bank was of a business which was based primarily on the receipt of deposits,"⁸ that commercial banks are unique by their taking of deposits,⁹ and that "receiving deposits is an indispensable part of the 'business of banking.'"¹⁰ The OCC cannot sever the "business of banking" from the taking of deposits.

The OCC's basis for chartering a non-depository relies on a redefinition of the business of banking under the text in Section 36 of the NBA.¹¹ However, Section 36 concerns the definition of a "branch" and not of banking itself. Section 36 states that a branch is a location "at which deposits are received or checks written, or money lent."¹² Section 36 does not support a change to the meaning of "the business of banking" and does not serve as grounds for the OCC to set out on a radical redefinition of banking.

The OCC should accept the decision of the U.S. District Court for the Southern District of New York decision in *Vullo v. Office of the Comptroller of the Currency*¹³ that under the National Bank Act, the OCC lacks the authority to issue a charter to companies that do not receive deposits, and that under the Administrative Procedures Act, the proper remedy was the "vacatur of [the SPNB charter provision] with respect to non-depository institutions."¹⁴ NCRC, the Center for Responsible Lending and NCLC filed an amicus brief in support of the New York Department of Financial Service's position in the subsequent

³ 12 U.S.C. § 1811

⁴ Section 12B(e)(1) of the Federal Reserve Act (12 U.S.C. § 264).

⁵ 12 U.S.C. § 1811

⁶ Federal Reserve Act (12 U.S.C. § 264), Section 12B(e) (1-2)

⁷ 12 U.S.C. § 1811

⁸ *In re Prudence Co.*, 10 F. Supp. 33 (E.D.N.Y. 1935)

⁹ *United States v. Philadelphia National Bank*, 374 U.S. 321, 326 (1963)

¹⁰ *Vullo v. OCC*, 378 F.Supp.3d 293 (S.D.N.Y. 2019)

¹¹ 12 U.S. Code § 36. Branch banks

¹² 12 U.S.C. § 36

¹³ *Vullo v. OCC*, 378 F.Supp.3d 293 (S.D.N.Y. 2019), *later decision sub nom. Lacewell v. OCC*, 2020 WL 6334895 (S.D.N.Y. Oct. 21, 2020) (entering order).

¹⁴ *Lacewell v. OCC*, 2020 WL 6334895 (S.D.N.Y. Oct. 21, 2020)

appeal by the OCC.¹⁵ Despite the *Vullo* decision, the OCC continues to contend that it has exclusive and absolute authority under the National Bank Act to define what it means to be a bank. The OCC does not have this power.

B. Embedded in subsequent banking laws is the assumption that the deposits held by a bank are insured

Since the passage of these laws, the concept that deposit taking is a foundational aspect of banking and that deposits held by national banks must be insured was incorporated in subsequent laws passed by Congress.

Acting in response to the “runs” on banks that occurred at the outset of the Great Depression, Congress passed the Banking Acts of 1933 and 1935 to establish deposit insurance and create the FDIC as the institution charged with implementing this protection. The Acts said that all national banks must become members of the FDIC.¹⁶ Subsequently, the Federal Deposit Insurance Act of 1950 (FDIA) required national banks "engaged in the business of receiving deposits other than trust funds" to have deposit insurance.¹⁷ Additionally, the FDIA states that any national bank that does not have deposit insurance must forfeit its charter.¹⁸ Likewise, all national banks have to become members of the Federal Reserve System¹⁹ and Figure’s application states that it intends to become a member bank of the Federal Reserve. However, all members of the Federal Reserve system must become FDIC-insured banks.²⁰ Members of the Federal Reserve that do not comply with the rule must forfeit their charters.²¹

The OCC does not have the authority to take this disruptive step – only Congress has the power to make a change of this magnitude.

C. The OCC does not have the authority to exempt a national bank from the requirement that its deposits be insured

The OCC does not have the ability to allow national banks to elect to not provide deposit insurance.

The FDIA defines the term “deposit” very broadly:

The term deposit: the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank or savings association, or a letter of credit or a traveler’s check on which the bank or savings association is primarily liable.²²

¹⁵ Amicus curiae brief of the Center for Responsible Lending, National Consumer Law Center and National Community Reinvestment Coalition in support of Appellee, *Lacewell v. Office of the Comptroller of the Currency*, 2nd Cir. (2020) (no 19-4271)

¹⁶ 12 U.S.C. § 228 Section 12B(e)(1)

¹⁷ 12 U.S.C. § 1811

¹⁸ 12 U.S.C. § 264 Sec. 12B(i)(1)

¹⁹ 12 U.S.C. § 222

²⁰ 12 U.S.C. § 222

²¹ 12 U.S.C. §§ 222, 501a

²² 12 U.S.C. § 1813(l)

Given this explicit and expansive statutory definition of the meaning of “deposit,” the OCC lacks the grounds to exempt the insurance requirement for deposits when considering Figure’s charter application.

D. Permitting a national bank to accept uninsured deposits to fulfill the deposit-taking requirement for a national bank charter is reckless and creates safety and soundness risks

Allowing Figure Bank to receive a national bank charter and permitting it to take uninsured deposits presents safety and soundness risks that are unaddressed in the application. The OCC is responsible for "assuring the safety and soundness" of national banks, and by chartering a bank that relies on uninsured deposits it would be shirking that duty.

Uninsured deposits are subject to severe "run risk" when depositors withdraw a large share of a bank's demand deposits in a short time and "rollover risk" when depositors simultaneously withdraw a large share of the bank’s matured time deposits instead of renewing them. It stands to reason that depositors may hasten to extract their funds from Figure and move them to an insured bank in a financial crisis.

These risks are precisely why national banks and Federal Reserve member banks are required to insure their deposits.

III. If approved, the proposed structure of Figure Bank will provide all the benefits of a bank charter while allowing it to avoid its obligations under the Community Reinvestment Act

If the OCC approves this application, it will establish a blueprint for future applicants who wish to avoid a CRA obligation by permitting uninsured deposits for the purposes of a national bank charter and as a Federal Reserve member bank but not requiring those deposits to be insured. Without insured deposits, the proposed bank can claim that it is not subject to the Community Reinvestment Act.²³ In its place, Figure Bank has proposed a Financial Inclusion Plan (FIP) similar to the FIP proposed in the OCC’s *Exploring Special Purpose National Bank Charter for Fintech Companies*.²⁴ The *Vullo*²⁵ decision invalidated the fintech charter in 2019.²⁶

We believe that the claimed exemption from the CRA is unwarranted since the proposed bank must be required to hold insured deposits. In any case, the proposed FIP is an unsatisfactory substitute, since it does not replace any of the necessary components of a CRA examination and the OCC has provided no guidance on how these plans should be implemented or evaluated.

A. The OCC has not established criteria for determining how to evaluate a bank’s performance under a Financial Inclusion plan, and Figure Bank’s application does not propose an evaluation process.

While Figure has volunteered to provide a FIP, it has claimed it does not have a CRA obligation. This is incorrect. The OCC must require that Figure Bank’s deposits be insured to approve this application, which would require the bank to submit a CRA plan.

²³ 12 U.S.C. § 2902(2).

²⁴ Office of the Comptroller of the Currency. (December 2016). *Exploring Special Purpose National Bank Charters for Fintech Companies*. Retrieved at <https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-special-purpose-nat-bank-charters-fintech.pdf>

²⁵ *Vullo v. OCC*, 378 F.Supp.3d 293 (S.D.N.Y. 2019), later decision sub nom. *Lacewell v. OCC*, 2020 WL 6334895 (S.D.N.Y. Oct. 21, 2020) (entering order).

²⁶ Ryan, John. (2020, August 19). “Congress, not the OCC, decides what is and isn’t a bank.” *American Banker*. Retrieved at <https://www.americanbanker.com/opinion/congress-not-the-occ-decides-what-is-and-isnt-a-bank>

In addition, a FIP cannot serve as a substitute for a CRA plan – there are no established criteria for what should be included in a FIP or evaluation criteria to ensure they are effective. The application says that the “CRA strategic plans of financial institutions of comparable size to the Bank may prove useful,” but the influence of the CRA is only suggestive. The CRA expects banks to develop a plan with measurable goals and to include those details in the charter application.

In addition, Figure’s FIP attempts to claim credit for a transaction account issued by a separate bank, and its delayed implementation suggests that it does not expect to be held accountable to meet the needs of the public at the outset. Figure’s application states that only after the approval of its charter – during the first three years of its de novo period – will the Bank “then establish measurable goals to address the identified credit and community development needs.”

Likewise, the CRA examination process serves an important fair lending enforcement function. Examiners can downgrade the bank’s performance evaluation rating if the bank is the subject of an enforcement action for violations of fair lending laws. In contrast, a fair lending violation would not have an impact in the form of a penalty or sanction to a bank operating a voluntary FIP.

B. There is little evidence that Figure Bank’s proposed FIP will meet the convenience and needs of the communities where it takes deposits.

Figure Bank’s proposed FIP is additionally inadequate because it does not provide sufficient information to evaluate its performance in the communities where it accepts deposits and offers to fund a technology school in place of established community reinvestment activities.

1. The proposed FIP does not adequately identify the geographic areas it will serve.

The Community Reinvestment Act requires that banks be evaluated on their performance in the communities where they accept deposits and these assessment areas are a key component of the CRA evaluation framework. The proposed FIP suggests some geographic targeting to ensure that it meets community needs, but it does not provide the specificity required by the CRA.

Usually, an application is specific about where it would focus its efforts. While Figure suggests that it could operate in Reno or in areas where consumers in aggregate have lower-than-average credit scores, it provides no further detail. Figure says that it will not have a geographical target market. The application provides a map detailing the share of subprime consumers for each county in the United States, with the inference that the uptake of its retail banking products will occur in those counties. This suggests that the uptake of a product is only a matter of making it available. There are many reasons to explain why some people remain outside of the banking system, and many of these are not reflective of products but rather of consumers’ views about banking itself.

2. The impact of the proposed Figure Banking Technology Institute is unclear and is no substitute for well-established CRA performance metrics

We view the likely impact of the Figure Banking Technology Institute (FBTI) with great skepticism. The FBTI appears to be the most significant investment element of Figure's FIP; elsewhere, the application says Figure "may" invest in other qualified opportunity funds. Despite that suggested focus, it is not clear what geographic community FBTI will serve or how it will meet the community's needs and conveniences. The application does not indicate if FBTI will be online, a hybrid, or a physical campus.

Moreover, as discussed earlier, there are no established criteria for determining whether the FBTI is meeting the convenience and needs of the communities where the proposed bank would accept deposits.

Would evaluations grade Figure's FIP based on graduation rates? On enrollment rates among lower-income students? On the share of graduates who find work in their chosen areas of study? Will Figure pay for tuition and related expenses, or will students potentially have to borrow money to pay for the cost of their schooling? Will FBTI qualify for Pell grants? Is it even possible to start a technology institute in less than one year?

FBTI may never materialize, as Figure only promises to make contributions from profits. Moreover, there could be high fixed costs to starting a technology institute, so the portion of profits attributed to FTI may remain in an accrual account for some time before the first student enrolls.

IV. Approval of the application would pose severe risks to consumers by facilitating evasion of state consumer protection laws by loosely regulated "banks."

The application does not preclude Figure's use of a charter to evade important state interest rate and consumer protection laws. Already several banks are using their charters to help non-bank lenders originate loans at high interest rates that are likely illegal and that the banks are not offering directly.²⁷ Additionally, non-banks are seeking lightly regulated charters, like industrial loan company (ILC) charters and what it appears Figure envisions here, to evade state laws directly themselves. Figure's proposal to facilitate point-of-sale small-dollar lines of credit in partnership with related non-bank entities raises a particular red flag: novel high-cost point-of-sale financing products have recently appeared on the scene, some of them loans disguised as retail installment contracts, and are a growth area for predatory financing.

Figure's application states that it will cap rates at 36%. But Figure has not committed to complying with state interest rate limits that are lower than 36%, as any non-bank is required to do. Indeed, a key feature of the Military Lending Act's fee-inclusive 36% interest rate limit, with which some lenders boast compliance on all loans (including those made to borrowers not covered by the MLA), is that the MLA rate limit *does not preempt* stronger state laws -- i.e., interest rate limits lower than 36%, which the majority of states have on installment loans.²⁸ But lenders tend to disregard that fundamental non-preemptive element of the MLA when they claim to comply with the law for all borrowers.

In addition, with respect to affordability, the application speaks only to loan size and does not discuss responsible underwriting for ability to repay. Approval of an application like Figure's will likely lead to more abuse of bank charters to evade interest rate caps and consumer protections.

IV. Conclusion

We urge the OCC to reject this application. We believe there is clear evidence that the proposed bank is intentionally structured to gain the benefits of a national charter while being subject to none of the obligations that come with it. The proposed structure conflicts with existing banking law and if approved, sets a harmful precedent for other banks seeking to evade consumer protections and CRA obligations. By failing to insure the deposits it holds and offering its customers insurance on its deposit accounts through a partner financial institution, the bank is not eligible for a national bank charter and cannot be a Federal Reserve member bank.

²⁷ See Testimony of Lauren K. Saunders before the House Financial Services Committee on Rent-A-Bank Schemes and New Debt Traps: Assessing Efforts to Evade State Consumer Protections and Interest Rate Caps (Feb. 5, 2020), *available at* https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/Lauren-Saunders-Testimony-on-rent-a-bank-hearing-REVISED-2-5-20-1.pdf.

²⁸ https://www.nclc.org/images/pdf/high_cost_small_loans/fact-sheet-apr-caps-for-installment-loans.pdf

If the OCC approves this application, it will put consumers at risk, take yet another step to undermine the Community Reinvestment Act and usurp Congressional authority to define the business of banking.

We have also have urged that the 30-day comment period be extended to fully review the significant ramifications of this application and allow for Congressional review of the proposal and its implications for banking policy. We reiterate that request here and note that, to date, that request has been ignored.²⁹

We also take this opportunity to restate previous requests to halt the approval of any national bank charter applications by non-depositories in the absence of Congressional action to redefine the definition of the business of banking and a clear framework for evaluating the ability of non-depositories to meet the convenience and needs of the communities they serve under the Community Reinvestment Act.

If you have any questions, please contact Jesse Van Tol, Chief Executive Officer of NCRC, or Tom Feltner, Director of Policy, at (202) 524-4889 or tfeltner@ncrc.org.

²⁹ American Bankers Association, Bank Policy Institute BPI, Center for Responsible Lending, Consumer Bankers Association CBA, Credit Union National Association, Independent Community Bankers of America ICBA, National Association of Federally Insured Credit Unions, National Community Reinvestment Coalition, National Consumer Law Center, The Clearing House. (2020, November 20). "Joint Trades Letter to OCC re Novel National Bank Chart Applications." Retrieved at <https://www.aba.com/advocacy/policy-analysis/joint-trades-letter-to-occ-re-novel-national-bank-chart-applications>