Ann E. Misback, Secretary

Board of Governors of the Federal Reserve System

20th Street and Constitution Avenue, N.W.

Washington, DC 20551.

RE: Docket No. OP-1747, Proposed guidelines to evaluate requests for accounts and services at Federal Reserve Banks.

Comment of David Zaring, Professor, Department of Legal Studies and Business Ethics, The Wharton School

I appreciate the opportunity to write in response to your invitation to comment on your guidelines to evaluate requests for accounts and services at the federal reserve banks by nontraditional financial institutions. In my view, the reserve banks have the legal authority to entertain the requests, and that there is good reason to consider extending access to these services to some fintech institutions, as Fed counterparts like the Bank of England have done. I have no financial interest in the matter, but have written about fintech charters. *See* David Zaring, *Modernizing the Bank Charter,* 61 WM. & MARY L. REV. 1397 (2020).

More broadly, I have written over fifty articles on administrative law and financial regulation, and have recently published a monograph on *The Globalized Governance of Finance*, that considers the international scheme for ensuring that banks are adequately capitalized in detail. I am one of the twenty most cited active scholars of administrative law in general, and ten most cited in financial regulation in particular. Before entering the academy and winning tenure at

Wharton, I served as a litigator in the Federal Programs Branch of the Department of Justice, where I defended, among other things, administrative law cases brought against government agencies.

In this brief comment, I would like to observe that:

1. The Fed is under no obligation to make its payment services available to any particular financial technology firm. 12 U.S.C. § 248a provides that those payment services "shall be available to non-member depository institutions." But many fintechs, including any fintechs that would be covered by the OCC's fintech charter, would not take deposits, and so would not be covered by this discretionless legal command. It may be better policy to develop some very clear standards for eligibility, for certainty and predictability reasons. But the Fed's hands are not tied when it comes to fintechs and payments.

2. The OCC's fintech charter is a good idea, with bipartisan support, and it could prosper if paired with access to the Fed's payments system. The fintech charter was devised during the Obama administration, and launched during the Trump administration. Other countries have issued special charters for fintechs, and some have allowed the fintechs to access the central bank's payment system. England, for example, allows these firms to access the Bank of England's payment system. This access has been paired with the growth of a vibrant fintech sector in that country. For comparative reasons alone, it is worth retaining the option of allowing appropriately safe and sound fintechs to access the Fed's payments rails so that American fintechs could operate on a roughly level playing field with their foreign counterparts.

In 2018, the United Kingdom attracted $16.1 billion in fintech investment, compared to $14.2 billion in the United States.[1] In contrast to the United States, which has not yet issued a

[1] Consultancy.uk, *UK Tops US for FinTech Investment, KPMG Study Shows* (Aug. 14, 2018), https://www.consultancy.uk/news/18291/uk-tops-us-for-fintech-investment-study-shows.

fintech charter (though the OCC has issued trust charters to three fintechs), the United Kingdom utilized its national banking regulator, the Financial Conduct Authority (FCA), to reach out to fintech companies and help them "navigate the regulatory framework and apply for a business license."[2] The FCA also allowed fintech companies to operate in a "regulatory sandbox," whereby they could "experiment with products in a modified regulatory framework, either in a controlled testing environment or through regulatory relief whereby agencies suspend certain regulations for novel business practices."[3] This allowed the FCA to observe a fintech product's "effect on consumers and engage with new market participants regarding products that do not fit neatly into the existing regulatory structure."[4] Federal regulators could do the same for American fintechs.

American fintech firms may succeed, or they may not, but many of them have offered inexpensive access to financial services to underserved citizens. Peer-to-peer lenders, for example, have helped indebted individuals reduce the interest payments made on their credit card debt. Younger Americans have made extensive use of phone-based payments systems like Venmo. Not every fintech will provide consumers with access to low cost financial services – but some could, and providing these firms with access to the payments system would obviate the need for a "rent-a-bank" relationship with a chartered depository institution, which increases costs with little obvious safety and soundness benefit.

3. The Fed's reserve banks have the discretion to offer nondepository financial technology firms access to the Fed's payment system.

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[2] Pew Trusts, *How Can Regulators Promote Financial Innovation While Also Protecting Consumers?* (Aug. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/reports/2018/08/02/how-can-regulators-promote-financial-innovation-while-also-protecting-consumers.

[3] *See id.*

[4] *See id.*

Those institutions could gain access as national banks chartered under the OCC's special-purpose bank charter, and make the case for access to the payments system through that route. The Fed has extended access to the payment system to the OCC's other special purpose national banks: trust banks and credit card banks. There is no reason to treat financial technology firms differently.

Or, it is possible that fintech firms with state charters could apply for access to the payments system, though I will not address that possibility in this comment.

12 U.S.C. § 342 provides that "[a]ny Federal reserve bank may receive from any of its member banks, or other depository institutions...deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, [etc.]...." Once again, fintechs that received special purpose charters could qualify as national banks – the Fed requires that national banks be members of the Federal Reserve System. The Supreme Court has said that this provision does not "impose upon reserve banks any obligation to receive" Farmers & Merchants Bank v. Federal Res. Bank, 262 U.S. 649, 662 (1923). Nonetheless, it gives the reserve banks the power to extend payments service access where appropriate. In that sense, the proposed guidelines outlining the considerations for making that decision is welcome.