February 11, 2026

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

Re: National Bank Chartering [Docket ID OCC-2025-0768]

The Conference of State Bank Supervisors ("CSBS")[1] provides the following comments on the proposed rule issued by the Office of the Comptroller of the Currency "(OCC"): *National Bank Chartering*.[2] Although aligning OCC regulations more closely with statutory text may appear benign, CSBS is concerned that replacing the term "fiduciary activities" with "operations of trust companies and activities related thereto" in national trust company ("NTC") regulations could dilute — or even remove — a critical National Bank Act ("NBA") constraint on how NTCs may operate. Simply removing the word fiduciary from the regulation does not change the NBA requirement that NTCs must be engaged predominantly in fiduciary activities.

The OCC may not use the NTC charter to authorize a new class of national bank that is neither predominately engaged in the fiduciary operations of a trust company nor in receiving deposits as an insured national bank. While the agency has made clear its ambition to establish broad, universal chartering authority for national financial services companies,[3] the Supreme Court has held that federal agencies may not unilaterally reinterpret the limits of their statutory authority to advance their own policy objectives.[4]

Accordingly, CSBS proposes several amendments to the OCC's chartering regulations to ensure that the agency's practices properly align with the specific, limited chartering authorities Congress has explicitly provided in the NBA.

EXECUTIVE SUMMARY

The OCC should clarify that NTCs must predominantly engage in fiduciary activities, and any nonfiduciary activities must be incidental to carrying out an NTC's trust business.

[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, the District of Columbia, and the U.S. territories.
[2] OCC, Notice of Proposed Rulemaking, *National Bank Chartering*, 91 Fed. Reg. 1098 (Jan. 12, 2026)(hereinafter "Proposed Rule" or "Proposal").
[3] *See* 12 C.F.R. § 5.20(e)(1)(i); *see also* OCC Interpretive Letter No. 1176 (January 11, 2021) (hereinafter "IL 1176").
[4] *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

The proposal would revise the current regulation limiting NTCs to "fiduciary activities" by instead authorizing them to engage in "the operations of trust companies and activities related thereto." While the proposed language mirrors the NBA, this change should not be used as a pretext to reinterpret or expand the scope of permissible NTC activities.

Congress authorized the OCC to charter three types of institutions: (1) national banks, to carry out the business of banking; (2) NTCs, to conduct fiduciary trust activities; and, (3) bankers' banks, to conduct correspondent banking.

National banks must accept deposits and maintain FDIC insurance; NTCs, by contrast, were authorized by Congress to conduct fiduciary activities comparable to those handled by the trust departments of national banks. Because they do not engage in the business of banking, NTCs are not required to obtain deposit insurance and are not subject to Bank Holding Company Act or certain other prudential requirements – such as prompt corrective action capital standards – in the same way they apply to insured depository institutions. While NTCs are authorized to engage in incidental activities in support of their fiduciary trust business, the NBA does not authorize the OCC to charter an NTC primarily engaged in nonfiduciary or banking activities.

Rather than clarifying the permissible operations of an NTC, by removing the word fiduciary from the regulation and asserting that NTCs may engage in "nonfiduciary activities," but failing to define which "nonfiduciary" activities are permissible to an NTC and to what degree, the OCC injects a fatal dose of ambiguity into the regulation. The OCC must cure this ambiguity and adhere to the confines of NBA authority.

The OCC may not look to state law to contrive authorities that Congress has not granted it through the NBA or other federal banking laws.

The NBA and judicial precedent likewise foreclose the OCC's assertion that an NTC may engage in any nonfiduciary activity simply because a state trust company is permitted to do so under "home state" law. The OCC's ability to "bootstrap" state law extends only to fiduciary activities authorized in the NBA or fiduciary activities authorized for other trust companies in an NTC's "home state."[5] While some "host states" may recognize these home-state-authorized fiduciary activities, the NBA does not grant broad nationwide preemption and exporting authority for these "bootstrapped" authorities. Instead, an NTC can only engage in "bootstrapped" activities in host states to the same extent as other state-chartered entities from the NTC's home state. Otherwise, an NTC could "bootstrap" any state nonfiduciary activity and export it nationwide – granting NTCs competitive advantages over state trust companies and undermining the principle of competitive equality between home state trust companies and NTCs that Congress sought to establish in the NBA.[6]

[5] We use the term "home state" to refer to the state in which an NTC is currently acting as a fiduciary and the term "host state" to refer to a state which an NTC seeks to expand its fiduciary activities.

[6] *See* 12 U.S.C. § 92a(a)-(b). *See also* 56 Cong. Rec. H. 5576 (1918) (remarks of Rep. Phelan) (stating that section 92a was intended to put national banks and state-chartered fiduciary institutions "upon precisely the same footing with reference to these fiduciary powers").

Allowing NTCs to engage predominantly in nonfiduciary activities invites regulatory arbitrage, undermining competition, consumer protection, and financial stability.

Even if the OCC possessed the chartering authority it incorrectly asserts, authorizing NTCs to engage predominantly in nonfiduciary activities would lead to serious adverse policy outcomes. Such institutions would fall outside the scope of core federal banking laws, resulting in regulatory arbitrage, competitive distortions, and an unauthorized mixing of banking and commerce. These "non-trust" trust companies would also inappropriately skirt important state consumer financial laws that they would otherwise be subject to as national banks, state banks, or state-licensed nonbanks.

Congress did not give the OCC open-ended, "choose your own adventure" chartering authority.

CSBS also strongly opposes the assertion in the existing chartering regulation that the OCC may charter a special purpose national bank that neither receives deposits nor maintains FDIC insurance. The NBA does not grant the OCC open-ended authority to charter a national bank or NTC that engages in any single banking or trust activity, any incidental activity, or any collection of such activities authorized at the OCC's discretion. Although the OCC's chartering regulations and various agency interpretations claim that this authority exists, that assertion is not supported by the NBA and other controlling federal banking laws.

Congress has not provided the OCC with unlimited discretion to charter institutions that assemble their own customized mix of banking, trust, or incidental activities. The OCC must conform its chartering regulations with the federal statutory scheme outlined in the NBA and other federal banking laws.

RECOMMENDATIONS

1. The OCC Must Commit to a Definitive Interpretation of the NBA. The proposed rule replaces the limitation that NTCs engage in "fiduciary activities" with authorization to engage in "the operations of trust companies and activities related thereto," while simultaneously stating that NTCs may engage in "non-fiduciary activities." The proposal does not specify:

- What activities qualify as "non-fiduciary;"
- Whether such activities may be conducted as a primary business line; or
- Whether NTCs must predominantly engage in fiduciary activities.

This ambiguity is itself a fatal defect. The OCC must expressly state which of the following interpretations it adopts:

A. Narrow Interpretation (Incidental Activities Only) – The rule authorizes NTCs to engage predominantly in fiduciary activities under 12 U.S.C. § 92a, with only incidental non-fiduciary activities that are necessary or related to carrying out the trust business; or

B. Broad Interpretation (Predominantly Non-Fiduciary) – The rule authorizes the OCC to charter NTCs that predominantly engage in non-fiduciary or banking activities, with fiduciary activity being incidental or optional.

2. If the OCC Adopts the Narrow Interpretation, the Rule Text Must Say So. If the proposal merely clarifies NTC authority to conduct incidental non-fiduciary activities, the OCC should revise the regulatory text to reflect this limitation expressly. At a minimum, the final rule must:

A. State that NTCs must predominantly engage in fiduciary activities permitted under 12 U.S.C. § 92a;
B. Specify that non-fiduciary activities must be incidental and directly related to the conduct of fiduciary trust business; and
C. Foreclose interpretations permitting NTCs to engage primarily in banking or other non-fiduciary activities.

Failure to codify these limits would leave the scope of the OCC's asserted authority indeterminate and invite *post hoc* reinterpretation, contrary to settled Administrative Procedure Act ("APA") principles.

3. If the OCC Adopts the Broad Interpretation, the Rule Exceeds Statutory Authority. If the OCC adopts — or refuses to disclaim — the broad interpretation of the proposal, the rule would exceed the OCC's chartering authority under the NBA. Congress has not authorized the OCC to charter NTCs that predominantly engage in non-fiduciary or banking activities, nor may the OCC rely on state law to bootstrap non-fiduciary powers not granted by federal statute.

Adopting such a broad interpretation would constitute an unlawful expansion of OCC chartering authority and violate the APA.[7]

4. Failure to Respond Meaningfully Will Constitute Arbitrary and Capricious Action. This comment letter places the OCC on notice of:

- The rule's core ambiguity;
- The precise statutory limits implicated; and
- The specific textual changes required to cure the defect.

If the OCC adopts a final rule without clearly resolving this ambiguity and responding substantively to these objections, such action would reflect a failure to consider an important aspect of the problem and a failure to engage in reasoned decision making, in violation of the APA.[8]

Absent these actions, the final rule will be legally defective — either because it goes beyond the OCC chartering authorities provided under the NBA or because it fails to meet APA requirements.

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[7] 5 U.S.C. § 706(2)(C).
[8] 5 U.S.C. § 706(2)(A).

POLICY AND LEGAL CONCERNS WITH THE PROPOSAL

I. The OCC should clarify whether the proposed rule is intended to authorize the OCC to charter national trust companies that engage predominantly in nonfiduciary activities.

Currently, the OCC's chartering regulation[9] provides that the OCC is authorized to charter two classes of special purpose banks:

(1) A special purpose national bank "that limits its activities to . . . activities within the business of banking" provided the bank "conduct[s] at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money."[10]
(2) A special purpose national bank "that limits its activities to fiduciary activities."[11]

The proposed rule would revise Section 5.20(e)(1)(i) to replace the phrase "fiduciary activities" with the phrase "the operations of trust companies and activities related thereto" in the description of the NTC charter. This phrasing is drawn directly from the NBA chartering statute.[12]

The stated purpose of the proposed rule is to clarify NTC authority "to engage in non-fiduciary activities in addition to their fiduciary activities."[13] The proposed rule does not explain what "non-fiduciary activities" means in this context. Presumably, the proposal is referring to activities other than the "fiduciary activities [performed] under the authority of 12 U.S.C. 92a."[14] Furthermore, given that the only example of "non-fiduciary activities" explicitly referred to in the proposal are "custody and safekeeping activities," which are also activities that are "authorized . . . as part of the business of banking under 12 U.S.C. 24(Seventh),"[15] it can be inferred that "non-fiduciary activities" at least includes custody activities, but may also include other banking activities.[16]

The proposed rule does not state whether a certain proportion of an NTC's activities must be fiduciary activities or what proportion may be nonfiduciary activities. Presumably, at least some amount of an NTC's activities must be "fiduciary" within the meaning of Section 92a.[17] At the same time, the proposal does not specify any limit as to the amount or type of nonfiduciary activities in which NTCs may engage.

Given this lack of clarity, a wide range of inferences could be drawn regarding the intent and impact of the proposed rule. On the one hand, it could be inferred that the proposed rule is merely intended to clarify that the OCC may charter NTCs that predominantly engage in fiduciary activities but also

[9] 12 C.F.R. § 5.20(e)(1)(i).
[10] Referred to herein as a "special purpose national bank" or "SPNB".
[11] Referred to herein as a "national trust company" or "NTC".
[12] 12 U.S.C. § 27(a).
[13] Proposed Rule at 1098.
[14] *Id.*, at 1099 (referred to herein as "fiduciary activities").
[15] *Id.* (referred to herein as "banking activities").
[16] *Id.*
[17] Indeed, if an NTC were not required to engage in any fiduciary activities at all, then the core banking functions proviso of Section 5.20(e)(1)(i) would be rendered surplusage as an NTC could engage in any activities within the business of banking without engaging in any core banking functions, which presumably the OCC does not intend.

incidentally engage in custody activities. This would be a permissible interpretation of the NBA authorizing language.

On the other hand, it could be inferred that the proposed rule is intended to allow the OCC to charter NTCs that predominantly engage in nonfiduciary, banking activities and only incidentally engage in fiduciary activities, if at all. We strongly oppose this interpretation, as it would assert authority that the OCC clearly lacks and further because exercising such authority would have numerous disturbing policy consequences.

The OCC lacks the statutory authority to charter NTCs that predominantly engage in nonfiduciary activities for many of the same reasons that the OCC lacks the authority to charter SPNBs that do not engage in receiving deposits and are not FDIC-insured. CSBS has consistently opposed the OCC's chartering regulation in its current form as it relates to the chartering of uninsured SPNBs. Indeed, CSBS has sued the OCC twice over its attempted exercise of this SPNB chartering authority.[18] Given that the proposed regulation would perpetuate this unlawful portion of the OCC's chartering regulation, we are compelled to reiterate our opposition to the regulation as it stands.

In the remainder of this letter, we assume, in light of the aforementioned lack of clarity, that the proposed rule is intended to provide that the OCC may charter NTCs that engage predominantly in nonfiduciary activities. We outline the legal and policy reasons that we oppose this assertion of authority as well as the reasons that we oppose the existing regulation's assertion that the OCC may charter an SPNB that does not engage in receiving deposits and is not FDIC-insured. After explaining why we are opposed to both the proposed and current regulation, we recommend specific changes to the regulation to bring it into conformity with the statutory limits of the OCC's chartering authority.

II. The OCC's chartering authority is specific and limited.

The proposed rule, as well as the regulation it amends, operates on the faulty premise that the OCC's chartering authority is virtually unlimited. Specifically, the OCC's chartering regulation is premised on the notion that, under its general chartering authority, the OCC has the power to charter an institution that limits its operations to any activity or activities that are permissible for national banks.[19] This premise is incorrect as it fundamentally misconstrues the nature of the OCC's chartering authority under the NBA.

The NBA is a general incorporation law enabling the organization of institutions for certain specified business purposes. Initially, the NBA only allowed for the formation of entities "to carry on the business

[18] *See Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, 17-cv-763-DLF, Doc. No. 1 (Apr. 26, 2017); *Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, Case 1:18-cv-02449-DLF, Doc. No. 1 (Oct. 25, 2018).

[19] *See* OCC, Notice of Proposed Rulemaking, 68 Fed. Reg. 6363, 6370–71 (Feb. 7, 2003) ("a limited purpose national bank may exist with respect to activities other than fiduciary activities, provided the activities in question are within the business of banking"); *see also* IL 1176 ("the OCC, under its general chartering authority, has the power to charter a national bank that limits its activities to those of a trust company and activities related to the same").

of banking."[20] Subsequently, however, Congress amended the NBA to enumerate other special purposes for which entities could be formed, namely, to carry on the business of a trust company or the business of a correspondent bank.[21] Thus, the NBA enables incorporation only for certain specified purposes that each involve carrying on a business of a different general character and nature.[22]

Furthermore, as a law authorizing incorporation for specified purposes, the NBA grants powers to the institutions organized thereunder to carry out the business purpose for which they are chartered and limits their powers to such purposes.[23] Specifically, since the OCC charters institutions to carry on a business of a certain character, OCC chartered-institutions must possess and exercise those powers that are essential to carrying on such business. For instance, as explained in detail below, from the time of the NBA's enactment through today, exercising the power to receive deposits has been an indispensable power of national banks because they could not otherwise achieve the purpose for which they are chartered, namely, to carry on the business of banking.

In this way, the NBA's enumeration of a specific business purpose for which institutions may be chartered also serves as a limitation on the OCC's chartering authority. Indeed, the OCC would lack the authority to charter an institution which did not possess or exercise such an indispensable power because the institution would be incapable of carrying on the business for which they are chartered. It is this limitation which the proposed rule and the existing chartering regulation fail to acknowledge.

Both the proposed rule and current regulation fail to acknowledge this limitation because they are premised on the notion that all powers granted to chartered institutions are permissive in nature, none are indispensable and essential to carrying out their specified business purpose. Rather, under the OCC's view, the specified business purposes for which it is authorized to charter institutions are thoroughly evolutionary and have no inherent nature or character which demands the exercise of any particular powers granted to such institutions.

This premise, if carried to its logical conclusion, leads to absurd results because it implies that the OCC's chartering authority is virtually unlimited. Indeed, under the OCC's view, it could charter a national bank that, for instance, solely provides courier services, data processing services, or internet access services

[20] 12 U.S.C. § 27(a).
[21] 12 U.S.C. § 27(a)-(b).
[22] *See* 18A Am Jur 2d Corporations § 164 ("Corporations may be organized for general or special purposes. 'Purpose' clauses . . . refer to the general objects or aim sought to be attained, and state the general nature of the corporation's business, while "power" clauses indicate the manner in which the purposes may be pursued."). *See also Independent Bankers Assn. of America v. Conover*, No. 84- 1403-Civ-J-12, 1985 U.S. Dist. LEXIS 22529, at *34 (M.D. Fl. Feb. 15, 1985) at *35. ("It is clear that when Congress has wanted to expand the authority of the Comptroller to charter national associations that are not to be engaged in the business of banking, it has done so through specific amendments. If Congress had intended that the Comptroller have broad chartering authority over various types of financial institutions, there would have been no need for the trust company and bankers' bank amendments, and those amendments would not have been narrowly drawn.").
[23] *See* 18A Am Jur 2d Corporations § 166 ("Corporations organized for special purposes are limited in their powers to the purposes for which they are organized."). *See also* Lev Menand & Morgan Ricks, Federal Corporate Law and the Business of Banking. 88 U. Chi. L. Rev. 1361, 1409-1417 (2021).

given that all such activities have been deemed by the OCC to be permissible for national banks.[24] Of course, nobody would seriously regard a data processor, a courier service, or an internet service provider as a bank, but this is the irrational outcome entailed by the OCC's chartering regulation.

Clearly then, the OCC's chartering regulation is based on a faulty premise. The statutorily specified purposes for which the OCC is authorized to charter institutions are not mere recommendations from Congress. Rather, they establish the general nature of the businesses that require chartering by the OCC and, as a corollary, establish the outer bounds of the OCC's chartering authority. As explained below, each expressly authorized business purpose in the NBA delineates a business of a distinct character and nature and the exercise of certain powers granted to chartered institutions is essential to carrying out these separate and distinct purposes. The OCC, as a chartering authority, is simply not empowered to redefine the general character of these expressly authorized business purposes. That power lies solely within the purview of Congress.

III. The OCC's authority to charter institutions is limited to chartering institutions for business purposes expressly authorized in statute.

Currently, the NBA authorizes the OCC to charter three distinct types of institutions for three specific business purposes:

(1) Chartering national banks to carry on the banking business;
(2) Chartering NTCs to carry on the trust business; and
(3) Chartering national bankers' banks to carry on the correspondent banking business.

These three types of institution each carry on a business of a distinct nature and character and the powers they exercise to conduct business derive from separate and distinct grants of authority.

We outline below the limits of the OCC's chartering authority with respect to national banks and NTCs and explain how the OCC's current chartering regulation and proposed rule exceed these limits. Since the proposed rule (to the extent that it purports to allow the OCC to charter NTCs that predominantly engage in nonfiduciary activities) would not only exceed the limit of the OCC's NTC chartering authority, but also the limits of the OCC's national bank chartering authority, we first explain the limits of the OCC's authority to charter national banks before turning to the limits of the OCC's authority to charter NTCs.

A. National banks are chartered to carry on the business of banking, and, consequently, must exercise the power to receive deposits.

The NBA empowers the OCC to charter national banks "to carry on the business of banking."[25] To carry on the business of banking under the NBA, a national bank must possess and exercise the power to receive deposits. Given that deposit-taking is indispensable to carrying on the business of banking, the

[24] *See* OCC, Activities Permissible for National Banks and Federal Savings Associations, Cumulative (Oct. 2017).
[25] 12 U.S.C. § 27(a).

OCC's extant chartering regulation is legally invalid in that it asserts that the OCC may charter an SPNB that limits its activities to forego engaging in deposit-taking.

1. Under the NBA, engaging in receiving deposits is indispensable to carrying on the business of banking.

Based on the text, structure, and purpose of the NBA, national banks must engage in receiving deposits to carry on the business of banking. The NBA was enacted to enable the formation of associations for "carrying on the business of banking."[26] The use of the term "bank" and "banking" is itself an indication that the drafters intended to enable the formation of depository institutions because contemporary dictionaries and legal treatises treat deposit-taking as an indispensable function of banks and the banking business.

For instance, one contemporary dictionary explained that the business of a bank is to establish a "common fund" through issuing notes and receiving deposits and then to employ this fund, together with its capital, in lending and investing.[27] Contemporary legal treatises generally defined banking according to the functions which banks perform, the usual division being receiving deposits, making discounts, and issuing/circulating notes. Banks were then defined as institutions engaged in all three functions, or at least the functions of deposit and discount.[28] These treatises were also quite clear that an institution that does not engage in receiving deposits would not be considered a bank.[29]

The purpose and structure of the NBA at the time it was enacted likewise underscores the indispensable relationship between deposit-taking and the banking business that the NBA was intended to authorize. Prior to the enactment of the NBA, paper currency in the United States consisted of notes issued by state banks. But state bank notes did not serve as a uniform currency because state banks were reluctant to pay out the notes of other banks at par (*i.e.*, at face value) in times of stress. The NBA was

[26] 12 U.S.C. § 21.

[27] *See* Joseph Worcester, Dictionary of the English Language, 112 (1860).

[28] *See* Joseph K. Angell and Samuel Ames, Treatise on the law of private corporations aggregate, 39-40 (7th ed. 1861); *see also* Condy Raguet, A Treatise on Currency & Banking, 67-68 (2d ed. 1840).

[29] *See* Raguet, *id.* at 71 ("In the nine hundred banks and branches which now exist in the United States, all the operations of these three distinct institutions are combined"); Angell and Ames, *id.* at 40 (" the Bank of the United States, and the State Banks in this country, are all of them banks of deposit, discount, and circulation"); Francis B. Tiffany, Handbook of the law of banks and banking, at 3-4 (1912) ("but an institution that practices only discount, without receiving deposits or issuing bank notes is simply an investor of its own money, as any individual may be"); *see also* John T. Morse, Jr., *A Treatise on the Law Relating to Banks and Banking*, xxxvii (1st ed. 1870); Charles F. Dunbar, Theory and History of Banking, 18 (1891) ("For the transaction of this business in the modern world both of the functions 'discount' and 'deposit' are indispensable. . . . If it practices the former only, it is simply an investor of its own money, as any private individual may be . . . ."); John M. Zane, The Law of Banks and Banking, 27 (1900) ("But this division is not valuable, for the reason that there are no banks purely of issue or purely of discount. The national banks alone are banks of issue, but they are also banks of deposit and discount. State banks of issue no longer exist, but all commercial banks, corporate as well as private, are banks both of deposit and discount.").

enacted to provide for a uniform national currency through the formation of national banks that would issue national bank notes secured by government bonds.[30]

The function of receiving deposits was as indispensable to accomplishing the NBA's purpose as the function of note issuance itself. Indeed, one of the mechanisms by which national bank notes were made a uniform currency was the requirement for par acceptance of such notes, which, by extension, required receiving deposits.[31] Moreover, the authority of national banks to continue engaging in issuing and circulating notes was conditioned by the NBA on national banks continuously exercising the power to receive deposits.[32] Thus, national banks serving as depository institutions was essential to the purpose for which the NBA was enacted, evidencing congressional intent that national banks would in all cases be depository institutions.

The NBA (both as originally enacted and as modified through the present day) is replete with additional provisions indicating that receiving deposits is indispensable to carrying on the business of banking. The NBA chartering provisions require incorporators to identify in the organization certificate the place where the national bank's "operations of discount and deposit are to be carried on"[33] and refers to such operations as "the general business" of national banks.[34] The phrase "discount and deposit" was used contemporaneously to the NBA's enactment as a functional definition of commercial banking.[35] It also was used to describe the process of discounting itself which inherently involved exercising the power to receive deposits.[36]

In sum, the text, structure, and purpose clearly indicate that deposit-taking is an indispensable attribute of the banking business under the NBA. This is why every court which has reviewed this question has

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[30] This purpose is evident in the very title of the NBA. *See* "An Act to provide a national Currency, secured by a Pledge of United States Stocks, and to provide for the Circulation and Redemption thereof", 12 Stat. 665 (Feb. 25, 1863); *see also* "An Act to provide a national Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof" 13 Stat. 99 (June 3, 1864).

[31] Revised Statutes, sec. 5196 (requiring that every national bank "*shall take and receive at par*, for any debt or liability to said association [national bank] any and all notes or bills issued by any association existing under and by virtue of this act.") (emphasis added).

[32] Revised Statutes, sec. 5206 (prohibited national banks from putting into circulation the notes of any national bank "which shall not, at any such time, be receivable, at par, on deposit and in payment of debts by the association so paying out or circulating such notes.").

[33] 12 U.S.C. § 22.

[34] 12 U.S.C. § 81.

[35] *See* Cong. Globe, 38th Cong., 1st Sess. 1351, 1868, 1870, 1990, 2662, 2736-2738 (1864). *See also* John M. Zane, The Law of Banks and Banking, 27 (1900).

[36] *See* H. G. Moulton, Principles of Banking: A Series of Selected Materials, 60-62 (1916). For instance, the process of "discount and deposit" involved the purchase of the promissory note of a customer (with deduction of interest in advance), crediting customer with a specified amount and allowing that person to draw on it to the amount indicated. This credit was most often provided in the form of a demand deposit on the books of the bank (although it could also be provided in the form of bank notes issued by the bank to the customer which, as mentioned, is substantially the same function). *See* Frank A. Fetter, Economics, vol. 2: Modern Economic Problems, § 5 (1916); *see also* Francis B. Tiffany, Handbook of the law of banks and banking, 6 (1912) ("it is of the essence that the function of receiving deposits be exercised, and that the exercise of this function, together with that of using the fund created by the deposits in discounting, are the primary and essential features of banking.").

found engaging in receiving deposits to be necessary to carry on the business of banking both under the NBA[37] and in general.[38]

2. A national bank is required to engage in receiving deposits to lawfully commence the business of banking.

Under the NBA, a national bank must be "lawfully entitled to commence the business of banking" for the OCC to be authorized to charter the institution.[39] As explained below, national banks are required to engage in receiving deposits to lawfully commence the business of banking under the NBA. This is because federal banking laws other than the NBA — namely, the Federal Reserve Act ("FRA"), the Federal Deposit Insurance Act ("FDIA"), and the Bank Holding Company Act ("BHCA") — require that national banks possess and exercise the power to receive deposits. These other federal banking laws are as determinative of whether a national bank is lawfully entitled to commence business as the NBA itself.

i. Federal banking laws other than the NBA limit the OCC's chartering authority.

The OCC repeatedly quotes dicta from an 1883 Supreme Court decision that the NBA "constitut[es] by itself a complete system for the establishment and government of national banks."[40] Perhaps in 1883 the NBA constituted such a "complete" system, but since that time, Congress has enacted numerous federal banking laws that bear as much weight as the NBA in determining what it means to lawfully commence business under the NBA. In particular, since that time, Congress created the Federal Reserve System ("FRS") through the enactment of the FRA in 1913, and subsequently, it created the Federal Deposit Insurance Corporation ("FDIC") through the Banking Acts of 1933 and 1935 ("Banking Acts").

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[37] *See National State Bank of Elizabeth v. Smith*, 1977 U.S. Dist. LEXIS 18184, at *21-24(Sept. 16, 1977) (reasoning that the Comptroller may not deprive a national bank of the banking powers of deposit-taking and lending, since Section 24 mandates that a national bank "shall have" such powers, and Section 22 mandates that a national bank have "operations of discount and deposit"); *Independent Bankers Assn. of America v. Conover*, No. 84- 1403-Civ-J-12, 1985 U.S. Dist. LEXIS 22529, at *34 (M.D. Fl. Feb. 15, 1985) (holding that "a financial institution that is legally unable to engage in both [deposit-taking and lending] cannot engage in the 'business of banking' within the meaning of the NBA."); *Vullo v. Office of the Comptroller of the Currency*, 378 F. Supp. 3d 271, 298 (May 2, 2019) ("the Court finds it unambiguous that receiving deposits is an indispensable part of the 'business of banking' as used by Congress in the original phrase from the NBA that now appears in Section 27 and Section 24 (Seventh)").

[38] *See*, *e.g.*, *First Nat. Bank v. Ocean Nat. Bank*, 60 N.Y. 278, 288 (1875) ("The corporations formed under the currency act are banks of deposit as well as circulation. They are authorized to issue their own notes for circulation and to receive from others their money and circulate it. . . . The principal attributes of a bank are, the right to issue circulating notes, discount commercial paper, and receive deposits of money."); *Mercantile National Bank v. Mayor*, 121 U.S. 138, 156 (1887)("business of banking, as defined by law and custom, consists . . . in receiving deposits payable on demand"); 30 Op. Att'y Gen. 341, 342 (1915) ("The power to receive deposits, expressly granted to every national bank . . . is, of course, indispensable to the conduct of the business of banking"); *United States v. Philadelphia National Bank*, 374 U.S. 321, 326 (1963) ("[c]ommercial banks are unique among financial institutions in that they alone are permitted by law *to accept demand deposits*.") (emphasis added). The pre-NBA cases are in accord with this as well. *See*, *e.g.*, *Bank of Augusta v. Earle*, 38 U.S. 519, 584 (1839) ("legitimate banking business" requires "receiving money on deposit").

[39] 12 U.S.C. §§ 26, 27.

[40] Proposed Rule at 1098 (quoting *Cook Cnty. Nat'l Bank* v. *United States,* 107 U.S. 445, 448 (1883)).

Given these fundamental reforms to the federal banking system after the NBA's enactment, the NBA generally, and the NBA chartering provisions in particular, cannot be interpreted in isolation from these other federal banking laws. Indeed, through these other federal banking laws, Congress intentionally modified the makings of a "complete system for the establishment and government of national banks," imposing conditions precedent on a national bank lawfully commencing business and subsuming many of the NBA chartering provisions.

For instance, the FRA mandated that all national banks become FRS members upon commencing business and required forfeiture of a national bank's charter for failing to do so or for otherwise violating the NBA or the FRA.[41] Similarly, the Banking Acts (and later the FDIA) mandated that national banks obtain federal deposit insurance and required the OCC, in chartering national banks, to consider whether the corporate powers of the prospective national bank were consistent with the purpose of federal deposit insurance.[42] In fact, to this day, the OCC's chartering regulation reflects that the OCC's authority to charter national banks derives, in part, from the FDIA.[43]

The NBA makes clear that the OCC must ensure that a charter is "not inconsistent with the law" and that national banks are "lawfully entitled to commence the business of banking" and able to "carry on the business of banking" under the NBA and the laws of the United States.[44] Since other federal banking laws mandate certain actions to lawfully commence the business of banking, they must be interpreted *in pari materia* with the NBA chartering provisions and, in doing so, necessarily bear upon the nature and type of national banks that the OCC can lawfully charter.[45]

Accordingly, and despite the OCC's assertions to the contrary, the NBA is no longer such a "complete" system that the OCC may simply ignore the requirements of other federal banking laws that apply to the formation of national banks. Rather, the FRA, FDIA, and BHCA all uniformly indicate that a national bank that does not receive deposits is incapable of lawfully commencing the business of banking under the NBA.

ii. The FRA requires that national banks possess and exercise the power to receive deposits to lawfully commence the business of banking.

In the half century that followed the NBA's enactment, there were recurrent financial panics due to flaws in the national currency system. At the same time, there was a resurgence of the state banking system due to the growing predominance of deposits over bank notes as the primary form of bank

[41] Act of Dec. 23, 1913, ch. 6, § 2.
[42] *See* 12 U.S.C. § 1816(7) (1988) ("The factors to be enumerated in the certificate required under section 4 . . . shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this Act."). Today, the authority to make this determination rests solely with the FDIC. *See* 12 U.S.C. § 1816(7).
[43] *See* 12 C.F.R. § 5.20(a) (citing, *inter alia*, 12 U.S.C. §§ 1814(b), 1816 as authority for chartering national banks).
[44] 12 U.S.C. §§ 21, 26, and 27(a). *See also* 12 U.S.C. §§ 37 and 25b(a)(1)(A) (defining national bank).
[45] *See California Bank v. Kennedy*, 167 U.S. 362, 366 (1897) ("United States statutes relative to national banks constitute the measure of the authority of such corporations. . . .").

credit in the United States. These trends would eventually lead Congress to overhaul the currency and monetary systems in the United States — a reform that firmly established an enduring dual banking system.

With the enactment of the FRA, Congress relegated the note issuance function of national banks to newly formed Federal Reserve Banks which would issue federal reserve notes (*i.e.*, U.S. dollars).[46] The FRA also mandated that all national banks become members of their local Federal Reserve Bank and hold their reserves in this bank.[47]

In making FRS membership compulsory for national banks, just as in the NBA, the FRA unambiguously required national banks to engage in receiving deposits, that is, to be depository institutions. Specifically, the FRA mandated (and still mandates) that the currency created by the FRA, Federal Reserve Notes, "shall be *receivable* by all national and member banks."[48] The Conference Report for the FRA explains that, through this and other provisions of the FRA, "it is required that every bank in the system shall receive the notes *on deposit* at par."[49] Thus, like the NBA and the par acceptance requirement therein, the FRA unambiguously requires that national banks operate as depository institutions.

Through the FRA, Congress also endeavored to reform federal banking law to maintain the dual system of chartering national and state banks while unifying their regulation, creating an equality of competitive opportunities between the charters. A major premise of this project of unifying commercial bank regulation was that national banks would operate as depository institutions.

Specifically, Congress maintained competitive equality between state and federal charters by: (1) mandating that national banks become FRS members, while broadening their powers to match those granted to state-chartered depository institutions, and (2) permitting state-chartered depository institutions to become FRS members, provided they submit to federal supervision and comply with restrictions applicable to national banks. The chartering of national banks that did not serve as depository institutions and permitting their entry into the FRS while not allowing state-chartered nondepository institutions entry into the FRS would have injected asymmetry into this competitive balance, in clear contravention of Congress' intent in enacting the FRA.

iii. The FDIA requires that national banks possess and exercise the power to receive deposits to lawfully commence the business of banking.

In response to the banking crisis and rampant bank failures of the early 1930s, Congress enacted the Banking Acts of 1933 and 1935 and established federal deposit insurance as a mechanism to provide safety and liquidity for money deposited in banks.[50] The provisions of the Banking Acts were made an

[46] Act of Dec. 23, 1913, ch. 6, §§ 17-18.
[47] Act of Dec. 23, 1913, ch. 6, §2.
[48] Act of Dec. 23, 1913, ch. 6, § 16 (codified at 12 U.S.C. § 411) (emphasis added).
[49] H. Rpt. 63-69, p. 54-55 (emphasis added).
[50] *See* Banking Act of 1933, Pub. L. 73-66, 48 Stat. 162 (June 16, 1933); Banking Act of 1935, Pub. L. 74-305, 49 Stat. 684 (Aug. 23, 1935).

integral part of the FRA and the NBA. All FRS member banks were required to have their deposits insured by the FDIC as a condition of FRS membership.[51] The failure to obtain FDIC insurance or to pay out deposits on demand resulted in the dissolution of a national bank's charter.[52] Further, the failure to maintain FRS membership resulted in loss of its FDIC insurance and, again, its dissolution.[53]

The tying of FRS membership to FDIC insurance was a deliberate effort to continue unifying the regulatory scheme for state and national banks. As in the FRA, the Banking Acts defined state banks as institutions engaged in receiving deposits.[54] State banks that were not FRS members were permitted to obtain FDIC insurance provided they satisfied certain requirements applicable to national and member banks, such as submitting to federal supervision.[55] Moreover, through the Banking Acts, Congress further tied federal bank regulation to the function of receiving deposits by prohibiting entities from receiving deposits without obtaining a state or national bank charter.[56]

Today, the FRS membership and FDIC insurance mandates are codified in the FRA.[57] As a result, every national bank is required, upon "commencing business," to become a member of the FRS and an "insured bank" under the FDIA.[58] To become an "insured bank," a bank must take the specific action of applying to the FDIC for deposit insurance. To be eligible to apply, a bank must be "engaged in the business of receiving deposits other than trust funds."[59] Therefore, in light of the FRA deposit insurance

[51] *See* Banking Act of 1933, Section 8, amending Section 12B(e) of the FRA; Banking Act of 1935, amending Section 12B of the FRA to read: "(e)(1) Every operating State or national member bank, including a bank incorporated since March 10, 1933, licensed on or before the effective date by the Secretary of the Treasury shall be and continue to be, without application or approval, an insured bank and shall be subject to the provisions of this section. (2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System." *See also* Raymond Natter, Formation and powers of national banking associations--a legal primer, Congressional Research Service, p. 1-8 (1983) ("All members of the Federal Reserve System must be insured by the Federal Deposit Insurance Corporation.").

[52] *See* Banking Act of 1935, amending Section 12B(i)(2) of the FRA to read: "whenever the insured status of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation whenever the bank shall be unable to meet the demands of its depositors. Whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured bank shall, without notice or other action by the board of directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System, with like effect as if its insured status had been terminated on said date by the board of directors after proceedings under paragraph (1) of this subsection."

[53] *Id*.

[54] *Id*. ("The term 'State bank' means any bank . . . which is engaged in the business of receiving deposits and which is incorporated under the laws of any State. . . .").

[55] *Id*.

[56] Banking Act of 1935, Section 303(b) amending Section 21 of the FRA (codified at 12 U.S.C. § 378).

[57] *See* 12 U.S.C. § 222. The provisions of the Banking Acts pertaining to deposit insurance and the FDIC were originally part of the FRA but were subsequently made an independent act with the enactment of the FDIA in 1950. *See* Federal Deposit Insurance Act of 1950, Pub. L. 81-797, 64 Stat. 873 (Sept. 21, 1950).

[58] 12 U.S.C. § 222.

[59] *See* 12 U.S.C. § 1815(a)(1).

mandate, a national bank cannot lawfully commence the business of banking under the NBA unless it "engages in the business of receiving deposits other than trust funds" as defined under the FDIA.[60]

The Federal Reserve Board and the OCC have recognized that the FRA deposit insurance mandate precludes the OCC from chartering an uninsured national bank.[61] Indeed, the OCC has repeatedly requested that Congress repeal the mandate for this reason, yet Congress has refused to make this fundamental change.[62] Accordingly, absent specific congressional authorization to charter an institution to carry on a business other than banking, national banks chartered by OCC must, at a minimum, be engaged in receiving deposits to comply with federal law found in the FRA and FDIA so as to be "lawfully entitled" to commence the banking business under the NBA.

As explained below, Congress has provided authorizations for other types of charters, such as NTCs, which, by definition, can receive only trust funds and lack the power to engage in receiving deposits. But, no such authorization exists for SPNBs. SPNBs must receive deposits, and, by purporting to allow otherwise, the OCC's existing chartering regulation asserts authority which the NBA and other federal banking laws do not grant.

iv. The BHCA requires that national banks possess and exercise the power to receive deposits to lawfully commence the business of banking.

The "business of banking" within the meaning of the NBA must be interpreted to require engaging in receiving deposits to give full effect to the BHCA and the NBA's "joint regulatory scheme."[63] In enacting the BHCA, Congress envisioned that it would operate in harmony with the NBA to fulfill a common purpose: restricting entry into the banking system and maintaining the separation of banking and commerce. It is through the BHCA's and NBA's overlapping regulations concerning "banks" and the "business of banking" that these purposes are accomplished.[64] A state or national bank charter is required to engage in the business of banking;[65] the BHCA prohibits a company from acquiring a "bank" without prior approval by the FRB.[66] Additionally, just as the powers of national banks are limited to

[60] *See* 12 C.F.R. § 303.14 (defining being "engaged in the business of receiving deposits other than trust funds").
[61] *See Economic Growth and Regulatory Paperwork Reduction Act: Hearing on S. 650 Before the S. Comm. on Banking*, 104th Cong., 91-92 (1995) (testimony of then-Comptroller Ludwig quoting FRB's interpretation and advocating for repeal of the FRA deposit insurance mandate to allow for the chartering of uninsured national banks) (hereinafter "Ludwig Testimony"); Comptroller's Manual for Corporate Activities, Policies and Procedures, Vol. 1, p. 40 (January 1992) ("Trust companies are the only type of charter that is NOT required to be FDIC-insured. All other limited or special purpose banks will be FDIC-insured, unless a request for waiver is approved by the OCC. Waivers may be granted in the case of bankers' banks.").
[62] *Id.,* Ludwig Testimony.
[63] *Indep. Bankers Ass'n of Am. v. Conover*, 1985 U.S. Dist. Lexis 22529, *33 (M.D. Fla. 1985).
[64] *See Whitney Nat'l Bank v. New Orleans Bank*, 379 U.S. 411, 417-26 (1965) (the NBA and BHCA should be interpreted in harmony and OCC cannot approve that which would violate the BHCA's terms or clearly intended policies).
[65] 12 U.S.C. § 378(a)(2).
[66] 12 U.S.C. § 1842(a).

those within the business of banking, the activities of a bank holding company are limited to those "closely related to banking."[67]

The BHCA defines a "bank" as an organization that either: (1) is an insured bank as defined in Section 3(h) of the FDIA or (2) accepts demand deposits or deposits that may be withdrawn by check or similar means for payments to third parties or others and engages in the business of making commercial loans.[68] Because Congress expressly defined a "bank" in the BHCA as a depository institution, any interpretation of the NBA's comparable term "business of banking" that would allow chartering institutions that are not "banks" under the BHCA — or explicitly exempted from the definition of "bank," as Congress did, for instance, in the case of industrial loan companies ("ILCs") — would create a class of bank charters wholly outside the BHCA's restrictions, thereby allowing commerce and banking to commingle to a degree that Congress did not intend or expressly countenance.

Due to the interplay between the two agencies and these two statutes, the definition of "bank" under the BHCA must establish the "inner limits" (*i.e.,* the essential elements) of what constitutes the "business of banking" under the NBA.[69] Indeed, this is why, when the OCC attempted to charter a national bank that would refrain from engaging in receiving deposits to avoid being classified as a "bank" under the BHCA, a court found that the OCC had exceeded its chartering authority.[70]

Thus, in light of the BHCA definition of "bank," a national bank must engage in receiving deposits to be lawfully entitled to commence business under the NBA.

3. <u>The OCC lacks the authority to charter uninsured SPNBs.</u>

Since national banks are required to engage in receiving deposits and be FDIC-insured to carry on and lawfully commence the business of banking, it follows that the OCC lacks the authority to charter uninsured SPNBs. The current chartering regulation contemplates that the OCC may charter a SPNB to engage in any activity within the business of banking, even if it does not engage in receiving deposits. However, for the reasons outlined above, such an SPNB would be incapable of carrying on or lawfully commencing the business of banking under the NBA. Consequently, the OCC's chartering regulation is legally invalid in asserting that the OCC is empowered to charter such an SPNB and, thus, must be rescinded or amended.[71]

B. NTCs are chartered to carry on the trust business and, thus, must predominantly engage in fiduciary activities.

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[67] 12 U.S.C. § 1843(c)(8).
[68] 12 U.S.C. § 1841(c)(1)(A) and (B).
[69] *See Indep. Bankers Ass'n of Am. v. Conover*, 1985 U.S. Dist. Lexis 22529, *33 (M.D. Fla. 1985). *See also* Symons, Edward L. Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 718 (1983).
[70] *See Indep. Bankers Ass'n of Am. v. Conover*, 1985 U.S. Dist. Lexis 22529, *33 (M.D. Fla. 1985).
[71] *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024) ("And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.").

The NBA empowers the OCC to charter NTCs to carry on the business of a trust company.[72] To carry on the trust business, a NTC must predominantly engage in fiduciary activities. A NTC that predominantly engaged in nonfiduciary activities would be incapable of carrying on the business of a trust company and, thus, the OCC would lack the authority to charter such an entity.

Congress first authorized the OCC to charter NTCs through an amendment to Section 27(a) of the NBA enacted in 1978.[73] Congress enacted this amendment after the OCC had attempted to charter a national bank that would limit its activities to the fiduciary powers of a national bank trust department permitted under 12 U.S.C. § 92a. A federal court rejected the OCC's attempt to assert this broad chartering authority because the chartered institution would not be engaged in the business of banking under the NBA.[74] While this case was on appeal, Congress amended the NBA to authorize the OCC to charter NTCs; the appeals court then interpreted this amendment as authorizing the OCC to charter institutions that strictly exercised the fiduciary powers granted under Section 92a.[75]

The appeals court's ruling underscores that NTCs are chartered to carry out a business purpose of a different nature and character than the business of banking — namely, the trust business. Given this distinct purpose, the powers of NTCs derive from a separate and distinct grant of authority than those of national banks.[76] As a result, NTCs may not exercise the banking powers conferred with a national bank charter under Section 24(Seventh), but are limited to predominantly exercising fiduciary powers. Moreover, given the manner in which fiduciary powers are granted under Section 92a, NTCs may not engage in banking activities under the authority of Section 92a.

1. <u>The OCC was not empowered to charter NTCs prior to receiving express authorization from Congress.</u>

In the sources relied upon in the proposed rule, the OCC has stated that, in enacting the NTC chartering amendment to Section 27(a), Congress simply sought to "clarify and confirm that the OCC, under its general chartering authority, has the power to charter a national bank that limits its activities to those of a trust company and activities related to the same."[77] Hence, the OCC construes the Section 27(a) amendment as merely confirming that the OCC was, prior to the amendment's enactment, already empowered to charter NTCs under its business of banking chartering authority. This is plainly incorrect.

As extensively detailed above, the OCC may not, under NBA "business of banking" authority, charter a national bank that engages in any banking activity but does not exercise the power of receiving deposits. In 1976, when the OCC attempted to assert broader authority and charter an institution that would strictly engage in fiduciary activities, a federal court held that the OCC lacked the authority to do so.

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[72] *See* 12 U.S.C. § 27(a) (last sentence).
[73] *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Sec. 1504, Public Law 95– 630, 92 Stat. 3641, 3713 (1978).
[74] *National State Bank of Elizabeth v. Smith*, 1977 U.S. Dist. LEXIS 18184 (Sept. 16, 1977).
[75] *See National State Bank v. Smith*, 591 F.2d 223 (Jan. 15, 1979).
[76] *See id*. at 231.
[77] IL 1176 at 2.

When Congress enacted the NBA, it did not empower the OCC to charter NTCs. In fact, at that time, not even national banks could exercise fiduciary powers. The NBA fiduciary powers provision, Section 92a, was not enacted until the passage of the FRA in 1913.[78] Even then, Congress did not include fiduciary powers among the powers conferred with the grant of a national bank charter. Rather, national banks were, and still are, required to separately apply for a permit to exercise fiduciary powers.[79]

In fact, allowing national banks to exercise fiduciary powers by special permit was an alternative to the legislation recommended in the so-called "Aldrich Plan" of the National Monetary Commission, which would have authorized the OCC to charter "national trust companies."[80] However, due to considerable opposition and persistent doubts as to the constitutionality of enabling the federal incorporation of trust companies, Congress ultimately opted to simply extend trust powers to national banks, rather than create a new type of federal charter.[81]

Years later, in 1962, Congress transferred the authority to permit national banks to exercise fiduciary powers from the Federal Reserve to the OCC.[82] In making this adjustment, Congress went to great lengths to make clear that, despite this transfer of authority, "no alteration of existing law regarding national banks acting in fiduciary capacities" was intended.[83]

This was the statutory scheme in place when, in 1976, the OCC attempted to charter a proposed national bank called City Trust, to be located in New Jersey that would offer "only those fiduciary services as may be authorized under [Section 92a], and that [would] not engage in any other activities otherwise permissible under a national bank charter, including the making of commercial loans and the receipt of deposits other than trust funds."[84] The OCC approved the charter application on the condition that City Trust specifically articulate, in its articles of association and elsewhere, that its purpose "shall be to carry on the general business of a commercial bank trust department and to engage in such activities as are necessary, incident or related to such business."[85]

The OCC's approval was subsequently challenged in *National State Bank of Elizabeth v. Smith* on the grounds that the OCC exceeded its chartering authority because City Trust would not carry on the

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[78] *See* Act of Dec. 23, 1913, ch 6, § 11(k), 38 Stat. 251, 262 (1913). *Miller v. King*, 223 U.S. 505, 510 (1912) ("A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children.").

[79] *See* 12 U.S.C. § 92a.

[80] *See Suggested Plan For Monetary Legislation*, Submitted To The National Monetary Commission by Hon. Nelson W. Aldrich, S. Doc. No. 784, p. 27 (Jan. 11, 1911).

[81] *See* 50 Cong. Rec. 4828 (1913) (statement of Rep. McKellar) ("The functions of national banks are enlarged in both bills. In the Aldrich bill . . . they are allowed to organize as trust companies. Generally speaking, these functions are given to the national banks in the Glass bill."). *See also* Charles S. Tippets, *Fiduciary Powers of National Banks*, 15 Am. Econ. Rev. 417 (1925).

[82] *See* Act of Sept. 28, 1962, P. L. 87-722, § 1, 76 Stat. 668 (1962).

[83] S. Rep. No. 2039, 87th Cong., 2d Sess. 2735 (1962).

[84] *National State Bank of Elizabeth v. Smith*, 1977 U.S. Dist. LEXIS 18184, at *2 (Sept. 16, 1977).

[85] *Id*. at *4-5.

business of banking under the NBA.[86] In 1977, the federal district court for New Jersey ruled that the OCC's approval of the charter application was "contrary to law and invalid."[87]

The Court reasoned that the OCC had acted in excess of its statutory chartering authority because City Trust would not possess or exercise any banking powers. Rather, it would be limited to exercising fiduciary powers under Section 92a, and so would be incapable of lawfully carrying on the business of banking under the NBA.[88] The court concluded that: "The Comptroller in effect has chartered a national trust company. In so doing, the Comptroller appears to have violated or allowed violation of sections 22, 24, 26, and 27. . . . The charter and preliminary approval of the organization of City Trust therefore must be revoked."[89]

Thus, the district court construed the statutory scheme to provide that a national bank could only exercise trust powers if it first possessed and exercised the powers necessary to carry on the business of banking. In other words, the OCC lacked the authority to charter NTCs because it was limited to chartering institutions to carry on the business of banking; the grant of trust powers alone was not sufficient to enable a national bank to carry on the business of banking.

The latter point is further reinforced by the limitations put in place on the fiduciary powers themselves, which prevent such powers from being used to engage in banking. For instance, Section 92a generally prohibits national banks from receiving deposits of current funds while acting in the fiduciary capacity permitted thereunder, and, conversely, generally prohibits them from using funds received in this fiduciary capacity to conduct a banking business.[90] Thus, not only were the banking powers granted under the NBA insufficient to authorize conducting trust activities, but, given the indispensability of the function of receiving deposits, the grant of fiduciary powers itself precluded carrying on the banking business through such powers.

Therefore, the district court was correct in finding that the OCC lacked the authority to charter NTCs under its business of banking chartering authority. The contention that the OCC already possessed such authority prior to Congress amending Section 27(a) simply cannot be reconciled with the statutory scheme predating the amendment's enactment, including distinct and separate statutory grants of banking powers and trust powers as they relate to the OCC's chartering authority.

2. Congress did not authorize the OCC to charter NTCs that do not predominantly engage in fiduciary activities.

To the extent that the OCC interprets Section 27(a) as empowering it to charter NTCs that predominantly engage in nonfiduciary, banking activities, the OCC's interpretation would directly contradict the only court decision to specifically address the meaning of the NTC chartering provision in

[86] *See id*. at *1.
[87] *Id*.
[88] *See id*.
[89] *Id*. at *30.
[90] *See* 12 U.S.C. § 92a(d).

Section 27(a). In that case, a federal court held that NTCs are limited to predominantly fiduciary activities authorized under Section 92a.

While the district court decision in *National State Bank* was on appeal to the Third Circuit, Congress amended Section 27(a) to authorize the OCC to charter NTCs. Given the timing of the amendment's enactment, the Third Circuit was able to construe the meaning and effect of the new law.[91] The Court found that, given its retroactive effect and reference to operations being limited to those of a trust company, as had occurred in the City Trust approval, it is quite clear that the amendment was intended to grant the OCC the authority which the district court had held it lacked, namely, to charter institutions whose operations would be limited to those of a national bank trust department.[92]

The Court noted that the OCC had been empowered, under Section 92a, to authorize national banks to exercise fiduciary powers in addition to exercising banking powers. The Court then held that:

> We think that it must have been these specially permitted fiduciary powers to which Congress intended to refer when by its recent enactment it authorized the Comptroller to restrict the operations of a national bank to those of a trust company and activities related thereto. In other words, it was the fiduciary operations carried on in the trust department of such a company or of a commercial bank to which reference must have been intended. Only by being so read does the statute have full meaningful effect and we so read it.[93]

On this basis, the court concluded that the OCC's action limiting the business of the charter applicant "to the operations of a commercial bank trust department must now be held to be valid if the statutory phrase 'trust company' may be read as limited in meaning to the trust or fiduciary operations of such a company."[94] So, based on the reference to "trust company," the Court concluded that the powers conferred in chartering a NTC under this new statutory provision were solely the fiduciary powers granted under Section 92a, that is, the powers of a national bank trust department.

The Court's interpretation cannot be squared with the interpretation of Section 27(a) presumably advanced by the OCC in the proposed rule — namely, that NTCs may engage predominantly in nonfiduciary, banking activities. Indeed, such an interpretation would render the phrase "trust company and activities related thereto" mere surplusage by instead reading Section 27(a) to provide that a national bank is not illegally constituted solely because its operations are so limited, without further specifying how or to what extent the operations have been limited. Such an interpretation would be of questionable validity because, as the Third Circuit stated, it would fail to give the Section 27(a) amendment "full meaningful effect."[95]

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[91] *See National State Bank v. Smith*, 591 F.2d 223 (Jan. 15, 1979).
[92] *See id*. at 231.
[93] *Id*.
[94] *Id*.
[95] *Id.*

Therefore, under the plain meaning of Section 27(a), the OCC is only empowered to charter NTCs that predominantly exercise fiduciary powers under Section 92a. This is not to say that NTCs are limited to *solely* engaging in the fiduciary activities permitted under Section 92a. Section 27(a) contemplates that NTCs may engage in "activities related" to the operations of a trust company and so, presumably, an NTC may conduct a minimal amount of nonfiduciary activities that are related to the trust services it provides.[96] However, to interpret this language as authorizing the OCC to charter NTCs that predominantly engage in nonfiduciary activities would exceed the chartering authority granted to the OCC under Section 27(a).

3. NTCs are not authorized to engage in nonfiduciary activities under the authority of Section 92a.

In an interpretive letter cited as support for the proposed rule, the OCC asserted that, pursuant to Section 92a, a NTC is "permitted to engage in any and all activities permitted under state law for a state trust company located in the same state" even if those activities are not defined as "fiduciary" by federal law in Section 92a and could otherwise only be engaged in through the exercise of banking powers conferred with a national bank charter.[97]

This interpretation is patently erroneous and, to the extent that the proposed rule relies upon it, the proposal is likewise invalid. As explained below, this interpretation is invalid not only because it contradicts the interpretation of Section 27(a) adopted by the Third Circuit, but also because it conflicts with longstanding precedent regarding the extent of the fiduciary powers permitted under Section 92a.

Since an NTC can only engage in limited, related nonfiduciary activities under the authority of Section 92a, the OCC lacks the authority to charter an NTC to predominantly engage in such nonfiduciary activities.

i. National State Bank held that NTCs are not authorized to engage in nonfiduciary activities under the authority of Section 92a.

In *National State Bank*, the Third Circuit declined to interpret Sections 27(a) and 92a as authorizing NTCs to engage in nonfiduciary activities on the basis that competing state-chartered trust companies could engage in such activities.

The Court addressed this argument because the plaintiff had argued that City Trust's charter was still not valid because trust companies chartered by New Jersey were authorized to engage in a full range of banking powers, but City Trust would lack such powers.[98] In other words, the plaintiff argued that, since the permissible fiduciary powers of a national bank trust department under Section 92a are determined, in part, by state law, the extent to which an NTCs operations may be limited is determined by reference to the law of the state in which the NTC is located. So, if a state authorizes its trust companies to engage

[96] 12 U.S.C. § 27(a); *accord* OCC Unpublished Interpretive Letter from James M. Kane (June 20, 1985).
[97] IL 1176 at 6.
[98] *See National State Bank v. Smith*, 591 F.2d at 231.

in banking activities, then an NTC located in that state must also be authorized to engage in banking activities.

The Court rejected this argument because, even if Section 92a were construed to authorize engaging in the same nonfiduciary powers, Congress could not have intended Section 27(a) to authorize a NTC to exercise such powers because Section 27(a) then would "amount to no restriction at all."[99] Since a national bank could not itself engage in activities which are within the "business of banking" under Section 24(Seventh), such as custody activities,[100] without possessing and exercising the power to receive deposits granted thereunder, it would be nonsensical to interpret Section 27(a) as empowering the OCC to charter institutions which lack the power to receive deposits but which can partake in the other banking powers conferred with a national bank charter on an a-la-carte basis. Such an interpretation would authorize through a NTC charter that which cannot be done through a national bank charter and, thereby, render Section 27(a) as a whole "virtually meaningless."[101]

Thus, the OCC's assertion (in an interpretive letter cited as support for the proposed rule) that "the phrase 'trust company' contained in 12 U.S.C. § 27(a) has been construed to refer to and include . . . the activities of trust companies and trust banks authorized under the laws of the various states" is patently false.[102]

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[99] *Id.*

[100] The OCC has long maintained that custody activities are authorized by the banking powers granted under Section 24(Seventh), not the fiduciary powers permitted under Section 92a. *See* OCC No-Objection Letter 86-11, 1986 OCC Ltr. LEXIS 117 (April 2, 1986) ("Agency services arrangements that do not involve the exercise of discretion or similar fiduciary responsibilities, such as escrow, safekeeping and custody, may be performed by a national bank under the incidental powers of banking without having trust powers."); *see also* OCC Trust Interpretive Letter No. 88, 1987 OCC Ltr. LEXIS 65 (March 24, 1987) ("The capacity of custodian is not one which has been delineated as a 'fiduciary power' within the scope of the [sic] 12 USC 92a(see also 12 CFR 9.1(c)). This Office has long recognized that banks may act in nondiscretionary capacities, such as custodian and safekeeping agent, without the necessity of obtaining fiduciary powers."); *see also* OCC Interpretive Letter No. 394, 1987 OCC Ltr. LEXIS 32, *4–5 (Aug. 24, 1987) ("This Office has indeed permitted banks without trust powers to enter into agency services arrangement such as escrow, safekeeping and custody. . . . However, in such instances where the bank is a custodian or agent, title remains with the customer. By contrast, in the case of a trust, legal title vests in the trust institution."); *see also* OCC Conditional Approval No. 267 (Jan. 12, 1998) ("the OCC has concluded that national banks do not need trust powers to offer escrow and other safekeeping services"); *see also* OCC Conditional Approval No. 479, 2001 OCC Ltr. LEXIS 69, *25 (July 27, 2001) ("electronic safekeeping activities are not 'fiduciary' activities within the meaning of 12 U.S.C. § 92a. Thus, no trust powers are necessary in order to conduct the activity."); *see also* OCC Interpretive Letter No. 1078 (April 19, 2007) ("The OCC has indicated it does not treat non-discretionary custodial activities as fiduciary, and that those activities are authorized under 12 U.S.C. § 24(Seventh)."); *see also* 84 Fed. Reg. 17967, 17969 (April 29, 2019) ("National banks and Federal savings associations also provide custody and recordkeeping services to clients for non-fiduciary accounts. In doing so, these banks and savings associations are not acting in a fiduciary capacity and, therefore, these activities are not subject to the OCC's fiduciary regulations."); *see also* OCC Interpretive Letter 1170 (July 22, 2020) ("The OCC has determined national banks may act as non-fiduciary custodians pursuant to the business of banking and their incidental powers.").

[101] *National State Bank v. Smith*, 591 F.2d at 231.

[102] IL 1176 at 2.

ii. Under longstanding precedent, neither national banks nor NTCs are authorized to engage in nonfiduciary activities under the authority of Section 92a.

The authority for NTCs and national banks (referred to in this section collectively as "national banks") to exercise fiduciary powers is enumerated in Section 92a. The meaning of Section 92a is fairly clear as applied to a national bank seeking to exercise fiduciary powers in a single state: it can engage in any of the eight enumerated fiduciary capacities when not prohibited by that state's law on a nondiscriminatory basis and "in any other fiduciary capacity" in which competing state-chartered institutions are permitted to act under that state's law. The clause authorizing acting "in any other fiduciary capacity" has been considered an "equalizing provision" because it was intended to put national banks "upon precisely the same footing with reference to these fiduciary powers" with state-chartered fiduciary institutions in the trust business.[103]

In light of the intent to create competitive equality in the field of fiduciary powers, "fiduciary" within the meaning of equalizing provision has been found to be a federal definition not controlled by state law as a threshold matter. Indeed, one of the very first questions that arose with respect to the Section 92a equalizing provision was whether it could be construed to permit national banks, through their fiduciary powers, to engage in any business that competing state-chartered institutions may carry on under state law. That is, whether Section 92a could be interpreted to permit "bootstrapping."

For instance, in 1920, the Federal Reserve was asked whether national banks can engage in mortgage lending through their fiduciary powers if state law permits state-chartered trust companies to engage in mortgage lending.[104] The Federal Reserve concluded that the equalizing provision does not allow national banks to engage in "nonfiduciary" activities, such as mortgage lending, through their fiduciary powers.[105] To reach this conclusion, the Board reasoned that "fiduciary" is a federally defined term which cannot be supplanted with state law definitions to indefinitely extend the activities authorized under the equalizing provision of Section 92a.

In the decades that followed, after the authority to grant fiduciary powers to national banks was transferred from the Federal Reserve to the OCC, the OCC adhered to this position in repeatedly ruling that the equalizing provision in Section 92a cannot be read to permit national banks to engage in activities that would not involve acting in a "true fiduciary capacity" simply because state-chartered institutions could do so.[106] For instance, in Interpretive Letter No. 265, the OCC addressed the question of whether engaging in a general real estate brokerage business was permissible for national banks

[103] 56 Cong. Rec. H. 5576 (1918) (remarks of Rep. Phelan).
[104] *See* 6 Fed. Res. Bull. 949 (1920).
[105] *Id*.
[106] OCC Interpretive Letter No. 89, 1979 OCC Ltr. LEXIS 30, *6 (April 3, 1979). *See also* OCC Interpretive Letter No. 224, 1981 OCC Ltr. LEXIS 8, *11 (Nov. 10, 1981) ("The statute does not, however, provide that every procedure incident to the exercise of these powers shall be permitted to a national bank if such is permitted to the state institution.").

under Section 92a because such activity was purportedly permissible for state banks and trust companies in Nebraska.[107]

IL 265 explained that a general real estate brokerage business does not fall within the federal definition of "fiduciary" and, therefore, it is irrelevant whether it is permissible for competing state-chartered institutions. IL 265 reasoned that:

> The definition of "fiduciary" for 12 U.S.C. § 92a purposes is a federal definition and is not controlled by state law. Only if an activity is determined to be "fiduciary" within the meaning of 12 U.S.C. § 92a do we look to state law to determine if state banks, trust companies, and other institutions which come into competition with national banks are permitted to perform that activity. If so, national banks may be permitted to perform that activity.[108]

The OCC subsequently applied this same analysis in finding that providing safe-deposit and safekeeping services does not fall within the definition of "fiduciary" in Section 92a and so is not a permissible fiduciary capacity for national banks, even though such safe-deposit activities were permissible for state banks and trust companies chartered in Florida.[109]

However, in IL 1176 (which is cited as support for the proposed rule), the OCC superseded this long line of precedent to interpret Section 92a to enable "bootstrapping," that is, to enable national banks to act in capacities that are not "fiduciary" within the meaning of Section 92a but are "fiduciary" under relevant state law.[110] At the same time, the manner in which the OCC interprets Section 92a to apply when a national bank seeks to exercise fiduciary powers in multiple states is premised on the now superseded construction, namely, that the only capacities authorizable under Section 92a are those that are "fiduciary" within the meaning of Section 92a (referred to herein as "federal fiduciary capacities").

As explained below, the OCC relies on a federal definition of "fiduciary" under Section 92a to enable multi-state fiduciary operations. If the OCC permits NTCs to bootstrap engaging in *nonfiduciary* activities, the NTCs cannot rely on the OCC's multi-state fiduciary rule ("MSFR") to engage in such activities in host states when doing so would contravene a host state's law.

iii. NTCs cannot act in nonfiduciary capacities through bootstrapping state law and also export those capacities to other states.

The MSFR enables "exportation" of state law because it allows a national bank to engage in fiduciary activities in a state without regard to whether the activities are authorized by the law of that state, it

[107] *See* OCC Interpretive Letter No. 265, 1983 OCC Ltr. LEXIS 13 (July 14, 1983) (hereinafter "IL 265").
[108] *Id*., at 5-6.
[109] *See* OCC Unpublished Interpretive Letter from James M. Kane (June 20, 1985).
[110] *See* IL 1176 at n.5 ("To the extent that Interpretive Letter No. 265 conflicts with this decision, it is superseded.").

being sufficient that the activities are authorized by the law of another state.[111] The MSFR enables exportation by construing Section 92a as "impos[ing] no geographic limit on where a bank may act in a fiduciary capacity."[112] The OCC ultimately reached this conclusion by assuming that "fiduciary power as granted by federal law" can be considered independent of state law — that is, by assuming that fiduciary power has some independent legal meaning and significance under Section 92a apart from state laws governing what constitutes a permissible fiduciary capacity or where such a capacity is exercisable.[113]

However, "fiduciary power as granted by federal law" can only be considered independent of state law if, as was assured by IL 265, the capacities in which Section 92a permits a national bank to act are federal fiduciary capacities — that is, capacities which are "fiduciary" within the meaning of Section 92a itself. This is because a fiduciary capacity permitted under Section 92a can only have a federal aspect that can be considered in isolation from state law only if "fiduciary" within the meaning of Section 92a has some threshold federal content which is not controlled by state law in the first instance.

Since, per IL 1176, NTCs may bootstrap nonfederal fiduciary capacities because "fiduciary" has no independent meaning under federal law, there is no basis for applying the MSFR to enable NTCs to engage in such nonfiduciary activities on a nationwide basis without complying with restrictions imposed by host state laws.[114] In short, an NTC may either rely on bootstrapping or exportation, but it simply cannot do both.

This result is entirely consistent with the competitive equality principle underpinning Section 92a. State-chartered fiduciary institutions cannot export the law of their chartering state and operate under that

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[111] *See* OCC Interpretive Letter No. 695, 1995 OCC Ltr. LEXIS 194, *32, n.6 (December 8, 1995) (recognizing that if, as is now the case under the MSFR, the laws of every state in which a national bank conducts fiduciary business were not incorporated into the State Law Condition, then "this situation would be similar to others in which a national bank from one state can conduct an authorized business in another state without regard to its being authorized by the other state") (hereinafter "IL 695").

[112] *See* 66 Fed. Reg. 34792, 34794-5 (July 2, 2001) ("This statutory grant of authority [in section 92a(a)] does not limit where a national bank may act in a fiduciary capacity. . . . section 92a imposes no geographic limit on where a bank may act in a fiduciary capacity"); *see also* OCC Interpretive Letter No. 872, at 10 (Oct. 28, 1999) ("section 92a does not impose any geographic limit on the places where a national bank may . . . act in a fiduciary capacity"); *see also* OCC Interpretive Letter No. 866, at 9 (Oct. 8, 1999) (same); *see also* OCC Interpretive Letter 995 (June 22, 2004) ("The grant of statutory authority in Section 92a does not limit where a national bank with fiduciary powers may act in a fiduciary capacity."); *see also* OCC Interpretive Letter 973 (Aug. 12, 2003) (same); *see also* OCC Interpretive Letter 1103 (Sept. 18, 2008) (same); *see also* OCC Interpretive Letter 1106 (Oct. 10, 2008) (same).

[113] *See* IL 695, at *7 ("Section 92a does not contain any language that limits where a national bank may conduct its fiduciary business. (For some states, the State Law Condition may have the effect of creating a geographic limit. . . . Here we are considering whether the *fiduciary power as granted by federal law* is itself geographically limited).") (emphasis added). *Compare* 12 C.F.R. § 9.1(c) (1973) (defining "fiduciary power" to mean "the power to act in any fiduciary capacity, . . . when not in contravention of local law") *with* 12 C.F.R. § 9.2(g) (defining "fiduciary power" to mean "the authority the OCC permits a national bank to exercise pursuant to 12 U.S.C. 92a.").

[114] CSBS is not addressing here whether the MSFR is valid as applied to a national bank that engages in activities that are "fiduciary" within the meaning of Section 92a, but rather whether there is any basis for applying the MSFR to a national bank that engages in activities that are not "fiduciary" under federal law, but are "fiduciary" under state law. The former issue, which has been addressed in cases such as *Dutcher v. Matheson*, 840 F.3d 1183 (10 Cir. 2016), is not relevant here.

law on a nationwide basis. Rather, their ability to act in the fiduciary capacity permitted by their home state in other states is tested on a state-by-state basis to determine whether acting in this capacity in other states is permissible under these host states' laws. Thus, if a national bank seeks to act in a nonfiduciary capacity because state-chartered institutions are permitted to do so under home state law, then the policy of competitive equality would require that the right of the national bank to act in such a capacity in other states likewise be tested on a state-by-state basis just as was the case before the OCC adopted the MSFR.[115]

4. The OCC lacks the authority to charter NTCs that engage predominantly in nonfiduciary activities.

Since an NTC must engage in fiduciary activities to carry on a trust business, the OCC lacks the authority to charter an NTC that would engage predominantly in nonfiduciary activities. Consequently, to the extent that the proposed rule is asserting that the OCC could charter such an NTC, the proposed rule is legally invalid.

An NTC may incidentally engage in nonfiduciary activities that are related to the trust business, such as custody activities. Section 27(a) likely contemplates some incidental amount of nonfiduciary activities taking place given that it authorizes NTCs to engage in "activities related" to the operations of a trust company. But interpreting Section 27(a) to allow NTCs to predominantly engage in banking activities, such as lending and payments, would exceed the authority granted to the OCC thereunder and thus be unlawful.

IV. The proposed rule and the existing chartering regulation, when exercised, would result in a multitude of adverse policy outcomes.

Even if the OCC were empowered to charter uninsured SPNBs or NTCs that predominantly engage in nonfiduciary, banking activities (hereinafter "nonfiduciary NTCs"), it should still decline to do so due to the multitude of negative policy consequences that would result therefrom. As explained below, chartering uninsured SPNBs and nonfiduciary NTCs would result in an unlevel playing field in financial services, discourage financial innovation, harm consumers via preemption of state consumer protections, and unlawfully intermingle banking and commerce.

As an initial matter, uninsured SPNBs and nonfiduciary NTCs would not be subject to the clear majority of federal banking laws. For instance, these institutions would be exempt from many of the statutes and regulations that apply to insured depository institutions, including Prompt Corrective Action

[115] *See* 7 Fed. Res. Bull. 816 (1921) ("the national bank would have to conform to those laws of any State in which it is acting which relate to the exercise of fiduciary powers by foreign corporations."); *see also* OCC Unpublished Interpretive Letter from Dean E. Miller (Sept. 29, 1993) ("A national bank's authority to act as a fiduciary outside its state of corporate residence is limited."); *see also American Trust Company, Inc. v. South Carolina State Board of Bank Control*, 381 F.Supp. 313 (D.S.C. 1974); *Ingalls v. Ingalls*, 263 Ala. 106 (1955); *Boatmen's National Bank of St. Louis v. Hughes*, 385 Ill. 431 (1944).

requirements, restrictions on management interlocks, generally applicable prudential safeguards, Community Reinvestment Act requirements, and uniform accounting standards.

The fact that uninsured SPNBs and nonfiduciary NTCs would not be covered by most federal banking laws will also necessarily result in an unlevel playing field in the financial services marketplace. These institutions will have a competitive advantage over traditional insured depository institutions because they will have the opportunity to negotiate how prudential regulatory requirements apply to them, a privilege not afforded traditional banks subject to longstanding and generally applicable rules.

While the OCC has stated that it would hold such entities to the "same high standards" that apply to national banks, this has not borne out in practice.[116] Indeed, in at least two recent charter approvals, the OCC actually reduced the capital requirements for the chartered institutions relative to those that apply to traditional, insured banks.[117] Aside from being highly questionable as a legal matter, such a maneuver should cast doubt on any notion that the OCC would apply the same high standards that apply to traditional, insured banks to any new, "hybrid" charters.[118]

In granting SPNB and NTC charters, the OCC would create a potential risk of tremendous harm to consumers by enabling such institutions to assert that they are entitled to immunity, through federal preemption, from critical consumer protections afforded under state law. For instance, nondepository lending companies may seek a novel charter from the OCC to take advantage of interest rate exportation. Such exportation privileges that have been traditionally reserved to FDIC-insured banks, which must comply with the full range of regulatory requirements that accompany FDIC-insured status. Yet, with the OCC's novel charter, the nondepository institution could benefit from the exportation privilege without being subject to the full suite of prudential and consumer protection requirements that apply to FDIC-insured banks.

Lastly, chartering uninsured SPNBs and nonfiduciary NTCs would erode the traditional separation of banking and commerce in the United States. Unlike every other institution the OCC charters, uninsured SPNBs and nonfiduciary NTCs would neither be covered by the definition of "bank" under the BHCA nor explicitly exempted from BHCA coverage.[119] Evading this Act means that such institutions would not be subject to consolidated supervision by the Federal Reserve and their parent companies would not be subject to the anti-tying rules, restrictions on proprietary trading, and restrictions on affiliations with commercial companies. Given the close connection of OCC chartered institutions to the federal support

[116] Comptroller Jonathan V. Gould, *Remarks at the Blockchain Association Policy Summit*, at 4 (Dec. 8, 2025).
[117] *See* OCC Conditional Approval 1353, at 6 (Dec. 12, 2025) (conditionally approving conversion of BitGo Trust Company, Inc., to BitGo Bank & Trust, N.A. and exercising OCC's "reservation of authority" under 12 C.F.R. § 3.1(d) to permit the trust to hold less regulatory capital against assets backing stablecoins issued by BitGo); *see also* OCC Conditional Approval 1358, at 7 (Dec. 12, 2025) (same with respect to Paxos Trust Company, N.A.).
[118] Note that the reservation of authority under 12 C.F.R. § 3.1(d) is expressly for applying higher capital requirements, and has never been used to lower capital requirements except for the December 2025 approvals. *See* 12 C.F.R. § 3.1(d) ("The OCC may require a national bank or Federal savings association to hold an amount of regulatory capital *greater than otherwise required* under this part if the OCC determines that the national bank's or Federal savings association's capital requirements under this part are not commensurate with the national bank's or Federal savings association's credit, market, operational, or other risks.").
[119] *Cf.* 12 U.S.C. § 1841(c)(2)(H) (ILC exemption).

mechanism, such as the discount window, SPNB and nonfiduciary NTC charters could, in effect, result in the extension of the federal safety net to commercial companies, which is precisely the outcome that the separation of banking and commerce is intended to avoid.

In light of these many disturbing policy consequences, even if the OCC had the requisite statutory authority to charter SPNBs and nonfiduciary NTCs, it should refrain from doing so.

V. The OCC should revise its chartering regulation to conform to the statutory limits of its chartering authority.

As it currently stands, the OCC's chartering regulation asserts chartering authority that the OCC lacks under the NBA. National banks are required to engage in receiving deposits and be FDIC-insured to carry on and lawfully commence the business of banking. The current regulation fails to acknowledge this limitation on the OCC's chartering authority and, thus, is legally invalid insofar as it asserts that the OCC may charter SPNBs that do not engage in receiving deposits and are not FDIC-insured.

Moreover, NTCs must predominantly engage in fiduciary activities to engage in the trust business. The proposed rule fails to recognize this limitation and, thus, would be invalid to the extent that it purports to permit the OCC to charter an NTC that predominantly engages in nonfiduciary activities.

In light of these unlawful assertions of chartering authority, we request that the OCC amend its chartering regulations to bring it into conformity with the statutory limits of the NBA. Specifically, we request that the OCC revise 12 C.F.R. § 5.20(e)(1)(i) to read as follows:

> 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 the operations of a trust company and activities related thereto or to any other activities within the business of banking. A special purpose bank that conducts activities other than the operations of a trust company and activities related thereto must ~~conduct at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money~~ apply for and receive approval for deposit insurance from the FDIC. A special purpose bank that limits its activities to the operations of a trust company and activities related thereto must predominantly engage in fiduciary activities permitted under 12 U.S.C. 92a. The name of a proposed national bank must include the word "national."

So amended, Section 5.20(e)(1)(i) would appropriately recognize the current limits of the OCC's chartering authority. Therefore, we encourage the OCC to adopt our proposed amendment to its chartering regulation.

CONCLUSION

The OCC should clarify the scope of its chartering authority under the NBA. To do so, the OCC must explicitly state that an NTC must predominately engage in fiduciary activities and may incidentally engage in nonfiduciary activities that are related to the trust business, such as custody activities. The revised rule must also clearly explain that an SPNB engaged in the "business of banking" must receive deposits and be FDIC insured.

If, however, the proposed rule is intended to allow the OCC to charter NTCs that predominantly engage in nonfiduciary activities, then the proposal would be legally invalid under the NBA and lead to multiple negative policy consequences.

We urge the OCC to act within its statutory authority and amend its chartering regulation to conform to the limits Congress clearly and intentionally placed within the NBA.

Sincerely,

Brandon Milhorn
President & CEO