American Bankers Association
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Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, S.W.
Washington, D.C. 20219

Re: Notice of Proposed Rulemaking Re Receiverships for Uninsured National Banks, 81 Federal Register 62835 (Sept. 13, 2016).

Dear Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates this opportunity to comment on the Office of the Comptroller of the Currency's (OCC, Agency) proposed regulations governing the receivership of uninsured national banks (Release, Proposed Rule). As the Release notes, unlike insured depository institutions, uninsured national banks do not have an explicit regulatory framework in place for their resolution in the event of failure. As of September 30, 2016,[2] all 56 uninsured national banks supervised by the OCC are limited purpose trust banks. Although historically speaking these trust institutions have not been at great risk of failure,[3] the OCC has proposed the rule in the interest of "preparedness for effective governmental responses to critical financial distress" and "clarity to market participants about how [uninsured national banks] will be treated in receivership."[4]

ABA represents a majority of the 56 uninsured national trust banks, as well as dozens of state chartered trust companies that may contemplate converting their charter to that of a limited purpose national trust bank. As such, we have a great interest in OCC rulemaking that preserves, enhances, and facilitates the growth of the limited purpose national trust bank charter. It is our understanding that for the last few years the OCC has had an unwritten policy of requiring certain de novo and

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.
[2] List of banks: https://www.occ.gov/topics/licensing/national-banks-fed-savings-assoc-lists/trust-by-name.pdf.
[3] Except on one occasion soon after the establishment of the Federal Deposit Insurance Corporation (FDIC) in the early 1930s, the OCC has not had to appoint a receiver of an uninsured national bank. *See* 81 FR 62837.
[4] 81 FR 62836-7.

conversion charter applicants to obtain insurance from the Federal Deposit Insurance Corporation (FDIC). We hope that the Proposed Rule paves the way for the OCC to begin once again granting limited purpose national bank charters without requiring participation in the FDIC insurance regime.[5] While understanding that the Agency is in the early stages of this process, ABA commends OCC on this important first step and also notes that it may address the potential commercial disadvantage that some uninsured national trust banks face when working with counterparties that are more familiar with the traditional resolution regime of insured banks than with that of uninsured institutions.

General Comments

While laying out a fairly straight forward set of rules governing how the OCC may initiate, manage, and terminate a receivership of a failed uninsured national bank, the Release raises a number of more nuanced matters that go beyond the scope of the present rulemaking. We would like to address several general points in response to the Release, before commenting specifically on the proposed addition of 12 CFR Part 51.

Unique Characteristics of the Trust and Fiduciary Business Model

Inherent in the Proposed Rule is a general concern about the potential for uninsured national banks to fail and require resolution by the Agency. We understand the need to be prepared, but urge the OCC to consider a number of factors that are unique to trust and fiduciary services and may mitigate some of these concerns.

First, unlike institutions engaged in commercial banking activities, such as lending and deposit taking, assets in fiduciary and custodial accounts are not on the books of the bank, and in fact the client may have the ability to transfer the accounts at any time to another institution. In other words, these accounts must be kept separate from the assets of the bank and do not become either assets or liabilities of the bank. Because legal title to the assets in the account is held either by the accountholder (e.g., in the case of a separately-managed account) or by the bank on behalf of a collective investment fund (e.g., in the case of a CIF in which accountholders are participating) or other trust, these accounts may be moved from one institution to another without becoming a part of the resolution process of the failed institution. Due in part to national trust banks not having

[5] We also encourage the OCC to work with the FDIC so that the Agency may continue granting new limited purpose federal savings bank charters. These institutions engage only in trust services, but must nonetheless, under legacy statutory provisions, obtain a nominal amount of deposit insurance from the FDIC.

significant liabilities on their balance sheet, with their attendant exposure to losses, there has been one only failure in nearly 90 years. Despite this good track record, the OCC still requires meaningful minimum capital when granting a new charter and can require additional capital to be raised if warranted.

Second, because fiduciary services must comport with a number of relevant laws and regulations, the OCC should be cognizant of any receiving institution's ability to take on the business of a failed institution.[6] Fiduciary accounts come in many forms and the administration or management of those accounts may be subject to, among other things, state trust laws, the Employee Retirement Income Security Act (ERISA), federal securities laws, tax laws, and related regulations, as well as organizational documents and governing agreements. Any receiving institution, assuming the client has not already moved the account elsewhere, must be ready and able to continue managing the fiduciary relationship with an understanding of, and experience with, all of those potentially applicable laws, regulations, documents, and agreements.

Potential Assessments Should Reflect the Differences in Business Models

As the Release notes, there may be circumstances in which the assets of a failed institution are not great enough to cover the expenses of the receiver.[7] The OCC, therefore, suggests initiating a separate rulemaking for new assessments on uninsured national banks, in accordance with 12 CFR Part 8, and further requests comments on alternatives to this approach.

While we understand the need for the OCC to consider the possibility of such a circumstance, we believe that given the historic solvency of national trust banks and the fact that these institutions have a long established track record of providing fiduciary and trust services in a safe and sound manner, they should be treated separately in this regard from other types of institutions that may be awarded uninsured national bank charters. Any contemplation of a new uninsured national bank charter should acknowledge these real differences and avoid placing national trust banks in the position of subsidizing through such an assessment new business models that may have significantly different risk profiles as compared to a national trust bank.

[6] 12 CFR 9.16 briefly outlines this process.
[7] 81 FR 62838.

We further suggest that the OCC's ability to require certain capital levels on an individualized basis may negate the need for such an assessment more broadly.[8] Many uninsured national banks have "safeguard agreements"[9] or "capital support agreements" in place that should mitigate the OCC's concerns regarding and lessen expected costs of resolution. Any future assessment rulemaking should complement and not disrupt these agreements and should address whether a bank that has such an agreement should be subject to the same assessment regime as a bank that does not.

OCC Approach to Innovative Special Purpose Banks

The Release requests comments on the application of proposed receivership rules to uninsured national banks that do not provide fiduciary services, referred to as "innovative special purpose banks."[10] Without making specific comments on such an application, ABA has commented on the general discussion regarding whether there is a role for a new type of limited purpose charter and urges policymakers to consider the purpose of such a charter and the need to provide the same customer protection that insured banks provide when engaged in similar services, as Comptroller Curry recently said the Agency will do.[11]

According to other recent statements by Comptroller Curry, a federal charter comes with a responsibility to serve a "public purpose."[12] Given these comments, the OCC must examine the specific nature of the charter being considered and how it compares to the existing bank charter that indeed serves a public purpose. How would such a proposed charter differ from existing bank charter options, and why would a different regulatory approach be necessary? Any "innovative special purpose" charter should have an affirmative responsibility to meet the charter purpose and have similar standards of performance consistent with the public policy goals of the charter.

In addition, any new charter must ensure that its clients and customers are adequately protected. When clients and customers receive financial services they expect consistent levels of protection,

[8] We also would appreciate understanding the OCC's analysis of the authority under which it may impose and limits on imposing such an assessment under 12 CFR Part 8.
[9] According to the Release, "In some instances, uninsured trust banks enter into safeguard agreements with the OCC to facilitate early resolution through a sale, merger or liquidation, thereby avoiding the need for a receivership. These safeguard agreements are entered into as part of the licensing process and concern operations, capital, and liquidity." 81 FR 62837, Footnote 12.
[10] 81 FR 62837.
[11] See Remarks by Thomas J. Curry, Comptroller of the Currency, Before Chatham House 'City Series' Conference, November 3, 2016, https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-142.pdf.
[12] See Remarks by Thomas J. Curry, Comptroller of the Currency, Before the OCC Forum on "Supporting Responsible Innovation in the Federal Banking System," June 23, 2016, https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-74.pdf.

regardless of the provider. Any such charter must provide the same level of client and customer protection and oversight as applied in the case of any other national bank charter and not be considered a path to circumvent regulation.

Specific Comments on Proposed Rule

The Proposed Rule puts forth a receivership framework that is outlined in the National Bank Act and generally mirrors, in a simplified manner, the process for receivership of insured depository institutions by the FDIC. The proposed rules in 12 CFR 51 address everything from the appointment of the receiver, notice of that appointment to creditors and claimants, how claims may be submitted, the seniority and payment of those claims, expenses of the receiver, the receiver's powers and duties, and termination of the receivership. We wish to comment on a number of these proposed sections and give some perspective on the considerations for national trust banks.

Proposed 51.3 states that the OCC shall provide notice to the public, including publication in a newspaper of general circulation for three consecutive months. The proposed section is silent as to other forms of notice. We, therefore, recommend that the OCC generally allow for notice and communication that is consistent with ways in which the failed bank typically communicates with its clients and counterparties. For example, for an institution with clients in other countries, if the institution had traditionally communicated in another language with those clients, the receiver should also communicate in the same manner.

Proposed 51.4 addresses claims and how they must be submitted to be given due treatment. In regards to the right of set-off that is established in 51.4(c), the OCC requests comments on whether there are additional characteristics of set-offs or other situations in which set-off may arise that should be included in the rule. Because the trust and fiduciary business is a fee-based industry, there are a number of situations that may arise and cause complications for such a set-off. For example, there may be times when fees have been accrued or are otherwise in the process of payment to one or more service providers, including the bank. These circumstances may depend upon how the assets are held, the structure of an investment product (e.g., a fund-of-funds structure), and the fee terms to which the account is subject. The proposed rules should acknowledge that a given resolution may involve bespoke, fact-specific set-off situations that would need to be carefully considered, while also providing for the need for the receiver or a successor fiduciary to continue providing fiduciary services even though the institution has failed.

Proposed 51.5 establishes the order of priorities of the claims. We appreciate that this section reaffirms the notion that custody and fiduciary assets are not claims against the bank, because as proposed 51.8 also notes they are not on the bank's books and records, nor will they be considered part of its general assets and liabilities.

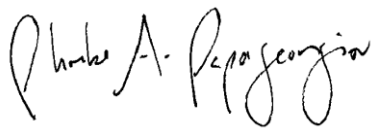
Proposed 51.8 describes how payments of claims shall be made and notes that fiduciary and custodial assets are not on the books and records of the bank and will not be considered a source for payment of unrelated claims of creditors and other claimants. As we have noted previously, we appreciate these statements affirming the segregated treatment of these accounts. Nonetheless, we would find it materially more comforting if the language in the subsection read more strongly as such:

> Assets held by an uninsured bank in a fiduciary or custodial capacity, as designated on the bank's books and records, ~~will not be considered as~~ are not part of the bank's general assets and liabilities held in connection with its other business, and will not be considered a source for payment of unrelated claims of creditors and other claimants.[13]

Conclusion

ABA appreciates this opportunity to comment on the Proposed Rule for receivership of uninsured national banks. We hope that this rulemaking allows the OCC once again to grant new national trust bank charters without requiring deposit insurance by the FDIC. We also ask that any further consideration of a special assessment for uninsured national banks explicitly treat separately those engaged in fiduciary services from those that do not.

Sincerely,



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[13] Proposed 12 CFR 51.8(b).